e-MANTSHI

A KZNJETCOM Newsletter

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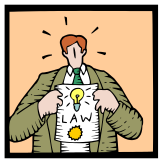
Welcome to the two hundredth and sixteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Constitutional Development has, in terms of section 19 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), amended Regulations 7 and form 6 of the regulations. The notice to this effect was published in Government Gazette no 52228 dated 7 March 2025. The amended regulations can be accessed here:
https://www.gov.za/documents/notices/domestic-violence-act-regulations-amendment-07-mar-2025

2. The Minister of Justice and Constitutional Development has issued a notice in terms of section 2(1)(b) of the Magistrates Court Act 32 of 1944 whereby all existing Regional divisions was abolished and new divisions were created and places for holding a court was proclaimed. The notice was published in Government Gazette no 52291 dated 14 March 2025. The notice can be accessed here:

https://www.gov.za/documents/notices/magistrates%E2%80%99-courts-act-abolishment-regional-divisions-and-creation-new-regional

Recent Court Cases

1. S v Dhliwayo (207/2024; A113/2024) [2025] ZAWCHC 139 (25 March 2025)

When a person commits an offence while under the age of 18, their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing purposes simply because the intervening passage of time has resulted in their being adults when sentencing occurs. That would mean punishing them for what they had done as children as if it had been done when they were adults. That such an approach would impinge on the substance of the rights provided in terms of s 28 of the Constitution is axiomatic.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2025/139.html

2. McKenzie v S (A143/2023) [2025] ZAWCHC 132 (6 March 2025)

CRIMINAL – Child victim – *Rights as witness* – Systemic disregard for child's dignity and emotional well-being – Disturbing pattern of cross-examination – Sought to shift blame onto child – Permitted without judicial intervention – Not dignified and detrimental to child's well-being – Subjected to secondary victimization – Defence allowed to exploit adversarial process – State proved guilt beyond reasonable doubt – No substantial and compelling circumstances – Appeal dismissed.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2025/132.html

From The Legal Journals

Badul, C J ,Strode, A E, Bhamjee, S & Ramdhin, A

Using common law and statutory offences to address obstetric violence in South Africa

December 2024, Vol. 17, No. 3 SAJBL113

Abstract

In recent years there has been increasing concern about the various forms of abuse faced by birthing patients during labour and childbirth. Common examples include being scolded, slapped, pinched, stabbed with scissors or struck with a ruler or other instruments. This mistreatment is collectively termed obstetric violence .A growing body of literature examines legal responses to obstetric violence including the potential use of the criminal law.The present article explores whether, in South Africa, common-law crimes or statutory offences could be used to prosecute healthcare workers for the range of harms falling within the broad definition of obstetric violence. It does not question whether criminal law is an appropriate response in this instance.The article concludes that existing crimes are sufficient to address obstetric violence. It is clear that the common-law crimes of crimen iniuria, assault, assault with intention to commit grievous bodily harm and the statutory offence of involuntary sterilisation, could be used to address both physical and emotional forms of obstetric violence.It is submitted that they cater adequately for the broad range of conduct that potentially falls into the definition of obstetric violence. Further research is required in this area and it may mean that prosecutorial guidelines are needed.

This article can be accessed here:
https://samajournals.co.za/index.php/sajbl/article/view/2135/1206

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

The private law roots (?) of common purpose*

Is it true that common purpose derives from English law, introduced via the Native Territories Penal Code, Cape Act 24 of 1886, and that it was authoritatively accepted into South African law via the Appellate Division delict case of *McKenzie v Van der Merwe* 1917 AD 41? More specifically, can the roots of this prominent and increasingly significant criminal law doctrine be found in the *private law*?

In what is generally accepted to be the most authoritative exposition of the development of the common purpose doctrine, Rabie states that the doctrine of common purpose originated in the English law ('The doctrine of common purpose in criminal law' 1971 *SALJ* 227). He then explains that the actual reception of this doctrine took place through the Native Territories Penal Code of 1886 (NTPC), which was, in itself based on English criminal law (at 229), and that the common purpose doctrine emerged in the delict case of *McKenzie v Van der Merwe*, was then 'applied outside the field of application of the Native Territories Penal Code' and has since then 'been elaborated especially by the Appellate Division of the Supreme Court and it has been applied in many decisions' (at 230).

But does Rabie's analysis, while highly influential, accurately convey the correct details regarding the genesis of the common purpose doctrine on South African soil?

First, as regards English antecedents, it appears that the 'common purpose' nomenclature is derived from the English writer Stephen, who describes 'common purpose', as 'when several persons take part in the execution of a common criminal purpose, each is a principal in the second degree, in respect of every crime committed by any one of them in the execution of that purpose'. Stephen's description of common purpose (*A Digest of the Criminal Law* 5ed (1894) art 39 at 32) is actually mentioned in the *McKenzie* case (at 46), but it is not cited as legal authority by a court, and there is no evidence of any actual reception of any English law *doctrine* to this effect.

While the NTPC has operated as a useful reference point for the courts in various contexts, it is not clear that it operated outside its designated geographical area. In *R v Taylor* 1920 EDL 318, the court equates the common-law definition of common purpose with the relevant provision (s 78) of the NTPC. However *Taylor* was not explicitly followed in any succeeding case law. Rabie's own support for this proposition

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* This short piece is based on a paper delivered at the Private Law and Social Justice Conference, Nelson Mandela University, Gqberha on 7 August 2023. Readers who want a deeper discussion of these issues are referred to: Shannon Hoctor "*The genesis of the common purpose doctrine in South Africa*" **Potchefstroom Electronic Law Journal** (2023) (26) – DOI http://dx.doi.org/10/17159/1727-3781/2023/v26i0a16385 1-29

is similarly limited to the judgment of the court in *Taylor*. In fact, the common-law definition of common purpose continued to develop without any direct judicial adversion to the NTPC formulation.

Thus far it may be concluded that English law is best characterised as *a* foundation of the South African common purpose doctrine, and that at best the definition of common purpose in the NTPC may have provided a convenient synopsis of the doctrine in its incipient form (rather than in itself contributing to doctrinal development). But what of the more narrow question arising out of Rabie's synopsis: whether the delict case of *McKenzie v Van der Merwe* indeed provides the first example of the formulation and application of the common purpose doctrine in the South African case law?

The term 'common purpose' arose in the earlier delict case of *Steenkamp v Kyd* (1898) 15 SC 221, where Buchanan J stated that the evidence further revealed that there was a '*common purpose* to attack [the plaintiff] which should render them all, severally and individually, liable for the consequences' (at 225). In his judgment De Villiers CJ acknowledges that 'the law-books provide no definite rule to meet the particular case with which the Court has now to deal' (at 223), despite the trial court making reference to the NTPC, and that instead the 'principles underlying the decision of previous cases may be made use of for the purpose of discovering the rule which should be applied…' (at 223-224). De Villiers CJ however states that 'such a rule may be fairly deduced from the cases relating to the law of agency' (224).

The same bench of the Appellate Division that handed down the decision in *McKenzie*, delivered another judgment in the context of delict, on the very same day as *McKenzie*. In *Naude and Du Plessis v Mercier* 1917 AD 32 the court heard an appeal against a judgment given for the respondent in an action to recover damages for wrongful arrest and detention. It was confirmed that the appellants were required to pay damages to the respondent, following their 'common purpose of imprisoning Mercier' (40). The *Naude* case has however not been mentioned in any discussion of the development of the common purpose doctrine.

The Appellate Division case of *McKenzie v Van der Merwe* arose out of the acts of bands of rebels in the Orange Free State, who had taken stock from the appellant and cut the fences on his farm, causing considerable damage. The respondent was at the time the assistant commandant of such a band of rebels. It was argued by the appellant that 'every rebel was liable for acts…done by every other rebel in furtherance of the common purpose' (at 44).

Innes CJ noted that while the appellant had cast his reliance on the English criminal law rule of common purpose (citing Stephen *Digest of Criminal Law* para 39), this rule had not been deduced from general principles, but rather rested on old decisions (at 46). Nevertheless, Innes CJ pointed out that the English cases provided a narrower basis for liability than that which was contended for by the appellant (at 46-47). Solomon JA (De Villiers AJA and Juta AJA concurring) agreed that the common purpose rule found in Stephen, and based on decided cases, was narrower in ambit than what the appellant was claiming (and that the *Steenkamp* case did not assist (at 52-53)). Solomon JA proceeded to identify the rule found in Stephen with the writings

of Van der Linden where it is stated (Van der Linden *Regsgeleerd, Practicaal en Koopmans Handboek* 2.1.7 cited in *McKenzie* at 53):

If, therefore, the parties to a conspiracy have met together in conjunction for the commission of a certain act, and have been prepared with mutual aid and co-operation, or have been used as spies or as sentinels against danger, they are all equally punishable, though the act itself, e.g. a murder has only been committed by one of them.

Taking into account the similarity between the common purpose rule in Stephen and the passage in Van der Linden, Solomon JA concludes that the appellant's argument is by no means assisted by this passage (at 53):

If crimes of different natures which have no direct connection with each other are committed at the same time by different sections of the same conspiracy, each act must be considered by itself, although the perpetrators are all parties to the same conspiracy.

It is noteworthy that Solomon JA further states that the case at hand needed to be determined 'upon the principles of our own law, not upon any special rules of the English criminal law' (at 56). The appeal was dismissed.

The approach in the *McKenzie* case therefore in itself somewhat disrupts the neat flow set out in Rabie's explanation of the genesis of the common purpose doctrine in South Africa. While the English law 'rule' as set out by Stephen is acknowledged, the court is careful to indicate that the South African sources, including Van der Linden, are of primary importance in assessing questions relating to participation. Further, the readily available formulation in the NTPC is not mentioned at all by the court.

The *McKenzie* case has been explicitly followed in the Appellate Division in the *Mouton v Beket* case in the context of *delict* (1918 AD 181 at 190, 193), has been mentioned but distinguished on the facts in the Appellate Division criminal case of *R v Ngcobo* 1928 AD 372 376, and has been mentioned in the mid-20th century criminal cases of *R v Duma* 1945 AD 410 414-415, *R v Mkize* 1946 AD 197 at 206 and *R v Mtembu* 1950 (1) SA 670 (A) 684 in the context of implied mandate providing a basis for the common purpose doctrine. This rationale for the common purpose doctrine has however, following criticism, disappeared from the case law.

In *S v Mzwempi* 2011 2 SACR 237 (ECM) para 39 it was indicated that *mandatum sceleris* plays an important role in common purpose today, although the court specifies that this is in the case of the prior agreement form of common purpose. However, the growing significance of the active association form of common purpose, widespread acceptance of the prior agreement form, and the query whether a contractual concept is appropriate in this context, have all contributed to the demise of implied mandate as a specified rationale for common purpose – if indeed it ever truly was the rationale for the doctrine.

So too it seems that the *McKenzie* decision has become a footnote in the history of the criminal law common purpose doctrine. However, in 1990 the *McKenzie* case arose for consideration in the Appellate Division in *S v Nzo* 1990 (3) SA 1 (A).

Hefer JA, writing for the majority of the court, distinguished the *Nzo* case from the *McKenzie* case on the facts, and therefore stated that the comments of the *McKenzie*

court which limited the application of the common purpose doctrine did not assist the appellants (at 8A-E). However, in his dissenting judgment MT Steyn JA (who more strongly asserts than Rabie that the common purpose doctrine was first received into South African law in *McKenzie*) made extensive reference to the reasoning of the *McKenzie* court and, relying on the narrow application of the doctrine by the *McKenzie* court, concluded that the appellants in *Nzo* ought to be treated as were the commando members in *McKenzie*, where no liability was apportioned to them for their conduct (at 13-16).

The approach of Hefer JA, where common purpose is established on the basis of the appellants' foresight of the possibility of, and reconciliation with, the death of the deceased, is consistent with the broad approach adopted in relation to common purpose today. In contrast, MT Steyn JA's approach, which seeks to limit liability on the basis of common purpose, and which adopts the principle of 'proximity' in order to establish common purpose liability, does not reflect the developments in the doctrine since the *McKenzie* case. Innes CJ in *McKenzie* tests liability on the basis of agency (at 47, cited in *Nzo* at 13E-F):

[D]o [the circumstances of each case]…justify the inference that the perpetrator was the agent of the accused to do the particular act? And where there is no evidence of express authority the presence of accused at the time and his co-operation then in a common purpose would, of course, become an element of great importance.

The common purpose doctrine has however moved on from seeking to assess questions of whether 'express authority' was given in order for there to be liability. The present law is that '[i]t is trite that a prior agreement may not necessarily be express, but may be inferred from the surrounding circumstances' (*S v Tshabalala* 2020 (2) SACR 38 (CC) at para 49; *S v Thebus* 2003 (2) SACR 319 (CC) at para 19).

What then can be concluded? It seems there is no monolithic narrative of the historical origins of common purpose, but instead that the origins of the doctrine need to be extracted from succeeding case law. Could it be said, as suggested by Rabie, that the common purpose doctrine emerged out of the private law through the 1917 decision of *McKenzie*? As intriguing as the possibility is, it appears that the *McKenzie* decision never really played a meaningful role in the development of the common purpose doctrine, and that the current form of the doctrine is somewhat different to the ideas expressed in *McKenzie*.

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Matters of Interest to Magistrates

The meaning of 'home' in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE Act) is a piece of legislation that was promulgated to give effect to s 26 of the Constitution. It affords protection to unlawful occupiers by prescribing procedures and processes that landowners must adhere to when they want to evict an unlawful occupier from their premises. Section 26 of the Constitution provides the right to housing and that no persons may be evicted or have their home demolished without a court order. The PIE Act does not specifically refer to the word '*home*', however, case law has established that the Act applies to all eviction process of persons from their 'home' (see *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA)). Considering that the Act does not refer to the word 'home' and provides no definition of what a 'home' is, there seem to be misconceptions that the PIE Act consistently applies to all premises used for residential purposes.

The courts continue to clarify the meaning of 'home' in terms of the Act and the scope of the application of the Act. In *Barnett*, the court held that 'home' is a place with regular occupation with some degree of permanence. 'PIE applies to all evictions from buildings or structures utilised for dwelling purposes (see *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA)). Structures that do not form the function of a dwelling do not fall under PIE (see *Shoprite Checkers (Pty) Ltd v Jardim* 2004 (1) SA 502 (O) at 506E …)' (M Moolla 'Having a slice of PIE – understanding the Act' 2016 (Oct) *DR* 24). 'If commercial property is utilised for dwelling purposes, PIE applies, holiday homes do not fall under PIE (see *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA) at 328B – C)' (Moolla (*op cit*)).

In the case of *Stay at South Point Properties (Pty) Ltd v Mqulwana and Others* 2024 (2) SA 640 (SCA), an appeal was bought by the appellants against an order from the Western Cape Division of the High Court in Cape Town. The appellants sought an order from the court *a quo* using the *rei vindicatio* to evict the respondents from a student accommodation that they refused to vacate after completion of their academic year. The court *a quo* held that the PIE Act was applicable in eviction of the respondents and the appellant could not rely on the *rei vindicatio* to evict the respondents. They had to follow the procedures and process of the PIE Act, hence the appeal. When the appeal was bought before the Supreme Court of Appeal (SCA) the respondents were no longer in occupation of the residence, however, it was decided that the appeal must proceed to provide clarity on the issue as the issue of students refusing to vacate student accommodations is a recurring issue. There needed to be precedent on whether the PIE Act is applicable or not and what approach landowners

must follow. 'The Supreme Court of Appeal (SCA) had to decide whether student accommodations can be described as a "*home"* for the purposes of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)' and whether the procedures and processes laid out in the Act should be followed (B Scriba, B Meyer and C Grobler 'Your "home away from home" is not in fact your home: Students be warned' (www.cliffedekkerhofmeyr.com, accessed 2-2-2025). See also J Berkowitz 'How does South African law define "home" in eviction cases?' (https://fwblaw.co.za, accessed 2-2-2025)).

In determining whether the PIE Act was applicable and whether evicting the students that occupied the residence would render them homeless, the SCA held that student accommodations have three features that do not make them a 'home' for purposes of the PIE Act and refused to offer them protection afforded to unlawful occupiers under the said Act. The court held that student accommodations are temporary accommodations that do not displace, nor do they replace, the homes from which students come; therefore, they will not be homeless if evicted. The court clarified two important aspects regarding the application of the PIE Act. If the occupation of land does not constitute the 'home' of the unlawful occupier, the PIE Act does not apply. In addition to that in instances where the unlawful occupier cannot demonstrate that they will be homeless then the Act also does not apply. 'The SCA concluded that the student residence was not a home to students. Rather, it was "*a residence, of limited duration, for a specific purpose, that is time-bound by the academic year, and that is, for important reasons, subject to rotation*"' (Scriba, Meyer and Grobler (*op cit*)). The PIE Act, therefore, does not apply to student accommodations. It seems students that are renting student accommodations for the duration of an academic year can be simply evicted by the landowners by using the *rei vindicatio* and do not need to comply with the procedures and processes laid down in the PIE Act as student accommodations are not recognised as 'homes' for purposes of the PIE Act.

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A Last Thought

Ensuring the integrity of South Africa's courts amid infrastructure challenges

The recent acknowledgment by the Minister of Justice and Constitutional Development, Mmamoloko Kubayi, regarding the impact of load shedding, water outages, and infrastructure failures on the functioning of courts underscores a need to resolve these issues. The operational efficiency of courts is fundamental to the rule of law, and systemic disruptions not only hinder legal proceedings but also erode public confidence in the justice system. A well-functioning justice system is the backbone of democracy, and without reliable infrastructure, the delivery of justice becomes uncertain and uneven, affecting vulnerable members of society.

The Department of Justice and Constitutional Development has outlined several initiatives to mitigate these challenges. These include the installation of generators and the exploration of renewable energy solutions to counteract load shedding, as well as the implementation of backup water supply systems in response to persistent water shortages. Furthermore, infrastructure repairs and renovations are being carried out in partnership with the Department of Public Works and Infrastructure to ensure the sustainability of court facilities. Additionally, the department's engagement with Eskom to seek exemption from load shedding schedules is a necessary step. Courts are an essential service, and their continued operation should be prioritised in national energy planning.

While these interventions are commendable, their success hinges on effective implementation, sustained funding, and long-term strategic planning. The reality remains that many court buildings still struggle with operational setbacks, delaying cases being finalised and exacerbating case backlogs. The consequences of infrastructure failures in courts extend beyond administrative inconveniences. Justice delayed is justice denied, and the current state of court infrastructure threatens the fundamental rights of South Africans to access a fair and efficient legal system. When courts experience power outages, matters are postponed, and legal practitioners are forced to reschedule cases, leading to an accumulation of backlogs that the system is already struggling to manage.

For legal practitioners and court users, these challenges translate into delays, inefficiencies, and increased costs. Vulnerable individuals seeking justice, particularly in urgent matters, are disproportionately affected by court closures and operational disruptions. The justice system must be robust enough to withstand infrastructure-related challenges without compromising access to legal recourse.

As these efforts progress, transparency will be key. The Department of Justice and its stakeholders must provide regular updates on the implementation of these solutions, ensuring that commitments do not remain theoretical but lead to tangible improvements. Access to justice is not merely a policy objective – it is a constitutional imperative that must be upheld through proactive and sustained action.

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