THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 20727/14

In the matter between:

THABO MACBETH NKOSI **APPELLANT**

And

THE STATE **RESPONDENT**

Neutral citation: *Nkosi v The State* (20727/14) [2015] ZASCA 125 (22 September 2015)

Coram: Mpati P, Shongwe and Majiedt JJA

Heard: 9 SEPTEMBER 2015

Delivered: 22 SEPTEMBER 2015

Summary: Criminal law – Robbery perpetrated by a gang of which appellant a member – fellow robber shot and lawfully killed in self-defence by victim of robbery – appellant correctly convicted of murder in the circumstances.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Molopa J sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Majiedt JA (Mpati P and Shongwe JA concurring):

[1] ‘Fair is foul and foul is fair’ said the three witches in the opening scene of Shakespeare’s Macbeth. In the course of an armed robbery gone horribly wrong for the robbers, one of them, Mr Bongani Jabulani Skhosana, was fatally wounded by the robbery victim, Mr Dennis Sikhumbuso Ngobese, who lawfully shot Mr Skhosana in self-defence. The question that arises is whether the appellant, Mr Thabo Macbeth Nkosi, who was part of the gang of armed robbers and who was accused number two at the trial, was correctly held criminally liable by the court below, (North Gauteng High Court, Pretoria, Molopa J sitting as court of first instance), for Mr Skhosana’s death. What is fair and what is foul in these circumstances with regard to the appellant’s culpability for his fellow-robber’s death at the hands of the victim, is the vexed question that confronts us.

[2] The facts are largely common cause or uncontroverted. Gleaned from Mr Ngobese’s testimony, they are as follows. Mr Ngobese owned a coal yard in Wattville, Benoni. When he was about to close his business at around 6pm on that fateful day, a vehicle with five occupants arrived. Two of the occupants

entered his office. Mr Ngobese had been busy cashing up the day's takings in his office and he intimated to the robbers, who demanded money, that they should take the cash lying on his office desk. His suggestion to the robbers that they search him was disdainfully brushed aside, with dire consequences to the robbers. On his own accord Mr Ngobese removed his cellphones and his wristwatch and placed them on the table. The deceased entered the office after his two fellow robbers. Like them, he was in possession of a firearm which he waved around, issuing threats and eventually firing a shot which hit one of the coal yard employees, Mr Dennis Mabaso, in the elbow. Mr Ngobese described the deceased's appearance as wild and agitated. Mr Ngobese was lying down, as he had been instructed, when a struggle ensued between him and the deceased. In the process he grabbed the deceased's wrist and a shot went off from the deceased's firearm and passed Mr Ngobese's left side. Mr Ngobese was able to draw his firearm and shot the deceased twice in his chest. Thereafter he shot back at the three robbers who were firing at him. It appears on the evidence to have been a wild shootout in that small office. In the end, the deceased was fatally wounded, the erstwhile accused number one was shot in the pelvis and Mr Ngobese sustained a gunshot wound in the leg. The appellant was convicted on one count of murder, two counts of robbery with aggravating circumstances and one count each for the unlawful possession of a firearm and ammunition.

[3] The only issue before us is whether the trial court had correctly convicted the appellant of the murder of his fellow robber. The appeal is with leave of this court. The broad thrust of the appellant's contentions is that the deceased had embarked on a 'frolic of his own' which caused his own death and that the State had failed to prove that the appellant had the requisite intent for murder. The conviction appears to have been based on dolus eventualis, an aspect which becomes apparent only in the judgment on sentence. Regrettably the learned judge said nothing about this central issue in the judgment on the merits, save for the finding that 'the guilt of all three accused have been proved [on all five counts]' and that '[t]he accused participated/acted in pursuance of a common purpose'. The rest of the evidence led at the trial was broadly consonant with the version advanced by

Mr Ngobese. It is against this factual backdrop that the narrow, circumscribed issue must be decided. The appellant and his co-accused all denied having been present at the scene and relied on alibi defences which were rejected by the trial court.

[4] Counsel for the appellant placed strong reliance on *S v Molimi & another* (249/05) [2006] ZASCA 43; 2006 (2) SACR 8 (SCA). In *Molimi*, however, the facts were materially different. In the course of an armed robbery at a shopping mall one of the robbers took a young man hostage inside a store. A bystander fired at the robber but struck the hostage instead, fatally wounding him. The robbery itself had been completed, albeit not without complications. One of the charges against the accused was in respect of the murder of the hostage. As is the case here, the primary contention on behalf of the defence was that the death of the hostage was not foreseeably part of the common purpose to perpetrate the armed robbery. In upholding this contention, Cachalia AJA made the following findings at paragraphs 35 and 36:

'. . . Once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene could be killed by cross-fire, whether from a law-enforcement official or a private citizen, which in the circumstances of this case they must have done, *dolus eventualis* was proved.

[36] But the taking of the hostage by accused 1 falls into a different category. It is probable that at the time he took the hostage, his co-robbers had escaped through the exit of the shopping complex. He was therefore on his own when he took the hostage while seeking refuge from the man who was pursuing him. *By taking a hostage he had, in my view, embarked on a frolic of his own. These actions could hardly have been foreseeable by the other participants in the common purpose.* To hold otherwise, as the court a quo did, would render the concept of foreseeability so dangerously elastic as to deprive it of any utility. To put it another way, the common purpose doctrine does not require each participant to know or foresee every detail of the way in which the unlawful result is brought about. But neither does it require each participant to anticipate every unlawful act in which each of the participants may conceivably engage in pursuit of the objectives of the common purpose.' (My emphasis.)

[5] Enquiries like these are always fact specific. It is readily apparent that the factual scenario in *Molimi* is very far removed from that in the present instance. An important consideration is the fact that all three of the robbers who had entered the office (including the appellant) were armed with loaded firearms. In my view the appellant and his cohorts were clearly cognisant of the reasonable likelihood that they may have to use their firearms. And it was equally reasonably foreseeable that one or more of their victims may be armed and would use those arms. It is trite that every case must be decided on its own facts. The law reports are replete with cases where casualties ensue in the course of armed robberies. As Professor Snyman correctly points out, our courts have consistently held accused persons who engage in a wild shootout with others, in the course of an armed robbery, criminally liable on the basis of dolus eventualis for the unexpected deaths that may result (C R Snyman, *Criminal Law* 5ed (2008) at 201).

[6] On the common cause and proved facts, the appellant and his fellow robbers reasonably foresaw the likelihood of resistance and a shootout, hence the need to arm themselves with loaded firearms. The shootout between Mr Ngobese and the deceased occurred in the same room where the robbery was being perpetrated and in the course thereof. I am unable to agree with the submission that it must count in the appellant's favour that the robbers accosted Mr Ngobese while under the impression that he was unarmed. They foolishly ignored to their peril his suggestion that they search him. And they foresaw the very real possibility of there being other employees and customers present at the coal yard, even though it was almost closing time. The facts are clearly distinguishable from those in *Molimi*.

[7] I am mindful of the fact that intent is a subjective state of mind and that 'the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case' (per Olivier JA in *S v Lungile & another* (493/98) [1999] ZASCA 96; 1999 (2) SACR 597 (SCA) para 16). Equally important is to be cognisant that 'the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive

reasoning. . . [b]ecause such reasoning can be misleading, one must be cautious' (see *S v Lungile and another* para 17). The facts in *Lungile* are more comparable with those in the present instance. In the course of a robbery at a store, a policeman arrived on the scene and exchanged gunfire with one of the robbers (the second appellant) resulting, amongst others, in the death of one of the store's employees. In upholding the conviction of the other robber (the first appellant) on murder and, after setting out the general principles quoted above, Olivier JA held that the inference was inescapable that the first appellant did foresee the possibility of the death of the employee since he knew that at least two of his co-conspirators were armed with firearms, that the store was located in the main street of Port Elizabeth opposite a police station and that the robbery would be committed in broad daylight. The following dictum in *Lungile* (para 17) is apposite:

'Generally speaking, the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.' (Compare also: *R v Bergstedt* 1955 (4) SA 186 (A) and *S v Nkombani & another* 1963 (4) SA 877 (A) at 893 F – H.)

[8] Some reliance was placed on *S v Dube & others* 2010 (1) SACR 65 (KZP). That case does not assist the appellant, since its facts differ materially from those in this case. There the perpetrators were unarmed and, while drilling a hole in the vault after having gained entry into a bank, they were surprised by the police who surrounded the bank. When they tried to escape one of them was shot and fatally wounded by one of the policemen. The full court held that a reasonable inference can be drawn that the appellants never subjectively foresaw that they would be apprehended because of the precautionary measures they had taken to avoid detection and apprehension. This inference is supported by the absence of firearms on them, ie the appellants 'did not reconcile themselves to a "dangerous resistance" to arrest with all its attendant consequences' (*S v Dube* para 16).

[9] Lastly, there is *S v Mkhwanazi &* others 1988(4) SA 30 (W). Counsel for the appellant relied heavily on this case for the contention that the appellant had not acted unlawfully in the killing of the deceased, since the death of the deceased resulted from the lawful action of the complainant, Mr Ngobese, who had shot the deceased in self-defence. In my view *Mkhwanazi* has been wrongly decided. That case in any event does not support the contention. There is in fact authority to the contrary from this court. In *Mkhwanazi* a neighbouring shopkeeper went to the assistance of a staff member of the Troyeville Post Office in Johannesburg which was being robbed by three men, one of whom had a firearm. On encountering the fleeing robbers a shootout ensued between them and the shopkeeper, who also had a firearm. One of the robbers was mortally wounded by a shot fired by the shopkeeper. The court held that there was no evidence to show that the accused, in pursuing their unlawful purpose (the armed robbery), foresaw and were indifferent to the possibility that one of their member's might be killed, and accordingly the subjective criterion of foreseeability had not been fulfilled. Van Schalkwyk J discharged the accused at the end of the State's case. The learned judge also held that the prosecution's proposition that each of the gang members should be guilty of murder in the event of one of their member's being killed by a third party, in defence of life or property, was untenable and found no support in the authorities. Lastly, he held that the State had failed to prove an actus reus, since the proximate cause of the death of the deceased robber was the lawful conduct of the shopkeeper.

[10] I have already dealt with the foreseeability element above and nothing much need further be said about it. It would suffice to state that *Molimi* and other authorities in this court are contrary to the finding in *Mkhwanazi*. And, secondly, as pointed out above, Professor Snyman supports this latter approach (at 201). In the course of that discussion, Professor Snyman refers to the following hypothesis:

'[A]ssume that X1, X2 and X3 decide to commit an armed robbery. They are confronted by the police. A wild shootout between the two groups breaks out. X1 as well as a police official are killed in the shootout. Ballistic tests reveal the surprising fact that X1 was not killed by a bullet fired by a police official, but by a bullet fired by

X2, and that the police official was not killed by one of the robbers, but by a bullet fired by another police official. Can the three robbers be convicted of both murders? It would seem that the courts answer this question in the affirmative, for the following reasons: X1, X2 and X3 foresaw the possibility that people might be killed in the course of the robbery, and the inference may also be drawn that, by persisting in their plan of action despite this foresight, they reconciled themselves to this possibility. It is submitted that the courts' handling of this type of situation is correct.'

[11] The last two findings in *Mkhwanazi,* as mentioned above*,* are also contrary to authorities in this court. In *S v Nkombani and another* 1963 (4) SA 877 (A) a would-be robber was killed by a gunshot fired by one of his fellow gang members at the intended victim of an attempted hold-up. The majority confirmed the conviction of not only the gang member who had fired the fatal shot, (the first appellant) but also that of the co-conspirator who had supplied one of the guns and who had not even been on the scene of the attempted robbery and shooting (the second appellant). Holmes JA explained the reason for the finding in respect of the second appellant as follows at 896 A-B:

'. . . the State proved beyond reasonable doubt that he foresaw the possibility of a shooting affray in which one of the henchmen might be hit by a bullet fired by the other. In other words, as far as he was concerned, the shooting of the deceased can be regarded as an envisaged incident or episode in the crime to which he was a party.'

A different scenario but with the same outcome occurred in *S v Nhlapo & another* 1981 (2) SA 744 (A), a case which Van Schalkwyk J sought to distinguish (wrongly so in my view) in *Mkhwanazi*. In the course of a shootout between three armed security guards and three armed robbers at a Makro Store, one of the security guards was shot and killed. On appeal this court dealt with the matter on the basis that the deceased might have been killed by a shot fired by one of the other security guards. In confirming the trial court's conviction of the robbers for the murder of the deceased, van Heerden JA reasoned as follows:

'. . .they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of Makro witnessing the attack. In sum, the only possible inference, in the absence of any negativing explanation by the appellants, is that they planned and

executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or in the immediate vicinity of the scene, could be killed by cross-fire. Compare the remarks of Rumpff JA in *S v Nkombani and Another* 1963 (4) SA 877 (A) at 892A. Or, to adopt the words of Holmes JA in the same case (at 896), the shooting of one guard by another was, as far as the robbers were concerned, "an envisaged incident or episode" in the crime planned by them.'

[12] I fail to understand how *Nhlapo* is distinguishable from the factual scenario in *Mkhwanazi*, as Van Schalkwyk J found. In particular, I respectfully disagree with the learned judge's remarks at 34D-E:

'The nature of the gun battle in *S v Nhlapo* was such that it was impossible to attribute any particular cause to a particular result. In short, in the matter of causation, the death of the deceased was the *result of the gun battle and those who were responsible for having instigated the gun battle were responsible also for his death.'*(My emphasis.)

Lastly there is *S v Lungile & another* referred to above. In rejecting the contentions on behalf of the second appellant that he cannot be held liable for the shop employee's death because the policeman's actions (in firing the lethal shot) was not unlawful, alternatively that the policeman's action was a novus actus interveniens, unforeseeable by the second appellant, Olivier JA held (at paragraph 27) that factually both the second appellant and the policeman had caused the deceased's death. And, the learned judge held (at paragraph 28) that the second appellant could not rely on the lawfulness of the policeman's acts – the latter was acting out of necessity, justified in law, whereas the second appellant was acting unlawfully in the execution of an armed robbery. Olivier JA said:

'. . . the death of the deceased was brought about by an unlawful act or acts of the second appellant, viz the implementation of the robbery the physical assault on the deceased and the participation in the gun battle.' (paragraph 29.)

The learned Judge also rejected the novus actus interveniens argument.

[13] In conclusion and to summarise: on the facts of this case the appellant was well aware that the fact of him and his fellow robbers being armed with

loaded firearms may result in a shootout or, as it was referred to in *Bergstedt* and in *Dube,* that they may encounter ‘dangerous resistance’. He reasonably foresaw subjectively that, in the course of encountering such ‘dangerous resistance’, the firearms may be used with possible fatal consequences. He was thus correctly convicted of murder and the appeal must fail. I can do no better than to end off with the inimitable eloquence of Holmes JA in *S v Nkombani* above at 896E-F:

‘This conclusion, arrived at by reference to reason and the facts, is also consistent with social necessity, that wicked minds which devise and plan such evil deeds may know the risks they run in the matter of forfeiting their own lives.’

[14] I issue the following order:

The appeal is dismissed.

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S A Majiedt

Judge of Appeal

Appearances

For the Appellant:	M van Wyngaard
Instructed by:	Saayman Attorneys, Johannesburg
	c/o Phatshoane Henney Attorneys, Bloemfontein
For Respondent:	E Sihlangu
Instructed by:	Director of Public Prosecutions, Pretoria
	Director of Public Prosecutions, Bloemfontein