CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 73/17

In the matter between:

SHANE JACOBS First Applicant

FRANK ANTHONY Second Applicant

SULAIMAN FERRIS Third Applicant

and

THE STATE Respondent

Neutral citation: *Jacobs and Others v S* [2018] ZACC 4

Coram: Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J

Judgments: The Court: [1] to [3]
Goliath AJ: [4] to [53]
Theron J: [54] to [86]
Froneman J: [87] to [119]
Zondo DCJ: [120] to [166]

Heard on: 1 March 2018

Decided on: 14 February 2019

Summary: [Appeal from the Full Court] — [The doctrine of common purpose] — [jurisdiction] — [whether matter consists of a constitutional principle]

[No majority] — [Court has no jurisdiction] — [Order of High Court stands]

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, North West Division, Mahikeng):

1. The application for leave to appeal is dismissed.

JUDGMENT

THE COURT:

[1] The first judgment in this matter was written by Goliath AJ and was concurred in by Cachalia AJ, Froneman J, Khampepe J and Madlanga J. Froneman J wrote a judgment concurring in the first judgment. Cachalia AJ and Madlanga J concurred in the judgment penned by Froneman J. The effect of these two judgments is that five members of the Court did not grant leave to appeal against the judgment and order of the Full Court.

[2] The second judgment in this matter was written by Theron J and was concurred in by Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ. Zondo DCJ wrote a judgment concurring in the second judgment. Dlodlo AJ, Jafta J, Petse AJ and Theron J concurred in the judgment of Zondo DCJ. The effect of these two judgments is that five members of the Court held that leave to appeal should be granted and the appeal must succeed to the extent set out in paragraph 86 of the judgment penned by Theron J.

[3] There is thus no majority decision of this Court. The result is that the judgment and order of the Full Court stands.

GOLIATH AJ (Cachalia AJ, Froneman J, Khampepe J and Madlanga J concurring):

Introduction

[4] The jurisprudence of this Court in relation to its jurisdiction to hear an application for leave to appeal is well established, but it still occasions difficulties in its application.[1] This is yet another case which raises the issue whether this Court has jurisdiction to decide a matter which concerns the mere application of accepted legal principles and purely factual disputes between the parties.

Parties

[5] The applicants are Mr Shane Jacobs, Mr Frank Anthony and Mr Sulaiman Ferris, who were all convicted of murder by the High Court of South Africa, North West Division, Mahikeng (High Court). The first applicant was sentenced to 18 years imprisonment and the second and third applicants to 15 years imprisonment each. The respondent is the State.

Factual background

[6] On 19 December 2010, Ms Maxine Anthony (the second applicant's daughter) accused Mr Patrick Abakwe Modikanele (the deceased) of stealing her cellphone. Members of the Colridge community came to her aid, confronted the deceased and proceeded with an indiscriminate attack on him in an incident of mob justice. This assault occurred at Poonawashi Shop / Moon Shop (also referred to as Busy Corner). The High Court identified this attack as stage one and, for ease of reference, I shall also

[1] See *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC); *Thebus v S* [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC); and *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) (*Boesak*).

refer to this attack as stage one. After inflicting various blows on the deceased at stage one, the assailants marched him to Maxine's home (the second applicant's home), where he was further assaulted by the applicants. The assault that occurred at Maxine's home is identified as stage two.

Litigation history

High Court

[7] In the High Court,[2] the applicants were charged with the murder in that they, acting in common purpose,[3] unlawfully and intentionally killed the deceased by assaulting him with a chair, clenched fists and booted feet. They pleaded not guilty to the charge.

[8] The High Court found the applicants guilty of murder on the basis that they had acted in common purpose.[4] The High Court held that they all "had a common desire to cause the death of the deceased" and each played a role in the furtherance of that common purpose. It dealt with the prerequisites for liability on the basis of common purpose as stated in *Mgedezi*.[5]

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[2] *S v Shane Jacobs*, unreported judgment of the High Court of South Africa, North West Division, Mahikeng, Case No CC33/11 (9 September 2013) (High Court judgment or Trial Court judgment).

[3] See Snyman *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 265 for the explanation of common purpose:

> "The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in the execution of that purpose is imputed to the others." (Footnotes omitted.)

[4] See the definition of common purpose as established in *Thebus* above n 1 at para 18:

> "The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. *Burchell and Milton* define the doctrine of common purpose in the following terms:
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> > 'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime'." (Footnotes omitted.)

[5] *S v Mgedezi* [1988] ZASCA 135; 1989 (1) SA 687 (A) (*Mgedezi*). The High Court identified the requirements in *Mgedezi* as follows:

> "(i) He must have been present at the scene where the violence was committed.

[9] The High Court held that all the requirements in *Mgedezi* must be proved by the State in order for the applicants to be held criminally accountable on the basis of common purpose. With regard to the first requirement, presence, the High Court found that all the accused were present at stage two. However, the High Court did not make a finding to the effect that the accused formed part of the group that had assaulted the deceased at stage one. With reference to the second requirement, awareness, the High Court found that all the accused were aware of the assault that had been perpetrated on the deceased at stage one. The High Court held that it was highly probable that Maxine, who was present at both stages, would have informed her father of the assault at stage one. It further found that accused two (second applicant in these proceedings), personally informed a police officer that he had witnessed an assault on the deceased prior to the assault at stage two. Moreover, on the evidence presented, the High Court concluded that the second applicant was part of the group that marched the deceased to stage two, in that he held the deceased by his waist belt. On this basis, the High Court concluded that all the accused must have been aware of the assault on the deceased at stage one.

[10] With regard to the third requirement, intention to make common cause, the High Court found that the assailants in stages one and two assaulted the deceased based on a belief that he had robbed Maxine of her cellphone and that all the accused had "a common desire to kill the deceased". It was based on this reasoning that the High Court

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(ii) He must have been aware of the assault on the deceased.

(iii) He must have intended to make common cause with those who were actually perpetrating the assault.

(iv) He must have manifested his sharing of the common purpose with the perpetrators of the crime by himself performing some act of association with the conduct of others.

(v) He must have had the requisite *mens rea*. So in respect of killing the deceased he must have intended him to be killed or he must have foreseen the possibility of him being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

Requirements (iv)-(v) are dealt with in [15].

concluded that the prerequisites laid down in *Mgedezi* were met and consequently found the applicants guilty of murder.

[11] The applicants applied for leave to appeal against their conviction and sentence. Gura J granted leave to appeal against their convictions but refused leave to appeal against their respective sentences. In granting leave to appeal to the Full Court of the High Court (Full Court) against the conviction, the High Court held that in the event that another court were to find that the fatal injury that caused the death of the deceased occurred at stage one, then it was likely that the conviction could be set aside. Consequently, the High Court concluded that reasonable prospects of success existed in regard to the appeal against the conviction.

Full Court

[12] The Full Court analysed the evidence of various witnesses in its judgment. For the purpose of the application for leave to appeal to this Court, the evidence of Mr Lester Africa (Mr Africa) will be traversed below as the applicants relied heavily on the Full Court's analysis of his evidence in their submissions.

[13] The Full Court summarised Mr Africa's evidence in the following terms:

> "Africa is an electrical engineering student and employed by Thudhuka Power Station. He said he saw the assault on the day of the incident at Busy Corner. He saw people chasing a man who, they caught and hit and kicked him on his chest and head. They were also sitting on his chest and on his head. He heard Maxine Anthony screaming that they must hit him because he took her phone."[6]

[14] Further, the Full Court held:

> "The assault at the shop cannot be divorced from the assaults at the second appellant's house. They form part of one continuous act, which was to punish the deceased for

[6] *Jacobs v The State*, unreported judgment of the High Court of South Africa, North West Division, Mahikeng, Case No CAF 3/16 (15 December 2016) (Full Court judgment) at para 24.2.

> stealing the cellphone. Africa who was at the shops, testified that the first appellant's daughter, Maxine was behind the people chasing the deceased and screamed 'Moer hom. Hy het my selfoon gesteel'. Again at the first appellant's house, his daughter Maxine screamed 'maak hom dood. Maak hom dood, maak die kaffer dood'. Also at the second appellant's home, Labaan testified that she heard a female scream 'kill him, kill him, kill the kaffer'."[7]

The Full Court made reference to the time frames between the two stages of the assault in support of the finding that the assaults formed part of one continuous act.

[15] With regards to the fourth and fifth requirements, the Full Court held that the applicants who assaulted the deceased all acted with a common intention to seriously injure him and they must have foreseen the possibility of him being killed and performed their own act of association with recklessness as to whether or not death was to ensue. On this basis, it was satisfied that the applicants had "actively associated themselves with the execution of the common purpose".[8] Their appeal against conviction was consequently dismissed.

[16] The applicants then sought to appeal against the decision of the Full Court to the Supreme Court of Appeal. Their application was dismissed on the grounds that there were no special circumstances meriting a further appeal to that Court. For special leave to be granted by the Supreme Court of Appeal, an applicant must show more than the presence of reasonable prospects of success; there must be some additional factor, such as the public importance of the matter that warrants granting special leave.[9] In general, mere incorrect findings of fact by a Full Court will not constitute special circumstances.[10] Constitutional issues, on the other hand, would. No constitutional

[7] Id at para 36.

[8] Id at para 39.

[9] *National Union of Metalworkers of SA v Fry's Metals (Pty) Ltd* [2005] ZASCA 39; 2005 (5) SA 433 (SCA) at para 43.

[10] Id at para 64.

issue was raised before the Full Court. The applicants now seek leave to appeal to this Court and for the first time contend that the appeal raises a constitutional issue.

Submissions in this Court

Applicants' submissions

[17] The Chief Justice, in terms of rule 11(4) of the Constitutional Court Rules, issued the following directions to the parties:

> "1. The parties were directed to file written submissions . . . on:
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> (a) whether the doctrine of common purpose was correctly applied by the Trial Court and the Full Court in this matter.
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> (b) whether, if the doctrine of common purpose was not correctly applied, that would give this Court jurisdiction in this matter."

[18] In their submissions, the applicants dealt in detail with the first question. They did so by summarising the Full Court's finding of Mr Africa's evidence. They referred to the factual finding by the Full Court where it held:

> "The assault at the shop cannot be divorced from the assault at the second applicant's house. They form part of one continuous act which was to punish the deceased for stealing the cellphone."[11]

[19] The Full Court further found that—

> "the appellants who assaulted the deceased all acted with a common intention to seriously injure the deceased and they must have foreseen the possibility of him being killed and performed their own act of association with recklessness as to whether or not death was to ensue. The fact that the witnesses saw different assaults on the deceased some more serious than others and that the assaults were committed at different stages and were spontaneous is irrelevant when one applies the doctrine of

[11] Full Court judgment above n 6 at para 36.

> common purpose. In the circumstances, I am satisfied that the appellants actively associated themselves with the execution of the common purpose."[12]

[20] The applicants submit that because the Full Court accepted the evidence of Mr Africa in its totality, it accepted then, by implication, that they were not present at stage one of the assault. The Full Court did not make any adverse findings on Mr Africa's credibility nor did it reject his evidence. It is based on this premise that the applicants submit, in relation to the first question, that both the High Court and the Full Court incorrectly applied the principle of common purpose.

[21] Regarding the second question, the applicants contend that the misapplication of the common purpose principle, by the lower courts, constituted an unconstitutional development of the principle, which is contrary to the spirit of the Constitution. The applicants contended that their right to freedom has been arbitrarily deprived due to the misapplication of the common purpose principle. They contend that they have been subjected to severe sentences in prison as a result of the constitutional violation. Relying on *Boesak*, they contend that a sentence involving imprisonment is a potentially drastic violation of the right to freedom in section 12(1) of the Constitution.[13] Therefore, the applicants submit that this Court has jurisdiction to entertain this application as it impacts on:

(a) the right to a fair trial (section 35);

(b) the right to freedom (section 12);

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[12] Id at para 39.

[13] *Boesak* above n 1 at para 36. See also section 12(1) of the Constitution which is entitled "Freedom and security of the person":

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
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> (c) to be free from all forms of violence from either public or private sources;
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> (d) not to be tortured in any way; and
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> (e) not to be treated or punished in a cruel, inhuman or degrading way."

(c) the unconstitutional development of the principle of common purpose by the Full Court as it ignored the application of its requirements outlined by the courts; and

(d) the interests of justice as society has an interest that persons be correctly convicted after the correct application of legal principles.

[22] During oral argument, the applicants' counsel requested the Court to take into consideration this Court's judgment of *Makhubela*.[14] Although counsel for the applicants had not referred to *Makhubela* in the written submissions, in argument, he relied heavily on it in support of his submission that leave to appeal should be granted in this matter. He emphasised that *Makhubela* is similar to this case in that this Court also dealt with the application of the common purpose doctrine. Counsel argued that this Court in *Makhubela* found that it was in the interests of justice to grant leave to appeal because—

> "[the effect of the application of the common purpose doctrine] is therefore far-reaching, and implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent."[15] (Footnotes omitted.)

[23] The applicants therefore submit that the reasoning of this Court in *Makhubela* should be taken into consideration when deciding whether leave to appeal should also be granted in this case.

[24] After the hearing, the Chief Justice issued directions calling for further submissions from the parties.[16] In response to these directions, the applicants submit

[14] *Makhubela v S; Matjeke v S* [2017] ZACC 36; 2017 (2) SACR 665 (CC); 2017 (12) BCLR 1510 (CC).

[15] Id at para 24.

[16] The directions provided:

> "(a) Whether *S v Thebus* 2003 (6) SA 505 (CC) is authority for the statement in *S v Makhubela* 2017 (2) SACR 665 (CC) that common purpose implicates the constitutional right of freedom of the person, the right to a fair trial and the right to be presumed innocent.

that *Thebus* deals with the duty of a court to properly apply the doctrine of common purpose and the consequences of its misapplication, which is therefore in line with *Makhubela* insofar as its application is concerned. The applicants submit that the statement in *Makhubela* is not wrong other than to the extent that the incorrect paragraph in *Thebus* was referred to.

[25] The applicants further state, with reliance on *Boesak*, that the application of a legal rule by the Supreme Court of Appeal may constitute a constitutional matter and that this may occur if the application of a rule is inconsistent with some right or principle of the Constitution, which clearly demonstrates that the misapplication raised constitutional issues.

[26] The applicants further submit that the misapplication of the doctrine of common purpose infringes upon the section 12(1)(a) guaranteed right against arbitrary deprivation of freedom. Furthermore, there are two elements to section 12(1)(a): a procedural safeguard and a substantive one. The procedural element relates to the rights contained in section 35 of the Constitution while the substantive element speaks to the right not to be imprisoned without just cause. The applicants contend that their imprisonment is without just cause. They submit that evidence must be scrutinised and analysed in order to determine whether the principle of common purpose had been

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(b) If it is not, whether this statement is wrong and whether the ratio in *Makhubela* was clearly wrong.

(c) Whether the conviction and imprisonment of a person that is based on a misapplication of a criminal law principle raises a constitutional issue.

(d) Assuming that the doctrine of common purpose was wrongly applied in this case by the Trial Court and the Full Court, whether this misapplication meets the requirements of just cause envisaged in section 12 of the Constitution, especially the substantive and procedural fairness elements that were recognised in *S v Coetzee* 1997 (3) SA 527 (CC) and *Bernstein v Bester* 1996 (2) SA 751 (CC) at paras 144-5.

(e) Whether it is constitutionally permissible to impose criminal liability on an accused person where the principle of common purpose on which such liability rests, has not been established beyond reasonable doubt.

(f) Whether the doctrine of common purpose is in any way based on public policy or the legal convictions of the community and, if it is, whether its application would raise a constitutional issue."

established beyond reasonable doubt. If this is not done, it would lead to an unlawful and unconstitutional conviction.

[27] The applicants acknowledge that the legal convictions of the community establish that the doctrine is vital in order to further the pressing social need to successfully prosecute violent crimes and to accord with the societal distaste for violent crimes. However, they contend that it is equally necessary for an accused person to be accorded substantive and procedural justice, and that any conviction of a person must be in accordance with the proper application of the doctrine of common purpose.

Respondent's submissions

[28] In its written submissions, the respondent contends that the High Court applied the principle of common purpose correctly. It contends that the prerequisites laid down in *Mgedezi* were all satisfied to find the applicants guilty of murder on the basis of common purpose.

[29] The respondent submits that it is common cause that there was no evidence to prove that the applicants assaulted the deceased at stage one. However, there was sufficient evidence to prove that the applicants participated in the assault at stage two. The respondent agrees with the Full Court's reasoning that the two stages cannot be separated and are a continuation of one act. The respondent further avers that when the deceased was marched to stage two of the assault, he was walking while the second applicant held him by his waist belt. This sequence of events supports the contention that the two assaults were indeed continuous and fortifies the view that the applicants acted in the furtherance of a common purpose with the assailants at stage one.

[30] Furthermore, the respondent submits that should this Court take the view that the assault at stage two was not connected to the assault at stage one, the respective conduct of the accused at stage two, in isolation, meets all the requirements laid down in *Mgedezi* and is sufficient to show that the accused acted in common purpose to kill the deceased.

[31] In relation to the post-mortem report, the respondent submits that the deceased only became incapacitated after the assault at stage two; that the cause of death as concluded in the post-mortem report is consistent with the nature of the assault by the applicants at stage two; that the burden of proof under the doctrine of common purpose does not require the respondent to prove which of the participants' blows was fatal; and that the fatal blow is to be imputed to all the participants. The respondent therefore contends that the actions of the applicants caused the ultimate death of the deceased and that the fatal blow, which the respondent contends occurred at stage two, ought to be imputed to the applicants.

[32] The respondent submits that the application of the doctrine of common purpose is neither a constitutional issue, nor is it connected to a constitutional issue. It was argued that on this basis alone, the Court lacks jurisdiction to decide the appeal. It therefore submits that the applicants' attempt to clothe this Court with jurisdiction on the basis that their right to a fair trial and freedom has been affected, is without substance and should be rejected.

[33] In response to the directions issued after the hearing, the respondent submits that *Makhubela* cannot be said to be wrong, except to the extent that it is intended to derive its authority from *Thebus*. Relying on *Boesak*, the respondent submits that in the absence of a separate constitutional issue being raised, disagreement with the High Court and the Full Court's assessment of facts is not sufficient to constitute a constitutional matter. The respondent further submits that the substantive and procedural fairness of the conviction was not the subject of the relief sought. Rather, this matter is about the alleged improper application of the facts of this case to the requirements of the doctrine of common purpose. In terms of *Boesak*, the High Court's findings meet the requirements of just cause envisaged in section 12 of the Constitution.

[34] Furthermore, in establishing criminal liability where the doctrine has not been proved beyond reasonable doubt, the safeguards to be observed are substantive and

procedural fairness constituting just cause. Where safeguards were observed, it is constitutionally permissible to impose criminal liability on a person.

[35] Lastly, the respondent argues that it is the legal convictions of the community that people who jointly participate in a criminal enterprise should be held jointly liable and punished. The purpose of the doctrine is to eliminate the possibility that "all but actual perpetrators of a crime and their accomplices would be beyond the reach of the criminal justice system".[17] The parties did not explicitly state that a constitutional issue was raised on this basis.

Jurisdiction and leave to appeal

[36] This is an application in which the applicants seek leave to appeal against the dismissal of their appeal to the Full Court and their application for special leave to appeal to the Supreme Court of Appeal. The applicants must show that this matter is a constitutional matter or that it raises an arguable point of law of general public importance, in order for this Court's jurisdiction to be engaged.[18] The applicants contend that this Court has jurisdiction on the ground that the matter involves a constitutional issue. But they were unable to explain precisely what the issue was.

[37] Instead the argument appeared to be that the incorrect factual findings in the lower courts negatively impacted upon their constitutional right to a fair trial. In this regard, the core factual dispute for determination was whether the fatal blow was

[17] *Thebus* above n 1 at para 40.

[18] Section 167(3) of the Constitution reads:

> "The Constitutional Court—
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> . . .
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> (b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

inflicted at stage one or stage two; it being common cause that the evidence did not establish that the applicants participated in the attack at stage one.

[38] The determination as to whether the fatal blow was inflicted during stage one or two is clearly a factual enquiry which does not raise a constitutional issue that this Court should consider. As this Court said in *Thebus*:

> "Where there is no other constitutional issue involved, a challenge to a decision of the Supreme Court of Appeal on the basis only that it is wrong on the facts is not a constitutional matter."[19] (Footnote omitted.)

[39] In this case the High Court made certain factual findings, which the Full Court confirmed. It is of no consequence in this Court whether the High Court was correct in its finding, for incorrect findings of fact do not raise constitutional issues.

[40] This Court has held that "[u]nless there is some separate constitutional issue raised, therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact".[20]

[41] The applicants, in their further submissions, place great emphasis on the fact that *Boesak* brings their case within the jurisdiction of this Court. They argue that the misapplication of the common purpose doctrine is the kind of separate constitutional issue that the Court in *Boesak* envisaged. However, the Court in that case held that the jurisdiction vested in the Constitutional Court to determine constitutional matters does not manifest where the question before the Court is merely whether there is sufficient evidence to justify a guilty finding beyond reasonable doubt.[21] The High Court and Full Court simply interpreted the evidence that they had before them and applied their conclusions to the test for common purpose settled in *Mgedezi*. Thus, the factual

[19] *Thebus* above n 1 at para 46.

[20] *Boesak* above n 1 at para 15.

[21] Id.

findings of the High Court, which were confirmed by the Full Court, remain undisturbed and this Court cannot make a determination to the contrary as this does not raise a constitutional issue. The relief sought by the applicants would require a re-evaluation of evidence and would also amount to a factual enquiry which this Court cannot entertain.

[42] The applicants allege that their procedural and substantive protections built into section 12 of the Constitution have been infringed. According to *Boesak,* the right to be presumed innocent is not implicated when all that is being challenged is a factual evaluation made by a lower court.[22] The applicants argue that the lower courts incorrectly held that their guilt had been proven beyond a reasonable doubt. The substantive requirement of just cause is grounded upon the values expressed in section 1 of the Constitution and *Boesak* established that the commission of a crime of a sufficiently serious nature constitutes just cause for imprisonment.[23] It is impossible to determine whether the commission of the crime occurred without engaging in a factual enquiry.

[43] This Court in *Fraser* held that an issue does not become a constitutional matter merely because an applicant calls it one. It held:

> "A contention that a lower Court reached an incorrect decision is not, without more, a constitutional matter. Moreover, this Court will not assume jurisdiction over a non-constitutional matter only because an application for leave to appeal is couched in constitutional terms. It is incumbent upon an applicant to demonstrate the existence of a bona fide constitutional question. An issue does not become a constitutional matter merely because an applicant calls it one."[24] (Footnote omitted.)

[44] The applicants camouflaged their application as a constitutional matter based on their assertion that the common purpose doctrine had been incorrectly applied and

[22] Id at para 35.

[23] Id at para 38.

[24] *Fraser v ABSA Bank Limited (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 40.

unconstitutionally developed by the lower courts. However, this matter was neither grounded on the interpretation of the common purpose doctrine, nor its development. It is purely factual and does not raise any important constitutional issues which attract the jurisdiction of this Court. The attempt to couch the matter as one which raises constitutional issues cannot be sustained.[25]

[45] I now turn to *Makhubela* where the main issue for determination was whether the common purpose doctrine was correctly applied. In deciding whether it would be in the interests of justice to grant leave to appeal this Court remarked:

> "This Court, in *Mhlongo*, granted leave to appeal to two people who had been convicted of murder in respect of the same incident that is the subject of the present applications. In *Molaudzi*, this Court granted leave to a third accused convicted in the trial, and this Court granted leave to a fourth accused in *Khanye*. The four appeals were upheld and the accused in question were released from prison. Matjeke and Makhubela are their co-accused. Therefore, it is in the interests of justice that leave to appeal be granted and that this Court entertain their cases."[26] (Footnotes omitted.)

From this passage, it is clear that the basis for this Court to grant leave to appeal in *Makhubela* was founded on the fact that the applicants' co-accused had all been granted leave to appeal and subsequently been released from prison.

[46] Further, on this basis, this Court found that the proper application of the common purpose doctrine had the effect of infringing the constitutional rights of freedom of the person and the right to a fair trial, which justified the granting of leave to appeal. However, *Makhubela* is fundamentally different from this matter. This case deals with

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[25] See *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 221:

> "Based on this and *Boesak*, in a scenario where it is clear that the substance of the contest between parties is purely factual, it cannot be said to raise a constitutional issue purely because an applicant says it does. Otherwise, that would be the simplest stratagem by means of which the unscrupulous would have their issues ventilated in this Court under the guise that they raise constitutional issues." (Footnotes omitted.)

[26] *Makhubela* above n 14 at para 23.

the issue whether this Court has jurisdiction to hear matters which are purely factual. In *Makhubela*, when one considers the reasoning of the Court in granting leave to appeal, it was founded on the basis that the interests of justice warranted that all the accused who were convicted as a result of the same trial, be afforded the same treatment. Thus, *Makhubela* does not bolster the applicants' argument that these two cases are substantially similar and that leave to appeal should be granted. In the result, *Makhubela* finds no application in this matter. What must be emphasised, however, is that *Makhubela* did not overrule or qualify this Court's ruling in *Boesak.*

[47] In my view, reliance on the quotation in paragraph 22 is misplaced. Were this Court to interpret that statement in the broad manner suggested by the applicants, every criminal appeal would implicate constitutional rights and engage the jurisdiction of this Court. That must be wrong.

[48] Moreover, the Court in *Makhubela* cites *Thebus* at paragraph 8 as authority for that broad proposition. However, *Thebus* says nothing of the sort; not at paragraph 8 or anywhere else. In fact, the Court in *Thebus* said explicitly that the doctrine of common purpose itself does not infringe any constitutional rights. *Makhubela* must be seen as a whole rather than standing for the overly-broad proposition suggested by the quotation above.

[49] Insofar as a genuine legal issue might have been raised by the applicants, it concerns the requirement in *Mgedezi* that the accused must be present at the scene of the crime. *Mgedezi* only assists the applicants if it stands for the legal proposition that the prosecution in a common purpose murder trial must establish that the accused were physically present when the fatal blow was struck. *Mgedezi* is simply not authority for that proposition. In that case, a latecomer to an assault was not guilty of murder because the fatal blow had already been struck. *Mgedezi* stands for the following proposition: if it is established that the accused was not present when the fatal blow was struck, he

or she cannot be convicted of murder by common purpose. The judgment in *Motaung* makes a similar point.[27]

[50] The High Court found that the prerequisites laid down in *Mgedezi* were complied with. The Full Court found that the applicants had actively associated themselves with the execution of the common purpose. The two courts made factual findings which supported each other, by reaching the same conclusion, that the accused were guilty of murder on the basis of common purpose. Thus, these factual findings must remain undisturbed, and this Court cannot make a determination to the contrary.

[51] It is important to remember that this Court, unlike the lower courts, does not have the benefit of scrutinising all the evidence and statements made by the various witnesses. Should this Court embark on such an enquiry, it would mean that "the distinction drawn in the Constitution between the jurisdiction of this Court and that of the Supreme Court of Appeal would be illusory".[28] In the result, I find that the applicants have failed to identify a constitutional issue which would clothe this Court with jurisdiction. Moreover, even on this Court's extended jurisdiction, this matter fails to raise a point of law of general public importance which this Court ought to consider. Consequently, the applicants have failed to demonstrate that this Court has jurisdiction as contemplated in section 167(3)(b) of the Constitution.

Conclusion

[52] For the reasons set out above, the application for leave to appeal is dismissed.

Order

[53] The following order is made:

1. The application for leave to appeal is dismissed.

[27] *S v Motaung* [1990] ZASCA 75; 1990 (4) SA 485 (A) (*Motaung*).

[28] *Boesak* above n 1 at para 15.

THERON J (Zondo DCJ, Dlodlo AJ, Jafta J and Petse AJ concurring):

Introduction

[54] I have read the judgments prepared by my colleagues Goliath AJ (first judgment) and Froneman J (third judgment). I cannot agree with the reasoning or conclusion in either judgment. I have also read the fourth judgment prepared by Zondo DCJ and I concur in that judgment.

Jurisdiction

[55] This Court's jurisdiction is governed by section 167(3)(b) of the Constitution which stipulates that this Court may decide constitutional matters and any other matter that raises an arguable point of law of general public importance which ought to be considered by it.[29]

[56] Does this Court have jurisdiction in this matter? The judgment prepared by Zondo DCJ deals with the question of whether the application of the doctrine of common purpose is a constitutional issue and concludes that it is. For the reasons given in his judgment, I also conclude that the application of the doctrine of common purpose is a constitutional issue and that, therefore, this Court has jurisdiction to entertain this matter.

Leave to appeal

[57] It is a well-established principle that if a constitutional issue is raised, this Court will grant leave to appeal if it is in the interests of justice to do so.[30] The factors to be considered at this stage of the enquiry include whether the matter raises only factual

[29] See above n 18.

[30] *Helen Suzman Foundation v Judicial Service Commission (The Trustees for the time being of the Basic Rights Foundation of South Africa as Amicus Curiae)* [2018] ZACC 8; 2018 (4) SA 1 (CC); 2018 (7) BCLR 763 (CC) at paras 10-1 and *Off-Beat Holiday Club v Sanbonani Holiday Spa Shareblock Ltd* [2017] ZACC 15; 2017 (5) SA 9 (CC); 2017 (7) BCLR 916 (CC) at para 22.

issues, has reasonable prospects of success and is of broader importance beyond the parties.[31] For example, where there are no prospects of success it is unlikely that leave to appeal will be granted. In this way, the interests of justice enquiry serves as a limiting or controlling measure; thus ensuring that this Court is not required to hear every matter.

[58] This matter involves the alleged violation of the applicants' right to a fair trial and deprivation of freedom and liberty, potentially without just cause. This Court has a duty to ensure that the doctrine of common purpose is not applied in a manner that violates constitutional rights.

[59] The doctrine of common purpose is a set of rules of the common law that regulate joint criminal liability. It is important to note that Superior Courts are protectors of the common law.[32] Moseneke J, speaking for the Court in *Thebus*, said:

> "Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, 'pressing social need'. The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime."[33] (Footnotes omitted.)

[60] This matter is of importance, not only to the parties, but to future prosecutions relating to joint criminal activity where the State seeks to rely on the doctrine of

[31] *Dladla v City of Johannesburg* [2017] ZACC 42; 2018 (2) SA 327 (CC); 2017 (2) BCLR 119 (CC) at para 34; *Lee v Minister for Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC); 2013 (2) BCLR 129 (CC) at para 31.

[32] *Thebus* above n 1 at para 31. See also *Pharmaceutical Manufacturers Association of SA: In re: Ex Parte Application of President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at paras 33-41.

[33] *Thebus* id at para 40.

common purpose. In addition, as will be demonstrated, there are reasonable prospects of success in this matter. For these reasons, the interests of justice dictate that leave to appeal should be granted.

Merits

Substantive issue

[61] The substantive issue in this matter is whether the doctrine of common purpose was properly applied by the lower courts.[34]

[62] The background to this matter has been set out in the first judgment. Save to the extent set out below, I agree with that exposition of the background. The analysis of the High Court judgment does not accord with the record. The High Court, in its judgment, recognised that all five requirements in *Mgedezi* had to be established before criminal liability, on the basis of common purpose, could be attributed to the applicants.[35] The first judgment fails to appreciate that the High Court held that three

[34] In their founding affidavit in this Court, the applicants outline the basis of their appeal as follows:

> "Applying the principle of common purpose, in the absence of any evidence that—
>
> (a) we participated in the first (serious) assault;
>
> (b) carried out the second assault knowing that there was even a first assault.
>
> It is submitted that there was no basis upon which the Full Court could have concluded that we associated ourselves with the first assault or carried out separate independent spontaneous assaults and foresaw the possibility of killing the deceased.
>
> It is incontrovertible that it was not proved beyond reasonable doubt whether the first or second assault caused the death of the victim.
>
> It is incontrovertible that there was no evidence that we were present at the first assault let alone participated therein.
>
> It is submitted that there was no evidence to show that we—
>
> (a) were present when the first assault occurred;
>
> (b) were aware of the first assault;
>
> (c) intended to make common cause with persons committing the first assault;
>
> (d) performed acts of association with the first assault;
>
> (e) intended to kill the deceased."

[35] See the first judgment at [9] where it is stated:

of the five *Mgedezi* requirements had been established. The first judgment incorrectly states that "the [High] Court concluded that the prerequisites laid down in *Mgedezi* were met".[36]

[63] This thread continues throughout the first judgment. It is later stated that the High Court and the Full Court "applied their conclusions to the test for common purpose settled in *Mgedezi*".[37] The High Court did not consider whether *all* the *Mgedezi* requirements had been met. The High Court held that the four accused before it (which included the three applicants) "had a common purpose to cause the death of the deceased".[38] Later, the first judgment again, incorrectly, states that the "High Court found that the prerequisites laid down in *Mgedezi* were complied with".[39]

[64] The High Court did *not* find, as stated in the first judgment, that the second applicant had "informed a police officer that he had witnessed an assault on the deceased prior to the assault at stage two" or that he "was part of the group that marched the deceased to stage two, in that he held the deceased by his waist belt".[40] The High Court found:

> "The court therefore makes a finding that the deceased was first assaulted near Moon Shop or near Poonwashi Shop in the area of Busy Corner that night and that thereafter he was . . . [marched] to accused 2's house *by the very same people who had assaulted him earlier*."[41] (Emphasis added.)

> "The High Court *held* that all the requirements in *Mgedezi* must be proved by the State in order for the applicants to be held criminally accountable on the basis of common purpose." (Emphasis added.)

[36] See the first judgment at [9] to [10] where the three requirements found to have been established by the High Court are discussed.

[37] See the first judgment [41].

[38] High Court judgment above n 2 at 62.

[39] See the first judgment [50].

[40] See the first judgment [9].

[41] High Court judgment above n 2 at 59.

[65] There was no finding by the High Court that the second applicant had been part of the group that marched the deceased from stage one to stage two. The evidence to the effect that the second applicant was seen holding the deceased by his waist belt was given by Mr Phenyo Louw. In his evidence in chief, Mr Louw testified that he was at Nizaan shop when he "saw a group of people emerging *from the direction* of Poonawashi shop".[42] Under cross-examination, Mr Louw said that, as the group from Poonawashi shop came closer to where he was, he noticed that the second applicant was "part of that group and he was holding the victim with his waist belt".[43] Mr Louw did not and could not testify about what had occurred at scene one and whether the second applicant was part of the group that marched the deceased away *from* scene one. His observation was from a stage *after* the group had already left scene one. It would appear that the first judgment has mistaken what the High Court recorded as having been said by Mr Louw as a finding made by that Court.

[66] Warrant Officer Hays testified that he had visited the second applicant at his home when the latter was still regarded as a state witness. Mr Hays had asked the second applicant to point out where the deceased had been assaulted:

> "Accused 2 then pointed out to him a place in 2nd Avenue which is about 60 meters away from accused 2's home. . . . As he pointed that spot out, accused 2 told Hays that he did see when the victim was assaulted there."[44]

[67] It is clear from this passage that Mr Hays' testimony was to the effect that the second applicant had informed him that he, the second applicant, had witnessed the assault upon the deceased at scene two and not scene one. The High Court's finding on this aspect was:

[42] Id at 15.

[43] Id at 16.

[44] Id at 18.

> "Accused 2 on the other hand personally told Hays, a police officer, that earlier, before the deceased was brought to stage 2, he saw when he was assaulted."[45]

This finding of the High Court must be read with the evidence of the second applicant to the effect that he had witnessed the assault on the deceased on 2nd Avenue. In any event, even assuming that the second applicant had seen the deceased being assaulted, there is no evidence that he was at scene one when he witnessed this. He may have seen this from a distance.

[68] The first judgment repeatedly states that the High Court made certain factual findings which were confirmed by the Full Court.[46] Unfortunately it does not set out the factual findings it refers to. On my reading of the judgments of these two courts, they made contradictory findings. The High Court found that the two scenes were separate assaults and the applicants shared a common purpose to murder the deceased. The Full Court treated the assault at the two scenes as a continuous act (assault) and found that all the persons who assaulted the deceased that night shared a common purpose to murder him. The two courts had different reasons for their respective conclusions.

The doctrine of common purpose

[69] In *Motaung*, the Supreme Court of Appeal defined common purpose as a "purpose shared by two or more persons who act in concert towards the accomplishment of a common aim".[47] The practical effect of the application of this doctrine is that "if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in execution of that purpose is imputed to the others".[48]

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[45] Id.

[46] See the first judgment [39] and [50].

[47] *Motaung* above n 27 at 509A-B.

[48] Full Court judgment above n 6 at para 28. See also *Thebus* above n 1 at para 18 which adopts the following definition:

[70] The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example murder.[49]

[71] One of the justifications for the doctrine of common purpose is crime control. As "a matter of policy, the conduct of each perpetrator is imputed (attributed) to all the others".[50] Simultaneously, the doctrine of common purpose assists at the practical level where the causal links between the specific conduct of an accused and the outcome are murky. The doctrine of common purpose is often invoked in the context of consequence crimes in order to overcome the "prosecutorial problems" of proving the normal causal connection between the conduct of each and every participant and the unlawful consequence.[51] In *Thebus*, Moseneke J explained:

> "The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social 'need to control crime committed in the course of joint enterprises'. The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and ineffectual."[52] (Footnotes omitted.)

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."

[49] Full Court judgment above n 6 at para 30 referring to *S v Maelangwe* 1999 (1) SACR 133 (N) at 150-1.

[50] Kemp *Criminal Law in South Africa* 2 ed (Oxford University Press, Cape Town 2012) at 235.

[51] Burchell *Principles of Criminal Law* 5 ed (Juta, Cape Town 2016) at 483.

[52] *Thebus* above n 1 at para 34.

[72] There are two possible ways in which a common purpose may arise:

> "(a) By prior conspiracy (agreement) to commit the crime in question: for example, where X and Y (or X, Y and Z) agree in advance to commit a particular crime, which implies a bilateral or multilateral act of association.
>
> (b) By conduct (spontaneous association): for example, where X notices (or Y and Z) committing a crime, and simply joins in. This would be a unilateral act of association. This form of association is most commonly found in cases of mob violence."[53]

[73] This case does not concern the first form of common purpose, but only the second. For conduct to constitute active association, the requirements set out in *Mgedezi* need to be met. These are well-established.[54] I set them out in the context of the crime of murder. Firstly, the accused must have been present at the scene where, for example, the assault was being committed. Secondly, the accused must have been aware of the assault on the deceased, in *Mgedezi* this contemplated that the accused had knowledge of a previous assault.[55] Thirdly, the accused must have intended to make common cause with those who were perpetrating the assault. Fourthly, the accused must have manifested a sharing of a common purpose with the perpetrators of the assault by performing some act of association with the conduct of the others. Fifthly, the accused must have had the requisite *mens rea* (intent). In the context of this case, the applicants must have intended that the deceased be killed, or they must have foreseen the possibility of him being killed and performed an act of association with recklessness as to whether or not death was to ensue.[56] Of particular relevance in this matter is the requirement that the applicants must have been present at the time when the fatal blow was inflicted for them to be guilty of murder.

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[53] Kemp above n 50 at 235-6. See also *Mgedezi* above n 5 at 705I.

[54] *Mgedezi* id at 705I-706C. See also *S v Safatsa* 1988 (1) SA 868 (A).

[55] See the fourth judgment [130] to [131] for a detailed discussion.

[56] *Mgedezi* above n 5 at 705I-706C.

Continuous acts and common purpose

[74] Like the High Court, the Full Court was alive to the fact that the assault upon the deceased had occurred at two distinct places. The Full Court concluded that the assault at the first scene and the assault at the second scene formed part of one continuous act. It said:

> "The assault at the shop cannot be divorced from the assaults at the second appellant's house. They form part of one continuous act, which was to punish the deceased for stealing the cellphone. Africa, who was at the shops, testified that the first appellant's daughter, Maxine was behind the people chasing the deceased and screamed, 'Moer hom. Hy het my selfoon gesteel'. Again at the first appellant's house, his daughter Maxine screamed 'Maak hom dood, maak hom dood, maak die kaffer dood'. Also at the second appellant's home, Labaan testified that she heard a female scream 'Kill him, kill him, kill the kaffer.'"[57]

[75] The Full Court treated the two scenes where the assault upon the deceased was perpetrated as a continuous act, finding that the persons who assaulted the deceased that night did so with a common purpose to murder him. The Full Court's reasoning was that the purpose of the assault was to punish the deceased for stealing the cellular phone. It also took into account the fact that Maxine had been present at both scenes and had, at the first scene, shouted that the deceased should be assaulted for stealing her phone and, at the second scene, shouted that the deceased should be killed. The other factor which prompted the Full Court to find that the assaults formed part of a continuous act was that "[t]he time frame between the assaults that were committed at the shop and the assaults that were committed at the second appellant's house lends further support to the finding that the assaults formed part of one continuous transaction".[58]

[76] In this matter, there are strong indications that the assaults – though committed with the same motive – constituted two separate assaults. The time period, and more

[57] Full Court judgment above n 6 at para 36.

[58] Id at para 37.

specifically, a break in between two periods of assault militates against a finding of continuity whilst continuing conduct over a period of time would favour such a finding.[59] In particular, the break in assaulting the victim as he was taken from scene one to scene two, combined with the absence of evidence of the applicants' presence at scene one, and the evidence that different people were involved in the assault at the two scenes, points toward the two instances of assault being separate occurrences.

[77] The Full Court acknowledged that it was confronted with an assault that had been perpetrated by different groups of people, at different places and at different times. The Full Court had regard both to the entire assault upon the deceased that evening, by various persons, and the deceased's resultant death. By taking a quantum leap, the Full Court held that the applicants must have foreseen the possibility of the death of the deceased and performed an act of association with recklessness as to whether or not death was to ensue.[60]

[78] In my view, this was not a continuous act. Even if it were a continuous act, it would have been necessary for the State to prove that the applicants were present where the fatal blow was administered unless it is shown that they were present throughout the continuous act. However, once it is accepted that the applicants were not present throughout, it becomes critical to establish where the fatal blow was administered because a requirement of the doctrine of common purpose is that the applicants must have been present when the fatal blow was struck. The Full Court would have had to satisfy itself that the applicants were present at the stage when the fatal blow was inflicted upon the deceased if it was to uphold their conviction on the basis of the doctrine of common purpose.

[79] The Full Court failed to satisfy itself that each applicant had shared a common purpose with the person who had inflicted the fatal injury upon the deceased. It was

[59] See *Ntame v S* [2006] JOL 17357 (NC); *S v Matjie* [2007] JOL 19091 (T); and *Rex v Diaho* (1906) 20 EDC 85.

[60] Full Court judgment above n 6 at para 39.

obliged to do so before it could convict each applicant of murder on the basis of the doctrine of common purpose. In adopting a globular approach, the Full Court failed to determine the active association of each applicant in the murder of the deceased. The requirement of active association serves "to curb too wide a liability".[61] In *Thebus*, this Court confirmed that where the state relies on common purpose, it was required to prove beyond reasonable doubt that "*each accused* had the requisite *mens rea* concerning the unlawful outcome *at the time the offence* was committed".[62] (Emphasis added.)

[80] Somewhat surprisingly, the first judgment seems to acknowledge that an accused must be present when the fatal injury is inflicted in order for criminal liability to ensue on the basis of a common purpose. It says:

> "Insofar as a genuine legal issue might have been raised by the applicants, it concerns the requirement in *Mgedezi* that the accused *must* be present at the scene of the crime. . . . *Mgedezi* stands for the following proposition: *if it is established that the accused was not present when the fatal blow was struck, he or she cannot be convicted of murder by common purpose*."[63] (Emphasis added.)

[81] That is precisely the point being made in this judgment. In this matter, it has not been established that the applicants were present when the fatal blow was administered. On the reasoning of the first judgment quoted above, the applicants should not have been convicted of murder on the basis of common purpose. That should be the end of the matter.

Conclusion

[82] It follows that the appeal must succeed and the conviction of the applicants for murder must be set aside. The applicants are, however, not without blame. The factual

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[61] *Dewnath v S* [2014] ZASCA 57; 2014 JDR 0804 (SCA) at para 15. See also *Motaung* above n 27, where the Court noted, with reference to *Mgedezi* above n 5 at 510: "The net of common purpose will enmesh only an accused who consciously recognises that his mind and that of the actual perpetrator are directed toward the achievement of a common goal".

[62] *Thebus* above n 1 at para 49.

[63] See the first judgment [49].

findings of the lower courts have established that the applicants participated in the assault upon the deceased. It was a severe and brutal assault and their participation mirrored this. That is borne out by the evidence that the deceased had, more than once, screamed out in pain. At the end of the assault he was groaning. The factual findings of the lower courts regarding the applicants' participation are sufficient to convict them of assault with intent to do grievous bodily harm.[64] This is a competent verdict on a charge of murder and justified in the circumstance of this matter.

Should the matter be remitted to the High Court for sentencing?

[83] Since the High Court and the Full Court could only have properly concluded that the applicants were guilty of assault with intent to do grievous bodily harm, the applicants need to be sentenced afresh.

[84] Generally, if this Court was to decide on an appropriate sentence in respect of the conviction of assault with intent to do grievous bodily harm, it would be acting as a court of first and last instance. This Court has on numerous occasions expressed itself on the undesirability of a court sitting as a court of first and last instance.[65] In *Fleecytex*, this Court stated:

> "It is, moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues

[64] See *Mgedezi* above n 5 at 708D-F which states:

> "It follows that accused No 2's appeal must be allowed in respect of all of the five counts on which he was convicted. He is liable, however, for his own assault, as such, on the deceased in count 1. Although I have found that it is a reasonable possibility that he did not know that the deceased had been fatally injured, I consider that an inference is justified, beyond reasonable doubt, that he was aware that the deceased had been injured seriously enough to cause him to be lying on his back in an apparently helpless condition. That being so, the proper verdict in his case, in my judgment, is that he is guilty of assault with intent to cause grievous bodily harm. The sentence to be imposed on him for this conviction will be considered later."

[65] *MM v MN* [2013] ZACC 14; 2013 (4) SA 415 (CC); 2013 (8) BCLR 918 (CC); *Dormehl v Minister of Justice* [2000] ZACC 4; 2000 (2) SA 825 (CC); 2000 (5) BCLR 471 (CC); *Bruce v Fleecytex Johannesburg CC* [1998] ZACC 3; 1998 (2) SA 1143 (CC); 1998 (4) BCLR 415 (CC) (*Fleecytex*).

> raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of reconsidering and refining arguments previously raised in the light of such judgment."[66]

[85] This Court would be depriving the applicants of an opportunity to appeal if it was to determine an appropriate sentence. In my view, it is in the interests of justice that the matter be remitted to the High Court for the imposition of sentence.

Order

[86] I would have made the following order:

1. The application for leave to appeal is granted.
2. The appeal is upheld.
3. The applicants' conviction of murder is set aside and replaced with:

"The accused are found guilty of assault with intent to do grievous bodily harm."

4. The applicants' sentence is set aside.
5. The matter is remitted to the High Court of South Africa, North West Division, Mahikeng, for the purpose of sentencing.

FRONEMAN J (Cachalia AJ, Madlanga J concurring):

[87] I have read the judgments of my sisters, Goliath AJ (first judgment), Theron J (second judgment), and my brother, Zondo DCJ (fourth judgment). On an acceptance of what I consider to be this Court's current jurisprudence on jurisdiction I concur in the first judgment's conclusion that our jurisdiction is not engaged and that leave to appeal should not be granted. But the second and fourth judgments challenge the correctness of that legal view of our jurisdiction. That challenge needs to be considered carefully, because if accepted it has important consequences for the future.

[66] *Fleecytex* Id at para 8.

[88] In this judgment I will attempt to deal concisely with the following:

(a) The different assessments of the facts in the first and second judgments;

(b) The constitutional and legal issues, if any, that may ground our jurisdiction;

(c) The interests of justice in deciding whether to grant leave or not; and

(d) The remedy if leave is granted and the appeal succeeds.

Assessment of the facts

[89] The first judgment accepts the finding of the Full Court that the assault was a continuous act as one of fact, while the second judgment considers it to be a legal issue.[67] I consider the finding to be one of fact and do not think that a finding by a judicial official that a number of acts of assault, viewed in context, constituted a continuous assault for the purposes of application of the doctrine of common purpose turns it into a new legal doctrine.

[90] But, on the assumption that it does, as the second judgment holds, there must be clarity on whether it is an independent legal issue that confers jurisdiction on this Court or whether it merely underlies the broader assertion that misapplication of the common purpose doctrine raises a constitutional issue that confers jurisdiction on this Court.

[91] The second judgment chastises the first for a wrong analysis of the High Court's findings because it "does not accord with the record".[68] It also criticises it for other supposed errors of the Full Court's judgment.[69] I do not agree with these criticisms.

[92] The disagreement illustrates the fundamental difficulty of the case, namely that in the end it revolves around facts, not legal or constitutional issues. The full record of

[67] See the first judgment [38] to [39] and the second judgment [78].

[68] See the second judgment [62].

[69] Id [62] to [68].

the evidence is not before us. In its absence I find it difficult to understand how the first judgment's analysis of the facts can be attacked on the basis that it does not accord with the record. And if we needed the full record to determine for ourselves what the correct factual findings should be, we would be deciding it on a basis eschewed by our jurisprudence until now.

[93] The absence of a full record of the evidence also has important implications for a proper remedy, the fourth issue that will be dealt with in this judgment.

Constitutional and legal issues

[94] This Court has repeatedly held that (1) in criminal matters it will not entertain a challenge on the basis only that it is wrong on the facts[70] and (2) that the mere misapplication of an accepted common law rule by a High Court or the Supreme Court of Appeal does not ordinarily raise a constitutional matter.[71]

[95] On an acceptance of this general and recently reaffirmed[72] principle that the mere misapplication of an accepted common law rule by a High Court or the Supreme Court of Appeal does not ordinarily raise a constitutional matter, it is clear that we do not have jurisdiction. I can discern no pressing reason to deviate from this principle and for that reason alone refusal to grant leave for want of jurisdiction is justified.

[70] *Boesak* above n 1 and many others for example, *Conradie v S* [2018] ZACC 12; 2018 (7) BCLR 757 (CC) at paras 11-2; *S v Barlow* [2017] ZACC 27; 2017 (2) SACR 535 (CC); 2017 (11) BCLR 1357 (CC) at para 15; *Molaudzi v S* [2014] ZACC 15; 2014 JDR 975 (CC); 2014 (7) BCLR 785 (CC) at para 2; *S v Basson* [2005] ZACC 10; 2007 (3) SA 582 (CC); 2005 (12) BCLR 1192 (CC) at para 70.

[71] *Booysen v Minister of Safety and Security* [2018] ZACC 18; 2018 (6) SA 1 (CC); 2018 (9) BCLR 1029 (CC) at para 50; *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (*Imvula Quality Protection*) at para 33; *Mbatha* above n 25 at paras 193-4; *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at paras 10-2; *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 (2) SA 34 (CC); 2003 (1) BCLR 14 (CC) (*Phoebus Apollo*) at para 9.

[72] *Booysen* id at para 50.

[96] In oral argument counsel for the applicants relied on the following passage in *Makhubela* in support of an argument that this Court has jurisdiction in the present matter:

> "In addition, this matter concerns the proper application of the doctrine of common purpose. The doctrine of common purpose involves the attribution of criminal liability to a person who undertakes jointly with another person or persons to commit a crime, even though only one of the parties to the undertaking may have committed the criminal conduct itself. *Its effect is therefore far-reaching, and implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent.*"[73] (Emphasis added.)

[97] The italicised portion of that quotation wrongly describes the law. Even Homer nodded.[74] And courts sometimes make decisions *per incuriam*, or in a more brutal translation, "through lack of care". The Latin phrase sounds more impressive than its English translation, but, embarrassing as it may turn out to be, one must examine whether the decision suffers from a lack of care.[75]

[98] The paragraph preceding the quoted passage reads:

> "This Court, in *Mhlongo*, granted leave to appeal to two people who had been convicted of murder in respect of the same incident that is the subject of the present applications. In *Molaudzi*, this Court granted leave to a third accused convicted in the trial, and this Court granted leave to a fourth accused in *Khanye*. The four appeals were upheld and the accused in question were released from prison. Matjeke and Makhubela are their

[73] *Makhubela* above n 14 at para 24.

[74] In *Ars Poetica*, the Roman poet Horace noticed the reappearance of a character whom the Greek poet Homer had previously killed off in *The Odyssey*, and noted in Latin, "Quandoque bonus dormitat Homerus" which translates to: "Even good old Homer nods off". The point derived from this is that even judges in apex courts can err.

[75] Brickhill "Precedent and the Constitutional Court" (2010) *Constitutional Court Review* 79 illustrates the reluctance of this Court to overturn one of its judgments and criticises the unduly protectionist approach that the Court has adopted thus far.

> co-accused. Therefore, it is in the interests of justice that leave to appeal be granted and that this Court entertain their cases."[76]

[99] There is a valid argument to be made that the first quoted passage follows upon the paragraph in which the reason for granting leave was given and thus does not form an essential part of that reason.[77] But that will not really do. I consider that the offending sentence was made through lack of care, at least on my part.

[100] The lack of care is this: As precedential authority for the statement that the effect of the doctrine of common purpose implicates the constitutional rights of dignity and freedom of the person and the right to a fair trial, including the right to be presumed innocent, *Makhubela* relied on this Court's judgment in *Thebus*.[78]

[101] The problem is that *Thebus* said exactly the opposite.[79]

[102] The first issue to be decided in *Thebus* was whether the Supreme Court of Appeal failed to develop the common law doctrine of common purpose in conformity with the Constitution and thus failed to give effect to the appellants' rights to dignity, freedom of the person and a fair trial, which includes the right to be presumed innocent.[80] In order to decide this issue the Court first had to decide whether the common law doctrine of common purpose limits an entrenched right.[81] It expressly held that the doctrine did not trench upon the rights to dignity and

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[76] *Makhubela* above n 14 at para 23.

[77] In lawyerly terms: it does not form part of the *ratio decidendi* (rationale for the decision) and is merely an *obiter dictum* (said in passing).

[78] *Makhubela* above n 14 at para 24 and fn 19.

[79] *Thebus* above n 1 at para 8 was used as authority for the proposition, however it says nothing about the proposition.

[80] Id at para 17.

[81] Id at para 32.

freedom,[82] or the right to be presumed innocent, an incident of the right to a fair trial.[83] In the absence of fundamental rights being limited by the doctrine it held that there was no need for its further development,[84] nor for interfering with the factual findings of the trial court and Supreme Court of Appeal.[85]

[103] *Thebus* was about the constitutional acceptability of the common purpose doctrine. Of course, when we consider whether a doctrine is constitutionally acceptable, we must presume that it is being properly applied. The conclusion in *Thebus* was that the doctrine of common purpose was constitutionally acceptable. It was absolutely silent on cases in which the doctrine was misapplied. There is not a sentence in *Thebus* which indicates that the Court intended to interfere with its previous jurisprudence that the misapplication of constitutionally acceptable doctrines does not warrant this Court's jurisdiction.

[104] *Thebus* is thus no authority for the proposition that we have constitutional jurisdiction to grant leave to appeal on the ground that the fundamental rights to dignity, freedom and a fair trial, which includes the right to be presumed innocent, are implicated by the application of the doctrine of common purpose. And, in the absence of that, we cannot interfere with the factual findings made by the Trial Court and the Full Court. Again, *Thebus* made this clear:

> "The application of a rule by the Supreme Court of Appeal may constitute a constitutional matter if it is at variance with some constitutional right or precept. No such case has been made out. There is no constitutional ground in the present case to justify interference by this Court with the credibility findings or application of the requirement of active association by the Trial Court or the Supreme Court of Appeal."[86]

[82] Id at paras 36-41.

[83] Id at paras 42-3.

[84] Id at paras 48 and 50.

[85] Id at paras 47 and 49.

[86] Id at para 47.

[105] So in *Makhubela*, in my view, we misunderstood and misapplied the reasoning and outcome of this Court's own decision in *Thebus*. Apart from its reliance on *Thebus*, our judgment in *Makhubela* offers no other substantive justification for asserting that the doctrine of common purpose implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent. That is sufficient reason not to be held to the errant statement in *Makhubela*. It was in conflict with the precedent it relied on. To my mind that shows it was clearly wrong. But if that is too strong a conclusion to stomach, then at least it must be carefully reconsidered and the apparent inconsistency between it and the decision it relied upon as a precedent must be clarified.

[106] There is no dispute here about the content of the common law. Where there is a prior agreement between parties to a common purpose there need not be presence or participation by each when the fatal assault is administered.[87] Where no prior agreement is established presence at or before the fatal blow is necessary.[88] Where the time of the fatal blow cannot be established then a finding of murder cannot follow, at most a finding of attempted murder or some other form of assault.[89] I fail to see what possible new arguable point of law of general public importance is raised in this matter.

[107] The fourth judgment finds analogous grounds for our criminal jurisdiction in the pervasive infusion of constitutional values into the wrongfulness enquiry in our law of delict.[90] But there is little scope for the development of the common law in criminal law in the same manner as in the law of delict. Courts cannot create new crimes.[91] That

[87] *Thebus* above n 1; *S v Yelani* [1989] ZASCA 145; 1989 (2) SA 43 (A).

[88] *Motaung* above n 27.

[89] Id.

[90] See the fourth judgment [136] to [140].

[91] *Masiya v Director of Public Prosecutions* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) at para 36. It is a basic tenor of the principle of legality that courts cannot create new crimes: Skeen "General Principles: Introduction" in *LAWSA* 2 ed (2010) vol 6 at para 8. In *Masiya* it was also stated that the courts may award the remedy of prospective overruling of a law, but it was further emphasised that in developing the common law, the court may only award the remedy prospectively.

is primarily the function of the legislature.[92] The same goes for the development of new defences relevant to the wrongfulness element of crimes on the basis of the legal convictions of the community.[93]

[108] If there was indeed no factual finding on when and where the fatal injury was inflicted and that the finding of a continuous act is untenable, the result would be that the Full Court misapplied the *Motaung* holding that where the time of the fatal blow cannot be established then a finding of murder cannot follow, at most a finding of attempted murder or some other form of assault.[94] The Full Court did not purport to develop the law on common purpose and even if it did attempt to do that, it would have been ineffective in the face of binding Supreme Court of Appeal authority. In the absence of this I have always understood that this Court would not have jurisdiction.

[109] The fourth judgment also holds that the common purpose doctrine is based on public policy. It continues that, as the element of wrongfulness in delict is based on public policy which has been held to raise a constitutional issue, the misapplication of the common purpose doctrine also engages this Court's jurisdiction. But if this link exists, it applies to a significant portion of criminal law norms and principles. Take the example of *mala in se* (evil in themselves) crimes[95] like rape, robbery, theft, murder and

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[92] After *Masiya* id was handed down, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 was enacted to repeal the common law offence of rape and replace it with a new expanded statutory offence, applicable to all forms of sexual penetration without consent, irrespective of gender. Section 3 defines rape:

> "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape."

[93] For the closed categories of defences available, see *Skeen* above n 91 at paras 37-71.

[94] See *Motaung* above n 27.

[95] For the distinction between crimes that are *mala in se* and crimes that are *mala in re prohibita* (evil prohibited by law) see *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 193 where O'Regan J stated:

> "In many jurisdictions a distinction has been drawn between criminal acts that are *mala in se* and criminal acts that are *mala in re prohibita*, or as they have been, perhaps inaptly, termed in English, criminal offences proper and regulatory offences."

The reason for this distinction was explained by the Supreme Court of Canada in *R v Wholesale Travel Group Inc* [1991] 3 SCR 154 at 218-9:

kidnapping. Besides the fact that the law has criminalised them, by their very nature they are anathema to "those values that are held most dear by the society". Put differently, societal norms or the legal convictions of the community dictate that they be outlawed. Duff writes:

> "What justifies the law in 'prohibiting' murder, rape and the like is that such actions are wrong in a way that properly concerns the law: they constitute 'public' wrongs in terms of *the values of the political community*. *Those values claim to bind the citizens, as members of that* normative community: *they should be the citizens' own public values, as members of the polity*."[96] (Emphasis added.)

[110] Equally, it is societal norms and values that ground the concept of justification for the exclusion of criminal liability. In this regard I have in mind examples of defences like necessity and private defence. Burchell explains that—

> "a person is entitled to protect life and limb in private defence. The privilege in this case derives from the pre-eminent *social interest* in the preservation of human life."[97] (Emphasis added.)

[111] By parity of reasoning, similar conclusions can be reached in respect of a substantial number of other criminal law principles; that is conclusions about the centrality of societal norms and values or public policy to the existence of those principles.

> "Acts or actions are criminal when they constitute conduct that is, in itself, so abhorrent to the basic values of human society that it ought to be prohibited completely. Murder, sexual assault, fraud, robbery and theft are all so repugnant to society that they are universally recognized as crimes. At the same time, some conduct is prohibited, not because it is inherently wrongful, but because unregulated activity would result in dangerous conditions being imposed upon members of society, especially those who are particularly vulnerable."

[96] Duff "Rule-Violations and Wrongdoings" in Shute and Simester (eds) *Criminal Law Theory* (Oxford University Press, New York 2002) at 53.

[97] Burchell above n 51 at 123.

[112] Taken to its logical conclusion, the fourth judgment's reasoning must have the result that the misapplication of a large body of criminal law principles[98] engages this Court's jurisdiction. There can be no principled basis for setting apart and giving a special place to the doctrine of common purpose. In turn, this result must lead to the conclusion that any challenge to, for example, a murder conviction raises a constitutional issue on the mere basis that it implicates public policy. This, regardless of whether the real dispute is a contestation of factual findings. It would be so because – according to the fourth judgment – this goes to the "application of the Constitution" itself.[99] And – as this must be true of a substantial number of criminal law principles – it thus undermines the very distinction that *Boesak* drew between constitutional and purely factual matters.[100]

[113] In the fourth judgment Zondo DCJ disputes this wider implication for the Court's jurisdiction on the basis that ordinary factual findings relating to, for example, who shot a deceased, or whether an alibi defence should be upheld, will not be affected by the approach he takes.[101] I hope he is right and I am wrong. For the moment, however I cannot see the difference in principle between a finding of fact in relation to who shot a deceased or the existence of an alibi that may flow from the wrong application of a different criminal law principle, from a factual finding flowing from the wrong application of the common purpose doctrine.

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[98] I consciously avoid making reference to all criminal law principles because it is not inconceivable that some criminal law norms may not accord with the legal convictions of the community.

[99] See the fourth judgment [152].

[100] *Boesak* above n 1 at para 15:

> "The structure of the Constitution suggests clearly that finality should be achieved by the Supreme Court of Appeal unless a constitutional matter arises. Disagreement with the Supreme Court of Appeal's assessment of the facts is not sufficient to constitute a breach of the right to a fair trial. . . . Unless there is some separate constitutional issue raised therefore, no constitutional right is engaged when an appellant merely disputes the findings of fact made by the Supreme Court of Appeal."

It was also enunciated at paragraph 15 that the application of a legal rule may constitute a constitutional matter where a rule is "consistent with some right or principle of the Constitution" – no reference was made to public policy.

[101] See the fourth judgment [157] to [158].

Jurisdiction and interests of justice

[114] In *Mankayi*, at a time when this Court had jurisdiction only in constitutional matters, I ventured this:

> "There is an impossible tension between asserting the fundamental supremacy of the Constitution as the plenary source of all law, and nevertheless attempting to conceive of an area of the law that operates independently of the Constitution. . . . The suggestion advanced in this judgment is to acknowledge frankly that this jurisdictional tension cannot be overcome by a conceptual separation of certain areas of the law from the Constitution, but rather on a practical and functional arrangement based on a shared constitutional endeavour between all courts."[102]

The problem is, however, that it was a minority judgment, rejected by the majority at the time and ever since in both civil and criminal matters.

[115] But even if we change course, or change course in criminal matters only, I do not think it would generally be in the interests of justice to grant leave to appeal where there has merely been a misapplication of accepted legal principles. A practical and functional arrangement based on a shared constitutional endeavour between all courts should acknowledge that the structure of our legal system is set up to allow other courts to apply uncontroversial laws on a day-to-day basis.[103] It is not for the Constitutional Court to engage in that exercise. It is important that the distinction is maintained, not least because this Court does not have the capacity to hear every case of alleged misapplication. In maintaining the proper distinction between cases that this Court should and should not hear, we have to recognise the need for a certain amount of judicial trust; we have to trust that the system of appeals all the way up to the Supreme

[102] *Mankayi* above n 71 at para 124.

[103] The additional jurisdiction to determine matters that raise "an arguable point of law of general public importance" in section 167(3)(b) of the Constitution merely underscores this.

Court of Appeal will ordinarily return the correct result.[104] We should be wary that so-called "misapplication cases" should not undermine that trust.

[116] We do not have the full record of evidence before us, only the Trial Court's and Full Court's assessment of that evidence. That is also invariably the case in almost all applications for leave to appeal that come before us. If we were to change jurisdictional tack now we would, in order to properly assess the reasonable prospects of success in cases of alleged fair trial infringements, in many cases have to call for the full record. We would become a final court of appeal on fact too. That should not be.

[117] In this case the applicants have had the full benefit of our judicial appellate structure. They now seek to extend it. I do not believe there were any material irregularities in the conduct of their trial or in the judgments of the Trial Court and the Full Court. So even if the true limiting factor for granting leave is not jurisdictional, but in the interests of justice, I see no compelling reason to grant leave.

Remedy

[118] I would caution against allowing the appeal and changing the conviction on the material before us. The full record is not before us and there is disagreement about the true import of the Trial Court and Full Court's judgments. If the second judgment is accepted, the issue of when the fatal injury was inflicted becomes crucial. In all the circumstances, it would have been more prudent to refer the matter back to a re-hearing of the appeal by a differently constituted Full Court.

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[104] In *Van der Walt v Metcash Trading Ltd* [2002] ZACC 4; 2002 (4) SA 317 (CC); 2002 (5) BCLR 454 (CC) this Court stated at para 14:

> "In *Lane and Fey NNO v Dabelstein* this Court said: 'The Constitution does not and could hardly ensure that litigants are protected against wrong decisions. On the assumption that section 34 of the Constitution does indeed embrace that right, it would be the fairness and not the correctness of the court proceedings to which litigants would be entitled.'"

In the same judgment, this Court further stated at para 19:

> "As this Court held in the *Lane and Fey NNO* case, the Constitution does not and cannot protect litigants from wrong decisions. The judicial system in any democracy has to rely on decisions taken in good faith by Judges. As already mentioned, reasonable minds may well differ on the correct outcome of similar or even identical cases."

[119] But, as indicated, I concur in the first judgment's refusal to grant leave, also for these additional reasons.

ZONDO DCJ (Dlodlo AJ, Jafta J, Petse AJ and Theron J concurring):

Introduction

[120] The applicants seek leave to appeal against a decision of the Full Court which upheld their conviction by the Trial Court of murder solely on the basis of the application of the doctrine of common purpose. The Trial Court sentenced them to long terms of imprisonment. Therefore, whether, for the rest of their lives, society will be entitled to call them murderers[105] and whether or not their right to freedom of movement as entrenched in section 21 of the Constitution will be taken away from them for a long time as a result of the conviction depends entirely upon whether the Trial Court and the Full Court correctly applied the doctrine of common purpose. If they applied the doctrine correctly, the applicants were correctly convicted and must serve their terms of imprisonment. If, however, the doctrine was wrongly applied, they should be acquitted of murder and society may not call them murderers for the rest of their lives.

Brief factual background

[121] The deceased was physically attacked at two stages. The first attack occurred near a certain shop. That was stage 1. The second attack took place within the yard of a certain house. That was stage 2. It is common cause that the applicants were not present at scene 1 or, to say the least, the applicants were not proved to have been present at scene 1 when the deceased was attacked. It is common cause that the

[105] In *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 96 this Court said:

> "It may be useful to pause and summarise. The Reconciliation Act did not render it untrue that Mr McBride committed murder. And it did not prohibit frank public discussion of his act as 'murder'. Nor did it proscribe his being described as a 'criminal'. The *Citizen's* comments, deriving from the fact of Mr McBride's deed, were based on adequate exposition of the pertinent facts."

applicants were present at scene 2 when the deceased was attacked. Critically, it is not known whether the fatal blow that caused the deceased's death occurred at scene 1 or scene 2.

Full Court

[122] The Full Court confirmed the conclusion of the Trial Court that the applicants were guilty of murder. That court reached that conclusion solely on the basis of its application of the doctrine of common purpose.

In this Court

[123] The applicants contend that the Full Court and the Trial Court misapplied the doctrine of common purpose in the present case and that, had the doctrine been correctly applied, the conclusion would have been that they were not guilty of murder. The respondent contends that the Full Court and the Trial Court correctly applied the doctrine of common purpose.

Jurisdiction

[124] In support of its contention that this Court has jurisdiction in respect of this matter, the applicants contend that this matter concerns the proper application of the doctrine of common purpose and that that is a constitutional matter. This means that they invoke the jurisdiction of this Court provided for in section 167(3)(b)(i) of the Constitution.[106] In this regard the applicants relied on this Court's decision in *Makhubela*[107] to which I shall refer below. They do not invoke this Court's jurisdiction covered by section 167(3)(b)(ii) of the Constitution. That is that this Court may decide

[106] Section 167(3)(b)(i) of the constitution provides:

> "(3) The Constitutional Court—
>
> …
>
> (b) may decide—
>
> (i) constitutional matters."

[107] *Makhubela* above n 14.

"any other matter, if it grants leave to appeal, on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by [this Court]".

[125] The respondent contends that this matter does not raise a constitutional issue and, therefore, this Court does not have jurisdiction. The respondent argues that this matter raises a purely factual issue. It submits that the proper application of the doctrine of common purpose is not a constitutional matter. Whether or not this Court has jurisdiction in this matter will depend upon whether the proper application of the doctrine of common purpose is a constitutional matter. If it is, this Court has jurisdiction. If it is not, this Court has no jurisdiction.

[126] I have read the judgments prepared by Goliath AJ (first judgment), Theron J (second judgment) and Froneman J (third judgment). I am unable to agree with the first and third judgments that this matter does not raise a constitutional issue and that this Court has no jurisdiction in respect of this matter. I also disagree with the third judgment that this Court's conclusion in *Makhubela* that the proper application of the doctrine of common purpose is a constitutional matter was clearly wrong and should be departed from. I write separately to deal with the question whether this matter raises a constitutional issue and, therefore, whether this Court has jurisdiction.

[127] In what follows I shall show why I take the view that this matter raises a constitutional issue and why the decision in *Makhubela* that the proper application of the doctrine of common purpose is a constitutional matter is correct. I shall do so with reference to the jurisprudence of this Court not referred to in *Makhubela* but which members of this Court would have been aware of at the time of considering and deciding *Makhubela*. In other words, it is important that, when we consider whether *Makhubela* was correctly decided, we consider not only the reasons that may have been given by the Court in that judgment for its conclusion but that we look also at this Court's jurisprudence at the time or even subsequently as that jurisprudence may reflect that that conclusion was justified. In my view, the jurisprudence of which the members of

this Court who decided *Makhubela* would have been aware at the time of *Makhubela* supports the conclusion in *Makhubela*. It is appropriate to begin the discussion with a word or two about the doctrine of common purpose.

The doctrine of common purpose

[128] In *Thebus* Moseneke J had this to say about the doctrine of common purpose:

> "The doctrine of common purpose is a set of rules of the common law that regulate the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. *Burchell and Milton* define the doctrine of common purpose in the following terms:
>
> > 'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime.'
>
> *Snyman* points out that 'the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others'. These requirements are often couched in terms which relate to consequence crimes such as murder."
>
> The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind. In the present matter, the evidence does not prove any such prior pact."[108] (Footnotes omitted.)

It is common cause that in this case there was no prior agreement. Accordingly, we are dealing with the second category of liability requirements.

[108] *Thebus* above n 1 at paras 18-9.

[129] In *Mgedezi* the Appellate Division set out the liability requirements for the doctrine of common purpose where there is no prior agreement to commit the crime in question. It said:

> "In the first place, *he must have been present at the scene where the violence was being committed*. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."[109]

[130] It will be seen from this passage that one of the requirements for the application of the doctrine of common purpose in the absence of a prior agreement is that the accused must have been present at the scene of the commission of the crime. This being the case, if it is not known where the fatal blow was administered, it cannot be said that the applicants were present at the scene where the fatal blow was administered. If that is the position, the first requirement of the doctrine of common purpose where there is no prior agreement would not be met and there could, therefore, be no criminal liability or conviction based on the doctrine of common purpose.

[131] From the passage quoted from *Mgedezi* above, it should be clear that the Trial Court and the Full Court incorrectly applied the doctrine of common purpose in the present case since it cannot be shown and was not shown that the applicants were present at the scene where the fatal attack on the deceased was carried out.

[109] *Mgedezi* above n 5 at 705I-706B.

Is the application of the doctrine of common purpose a constitutional matter?

[132] The applicants relied on the decision of this Court in *Makhubela* in support of their submission that this Court has jurisdiction in this matter. In paragraphs 23 and 24 of *Makhubela* this Court unanimously said:

> "This Court, in *Mhlongo*, granted leave to appeal to two people who had been convicted of murder in respect of the same incident that is the subject of the present applications. In *Molaudzi*, this Court granted leave to a third accused convicted in the trial, and this Court granted leave to a fourth accused in *Khanye*. The four appeals were upheld and the accused in question were released from prison. Matjeke and Makhubela are their co-accused. Therefore, it is in the interests of justice that leave to appeal be granted and that this Court entertain their cases.
>
> In addition, *this matter concerns the proper application of the doctrine of common purpose*. The doctrine of common purpose involves the attribution of criminal liability to a person who undertakes jointly with another person or persons to commit a crime, even though only one of the parties to the undertaking may have committed the criminal conduct itself. Its effect is therefore far-reaching, and implicates the constitutional rights of freedom of the person and the right to a fair trial, including the right to be presumed innocent."[110] (Footnotes omitted.)

[133] In *Nehawu* this Court held that "*[t]he proper interpretation and application of the LRA will raise a constitutional issue*."[111] This Court said this in the following context:

> "The LRA was enacted 'to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution'. In doing so the LRA gives content to section 23 of the Constitution and must therefore be construed and applied consistently with that purpose. Section 3(b) of the LRA underscores this by requiring that the provisions of the LRA must be interpreted 'in compliance with the Constitution'. *Therefore the proper interpretation and application of the LRA will raise a constitutional issue*. This

[110] *Makhubela* above n 14 at paras 23-4.

[111] *National Education Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*Nehawu*) at para 14.

> is because the Legislature is under an obligation to 'respect, protect, promote and fulfil the rights in the Bill of Rights'. In many cases, constitutional rights can only be honoured effectively if legislation is enacted. Such legislation will of course always be subject to constitutional scrutiny to ensure that it is not inconsistent with the Constitution. Where the Legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and the Legislature act in partnership to give life to constitutional rights."[112] (Footnotes omitted.)

Later, this Court said:

> "In relation to a statute a constitutional matter may arise either because the constitutionality of its interpretation or its *application* is in issue or because the constitutionality of the statute itself is in issue."[113]

[134] Of course, if the proper application of legislation enacted to give effect to fundamental rights entrenched in the Constitution is a constitutional matter, as this Court held in *Nehawu*, *a fortiori* (for the stronger reason) the proper application of the provisions of the Constitution is also a constitutional matter. It cannot be otherwise. That is not confined to the application of those provisions of the Constitution that relate to the Bill of Rights but extends to all provisions of the Constitution. In *Boesak* this Court said through Langa DP:

> "Under section 167(7), the interpretation, *application* and upholding of the Constitution are also constitutional matters."[114] (Footnote omitted.)

[135] In an article titled: "*Thebus and Tadic: Comparing the application of the doctrine of common purpose in South Africa to its application in the Yugoslav*

[112] Id.

[113] Id at para 15.

[114] *Boesak* above n 1 at 14.

Tribunal",[115] Pieter du Toit compares two decisions on the doctrine of common purpose, namely, this Court's decision in *Thebus* and the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v Tadic*.[116] He then concludes thus in part:

> "The ICTY Appeals Chamber and the South African Constitutional Court both upheld a rather broad notion of common purpose liability. *Policy considerations are at the heart of the doctrine of common purpose at the international and domestic level. Society must respond effectively against collaborative misdeeds and the role of any participant therein should not be understated*. The focus of criticisms against this approach is that it casts the net of criminal liability too widely and ignores the fundamental principle of individual culpability."[117]

The policy considerations referred to in this passage are public policy considerations. I agree that public policy considerations are at the heart of the doctrine of common purpose.

[136] Some time after the hearing of this matter by this Court, directions were issued to the parties to deliver written submissions dealing with certain issues. One of the issues that the parties were directed to address was "whether the doctrine of common purpose is in any way based on public policy or the legal convictions of the community and, if it is, whether its application would raise a constitutional issue". In response the State conceded in its written submissions that the doctrine of common purpose is based on the legal convictions of the community. The concession was made in these terms:

> "The common law doctrine of common purpose is based on the legal convictions of the community. It is the legal convictions of the community that people who jointly participate in a criminal enterprise should be jointly held liable and punished. In our constitutional dispensation, all laws, whether common law or statutory origin, are

[115] Du Toit "Thebus and Tadic: Comparing the Application of the Doctrine of Common Purpose in South Africa to Its Application in the Yugoslav Tribunal" (2007) 20 *SACJ* 361.

[116] Case No.: IT-94-1-A in International Criminal Tribunal for the Former Yugoslavia (ICTY).

[117] Du Toit above n 115 at 370-1.

> subject to the constitutional framework and in case of conflict; they are to be aligned to the Constitution and should therefore raise a constitutional issue."

The concession was, in my view, correctly made.

[137] In *Barkhuizen* this Court held that under our constitutional democracy:

> "Public policy represents the *legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our Constitution and the values that underlie it. Indeed, the founding provisions of our Constitution make it plain: our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms and the rule of law*."[118] (Footnotes omitted.)

This Court went on to say:

> "What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."[119]

[138] In *Imvula Quality Protection* this Court had this to say about wrongfulness in our law of delict:

> "*This Court has held that an appeal against a finding on wrongfulness on the basis that it failed to have regard to normative imperatives of the Bill of Rights does ordinarily raise a constitutional issue*. This is because of the nature of the wrongfulness element in delict. An enquiry into wrongfulness is determined by weighing competing norms and competing interests. *Since the landmark Ewels judgment, whether conduct is*

[118] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 28.

[119] Id at para 29.

> *wrongful is tested against the legal convictions of the community. These now take on constitutional contours: the convictions of the community are by necessity underpinned and informed by the norms and values of our society embodied in the Constitution.*"[120] (Footnotes omitted.)

[139] In *Phumelela Gaming and Leisure* a decision of the Supreme Court of Appeal was challenged in this Court on the basis that the Supreme Court of Appeal had failed to have regard to the spirit, purport and objects of the Bill of Rights in the application of the test for wrongfulness. Immediately after recording this, Langa CJ said in the next sentence: "The application of the Bill of Rights to the current set of facts is a constitutional issue. This Court accordingly has jurisdiction to deal with the application for leave to appeal."[121]

[140] Later on, the Chief Justice said:

> "The delict of unlawful competition is based on the *Aquilian* action and, in order to succeed, an applicant must prove wrongfulness. This is always determined on a case by case basis and follows a process of weighing up relevant factors, in terms of the *boni mores* now to be understood in terms of the values of the Constitution."[122] (Footnote omitted.)

[141] In considering whether the application for leave to appeal raised any constitutional issues in *Steenkamp,*[123] this Court referred to the respondent's contention in that case that the substantive test for wrongfulness should never have arisen in either the High Court or the Supreme Court of Appeal. It also considered the respondent's submission that wrongfulness did not need to be decided on appeal. This Court rejected this submission and gave a number of reasons. The second of those reasons was this:

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[120] *Imvula Quality Protection* above n 71 at para 34.

[121] *Phumelela Gaming And Leisure Limited v André Gründlingh* [2006] ZACC 6; 2007 (6) SA 350 (CC); 2006 (8) BCLR 883 (CC) (*Phumelela Gaming and Leisure*) at para 23.

[122] Id at para 31.

[123] *Steenkamp N.O. v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC).

> "Second, it is *an important consideration that the applicant, as the party aggrieved by the decision of the Supreme Court of Appeal, seeks an appeal to lie against the substantive decision on wrongfulness. This Court is seized with the matter and there is no good reason why it should decline to resolve the substantive issue on appeal*."[124]

[142] The above quotation appears in paragraph 19 of the *Steenkamp* judgment. The first sentence of paragraph 20 reads: "*There are indeed, other cogent reasons why the application involves constitutional issues*".[125] What is necessarily implied in this first sentence of paragraph 20 in this Court's judgment in *Steenkamp* is that what this Court had just given in the paragraphs immediately preceding paragraph 20 are reasons why the application for leave to appeal in *Steenkamp* involved constitutional issues. The issue that the Court had just dealt with at the end of paragraph 19 was wrongfulness. This means that the Court held that the determination of wrongfulness is a constitutional issue. If the determination of wrongfulness is a constitutional issue, it can only be so because it involves the legal convictions of the community. This means that the determination of whether an accused is criminally liable on the basis of the doctrine of common purpose must, logically, also be a constitutional issue since it, like wrongfulness, also involves the legal convictions of the community.

[143] Furthermore, after pointing out in paragraph 20 of its judgment that there were other cogent reasons why the application in *Steenkamp* involved constitutional issues, the Court went on to give further reasons. One of them was this one:

> "Second, the question of private-law liability of a tender board involves significant policy considerations relating to fairness and justice, which must now be settled in the light of section 39(2) of the Constitution."[126] (Footnote omitted.)

[124] Id at para 19.

[125] Id at para 20.

[126] Id at para 21.

This statement reinforces the proposition that public policy considerations in any inquiry raise a constitutional issue.

[144] The effect of this point is that one of the reasons advanced for the conclusion that the application in *Steenkamp* involved constitutional issues was that the matter involved "policy considerations" which had to be settled in the light of section 39(2) of the Constitution. In other words, policy considerations settled in the light of section 39(2) give rise to a constitutional issue. In *Steenkamp* the Court went on to say:

> "Therefore, shortly stated, the enquiry into wrongfulness, is an after-the-fact, objective assessment of whether conduct which may not be *prima facie* wrongful should be regarded as attracting legal sanction. In *Knop v Johannesburg City Council* the test for wrongfulness was said to involve objective reasonableness and whether the *boni mores* required that 'the conduct be regarded as wrongful'. The *boni mores* is a value judgment that embraces all the relevant facts, the sense of justice of the community and considerations of legal policy both of which now derive from the values of the Constitution."[127] (Footnotes omitted.)

[145] Later on, this Court said in *Steenkamp* about the determination of wrongfulness:

> "It should be kept in mind that in the determination of wrongfulness foreseeability of harm, although ordinarily a standard for negligence, is not irrelevant. The ultimate question is whether on a conspectus of all relevant facts and considerations, public policy and public interest favour holding the conduct unlawful and susceptible to a remedy in damages."[128] (Footnotes omitted.)

[146] In the light of all this, it seems to me that, just as an inquiry into wrongfulness raises a constitutional issue, an inquiry into criminal liability on the basis of the doctrine of common purpose also raises a constitutional issue as both are based on public policy which is now represented by our constitutional values.

[127] Id at para 41.

[128] Id at para 42.

[147] If one accepts that the doctrine of common purpose is based on public policy and that public policy is now represented by our constitutional values, it must follow that the application of the doctrine of common purpose entails the application of our constitutional values. I quoted earlier a statement by this Court (through Langa DP) in *Boesak* which stated the obvious, namely, that the "interpretation, *application* and upholding of the Constitution are also constitutional matters."[129] The constitutional values are an integral part of the Constitution. Therefore, when one applies them, one is applying the Constitution. The application of our constitutional values is a constitutional matter or issue. Therefore, this matter raises a constitutional issue because it raises the application of our constitutional values.

[148] That public policy is at the heart of the doctrine of common purpose is hardly surprising when it is considered that the doctrine of common purpose shares a number of features with the doctrine of vicarious liability which this Court has said has "a policy-laden character".[130] The principle of vicarious liability deals with the liability of an employer for the harm-causing conduct of its employee in certain circumstances. The doctrine of common purpose, too, is about holding someone criminally liable for the *actus* of another person in certain circumstances.

[149] The doctrine of common purpose is based on public policy. The doctrine of vicarious liability was developed by the courts and is applied by them. The doctrine of common purpose was also developed by the courts and is applied by them. In developing both the doctrine of vicarious liability and the doctrine of common purpose the courts sought to give effect to or reflect the legal convictions of the community. The legal convictions of the community are represented by "the values that underlie" our Constitution.

[129] *Boesak* above n 1 at para 14.

[130] See first sentence in the quotation in [153].

[150] The test used to determine vicarious liability includes the question whether there is a sufficiently close connection between the conduct committed by the employee with the business of the employer. That is the second leg of the *Rabie* test.[131] In determining whether an accused person must be held criminally liable for the *actus* of another person on the basis of the doctrine of common purpose, an important question that must be asked, if there was no prior agreement between the accused and the other person, is whether the accused sufficiently associated himself or herself with the conduct of the other person.[132] Those two questions both seek to establish an association or connection of one kind or another between the person sought to be held liable and the person who committed the *actus*.

[151] The two questions are questions which a court determines on the basis of its understanding of the community's sense of justice. In a case involving vicarious liability, a court has to take into account the community's legal convictions when it decides whether, for example, on a certain set of facts, the employer must be held vicariously liable for the act or omission of an employee. The same applies to a case involving the doctrine of common purpose. The basic rule is that a person is not responsible or liable for the consequences of the conduct of another person. However, in certain circumstances society deems it appropriate that someone be held liable for the conduct of another. In this regard the court must bear in mind our constitutional values.

[152] In *K* this Court described the character of vicarious liability as "the policy-laden character of vicarious liability."[133] Through O'Regan J this Court said about vicarious liability:

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[131] What I refer to as the *Rabie* test is the test found in *Minister of Police v Rabie* [1985] ZASCA 105; 1986 (1) SA 117 (A) at 134C-E.

[132] See *Thebus* above n 1 at para 19, which is quoted in [128].

[133] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 22.

> "Despite the policy-laden character of vicarious liability our courts have often asserted, though not without exception, that the common law principles of vicarious liability are not to be confused with the reasons for them and that their application remains a matter of fact. If one looks at the principle of vicarious liability through the prism of section 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order. This is not to say that there are no circumstances where rules may be applied without consideration of their normative content or social impact. Such circumstances may exist. What is clear, however, is that as a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and normative content."[134] (Footnotes omitted.)

[153] In relation to the doctrine of vicarious liability, in *K* this Court held that "[t]he courts, bearing in mind the values the Constitution seeks to promote, will decide whether the case before it is of the kind which in principle should render the employer liable."[135] In respect of the doctrine of common purpose I would say that, in a case where there is no prior agreement, a court, bearing in mind the values the Constitution seeks to promote, will decide whether the case before it is of the kind which in principle should render the accused criminally liable for the conduct of another person on the basis of a common purpose.

[154] The applicants contend that the doctrine of common purpose was not properly applied by the Trial Court and the Full Court. As the doctrine of common purpose is based on public policy, its proper application by a court includes the court bearing in mind the values contained in our Constitution. Therefore, the applicants' complaint that the lower courts did not apply the doctrine of common purpose correctly requires this

[134] Id.

[135] Id at para 23.

Court to ascertain what the correct application thereof is and, if the doctrine was not correctly applied, go ahead and apply it correctly. Applying it correctly will involve a constitutional issue.

I have noted the points made in the third judgment about this judgment. However, the third judgment does not dispute the fundamental points I make in this judgment on why I say that this matter raises a constitutional issue, and that, therefore, this Court has jurisdiction. Those points are simply the following:

(a) The doctrine of common purpose is based on public policy considerations and reflects the legal convictions of the community;

(b) In terms of this Court's jurisprudence, public policy and legal convictions of the community are now reflected in and represented by our values as contained in our Constitution;

(c) The application of the Constitution is, obviously, a constitutional issue;

(d) Therefore, the application of the doctrine of common purpose constitutes the application of our constitutional values which is the application of the Constitution.

[155] With regard to the points made in the preceding paragraph, the third judgment also says that, if the fact that the doctrine of common purpose is based on public policy means that its proper application raises a constitutional issue, the effect would be that any challenge to murder would raise a constitutional issue as well. What the third judgment is in effect saying is that all grounds upon which a conviction for murder is challenged would be a constitutional issue. This is not correct. If an accused person challenges his or her conviction on the basis that the court a quo was wrong in concluding that she or he shot the deceased, there is nothing constitutional about that. The issue is purely factual.

[156] If an accused pleads an alibi to a charge of murder, that is a purely factual issue. There is nothing constitutional about that. The third judgment is, therefore, wrong to say that holding that the proper application of the doctrine of common purpose is a

constitutional matter will result in all challenges to murder convictions and other convictions being constitutional matters. This also answers the third judgment's elaboration where it says that, if the link between public policy and a matter being a constitutional matter exists, it applies to all other criminal principles and this would undermine "the very distinction that *Boesak* drew between constitutional and purely factual matters".[136]

[157] It is to be noted that the third judgment does not dispute that the doctrine of common purpose is based on public policy which, as this Court said in *Barkhuizen*,[137] represents the legal convictions of the community, and that this Court's jurisprudence makes it clear that public policy or the legal convictions of the community are now reflected in the values contained in our Constitution. What the third judgment does seem to dispute, albeit indirectly, is the conclusion that the application of the doctrine of common purpose constitutes in effect the application of the values contained in the Constitution which is a constitutional matter. I am unable to follow the third judgment's reasoning in this regard. To my mind, it is self-evident that, if the doctrine of common purpose is based on public policy or the legal convictions of the community and those are themselves reflected in, or represented by, the values contained in our Constitution, the application of the values contained in the Constitution is, axiomatically, the application of the Constitution and the application of the Constitution is a constitutional matter.

[158] To the extent that a reference to the Constitution may put the proposition that the application of the Constitution is a constitutional issue beyond any doubt, section 167(7) is clear. It reads:

> "A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

[136] See the third judgment [26].

[137] *Barkhuizen* above n 118 at para 28.

In *Boesak* this Court said through Langa DP: "Under section 167(7), the interpretation, *application* and upholding of the Constitution are also constitutional matters".[138] Therefore, the approach adopted in this judgment does not only not seek to obliterate the distinction between a constitutional issue and a purely factual issue that *Boesak* sought to make, but it actually gives effect to *Boesak* which held that the application of the Constitution is a constitutional matter.

[159] The third judgment in effect says that this Court should not hold that the proper application of the doctrine of common purpose is a constitutional issue and, thus, this Court has jurisdiction because that will mean that this Court will be inundated with many criminal matters. In *Nehawu* the same argument was advanced in the context of labour matters.[139] In that case *Nehawu* argued that the proper interpretation and application of legislation enacted to give effect to the Bill of Rights such as the LRA constituted a constitutional issue and that, therefore, this Court has no jurisdiction to decide the matter in *Nehawu*.

[160] The employer argued in *Nehawu* that the proper interpretation and application of the LRA was not a constitutional issue and, therefore, this Court had no jurisdiction to decide such matters. The employer argued that, if this Court held that the proper interpretation and application of the LRA constituted or raised a constitutional issue and that, therefore, this Court had jurisdiction, "this Court would have jurisdiction in all labour matters."[140] That is the same as the argument raised by the third judgment in respect of criminal matters. In *Nehawu* this Court rejected this contention. It said:

> "What must be stressed here is the point already made, namely that we are here dealing with a statute enacted to give effect to section 23 of the Constitution and, as such, it must be purposively construed. If the effect of this requirement is that this Court will

[138] *Boesak* above n 1 at para 14.

[139] *Nehawu* above n 106 at para 15.

[140] Id at para 16.

> have jurisdiction in all labour matters that is a consequence of our constitutional democracy. The Constitution '… is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.' Our constitutional democracy envisages the development of a coherent system of law that is shaped by the Constitution."[141] (Footnote omitted.)

Similarly, the third judgment's argument in this regard must be rejected.

[161] In any event it is, in my view, not appropriate that, when this Court considers the question whether a matter raises a constitutional issue and, therefore, whether it falls within its jurisdiction, it should consider whether holding that the matter falls within its jurisdiction will result in an increase in its workload. That is because a matter either falls within or outside of a court's jurisdiction. There is, generally speaking, no discretion involved in deciding that and a court should not exclude from its jurisdiction a matter that falls within its jurisdiction just because holding that such a matter falls within its jurisdiction may increase the workload of the court.

[162] The jurisdiction of this Court is dealt with in section 167 of our Constitution. For our purposes, we only need to have regard to section 167(3)(b)(i),[142] (ii),[143] (c)[144] and section 167(7).[145] Then, we have the provisions of section 167(6) of the Constitution. Section 167(6)(b) contemplates legislation or rules in terms of which this Court would allow a person to bring a matter directly to it or in terms of which a person would be allowed to appeal directly to this Court from any other court "when it is in the interests

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[141] Id.

[142] This section is quoted in above n 18.

[143] Id.

[144] "(3) The Constitutional Court–

. . .

(c) makes the final decision whether a matter is within its jurisdiction."

[145]"(7) A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution."

of justice" to do so and "with the leave of [this Court]".[146] In my view, it is when we consider the question whether it is in the interests of justice to allow a person to bring a matter directly to this Court or to appeal directly to this Court from any other court that it is appropriate to consider a possible increase in the workload of the Court should the Court entertain the matter. This consideration does not, in my view, belong to the stage of considering whether a matter falls within the jurisdiction of this Court.

[163] In considering whether a matter is a constitutional matter as contemplated in section 167(3)(b)(i) read with section 167(7) of the Constitution, we are required to consider only the question whether the matter has the features or elements or characteristics that are to be found in a constitutional matter and nothing else. This judgment identifies the characteristics that are to be found in a constitutional matter which are to be found in the present matter. They are that the doctrine of common purpose is based on public policy or the legal convictions of the community and those refer to the values contained in our Constitution and applying the doctrine means applying the values of the Constitution.

[164] It is in considering whether it is in the interests of justice for this Court to grant leave to appeal that this Court should control which matters it entertains and which matters it does not entertain. In this regard it is important to point out that the fact that the matter falls within the jurisdiction of the Court does not necessarily mean that it must be entertained. There are many matters which fall within the jurisdiction of the Court which this Court does not entertain because it is not in the interests of justice that they be entertained. That is because, in deciding whether or not it is in the interests of justice for this Court to grant leave to appeal or to grant direct access, this Court takes into account a number of factors. In the case of leave to appeal, these include:

(a) whether there are reasonable prospects of success;

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[146] "(6) National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–

. . .

(b) to appeal directly to the Constitutional Court from any other court."

(b) whether the matter raises any important principle;

(c) whether the decision of the Court would affect many people or large sections of society.

In *Nehawu* this Court made it clear that, even when a labour matter raises a constitutional issue and, therefore, falls within its jurisdiction, this would not necessarily mean that it would entertain it as it would also consider whether there is an important principle raised by the matter.[147]

[165] There are many matters including criminal matters which will not be entertained by this Court even if they raise a constitutional issue because they do not raise any important principle and because they only raise factual issues or because they have no reasonable prospects of success.

[166] I conclude that this matter does raise a constitutional issue. Consequently, this Court has jurisdiction. With regard to leave to appeal and the merits of the appeal, I concur in the second judgment.

[147] *Nehawu* above n 106 at para 15.

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