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**FORESIGHT OF THE CAUSAL SEQUENCE AS A REQUIREMENT OF
DOLUS EVENTUALIS IN CONSEQUENCE CRIMES: A CRITICAL
ANALYSIS**

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As the candidate's supervisor, I agree/do not agree to the submission of this mini-dissertation.

SA WALKER

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DECLARATION

I, the undersigned, AMANDA PEARL MKHIZE, hereby declare that this project is an original piece of work and is made available for photocopy and inter-library loan.

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AP MKHIZE

ABSTRACT

Dolus eventualis is an important aspect of South African criminal law which has undergone certain modifications. One of these modifications was formulated in 1989 in the case of *S v Goosen*.

Before the decision of *Goosen*, the principle of law was that as long as the accused foresaw the occurrence of the unlawful consequence, the manner in which it occurred was irrelevant. Dolus eventualis was said to be present if death was foreseen as a possibility but occurred in a way which was not exactly the same as the way which was anticipated by the accused. The accused did not have to foresee the precise or general way in which death would be brought about; it was enough that death was desired or foreseen.

The *Goosen* decision formulated the requirement of 'foresight of the causal sequence'. This requirement is now essential in order to prove the existence of dolus eventualis in consequence crimes. According to the requirement of foresight of the causal sequence, the intention element is not satisfied if the consequence occurs in a way that differs markedly from the way in which the accused foresaw the causal sequence. This requirement differs from the principle followed by the courts in pre-*Goosen* decisions where foresight of the causal sequence was not necessary and was sometimes considered as irrelevant. All that was required was that the accused foresee the possibility of death occurring as a result of his or her unlawful conduct.

The purpose of this dissertation is to critically analyse the requirement of foresight of the causal sequence by analysing the case of *S v Goosen*, exploring how commentators received the *Goosen* rule and investigating how the rule has been applied in practice.

Although, the rule has attracted conflicting academic criticism, none postulate that the decision of *Goosen* made bad law. One of the problems of the *Goosen* rule is that it is not consistently applied in practice. Although this is undesirable, the rule has not been detrimental to the law and certainly does have a valuable place as it limits liability in common purpose cases, where an unlawful consequence occurs in a manner that the immediate party did not subjectively foresee.

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CHAPTER 1

INTRODUCTION

1. DEFINITION OF TERMS

Actus reus: a criminal act, the conduct required for the crime. The essential elements of the actus reus are (1) the conduct be that of a human being, (2) the conduct must be voluntary and, (3) the conduct must be unlawful.¹

Culpability: requires that, in the eyes of law, there must be grounds for personally blaming an accused for his or her unlawful conduct.² Culpability takes the form of either intention or negligence and is sometimes referred to in Latin terms as *dolus* and *culpa* respectively. Courts usually refer to culpability as *mens rea* whereas criminal law scholars prefer using the term *fault*.

Doctrine of common purpose: a legal rule that states that where two or more people agree to commit a crime or actively associate in joint unlawful conduct, each person will be responsible for the specific actus reus committed by one of their number which falls within their common design.³

Dolus directus: actual intention;⁴ where an accused aims to commit the crime which he or she does commit.

Dolus eventualis: a form of intention that deviates from intention in the ordinary sense.⁵ This Latin term is sometimes referred to as legal intention. Dolus eventualis exists where the accused does not 'mean' to cause the unlawful consequence,⁶ but he or she subjectively foresees the possibility that in striving towards the main aim, the unlawful consequence may ensue but nevertheless reconciles him/herself to this possibility.⁷ For example, X wants to steal money from a small a grocery shop- he carries a firearm with him. Although he hopes that he will not

¹ G Kemp (ed) et al. *Criminal Law in South Africa* (2012) 30.

² CR Snyman *Criminal Law* 6 ed (2014) 145.

³ J Burchell *Principles of Criminal Law* 4 ed (2013) 467.

⁴ Kemp (note 1 above) 184.

⁵ Snyman (note 2 above) 179.

⁶ Burchell (note 3 above) 347.

⁷ *S v Makgatho* 2013 (2) SACR 13 (SCA) para 9.

use it, he foresees the possibility of someone being shot. Y, a cashier at the shop, offers resistance and X shoots and kills him. X has *dolus eventualis* in respect of Y's death.

Dolus indeterminatus: includes *dolus directus*, *indirectus* and *eventualis*. It has been defined as the intention directed at any indeterminate victim.⁸ For example, where a person throws a bomb into a crowd or derails a train, the fact that he or she has no particular intention to kill a particular person in the crowd or in the train does not mean that the person lacks intention because he or she knows or foresees that someone will die.⁹

Immediate party: a participant in a common purpose who satisfies the *actus reus* by virtue of his own conduct.¹⁰ That is, the participant who actually fires the fatal blow or shot.

Mens rea: a mental state that an accused must be in, in order to be found guilty for a particular crime. *Mens rea* takes either the form of intention or negligence.¹¹

Mistake as to the causal act: a mistake made about the act that actually causes the unlawful consequence. For example, X strangles Y believing him to be dead, throws him over a bridge. In actual fact, Y's death is caused by drowning and not the act of strangulation.

Mistake as to the causal sequence: a mistake made about the sequence of events that leads to the unlawful consequence. For example, X with the intent to kill, puts poison into Y's food. As he swallows, Y chokes and dies. X can be said to have made a mistake as to the manner in which Y's death is caused.

Novus actus interveniens: a Latin term which translates to 'a new intervening act'. This is an event which is completely abnormal and completely independent of the act of the accused.¹² A *novus actus interveniens* serves to break the chain of causation between the unlawful conduct and the unlawful consequence: it excludes legal causation and thus absolves the accused from liability for the consequence crimes only.

⁸ Burchell (note 3 above) 348.

⁹ Ibid.

¹⁰ A Paizes 'Mistake as to the causal sequence' and 'mistake as to the causal act': Exploring the relation between *mens rea* and the causal element of the *actus reus* (1993) 110 *SALJ* 493, 496.

¹¹ Burchell (note 3 above) 337.

¹² Kemp (note 1 above) 66. This definition corresponds with the English and American definition of the concept.

Remote party: a participant in a common purpose who satisfies the actus reus by virtue of the conduct of another.¹³ The effect of common purpose is to impute the conduct of the immediate party to the remote party.¹⁴

2. BACKGROUND

The maxim *actus non facit reum, nisi mens sit rea* (the act is not wrongful unless the mind is guilty) expresses the fundamental principle of criminal justice that in order for an accused to be held liable, he or she must be said to be culpable.¹⁵ The principle of culpability has been endorsed by the Constitutional Court as being an important part of our criminal law which is not merely an incidental aspect relating to crime and punishment, but lies at the heart of our law.¹⁶ The rationale of the principle of culpability rests upon the moral and ethical view that only persons who are deserving of blame ought to be punished.¹⁷

South Africa adheres to the psychological theory of culpability. According to this theory, an accused's intention depends solely on his or her subjective mind.¹⁸ Culpability is regarded as the sum of all the subjective requirements of liability because it is reflective of the relationship between the accused and the conduct or ensuing result.¹⁹ Culpability is seen as a particular mental attitude or state of mind.²⁰ Thus, criminal liability does not attach unless there is a blameworthy state of mind.²¹ If a crime requires intention, it is according to the psychological theory of culpability to merely enquire whether the prescribed intention was present or not.²² The principle of culpability also looks at what the law may fairly expect of an accused, in light of that particular person's personal aptitudes, gifts, shortcomings and knowledge in order to attribute blame for wrongdoing.²³ The recent case of *S v Qeqe*²⁴ explained that murder is

¹³ Paizes (note 10 above) 496.

¹⁴ *S v Boekhond* 2011 (2) SACR 124 (SCA).

¹⁵ Burchell (note 3 above) 337.

¹⁶ *S v Coetzee and Others* 1997 (3) SA 527 (CC) 162.

¹⁷ Burchell (note 3 above) 340.

¹⁸ S Hoctor 'The degree of foresight in *dolus eventualis*' 2013 (2) *SACJ* 131.

¹⁹ Snyman (note 2 above) 153.

²⁰ *Ibid*

²¹ *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC) para 85.

²² Snyman (note 2 above) 154.

²³ *Ibid* 146.

²⁴ *S v Qeqe* 2012 (2) SACR 41 (ECG) 48.

committed if the accused was actually aware that death might result, but nonetheless directed his will to the performance of an act which had that result.

For many years it appeared to be settled law that as long as the unlawful consequence of the accused's action was foreseen and reconciled with, for example, death in the case of murder, then that would be sufficient to establish *dolus eventualis*.²⁵ In other words, it was not necessary for the accused to foresee the manner in which the prohibited consequence was brought about. It was sufficient if the accused subjectively foresaw the possibility that such action would cause death and was reckless of such a result.²⁶ Criminal law writers agreed,²⁷ and a judgment held,²⁸ that it was not necessary for the accused to foresee the precise or even general manner or way in which death occurred. Where the consequence occurred in an unexpected or unusual manner, the case would turn to the question of legal causation. It would then be inquired whether there was a *novus actus interveniens* breaking the chain of causation. If the affirmative was found, then the accused would escape liability on the grounds of not being the legal cause of the unlawful consequence. Although there was some debate on the topic,²⁹ the general consensus was that, if the consequence was desired or foreseen, it was irrelevant that the actual way in which it occurred was not foreseen.³⁰

Despite these views, in the case of *S v Goosen*³¹ the Appellate Division (AD) adopted a different view influenced by German law. According to this approach the intention element (in consequence crimes) is not satisfied if the consequence occurs in a manner that differs markedly from the manner foreseen by the accused. In other words, for *dolus eventualis* to exist, there must be a substantial correlation between the foreseen and the actual way in which the consequence occurs.³² This approach made 'foresight of the causal sequence' an essential requirement of *dolus eventualis* in consequence crimes. Where this requirement is not fulfilled, commentators have commonly described the deficiency as a 'mistake as to the causal sequence'. Certain South African scholars have critiqued the approach adopted by the AD

²⁵ Kemp (note 1 above) 189.

²⁶ *S v Sigwahla* 1967 (4) SA 566 (A) 570.

²⁷ Burchell (note 3 above) 359 footnote 100.

²⁸ *R v Lewis* 1958 (3) SA 107 (A).

²⁹ Burchell (note 3 above) 359 states that certain Continental writers are not in complete agreement but one view is that, provided the actual causal sequence does not differ substantially or markedly from the foreseen sequence of events, there is intention.

³⁰ De Wet cited in Burchell (note 3 above) 359.

³¹ *S v Goosen* 1989 (4) SA 1013 (A).

³² Burchell (note 3 above) 360.

suggesting that a mistake as to the causal sequence is not a material mistake,³³ that the court confused a mistake as to the causal sequence and a mistake as to the causal act,³⁴ and that the court confused the causation and intention inquiries.³⁵ However, it has also been said that the *Goosen* rule could serve as a valuable tool in limiting the harshness of the doctrine of common purpose.³⁶

3. PURPOSE STATEMENT

The overall purpose of this dissertation is to critically analyse foresight of the causal sequence as a requirement of *dolus eventualis* in consequence crimes. This purpose is achieved by analysing the case of *S v Goosen*,³⁷ exploring how commentators received the *Goosen* rule and investigating how the rule has been applied in practice.

4. RESEARCH METHODOLOGY

The methodology adopted throughout this research is library-based (digital and manual). The data used comprises of primary and secondary sources such as textbooks, cases and journal articles which have documented the position of law in South African and in foreign jurisdictions. This dissertation essentially takes the form of expository scholarship - a critical analysis of the law and its application thereof. Although an in depth comparative analysis of the law pertaining to *mens rea* in other comparable jurisdictions is not conducted, reference is made to other foreign jurisdictions for purpose of comparison as and when necessary.

³³ Snyman (note 2 above).

³⁴ Paizes (note 10 above).

³⁵ Snyman (note 2 above).

³⁶ J Burchell 'Mistake or ignorance as to the causal sequence- A new aspect of intention' (1990) 107 *SALJ* 168, 173.

³⁷ *S v Goosen* (note 31 above).

5. CHAPTER OUTLINE

Chapter 1: Introduction

- Defines terms used in the dissertation,
- Provides a background of the research topic,
- States the purpose of the dissertation,
- Explains the methodology employed, and
- Provides a chapter outline.

Chapter 2: Foresight of the causal sequence as a requirement of *dolus eventualis*

- Discusses the modification of the requirements of *dolus eventualis* in consequence crimes,
- Explores case law and academic commentary prior to the *Goosen* rule,
- Provides a case note on *S v Goosen*, and
- Discusses cases decided after the *Goosen* rule.

Chapter 3: A critical analysis of the *Goosen* rule

- Reviews academic criticisms of the *Goosen* rule, and
- Evaluates the rule.

Chapter 4: Conclusion

- Summary of the dissertation, and
- Concluding remarks.

CHAPTER 2

FORESIGHT OF THE CAUSAL SEQUENCE AS A REQUIREMENT OF DOLUS EVENTUALIS

1. OVERVIEW

This chapter will discuss the modification of the requirements of dolus eventualis with respect to consequence crimes. This will be done by firstly exploring the cases decided before *S v Goosen*³⁸ and discussing some academic commentary on the law relating to foresight of the causal sequence. Secondly, this chapter will provide a case note on the case of *Goosen* and finally explore post-*Goosen* cases.

Foresight of the causal sequence is a requirement of dolus eventualis which must be satisfied in consequence crimes. This requirement was formulated in 1989 in the case of *S v Goosen*, where the intention element was held not to be satisfied if the consequence occurred in a way that differed markedly from the way in which the accused foresaw the causal sequence.³⁹ This effectively means that intention in the form of dolus eventualis only exists where there is a substantial correlation between the foreseen way and the actual way in which the consequence occurs.

Where there is no substantial correlation, such deficiency is sometimes referred to as a mistake as to the causal sequence or a mistake relating to the chain of causation.⁴⁰ Such a mistake can only occur in the context of materially defined crimes.⁴¹ The Continental writers, particularly those from Germany, debate the notion of mistake as to the causal sequence and are not in complete agreement.⁴² It has been stated that provided the actual causal sequence does not differ markedly from the foreseen sequence, there is intention on the part of the accused.⁴³ In

³⁸ *S v Goosen* (note 31 above).

³⁹ *Ibid* 1026H-J.

⁴⁰ Snyman (note 2 above) 189.

⁴¹ The definitional requirements of such crimes do not proscribe a specific conduct, but any conduct which causes a specific condition. For example, murder. Thus, X's conduct causes the condition of Y, being death.

⁴² Burchell (note 3 above) 359.

⁴³ Burchell (note 3 above) 360.

other words, intention exists where there is some form of equivalence between the actual and the foreseen sequence of events.

2. THE LAW BEFORE *GOOSEN*

Before our leading case, it seemed to be settled law that as long as the accused foresaw the consequence, the manner in which it occurred was irrelevant. Dolus eventualis was said to be present if death was foreseen as a possibility but occurred in a way which was not exactly the same as the way which was anticipated by the accused.⁴⁴ The accused did not have to foresee the precise or general way in which death would be brought about; it was enough that death was desired or foreseen.

2.1 CASE LAW

R v Lewis

In *R v Lewis*⁴⁵ the appellant asked the deceased to have homosexual relations, to which the latter agreed, but then seemingly rejected such advances because he began to scream. In order to stifle the screams and overcome the resistance offered by the deceased, the appellant applied pressure on the deceased's throat. When he released his hold, the deceased collapsed and was found to be dead. The body was found in an advanced state of decomposition and it could not be ascertained whether death was caused by strangulation or by pressure on the carotid arteries.

The court found that the appellant must have realised the necessity of overcoming resistance to his indecent act and that his decision to apply pressure to the throat was a deliberate act designed to be effective and in order to be effective, it was necessary that the pressure be severe and of some duration.⁴⁶ The most important finding of the court in this case was:

“It was, however, directly incidental to the performance of what the appellant knew to be an inherently dangerous act and the fact that the precise consequence of the act could not have

⁴⁴ *S v Msiza* 1984 (2) PH H116 (A).

⁴⁵ *R v Lewis* 1958 (3) SA 107 (A).

⁴⁶ *Ibid* 109C.

been foreseen or contemplated by the appellant is irrelevant and he is nevertheless... guilty of murder.”⁴⁷

The court certainly found that the appellant had intention in the form of *dolus eventualis* because he was aware of the degree of force he exerted as he strangled the deceased and could see the deceased’s reaction to the pressure applied but still continued until the fatal point. And because of this, it was considered irrelevant that death occurred without the appellant contemplating the exact manner of its occurrence.

Thabo Meli v R

In *Thabo Meli v R*⁴⁸ the four appellants planned to kill a man then make his death look like an accident. They took him to a hut, gave him some beer and hit him over the head with a piece of iron. Believing that he was dead, they threw him off a cliff and framed the circumstances to appear as an accident. Medical evidence revealed that the head injuries were not sufficient to bring about death and that the deceased had died of exposure while lying unconscious at the foot of the cliff. The High Court of Basutoland (now Lesotho) convicted the appellants of murder. They appealed against their convictions on the grounds that the *actus reus* and *mens rea* of the crime did not coincide. In other words, when the appellants formed the intention to kill, there was no unlawful act as the man was still alive but when they threw him off the cliff, there was no intention as they could not intend to kill someone they believed was already dead.

Lord Reid explained that:

“...it impossible to divide up what was really one transaction...there is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law.”

The Privy Council upheld the murder convictions on the grounds that the act of beating the deceased and throwing him off the cliff was part of a series of acts following a preconceived plan of action that could not be seen as separate acts but as a single transaction.

⁴⁷ *R v Lewis* (note 45 above) 109H.

⁴⁸ *Thabo Meli v R* [1954] 1 All ER 373 (P.C.).

R v Chiswibo

In *R v Chiswibo*⁴⁹ the accused hit the deceased on the head with the blunt side of an axe which rendered the deceased unconscious. The accused genuinely believed that the deceased was dead and put the body down an ant-bear hole. During the trial, it was not proven that the deceased had died from the blow to his head or of asphyxiation in the ant-bear hole. The trial court found the accused guilty of attempted murder. The Attorney-General appealed to the Federal Court (FC) against the decision. The FC applied the contemporaneity rule and held that although it was bound by the decision in *Thabo Meli's* case, the facts were distinguishable: in *Thabo Meli* there was a preconceived plan to kill whereas in the present case, there was no such preconceived plan in which disposal of the body formed part of the plan.

The court further held that, where the accused has *dolus directus* in respect of the initial assault but only constructive intention in respect of the consequence,⁵⁰ murder is not committed if the accused does not have the necessary intention to kill at the time of the final act that causes the death. The FC accordingly upheld the accused's conviction of attempted murder.

S v Nkombani

In *S v Nkombani and Another*⁵¹ H furnished S and D with loaded pistols for the purpose of robbing petrol stations. At one of these petrol stations, a petrol attendant (A) offered resistance. In the ensuing scuffle, S attempted to shoot A. However the bullet struck and killed D. The majority found that H was aware of the possibility that one of the robbers might kill the other during a tussle but, Steyn CJ, in his dissent, found that this had not been proved. He did however accept that H was aware of the possibility that S and D might fire some shots during one of the robberies or while fleeing a petrol station, and that an employee or some other person within the firing proximity might be fatally injured. The appellants were found to have *dolus indeterminatus* and were therefore found guilty of the murder of their fellow robber, D.

⁴⁹ *R v Chiswibo* 1961 (2) SA 714 (FC).

⁵⁰ The FC refers to *dolus eventualis* as constructive intention.

⁵¹ *S v Nkombani and Another* 1963 (4) SA 877 (A).

S v Masilela

In *S v Masilela and Others*⁵² the appellants assaulted and strangled the deceased with the intention to kill him. Believing him to be dead, they threw the deceased on the bed, covered him with a blanket and proceeded to ransack the house. They then set fire to the house and ran off with money and clothing items. The post-mortem examination revealed that the deceased was still alive after the assault (which probably rendered him unconscious) and died because of carbon monoxide poisoning derived from the fumes of the fire. It was contended on behalf of the appellants that the State failed (in the court a quo) to establish the necessary mens rea to support a conviction of murder. This was because the appellants' intention to kill by strangulation did not suffice and thus death by carbon monoxide poisoning was unintended. Counsel for the appellants essentially argued that there were two separate acts: the first was accompanied by intention to kill but did not cause death; the second was not accompanied by intention to kill but did in fact cause death.

The AD rejected this argument and stated that the actions of the appellants amounted to one single course of conduct. Ogilvie Thompson JA (Potgieter JA concurring) held:

“That the appellants by their deliberately intended actions caused the death of the deceased is indisputable. To accede, on the facts of the present case, to the contention advanced on behalf of the appellants that, once they erroneously believe that they had achieved the object by strangling deceased, their proved intention to kill him fell away and can no longer support the charge of murder, would, in my opinion, be wholly unrealistic.”⁵³

The court extended the principle set by the Privy Council in *Thabo Meli*, holding that the appellants were guilty of murder even although their intention to kill was concerted, not previously but as a matter of improvisation in the course of the execution of the robbery. The appellants were accordingly convicted of murder.⁵⁴ Rumpff JA in his concurring judgement held that where the accused and nobody else causes the death, the accused's mistake as to the precise manner and cause of death is not a factor on which the accused can rely to escape liability.⁵⁵ Intention was said to be satisfied because there was a goal to kill and death actually

⁵² *S v Masilela and Others* 1968 (2) SA 558 (A).

⁵³ *Ibid* 572.

⁵⁴ *S v Masilela* (note 52 above) 572.

⁵⁵ *Ibid* 573.

did occur although the appellants were unaware that the deceased was alive when they burned him.

S v Nyongano

In *S v Nyongano*⁵⁶ X strangled Y and believing him to be dead, fastened his hands behind him, tied a heavy stone to him, and hurled him down a crocodile-infested river. The court held that X had committed murder even though the strangulation might not have caused his death. Similarly, in *Buthlezi*⁵⁷ X strangled Y and believing him to be dead, hid him in a cane-field where he subsequently died of pneumonia due to exposure. X was convicted of murder.

S v Nhlapo

In *S v Nhlapo and Another*⁵⁸ the appellant and two other robbers attacked the deceased and two other armed security guards while the guards were removing cash from a large store. A wild shooting affray ensued in which the deceased was fatally shot. Evidence revealed that the deceased was not killed by a bullet fired by one of the robbers, but by a bullet fired by one of the security guards. All the robbers were convicted of murder on the basis that they had foreseen the possibility of one guard being killed by a shot fired in his direction by another guard. The robbers mistakenly thought that one of them, and not a co-guard might kill the victim. However, the court did not consider this mistake relating to the chain of causation as material. The court found that the appellants had *dolus eventualis* and was therefore guilty of murder:

“It follows that they must have known that their attack on the guards could lead to a gun battle during which anybody, be it a guard, one of the robbers or an innocent bystander, might be killed in the envisaged cross-fire. Consequently they also foresaw the possibility of one guard being killed by a shot fired in the direction of the robbers by another guard or, for that matter, a person such as a staff member of Makro witnessing the attack. In sum, the only possible inference, in the absence of any negating explanation by the appellants, is that they planned

⁵⁶ *S v Nyongano* 1975 1 PH H42 (R).

⁵⁷ *S v Buthelezi* 1963 (2) PH H238 (D).

⁵⁸ *S v Nhlapo* 1981 (2) SA 744 (A).

and executed the robbery with *dolus indeterminatus* in the sense that they foresaw the possibility that anybody involved in the robbers' attack, or in the immediate vicinity of the scene, could be killed by cross-fire.”

S v Mkhwanazi

In *S v Mkhwanazi and Others*⁵⁹ four accused were charged with murder of one of their gang members in an attempted armed robbery. They attempted to rob a Post Office when the owner of a café next door was summoned to help. The café owner fired a warning shot which alerted the robbers of his presence. A shootout ensued which resulted in the death of the deceased. The fatal shot was fired by the café owner who was lawfully acting in defence of life or property. Van Schalkwyk J acknowledged that the question of the relevance of a foreseen consequence occurring in an unforeseen manner was left open in *Nhlapo*,⁶⁰ but rather looked at the present case from the foreseeability point of view:

“The question which must therefore be asked is whether, on the facts of this case, the accused, in pursuing their unlawful purpose, foresaw and were indifferent to the possibility that one or more of them might be killed in the execution of their enterprise. I am dealing here, not with the 'unforeseen manner in which a foreseen consequence' might be caused (a matter which was left open in *Nhlapo*). I am dealing with the foreseeability of, and indifference to, the death of one of the gang members by the remainder.”

The court found that the accused did not have intention in the form of *dolus eventualis* because when they undertook the robbery they were not reckless as to the possibility that one of their fellows could be killed in defence of life or property.⁶¹

2.2 ACADEMIC COMMENTARY ON EARLY CASES

Du Plessis

⁵⁹ *S v Mkhwanazi* 1988 (4) SA 30 (A).

⁶⁰ *S v Nhlapo* (note 58 above).

⁶¹ *S v Mkhwanazi* (note 59 above) 34C.

According to Du Plessis,⁶² the principle of mistake as to the causal sequence was only applicable in cadaver disposal cases, where the accused carried out two separate actions: the first act coupled with the necessary intention to kill but not the desired consequence, while the second act (which causes the consequence) is not coupled with the necessary intention to kill. Du Plessis states further that, these cases always dealt with intention in the form of *dolus directus* and this did not address the question of whether an accused person can rely on mistake where there was *dolus eventualis* in respect of the consequence, but a mistake as to the causal sequence of events.⁶³

He points out that this question was never pertinently answered by the courts. The question was left open in *Nhlapo* and disregarded in *Mkhwanazi*. However, the decision in *Masilela* confirmed that a mistake as to the causal sequence is not a valid defence to exclude intention. Du Plessis submits that there is no clear reason why courts make a distinction between *dolus directus* and *dolus eventualis*. He is of the opinion that the fact that the accused has one or another form of intention does not make him guiltier of the crime: the question is simply whether the accused's subjective consciousness was directed towards causing a particular consequence and not whether he directed his will as a necessary or reasonable possibility in respect of every link of the causal chain.

Snyman

According to Snyman,⁶⁴ an accused can rely on a mistake to exclude *mens rea* only if the mistake is material. A mistake is material if it is in relation to a material element of a crime. The material elements are found in the definitional proscription of every crime. One of the material elements of murder is the *causing of another's death* (that is, killing). However, this element does not require death to be brought about in a specific manner, all that is required is that the accused's conduct in general cause the victim's death. Although the exact manner and time of the cause of death is not material, the accused must have at least thought or foreseen the reasonable possibility that there could be a causal connection between his conduct and the death. Snyman believes that a contention that the accused's conduct which caused the death

⁶² I Du Plessis 'Die onvoorsiene wyse waarop 'n voorsiene gevolg kan intree en ander strafregwetenskaplike raaisels' 1989 (2) *TSAR* 268.

⁶³ Du Plessis' view is not entirely correct- the cases of *Chiswibo* and *Lewis* were cases of *dolus eventualis*; even the case of *Nkombani* was a case of *dolus indeterminatus*.

⁶⁴ CR Snyman *Criminal Law* (1984) 164.

occurred in a different manner from that in which he thought or foresaw, does not avail him in escaping criminal liability.

3. THE GOOSEN RULE

The case of *S v Goosen* modified what seemed to be a settled principle of criminal law pertaining to a mistake as to the causal sequence. The facts *in casu* were as follows:

Goosen, Mazibuko and three others (A, B and C) had conspired to participate in a robbery where the deceased was shot and killed. They planned to wait for the deceased outside his place of work, follow his vehicle with their own, cut him off at a stop street and by directing an automatic carbine at him, induce him to hand over a sum of money. The plan was executed: the deceased's Mercedes was pursued by a Cortina driven by Goosen. The Mercedes stopped at a stop street and was cut off by the Cortina. Mazibuko climbed out the front left door of the Cortina and pointed the carbine at the deceased. A also climbed out the Cortina and struck the deceased on the jaw which jolted back his head. The deceased apparently stepped on the accelerator pedal⁶⁵ and the Mercedes began to roll forward, threatening to pin Mazibuko against the front of the Cortina.

As the vehicle moved towards Mazibuko (the automatic carbine still directed towards the deceased) a fatal shot was fired. Mazibuko claimed that he accidentally depressed the trigger of the carbine.⁶⁶ The trial court found Mazibuko guilty of culpable homicide, in that he negligently caused the death of the deceased. Goosen, who neither carried the carbine nor struck the deceased pleaded guilty to murder on advice of his counsel, was so convicted and sentenced to death.

On appeal, the AD accepted that when Mazibuko jumped out of the way of the Cortina he unconsciously pulled the trigger and this made his action involuntary. It then had to be determined whether the appellant (Goosen) was correctly convicted of murder. Van Heerden JA (delivering the unanimous judgment) found that the possibility of a coincidence occurring that would cause the carbine to accidentally fire and fatally wound the deceased obviously existed but Goosen could not be found to have foreseen this possibility because he had failed

⁶⁵*S v Goosen* (note 31 above) 1019-20.

⁶⁶*Ibid* 1020E-F.

standard six and was of low intelligence.⁶⁷ However, Goosen should have foreseen the possibility of his fellow robber involuntarily shooting and causing the death of the deceased and in not doing so, he acted unreasonably therefore negligently. Notably the court found that Goosen did not have the requisite intention for the crime of murder because (in the court's opinion) death occurred in a manner that differed markedly from the manner which he had foreseen.⁶⁸ The court set aside the murder conviction and found Goosen guilty of culpable homicide.

Ratio decidendi

Van Heerden JA was aware of Snyman's view that a mistake as to the causal sequence is not a material mistake. He responded⁶⁹ and found this view to be too restrictive⁷⁰ because one of the requirements of a materially defined crime is the causing of the unlawful consequence. Since an unlawful consequence is not caused in an abstract fashion, an accused's intention must be directed at bringing about such a consequence in a specific manner- the fault element will not be satisfied if the consequence was brought about in a manner that materially differed from the manner which the accused foresaw.⁷¹

Van Heerden JA then found that the subject of mistake as to the causal sequence was considered by Rumpff JA in *Masilela*: 'the accused's mistake about exactly when and how death occurs was to his mind completely irrelevant.'⁷² However, he was of the view that Rumpff JA did not postulate that a mistake as to the causal sequence was irrelevant in all cases; his dictum only concerned a mistake relating to the precise causal sequence and in the specific circumstances of the facts in *Masilela*.⁷³ Van Heerden JA further referred to the rule laid down by Jansen JA in *S v Daniëls*⁷⁴ that 'when the appellant shot, he had the intent to kill and death did occur; a

⁶⁷ *S v Goosen* (note 31 above) 1021B-D.

⁶⁸ L Steyn 'Recent cases' 1990 (1) *SACJ* 104, 105.

⁶⁹ *S v Goosen* (note 31 above) 1025D.

⁷⁰ Paizes (note 10 above) 513.

⁷¹ *Ibid.*

⁷² *S v Masilela* (note 52 above) 573-4.

⁷³ Paizes (note 10 above) 512.

⁷⁴ *S v Daniëls* 1983 (3) SA 275 (A) 332F-H. In this case, A shot B twice in the back. It was found that B would have died of these injuries within 30 minutes. However, B died shortly afterwards as a direct result of a third shot to the head which was proved not to have been fired by A. on the question of fault, Jansen JA found that when A fired the shots he had the intention to kill and death did occur; he can thus not benefit from claiming that he made a mistake about the causal chain of events.

delusion about the causal chain of events may not benefit him' and stated that the rule should be read in the context of the situation that arose in *that* case.

In order to ascertain whether a mistake as to the causal sequence negates mens rea in the form of dolus eventualis, Van Heerden JA referred to *Nkombani*⁷⁵ and stated that it was reasonably foreseeable in that case that a shot would be fired accidentally, but this was not the position in the present case. He then concluded that:

“Death caused by intentional action differs materially from death caused by involuntary action, and if the totality of events be noted, there was in my opinion a real significant difference between the means of causing the death and the causal chain of events that the appellant foresaw as a possibility.”⁷⁶

This view of material difference between the actual and the foreseen manner in which death occurred resulted in Van Heerden JA formulating the requirement of foresight of the causal sequence as an essential requirement of dolus eventualis in consequence crimes. In such situations, where there is no substantial correlation between the actual and the foreseen manner in which death occurs, the accused is sometimes said to have made a mistake as to the causal sequence. The effect of such a mistake is that the accused lacks the necessary intention to commit the crime for which he or she is charged. Effectively, Goosen lacked the intention to satisfy the crime of murder.

4. THE LAW POST-GOOSSEN

S v Mitchell

In *S v Mitchell and Another*⁷⁷ appellant 1 (X), appellant 2 (Y) and two others occupied a Land Rover as they returned from a pleasure resort. They stopped at a café for food and cigarettes where they agreed to throw stones at pedestrians from the open back of the vehicle. To this end, they collected stones; X picked up a paving brick. After they had resumed the journey, X stood up and threw the brick at a group of pedestrians who were on the side of the road. The

⁷⁵*S v Nkombani* (note 51 above) referred to in *S v Goosen* (note 31 above) 1021A.

⁷⁶*S v Goosen* (note 31 above) 1027A-C.

⁷⁷*S v Mitchell and Another* 1992 (1) SACR 17 (A).

brick struck the deceased on the head and killed him. The trial court convicted Y of murder on the basis of his common purpose with X.

On the facts, the AD as per Nestadt JA (Van Heerden JA and Goldstone JA concurring) applied the *Goosen* rule and found that Y did not foresee the manner in which the deceased died (that is, through being struck with a brick, rather than a stone) and therefore set aside the conviction of murder.

S v Lungile

In *S v Lungile and Another*,⁷⁸ a robbery occurred at a shop situated opposite a police station. A policeman arrived at the scene; there was crossfire between him and one of the robbers (appellant 2). At the end of the crossfire, an employee of the shop was discovered to have been killed by a gunshot wound through the lungs and heart. The appellants were convicted (amongst other things)⁷⁹ of murder and robbery. Counsel for the appellant argued that the state had not proved the existence of the necessary *dolus* in respect of the murder. Whereas, the prosecution argued that in participating in the robbery, there is no way the appellant could not have foreseen the likelihood of the resistance by the employees of the shop or security guards or police or by armed by-passers who became aware of the robbery. Further, knowing that two of the four gang members were armed, the appellant must have foreseen that someone might be injured or killed in a confrontation; nevertheless he persisted in associating himself with the robbery.

Upon consideration of the facts of the case and previous decisions,⁸⁰ Olivier JA stated the following:

“In my view the inference is inescapable that the first appellant did foresee the possibility of death of an employee of Scotts: he knew that at least two of his co-conspirators were armed with firearms; he also knew that Scotts is in the main street of Port Elizabeth, and that it is immediately opposite a police station; and he knew that the robbery would take place in broad daylight. He nevertheless participated in the robbery, helping to subdue some of the victims”⁸¹

⁷⁸ *S v Lungile and Another* 1999 (2) SACR 597 (SCA).

⁷⁹ The second appellant was also convicted of unlawful possession of an unlicensed firearm and ammunition.

⁸⁰ *S v Maritz* 1996 (1) SACR 405 (A) 415a-f; *Mkhwanazi v S* [1998] 2 All SA 53 (A) 56b-d.

⁸¹ *S v Lungile* (note 78 above) para 18.

The court concluded that the State proved the necessary mens rea in the form of *dolus eventualis* beyond reasonable doubt and the appellants were accordingly found guilty of murder.

S v Molimi

In *S v Molimi and Another*⁸² the two appellants together with four others, had planned to rob a retail store (Clicks in Southgate Mall). During the robbery, the four robbers who had been tipped-off in advance by Molimi (an employee of Clicks), entered the store when a fidelity guard officer arrived to collect money as he did routinely. The robbers held him up and ordered him to empty the money into a bag. As the robbers fled, there was an exchange of gunfire between them and the Clicks security guard. The crossfire resulted in one of the robbers and the security guard being fatally wounded. As the remaining three robbers attempted to flee, a bystander, drew his firearm and tried to stop them. The bystander gave chase, firing a shot at a robber who attempted to take refuge in one of the stores in the mall. The shot missed him but struck an employee in the shop instead, and injured her. The robber retreated into the store, taking a hostage with him while pointing his firearm at the head of the hostage. The bystander fired another shot at the robber, but this time the shot struck the hostage instead. The hostage died as a result of this bullet wound. The robber eventually surrendered.

Makhoba AJ in the Johannesburg High Court found the appellants guilty of all seven counts for which they were charged.⁸³ However, the Supreme Court of Appeal (SCA) upheld the convictions of counts 1, 2 and 4 and dismissed counts 3, 5, 6 and 7. With regard to the kidnapping and murder of the hostage (count 3 and 7) the court found that the two appellants could not be held responsible for the actions of the robber who had, by taking a hostage, embarked on “a frolic of his own.”⁸⁴ The court held *obiter* that *dolus eventualis* was proved once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene could be killed by crossfire, whether from a law-enforcement official or a private citizen.⁸⁵

⁸² *S v Molimi and Another* 2006 (2) SACR 8 (SCA).

⁸³ Count 1: robbery with aggravating circumstances; count 2: murder of the Clicks security guard; count 3: murder of the hostage; count 4: attempted murder of the injured employee; count 5: unlawful possession of firearms; count 6: unlawful possession of ammunition; count 7: kidnapping of the hostage.

⁸⁴ *S v Molimi* (note 82 above) para 36.

⁸⁵ *S v Molimi* (note 82 above) para 35.

Observations

The *Goosen* rule has not been applied consistently. There were circumstances in post-*Goosen* cases where the accused had no subjective foresight of the events but the court did not deal with the requirement of foresight of the causal sequence. This was evident in the cases of *Lungile* and *Molimi*. In these two cases the court dealt with the question of whether the accused foresaw the occurrence of the unlawful consequence. This was a different approach to that adopted in the case of *Mitchell*, where the court applied the *Goosen* rule. The court stated that the accused had no foresight of the causal sequence. The application of the rule in this case has been criticised: according to Boister,⁸⁶ the accused lacked foresight of the death of the victim and not the manner in which death was brought about. This is because the accused foresaw the assault and not the death of the victim. Therefore, applying a rule of foresight of the sequence, was incorrect in the circumstances.

5. SUMMARY

It is evident from the preceding discussion that the requirements of *dolus eventualis* have undergone certain modifications. Van Heerden JA in delivering the decision in *S v Goosen*⁸⁷ formulated the requirement of ‘foresight of the causal sequence’. This requirement is essential to prove the existence of *dolus eventualis* in consequence crimes. According to the requirement of foresight of the causal sequence, the intention element is not satisfied if the consequence occurs in a way that differs markedly from the way in which the accused foresaw the causal sequence. This requirement is different from the principle followed by the courts in pre-*Goosen* decisions where foresight of the causal sequence was not necessary and was sometimes considered as irrelevant. All that was required was that the accused foresee the possibility of death occurring as a result of his or her unlawful conduct. It has been observed that the application of the *Goosen* rule in cases decided after 1989 has not been consistent.

⁸⁶ N Boister ‘Common purpose: association and mandate’ (1992) 5 *SAJCJ* 167, 171.

⁸⁷ *S v Goosen* (note 31 above).

The next chapter will discuss how the *Goosen* rule was received by the leading commentators, followed by an evaluation of the rule.

CHAPTER 3

A CRITICAL ANALYSIS OF THE *GOOSEN* RULE

1. OVERVIEW

Since its formulation, the law regarding mistake as to the causal sequence has been contentious. Both the Continental writers and our South African scholars are not in complete agreement on this point of law. This chapter will firstly provide an exposition of how the leading commentators on mistake as to the causal sequence received the *Goosen* rule and secondly evaluate the rule against general principles of common purpose, correspondence of fault and conduct and the principle of culpability.

2. REVIEW OF ACADEMIC CRITICISM

Paizes

Paizes is of the opinion that the approach of the AD was flawed, in that the court failed to make a crucial distinction between two types of mistakes: a mistake as to the causal act and a mistake as to the causal sequence. Paizes argues that the distinction is important because mistake as to the causal act will normally exclude intention,⁸⁸ whereas mistake as to the causal sequence will not. According to Paizes, the difference between what actually occurred and what was foreseen by Goosen, was the nature of the act by which death was caused, that is, accidental as opposed to deliberate shooting.⁸⁹ He goes on to submit that because of this flawed approach, the court

⁸⁸ A causal act is the act or conduct that actually causes the unlawful consequence. Paizes cites the following cases as authority: *S v Bernardus* 1965 (3)SA 287 (A) at 307B-D where Holmes JA said 'I do not think that the appellant is rescued by the fact that the injury was an unusual one and happened in a curious way- the end of a fairly thick stick penetrated the side of the head. It is the general possibility of resultant injury which must reasonably be foreseeable, and not the specific manner and nature thereof.' [This was a case of culpable homicide]. In *S v Msiza* (note 44 above) Smuts AJA said that even if the death of the deceased occurred in a way that was not exactly the same as that envisaged by the appellant, *dolus eventualis* will still be present. In *R v Lewis* (note 45 above) Malan JA held that where an accused performs an act that is inherently dangerous, he cannot escape a conviction of murder based on the fact that he could not have foreseen the precise consequence of the act.

⁸⁹ Paizes (note 10 above) 516.

found it necessary to qualify and unwarrantedly relax a principle that had been accepted in law through cases such as *Bernardus*, *Lewis* and *Msiza*.

Paizes submits that in the case of an immediate party, there is not much difficulty in determining whether a mistake as to the causal sequence excludes intention but the same is not true in the context of a remote party.⁹⁰ He believes that in the context of an immediate party, a mistake as to the causal sequence should not exclude intention and reasons that:

“It seems, for instance, wrong in principle that an accused should necessarily escape liability for murder where (a) he performs an act, foreseeing the real possibility that it may cause the victim's death; (b) the victim dies; (c) his act was a factual cause of the victim's death; but (d) the manner in which that act brought about that result was substantially different from the way he foresaw he might do so, owing to the occurrence of some event which, while it was not substantially unusual or, even, in the least unusual, was not subjectively foreseen by the accused.”⁹¹

Paizes' main contention is that Goosen made a mistake as to the causal act, but the court treated it incorrectly as a mistake as to the causal sequence.⁹² He reasons that in some instances⁹³ a remote party makes a mistake as to the causal act but it is possible to interpret that mistake as a mistake as to the causal sequence. He goes on to argue that *dolus eventualis* requires the accused to foresee the risk of causing the unlawful consequence, as well as accepting this risk into the bargain. Therefore, *dolus eventualis* is present if it can be shown that, but for the accused's remoteness he would:

“(a) Have foreseen the possibility that the prohibited consequence might be caused by the act of the immediate party that actually caused it; and (b) have accepted or consented to that risk, in that such foresight would not have caused him to dissociate himself from the common purpose.”⁹⁴

⁹⁰ Paizes (note 10 above) 494.

⁹¹ *Ibid* 501.

⁹² *Ibid* 517.

⁹³ *Ibid* 502, Paizes gives an example where J instructs K to rob L and h=gives him a stick with which to intimidate and if necessary, assault L. J foresees the possibility that K, who is short-tempered and powerfully built, might kill L by striking a hard blow. In the course of the robbery, K, with a view of intimidating L, strikes a very light blow which unexpectedly causes L's death. In such a case, one can regard J as having made a mistake as to the causal sequence in respect of his own conduct, the act, that is, of procuring and instructing K to attack L with a stick, as well as a mistake as to the causal act in respect of the conduct imputed to him, in that he did not foresee the possibility that L might die as a result of the light blow that was actually struck.

⁹⁴ *Ibid* 502.

However, where the accused does not foresee the commission of the causal act but does foresee the causing of the unlawful consequence by an act of the immediate party (an act that differs from that which actually caused the unlawful consequence)⁹⁵ it must be ascertained what the position would be if the accused had foreseen the commission of the actual causal act.⁹⁶ On one hand, if the accused would have not foreseen the causing of the unlawful consequence by the very act that caused it, then, the answer lies in his or her cognitive capabilities.⁹⁷ On another hand, if the accused would have foreseen the causing of the unlawful consequence by the very act that caused it, it can be said that the accused's mistake as to the causal act is due only to his remoteness.⁹⁸

Snyman

As might be expected, Snyman criticised the *Goosen* rule on the basis of his earlier contention, that a mistake as to the chain of events is not a material mistake and ought not to exclude intention.⁹⁹ Snyman adheres to his original view that a mistake as to the causal sequence is not material. This is because the intention required in consequence crimes does not include knowledge of the precise time and way in which the consequence is brought about; the accused is only required to have foresight that his or her act may cause the unlawful consequence.¹⁰⁰ This view would mean that Goosen would be found guilty of murder because his mistake as to the causal sequence cannot exclude his liability.

Snyman also argues that following the rule laid down in *Goosen* will make courts apply principles of causation in answering a question of culpability or intention.¹⁰¹ He states that a problem arising out of one element of the crime cannot be solved by applying a test employed in another earlier element of the crime.¹⁰² He identifies that the facts of the case raise a question of causation as opposed to intention, and reasons:

⁹⁵ Ibid 505.

⁹⁶ Paizes (note 10 above) 506.

⁹⁷ Ibid. This position may accepted as true because the court did find that Goosen did not foresee the possibility of an accidental shooting because he was of low intelligence and had failed standard six.

⁹⁸ Ibid.

⁹⁹ Snyman (note 2 above) 191.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

“If, in a set of facts such as that in *Goosen* a court does not want to hold X criminally liable for murder, the reason for not holding him liable for must be found in the absence of a legal causal link between X’s conduct and Y’s death, and not in the absence of intention to kill.”¹⁰³

This view is supported by Snyman’s observation that the terminology used to define the concept of material deviation corresponds with that used to describe the criteria for legal causation in our law.¹⁰⁴ Snyman further argues that the court’s reliance on foreign law was misguided, because the South African concept of causation is unknown in German criminal theory; instead a complex concept known as objective imputation is applied to determine materiality.

The theory of objective imputation

The view adopted by the AD was influenced by German criminal law-theory¹⁰⁵ and has found favour among the scholars of Germany.¹⁰⁶ According to Chiesa,¹⁰⁷ the theory of objective imputation is used by German law scholars to deal with causation problems in borderline cases. The most modern version of the theory is that an actor ought to be held accountable for resulting harm only if two conditions are satisfied:

- (a) The actors conduct must create an unreasonable risk of harm; and
- (b) The resulting harm must be the consequence of the particular risk created by the actor’s conduct, rather than the product of a different risk.

The facts of *People v. Acosta*¹⁰⁸ can best illustrate the theory of objective imputation. In this case, the police had been alerted that the defendant had stolen a car. A car chase ensued, with two police helicopters dispatched to follow the movements of the defendant. The helicopters crashed into one another and both pilots died. The issue before the court was whether the defendant should be held accountable for the deaths of the pilots. According to the theory of

¹⁰³ Ibid 192.

¹⁰⁴ Snyman (note 2 above) 191. Material deviation can be described by using words such as improbable, unexpected, remote and *novus actus interveniens*.

¹⁰⁵ JMT Labuschagne & MA Rabie ‘The influence of the German Max-Plank Institute for criminal law on the development of the South African criminal justice system and literature’ (1991) 4 *SALJ* 288, 296.

¹⁰⁶ Burchell 360

¹⁰⁷ LE Chiesa ‘Comparative criminal law’ in M Dubber & T Hörnle (ed) *The Oxford Handbook of Criminal Law* (2014) 1096.

¹⁰⁸ *People v. Acosta* 284 Cal Rptr. 117 (1991).

objective imputation the defendant should not be held liable because the *ex ante* risk created by the defendant was possible harm to those using roads, whether they were pedestrians or drivers. However, his conduct did not create an *ex ante* risk of harm to those navigating the skies. Therefore, the resulting harm (that is, the deaths of the pilots) could not be fairly attributed to the defendant.

This conclusion is not novel: in Anglo- American terms, the comparison of risks that is found in the modern version of the objective imputation theory is similar to the adequate cause theory. Judge Cardozo captured the essence of the modern continental doctrine of objective imputation in *Palsgraf v. Long Island Railroad*¹⁰⁹ :

“...the risk reasonably to be perceived defines the duty to be obeyed, and risks imports relation; it is risk to another or others within the range of apprehension.”

Similarly, Jansen JA and Trengrove JA in *Daniels* quoted:

“An act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation...”

It is evident from the above *dictum* that objective imputation is similar to the adequate cause theory. Adequate cause theory does not consider the intervening sequence of events: according to this theory, an act is a legal cause of a situation if, according to human experience, in the normal course of events, the act has the tendency to bring about that type of situation.¹¹⁰ The South African approach to causation is different to that of Germany; not entirely but there are important differences. The most common approach in South African law is a combination of adequate cause and *novus actus interveniens*. The case of *S v Lungile*¹¹¹ defined *novus actus interveniens* as an event which is, in the context of the act that was committed, abnormal, and completely independent of the acts of the accused.¹¹² Without the need to involve the fault enquiry, South African law already makes provision for foreseeable consequences that happen in an unforeseeable manner.

It is important to highlight that legal causation is judged objectively, based (in part) on what is normal and therefore reasonably foreseeable. Legal causation is understood as a flexible

¹⁰⁹ *Palsgraf v. Long Island Railroad* 284 N.Y. 339 (1928).

¹¹⁰ Snyman (note 2 above) 85.

¹¹¹ *S v Lungile* (note 78 above).

¹¹² *Ibid* para 30.

criterion that is based on normative value judgments and policy considerations which demand a fair endeavour in ascertaining whether it is reasonable or just to hold an accused liable for causing the unlawful consequence.¹¹³ Dolus eventualis is however, a subjective enquiry based on what the accused himself actually foresaw. Although there are areas of overlap, the two are certainly not identical enquiries. The confusion between the two enquiries that Snyman suggests, could possibly come from Van Heerden JA's wording in the decision. When the judge speaks of a 'concrete causal nexus', it seems as if he is implying that the unforeseen manner in which the consequence occurs, interrupts the chain of events anticipated by the accused. What is important to note is that for such interruption to be considered as breaking the chain of causation, it must be abnormal and completely independent.

Snyman further argues that courts do not seem to apply the *Goosen* rule consistently. He explains that subsequent to *Goosen* there were strong probabilities that the accused made a mistake as to the causal sequence however these cases were decided without applying or referring to the rule.¹¹⁴ He refers to the cases of *Lungile, Molimi*¹¹⁵ and *S v Nair*¹¹⁶ and prefers these decisions than that of *S v Goosen*.

Summary of criticisms

The critiques made by the leading commentators pertaining to the rule laid down in *S v Goosen* can be summarised as follows:

1. The court confused mistake as to the causal sequence and mistake as to the causal act;
2. A mistake as to the causal sequence is not a material mistake;
3. The approach adopted by the court confused the causation and intention inquiries.

Burchell

¹¹³ *S v Mokgethi en Andere* 1990 (1) SA 32 (A).

¹¹⁴ Snyman (note 2 above) 192.

¹¹⁵ As discussed at note 78 and note 82 above.

¹¹⁶ *S v Nair and Another* 1993 (1) SACR 451 (A) in this case, X and Y assaulted, and threw Z's body into the sea. It was uncertain whether Z died as a result of the assault or as a result of drowning. There was a reasonable possibility that death by assault was intended but death was caused by drowning or the other way around. The SCA convicted X and Y of murder. The court did not investigate the question of mistake as to the causal sequence.

Burchell¹¹⁷ is of the view that the *Goosen* rule has an advantage: the rule will serve as a valuable way of limiting liability in common purpose cases.¹¹⁸ He is of the view that “it would be have been absurd if the appellant in *Goosen* had been found guilty of murder of the deceased, whereas the robber (Mazibuko) who actually discharged the firearm, albeit unintentionally, was guilty of only culpable homicide.”¹¹⁹ The reason for this lies in the common purpose rule which does not require a causal nexus between the act of each party and the unlawful consequence. Active participation in the common purpose coupled the requisite guilty mind is enough to hold a party liable for murder irrespective of whether he causally contributed to the unlawful consequence.¹²⁰ It is for this reason that the *Goosen* rule has been referred to as “a powerful alleviation of the harshness of the common purpose rule.”¹²¹ Burchell states where death was foreseen, but happens in a way that is markedly different or bizarre to the way that was foreseen, the result of applying the *Goosen* rule would be that the accused would escape liability for murder derived from the doctrine of common purpose.¹²²

Burchell summarises the value of the rule as follows:

“The value of the *Goosen* rule comes into its own (i) when the common purpose rule leads to disregarding the causal inquiry, and so further fault limits are required to soften the harshness of the common purpose imputed causation rule; or (ii) where no common purpose rule applies, both factual and legal causation are present and where it is concluded that there is no intention because there is a marked difference between the foreseen causal sequence and the actual causal sequence.”¹²³

He goes on to identify two inherent limitations in the *Goosen* rule.¹²⁴ Firstly, a mistake as to the causal sequence is only relevant in the context of *dolus eventualis* rather than *dolus directus*. He reasons that if *dolus directus* is present then Van Heerden JA and the cases of *Masilela*¹²⁵ and *Daniëls*¹²⁶ are correct in concluding that a mistake as to the precise and general manner in which death occurs is irrelevant. Secondly, Van Heerden JA did not state that there must be

¹¹⁷ Burchell (note 36 above).

¹¹⁸ Ibid 173.

¹¹⁹ Burchell (note 36 above) 172.

¹²⁰ Burchell (note 3 above) 362.

¹²¹ Ibid 364.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ *S v Masilela* (note 52 above).

¹²⁶ *S v Daniëls* (note 74 above).

foresight of the precise manner of death: all that the judge said was that there must be a substantial correlation between foreseen manner in which death might occur and the actual manner in which death does occur, that is, there must be foresight of only the *general* way in which death occurs.

Burchell further argues that the court could have found Goosen liable of culpable homicide without involving the principle of mistake as to the causal sequence.¹²⁷ He explains that this conclusion would be reached by asking whether a reasonable person would foresee the accidental discharge of the automatic carbine. However, it must be noted that this is dependent on the point in time at which intention is judged. The assessment of fault in common purpose cases is no different than in individual cases, that is, a party to a common purpose can be found liable on either *dolus directus*, *dolus indirectus*, *dolus eventualis*, or even negligence. A crucial question (that has not been satisfactorily answered by our courts) is which moment should *mens rea* be assessed in common purpose conspiracy cases.

In the case of *S v Nkwenja*¹²⁸ the majority assessed *mens rea* at the time the parties entered into the common purpose while the minority assessed *mens rea* at the time the immediate party committed the unlawful conduct.¹²⁹ The view of the minority is in accordance with the contemporaneity rule which requires that “a guilty mind” be present at the time the unlawful act is committed.¹³⁰ While Burchell prefers the view of the minority because it allows for a change in the state of mind of the accused, Walker (who correctly states that the courts should clarify this issue) yields towards the view of the majority. She explains that:

“Where parties to a common purpose to commit one crime later agree, either expressly or tacitly, to commit a collateral crime, all parties to such a later agreement will be guilty of the collateral crime. Equally, if one party starts committing a collateral crime without such an agreement having been reached, and another party joins in with him in the commission of that

¹²⁷ Burchell (note 36 above).

¹²⁸ *S v Nkwenja en 'n Ander* 1985 (2) SA 560 (A). In this case, the two appellants had decided to rob two persons who were sitting in a car at night. The appellants simultaneously wrenched open the doors of the car. Each of the appellants immediately used violence on the two occupants of the car. One of the occupants died as a result of the violence used on him. The other occupant was raped. The trial court convicted the appellants of culpable homicide, robbery with aggravating circumstances and rape. On appeal, the conviction of culpable homicide was upheld on the basis that when the appellants entered into the common purpose, the death of the deceased was reasonably foreseeable.

¹²⁹ Although this was a case of culpable homicide, the correspondence between fault and unlawful conduct is the same as in the case of murder.

¹³⁰ Snyman (note 2 above) 148. The case of *S v Masilela* (note 52 above) applied the principle of contemporaneity. The court found that the two acts of assault and burning were so closely related in time and place that they amounted to a single course of action.

crime, the latter will also be guilty of the collateral crime. All that has happened, in either case, is that a new and extended common purpose has been formed, either by fresh conspiracy (the first example), or by spontaneous association (second example). There does however need to be a fresh act of association.”¹³¹

The case of *S v Mthombeni*¹³² can be used to support the view that mens rea should be assessed at the time of entry into the common purpose. In this case, the appellant and a colleague spent the evening with the deceased pursuant to their pre-arranged plan to steal property from the deceased’s place of work. At a certain stage, the appellant got up and strangled the deceased with his belt. Believing that she was dead, they laid the deceased’s body on a bed and proceeded to remove valuables from the house. In the early hours of the morning, the appellant returned to the house and set it on fire. The post-mortem revealed that the deceased had not died as a result of the strangulation but rather from asphyxiation due to the inhalation of the smoke from the fire. The appellant was convicted of murder. On appeal it was contended that the State had failed to establish the mens rea essential to support a conviction for murder, and that on the facts of the case, the State was at best entitled to a conviction for attempted murder. Gubbay CJ of the Zimbabwean Supreme Court found that the appellant had been correctly convicted of murder and held that on the circumstances of the case, the law provided two grounds for a murder conviction:

First, whether or not there is a pre-conceived plan to murder and then to conceal the supposed corpse, or to try to erase the evidence of the evil deed, there is no question of the second act or event being treated as a *novus actus*, provided that the two are so closely connected to each other as regards duration and method of performance that for all practical purposes they constitute a single transaction. Second, and in any event, no exception to the principle of contemporaneity need be made, for the offender's initial *actus* (which was accompanied by *mens rea*) is indeed the cause of the death, for it operates as a *sine qua non* of the victim's demise, the subsequent act not being such as to break the chain of causation arising from the first.¹³³

According to Walker’s preference of the moment when mens rea should be assessed, Goosen would be guilty of murder because at the time he entered into the common purpose he foresaw the possibility of the deceased being shot and killed. Although this view would result in Goosen being worse off than Mazibuko who actually fired the shot, the mens rea of a remote party is

¹³¹ SA Walker *A Critical Evaluation of the Doctrine of Common Purpose in South African Law* (2013) 63.

¹³² *S v Mthombeni* 1993 (1) SACR 591 (ZS).

¹³³ *S v Mthombeni* (note 132 above) 595D-E.

normally judged at the time when the parties enter into the common purpose. According to Burchell's preference, Goosen's mens rea would have to be assessed when Mazibuko pointed the firearm. At this point in time, Goosen acted unreasonably in that he did not foresee the accidental firing of the fatal shot. He would then escape liability for murder and be found guilty of culpable homicide without invoking the notion of mistake as to the causal sequence. Goosen would not be guilty of murder because his lack of foresight of the possibility that his victim might be killed accidentally was in itself unreasonable. A reasonable person in his position would have foreseen such a possibility and guarded against it, for example, by means of dissociation from the common purpose.

3. AN EVALUATION OF THE GOOSEN RULE AGAINST GENERAL PRINCIPLES OF SOUTH AFRICAN CRIMINAL LAW

Let us consider the following dictum of Van Heerden JA:

“Death caused by intentional action differs materially from death caused by involuntary action, and if the totality of events be noted, there was in my opinion a real significant difference between the means of causing the death and the causal chain of events that the appellant foresaw as a possibility.”¹³⁴

It can be noted from this dictum that the AD construed the foreseen sequence as that which was envisaged by the appellant upon entry into the common purpose: the appellant foresaw and reconciled himself with the possibility that his conduct might result in the death of the deceased by *voluntary* shooting. Since the actual cause of death occurred by a different manner (involuntary shooting) the appellant must have made a mistake as to the causal sequence. This mistake had to now absolve him from liability of murder because the actual way in which death occurred differed markedly from the foreseen way.

It is the main submission of this paper that this is not so. Contrary to what has been said that the reason for the court not to find the appellant liable for murder must lie in the absence of a legal causal link, Burchell correctly identifies¹³⁵ that the reason lies in the judgment of Kumleben JA in *S v Mazibuko and Others* (the trial of Goosen's co-accused).¹³⁶ Here, the court

¹³⁴ *S v Goosen* (note 31 above) 1027A-C.

¹³⁵ Burchell (note 36 above) 173.

¹³⁶ *S v Mazibuko and Others* 1988 (3) SA 190 (A).

stated that if it is proved that Mazibuko fired the fatal shot accidentally, none of his co-robbers would be found guilty of murder based on common purpose.

“If the causative link is not forged in the case of accused No 1 (he being a person who, albeit accidentally, fired the shots) there is a fortiori scope - again depending on the proved facts for a cogent argument that the other accused are not to be found guilty of murder on an application of the doctrine of common purpose.”¹³⁷

It is for this reason that Goosen ought to have escaped liability for murder. According to Kumleben JA, none of Mazibuko’s co-accused should be found guilty of murder on the basis of common purpose because the doctrine requires that only voluntary conduct be attributed to other parties to the common purpose. However, the court found that Mazibuko’s co-robbers could still be found guilty of murder if *dolus eventualis* could be proved.

“There is a further ground on which the conviction of murder might be challenged, if it is accepted that the killing was accidental. *Dolus eventualis* is attributed to an accused person whenever the possibility of death as a consequence of the unlawful act is foreseen (and is persisted in), whether or not the precise manner in which death eventuated was foreseen or contemplated. . . Thus, with reference to the requirement of foreseeability as well, an argument may be profitably advanced on behalf of the accused, should it appear that the shots were accidentally fired.”¹³⁸

In other words, Kumleben JA was suggesting that Mazibuko’s co-accused (that is, Goosen) might escape liability for murder on the grounds that he had not foreseen the possibility of the death at the relevant time. Unfortunately, however, this suggestion failed to take account of the manner in which the doctrine of common purpose is applied in our law and the time at which intention is judged in such cases.

Common purpose

The doctrine of common purpose is not unique to South Africa; it forms part of the tradition of the Anglo-American legal systems.¹³⁹ The doctrine was first formulated in the case of *S v*

¹³⁷ Ibid 202B-C.

¹³⁸ *S v Mazibuko* (note 136 above) 202C-F.

¹³⁹ English law, Scottish law, Australian law, Canadian law and American law.

*Garnsworthy*¹⁴⁰ and was introduced to our legal system through section 78 of the Native Territories' Penal Code.¹⁴¹ According to Snyman, 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.¹⁴² This state of law has been affirmed by the Constitutional Court in *S v Thebus*.¹⁴³

“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.”¹⁴⁴

The effect of the doctrine of common purpose is to impute the conduct of the immediate party to the remote party.¹⁴⁵

To accept that Mazibuko fired the fatal shot accidentally means accepting that he acted involuntarily. Voluntary conduct is the first general requirement for criminal liability.¹⁴⁶ Conduct is voluntary if it is subject to the control of the accused's state of mind in that he or she must be capable of directing his or her bodily movements in accordance to will and intellect. Examples of involuntariness are sleepwalking, epileptic seizures, blackouts, dissociation, cerebral tumour, arteriosclerosis, hypoglycaemia and intoxication. If involuntary conduct is found, an accused can still be liable based on culpable prior voluntary conduct.¹⁴⁷ For all legal purposes, therefore, the pulling of the trigger by Mazibuko did not amount to conduct and could not in itself result in liability.

Mazibuko was however, convicted of culpable homicide based on his culpable prior conduct, in that he pointed a loaded firearm at the deceased knowing that he could provoke danger and that was unreasonable of him. This means that the shooting was not the unlawful act; the actual unlawful act was the pointing of the firearm which endangered the deceased.¹⁴⁸ How then could Goosen (the driver of the Cortina) be liable for murder? Presumably, it was the *pointing* of the

¹⁴⁰ *S v Garnsworthy* 1923 WLD 17 at page 19 defined the doctrine as “where two or more people agree to 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.”

¹⁴¹ Act 24 of 1886 of the Cape of Good Hope.

¹⁴² Snyman (note 2 above) 265.

¹⁴³ *S v Thebus and Another* 2003 (2) SACR 319 (CC).

¹⁴⁴ *S v Thebus* (note 143 above) para 18.

¹⁴⁵ *S v Boekhond* 2011 (2) SACR 124 (SCA).

¹⁴⁶ Snyman (note 2 above) 51.

¹⁴⁷ This is unlike the position in individual cases; if the accused is found to have acted involuntarily, the inquiry ends and the accused escapes liability.

¹⁴⁸ Burchell (note 36 above) 171.

firearm that was imputed to Goosen. It is strongly believed that the AD decided the case from the *dolus eventualis* point of view because the court thought it was obliged to convict Goosen of murder (unless it could find a way around this) because death had been foreseen as a possibility. The problem arises because we continually use the usual line of reasoning (the perpetrators planned the robbery, they were armed, somebody got shot and a life was lost so obviously, they must be guilty of murder) without properly considering the issues each case presents.¹⁴⁹ One of these issues, which has never been satisfactorily addressed by our courts, is the point in time at which the remote party's foresight (and hence intention) falls to be judged, as discussed above.

4. SUMMARY

¹⁴⁹ The case of *S v Sibeko and Another* 2004 (2) SACR 22 (SCA) is a good example of how courts adopt this usual line of reasoning. *In casu*, the two appellants had been convicted of murder and other charges in and had been sentenced to life imprisonment. Their appeal was against their murder conviction and the sentences imposed. The appellants and another co-perpetrator were involved in an armed robbery where they stole a car. The three then stopped at a petrol station to refuel the car. Whilst at the garage, they spotted a police patrol vehicle whereupon the second appellant had run away. The police chased after and arrested the second appellant. Meanwhile, back at the garage, a police officer had approached the first appellant who had been standing outside the stolen car. The police officer had searched him and had then gone back to the police vehicle. When he returned, the first appellant had suddenly opened the rear passenger door and his colleague had jumped out and had started firing at the police officer. In the ensuing shoot-out, both the police officer and the appellant's colleague were killed. The evidence indicated that after he had opened the door of the vehicle and his colleague had jumped out, the first appellant had fled the scene but was arrested later that day.

The court *a quo* had found that although both appellants had not been at the petrol station when their colleague had killed the police officer, they were nevertheless co-perpetrators. On appeal, the appellant's counsel submitted that even though the appellants had foreseen the use of firearms during the robbery, this foresight did not extend to the situation at the garage as the appellant's could not have foreseen their encounter with the police. The court dismissed the submission as being without substance and found that the appellants and their deceased colleague had deliberately armed themselves with firearms when they had set out on their mission to rob and pillage. Therefore, they must have foreseen the possibility of using their firearms to achieve their objective. The court found that the fact that they had not harmed any of their victims in the course of robbing them did not change the fact that they foresaw the possibility that one or more of them could use their firearms in the event of them happening upon opposition. The court stated further that the fact that the appellants had run away leaving their colleague behind did not absolve them from blameworthiness as their colleague's use of the firearm was in line with the group's intention to use firearms to protect the stolen property, to evade capture and to effect escape.

In support of this finding, the court referred to its decision in *S v Malinga* 1963 (1) SA 692 (A) at page 695A-B, where in a factually similar situation, the court had stated that where one member of a group of robbers was armed with a loaded firearm with the knowledge of others in the group, all of them must have foreseen the possibility of that firearm being used against 'the contingency of resistance, pursuit or attempted capture'. The court accordingly concluded that no basis existed for overturning the conviction of the appellants for the murder of the police officer.

From the above discussions, it can be seen that the *Goosen* rule has given rise to conflicting academic views, all of which have merit. This chapter has identified and elaborated on three principle criticisms by the leading commentators on the *Goosen* rule:

- The court confused mistake as to the causal sequence and mistake as to the causal act;
- A mistake as to the causal sequence is not a material mistake;
- The approach adopted by the court confused the causation and intention inquiries; and,
- The rule has also been received as having an advantage in that it is a valuable way of limiting the harshness of the doctrine of common purpose.

This chapter also evaluated the *Goosen* rule against the general principles of common purpose and correspondence of fault and unlawful conduct. The following chapter will summarise and conclude this dissertation.

CHAPTER 4

CONCLUSION AND RECOMMENDATIONS

1. A SUMMARY OF THE DEVELOPMENT OF THE LAW RELATING TO MISTAKE AS TO THE CAUSAL SEQUENCE

Prior to 1989, it was a settled principle in our law that *dolus eventualis* exists where an accused foresees that his or her conduct will cause the death of the victim. The accused did not have to foresee the manner in which death would come about. All that was required was the subjective foresight of the possibility that the unlawful consequence would arise as a result of the accused's conduct. The courts and criminal law commentators were in agreement on this position. There was a general consensus even among the Continental writers (who were not in complete agreement) that an accused did not have to foresee the manner in which the death occurred, mere foresight of its occurrence was sufficient to prove *dolus eventualis*.

The case of *S v Masilela*¹⁵⁰ confirmed the position that a mistake as to the causal sequence was not a defence to exclude *dolus*. A great number of the cases decided during this era involved cadaver disposal situations. In these cases, the accused carried out two separate actions. The first, coupled with the necessary intention but not the foreseen consequence while the second act that causes the consequence, was not coupled with the necessary intention. Although a ground of defence based on mistake as to the causal sequence was inapplicable, it took time

¹⁵⁰ *S v Masilela* (note 52 above).

for the courts to answer the question of whether *'the unforeseen manner, in which a foreseen consequence was caused, suffices as a defence to exclude intention.'*¹⁵¹

The question was touched on, but left open in *S v Nhlapo*.¹⁵² The case of *S v Mkhwanazi*¹⁵³ was analogous to *Nhlapo* but instead of the court answering the question it left open in the latter case, the two cases were distinguished by stating that:

“The nature of the gun battle in *S v Nhlapo* was such that it was impossible to attribute any particular cause to a particular result. In short, in the matter of causation, the death of the deceased was the result of the gun battle and those who were responsible for having instigated the gun battle were responsible also for his death.”¹⁵⁴

In 1989, the case of *S v Goosen*,¹⁵⁵ changed the position of the law and found that a mistake as to the causal sequence *does* exclude intention. In this case, the appellant was party to a common purpose to rob where he and his co-perpetrators foresaw the possibility that their victim might be intentionally shot if he offered resistance. It was evident that the co-perpetrator who fired the fatal shot, did so accidentally. Van Heerden JA found that the appellant did not foresee death by accidental conduct. It was held that an accused does not have the necessary intention if there is a marked difference between the actual way and the foreseen way in which death occurs. This subsequently meant that foresight of the causal sequence was an essential requirement for *dolus eventualis* but only in consequence crimes.

2. DID THE GOOSEN RULE MAKE GOOD LAW?

Flaws in the justifications of the rule

In order to justify the principles used in the formulation of the *Goosen* rule, Van Heerden JA referred to judgments of *Daniëls*, *Nkombani* and *Masilela*¹⁵⁶ and found that the rule that a mistake as to the causal sequence may not generally exclude the accused's intention was limited to the facts in those cases and did not extend to *Goosen*. Van Heerden JA could only

¹⁵¹ Du Plessis (note 62 above) 269.

¹⁵² *S v Nhlapo* (note 58 above). See the dictum 750H-751B.

¹⁵³ *S v Mkhwanazi* (note 59 above).

¹⁵⁴ *S v Mkhwanazi* (note 59 above) 34D-F.

¹⁵⁵ *S v Goosen* (note 31 above).

¹⁵⁶ *S v Daniels* (note 74 above); *S v Nkombani* (note 51 above); *S v Masilela* (note 52 above).

find one situation where a mistake as to the causal sequence had been considered and it could be illustrated as follows: X commits an act with the intention of killing Y; erroneously believing that he had achieved this end performs a second act which does in fact kill Y. It is submitted that (1) in this type of situation the reason why X would escape liability for the act he committed, say murder, would lie in the contemporaneity rule and not in the absence of *dolus eventualis* (in the sense that X did not foresee the manner in which Y was killed) and; (2) there is only one perpetrator in this illustration and there are no problems with the imputation of conduct of one party to a common purpose to another.

Further, in reaching his conclusion, Van Heerden JA did not consider the cases of *R v Chiswibo*, *R v Lewis* and *S v Nkombani*. In these cases, the accused were found to have *dolus eventualis* regardless of death occurring in an unforeseen manner. The AD rather adopted a principle of German criminal law. The German legal system applies a theory called objective imputation in their borderline cases of causation. This theory is similar to the adequate cause theory. The case of *Goosen* involved *dolus*- applying a test of causation has been perceived as inappropriate and it has led to the criticism that the rule laid down creates a confusion of the causation and intention inquiries.¹⁵⁷ It must be noted that the legal causation enquiry is not a sufficient escape for an accused when an unlawful consequence occurs in a freakish manner. In such a case, the rule does have the advantage of limiting the scope of liability where an accused genuinely does not foresee the consequence occurring in the manner that it does in fact occur.

Inconsistent application

The *Goosen* rule has not been consistently applied in cases decided after it was laid down. In *Mitchell*,¹⁵⁸ Nestadt JA followed the *Goosen* rule and found that the appellant did not foresee the sequence of events that led to the deceased's death. It is submitted that there was no need to apply the rule laid down in *Goosen* because the facts of *Mitchell* show that the appellant did not make a mistake as to sequence of events, he simply did not foresee death as a possibility.

In *Molimi*,¹⁵⁹ the court applied the pre-*Goosen* principle and found that the doctrine of common purpose does not require each co-perpetrator to know or foresee in detail the exact manner in

¹⁵⁷ Snyman (note 2 above) 191.

¹⁵⁸ *S v Mitchell* (note 77 above).

¹⁵⁹ *S v Molimi* (note 82 above).

which the unlawful consequence occurs.¹⁶⁰ At paragraph [33] the court identified the procedure for the State to secure a conviction on the basis of common purpose as:

“...an accused must foresee the possibility that the acts of the participants may have a particular consequence, such as the death of a person and reconciles himself to that possibility.”

There was no direct mention of the correlation between the actual and the foreseen consequence but the SCA held *obiter*, that it was satisfied that the appellants did foresee both the causal act and the causal sequence.

This was also the case in *Lungile*.¹⁶¹ Nowhere in the arguments or in the *ratio* was there mention of foresight of the causal sequence. In pursuit of persuading the court of the absence of *dolus eventualis* the defence would be “expected” to argue that the appellant did not foresee the manner in which the deceased died. That is, he foresaw death caused by one of the robbers and not the policeman. Rather an argument was averred that the conduct of the policeman constituted a *novus actus interveniens* unforeseeable by the appellant.

3. CONCLUDING REMARKS

The usefulness of the rule as Boister states¹⁶² is that it recognises that when a member of a group foresees a result happening in a certain way, and it happens in a markedly different way, then it is not the same crime that the individual contemplated and accordingly he or she cannot be held liable. The rule is only useful in common purpose cases and/or where the perpetrators have *dolus eventualis* in respect of the unlawful consequence.

It is submitted that if there were certainty regarding the moment when *mens rea* should be assessed, there would be no need to have the requirement of foresight as to the causal sequence. If Burchell’s argument is accepted that *mens rea* should be assessed at the time of the commission of the unlawful act then, Paizes’ argument that only a mistake as to the causal act can exclude intention would be compelling.

¹⁶⁰ *Rex v Shezi and Others* 1948 (2) SA 119 (A) 128.

¹⁶¹ *S v Lungile* (note 78 above).

¹⁶² Boister (note 86 above).

However, it is true that the *Goosen* rule has an advantage of limiting liability in common purpose cases as strict application of the doctrine sometimes has unfair results. An example would be the recent Marikana massacre: two hundred and seventy miners were charged with the murder of their fellow eight miners who died when police shot at them during a salary increase strike. The prosecution based its charge on the doctrine of common purpose. Although no one can know what would have happened if the National Prosecuting Authority pursued its case, the mere fact that the miners were charged is evidence of how “harsh” the doctrine of common purpose can be.

Although the principles upon which the *Goosen* rule was formulated are somewhat flawed and although it has not been consistently applied in practice, the rule has not been detrimental to the law. Furthermore, the rule has an important place in the law through the advantage it affords: it limits liability in common purpose cases where the remote party faces liability for a crime he or she could not have foreseen by virtue of his or her remoteness.

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