IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

CASE NO.: 96/2015

In the matter between

DIRECTOR OF PUBLIC PROSECUTIONS,

GAUTENG **Appellant**

and

OSCAR LEONARD CARL PISTORIUS **Respondent**

THE APPELLANT'S MAIN HEADS OF ARGUMENT

INTRODUCTION:

1.

In the Gauteng High Court, the Honourable Justice Masipa, acquitted the accused (Respondent) on the main count of murder (count 1) but "found (him) guilty of culpable homicide". [1]

2.

On application by the Appellant (State) the Court *a quo* reserved the following questions of law for the consideration of the Supreme Court of Appeal:

> *"4.1 Whether the principles of dolus eventualis were correctly applied to the accepted facts and the conduct of the accused, including error in objecto.*
>
> *4.2 Whether the Court correctly conceived and applied the legal principles pertaining to circumstantial evidence and/or pertaining to multiple defences by an accused.*
>
> *4.3 Whether the Court was correct in its construction and reliance on an alternative version of the accused and that this alternative version was reasonably possibly true …"* [2]

2.1. We anticipate argument by the Respondent that the Court *a quo* was wrong in her finding that she is *"satisfied that the points raised by the Applicant … are indeed questions of law."*

[1] Record page 1730 L 11- 14
[2] Record page 3244

2.2. Furthermore, we anticipate that the reservation of a question of law in instances where there were convictions on a competent verdict will also be argued.

3.

We respectfully argue that not only the fragmented approach in evaluating the circumstantial evidence but more importantly the exclusion of circumstantial evidence certainly constitutes a question of law. This, on its own, qualifies as a question of law which entitles the Appellant to argue that the Court *a quo* was wrong in its acquittal of the Respondent on a charge of murder.

PROCEDURAL ASPECTS

Acquittal: The Seekoei hurdle

4.

We acknowledge that **S v Seekoei** 1982 (3) SA 97 (A) ("*Seekoei*") may be interpreted to prohibit the State from reserving a question of law in a case where there was a conviction on a competent verdict.

4.1. We respectfully submit that in *casu* the Court *a quo* did not follow Seekoei's interpretation that the charge of murder is a single charge of which various convictions are possible.[3] The Court *a quo* found the accused not guilty and discharged him on the charge of murder.

[3] 3 Seekoei p 103 : "… is daar in werklikheid slegs een aanklag , waarop verskillende beskuldigings uitgebring kan word…

4.2. We respectfully argue that competent verdicts require a Court to read into a charge several alternative charges. Section 258 of the Criminal Procedure Act No 51 of 1977 ("the Act") merely excludes the requirement that the State has to include a long list of alternative charges in the indictment.

4.3. We respectfully argue that it would be absurd to find that if the Respondent had charged the accused with murder and with culpable homicide as an alternative count, a reservation of a question of law would be possible but following a conviction on a competent verdict of culpable homicide then prohibits such.

The Court in Seekoei specifically left the question open as to a possible conviction on an alternative count.[4]

4.4. Unlike the accepted procedure where a Court first decides the question of the accused's guilt on the main count before it focuses on the competent verdicts, it is conceivable that on the Seekoei definition the Court may convict an accused on a lesser charge, even if the more serious charge was proven.

4.5. For a Court not to convict on the proven main count would be wrong in law. If the Court holds the opinion that the circumstances warrant leniency, then the

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[4] Seekoei p 104 : '… dit is nie nodig om in te gaan op die vraag of dieselfde posissie geld in die geval waar iemand … op n alternatiewe aanklag skuldig bevind word nie …

leniency may be applied with regard to sentence but not by convicting on a lesser count. [5]

5.

The Court in Seekoei, with reference to **R v Gani and Others** 1957 (2) SA 212 (A), found that the Court of Appeal will have no option but to order a new trial if the Court of Appeal found that the Court *a quo* wrongly decided a point of law.

5.1. We respectfully argue that not only was the *ratio* based on an incorrect reading of Gani, but also an incorrect reading of the provisions of s322(4) of the Act.

5.2. We furthermore argue that s322(1)(b) and (c) of the Act specifically provided the Court of Appeal with a discretion.

6.

Section 322(4) adopts the word "*may*" and not "*must*" and is therefore discretionary.

7.

In Gani, the Court recognised that only if an order under the equivalent of s322(4) was given could a fresh trial be instituted. This, with respect, does not mean that the only option is a re-trial. An order under s322(4) is a necessary but not sufficient condition.[6]

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[5] **S v Hartmann** 1975 (3) SA 532 (C).

[6] Quote Gani **R v Gani and Others** 1957 (2) SA 212 (A)

We re-iterate and respectfully submit that s322(1b) empowers the court of appeal to "…give such judgements as ought to have been given at the trial.."

8.

We respectfully argue that Seekoei was wrongly decided and if not, that the Constitutional Court's decision in **S v Basson** 2007 (1) SACR 566 (CC) provides a post constitutional interpretation of s319(1) which led the Court to find that the legislative history of s319(1) indicates that its purpose was, amongst others, to allow the State to appeal on a point of law by requesting the reservation of a question of law.

8.1. The Court found at 621 a – d that s319 was never intended to provide the State with a right to appeal a question of law in limited circumstances.

9.

We respectfully argue that the Basson judgment renders the distinction between acquittal and / or conviction in Seekoei invalid.

QUESTION OF LAW OR FACT

10.

We respectfully acknowledge that it may be difficult to distinguish between clear questions of law and fact.

11.

We acknowledge that the Court's finding in **Magmoed v Janse van Rensburg and Others** 1993 (1) SA 777 A, may be viewed as an obstacle to our argument in convincing this Court that the Court *a quo* was correct in its formulation of the questions of law. There is however no question of common purpose that may cloud the issues but the court correctly found that the Court has discretion to order a trial *de novo*.[7]

12.

We respectfully submit that the Court *a quo* was correct in her finding and in line with the *ratio* in Magmoed that the essence of the questions (questions 1 and 2) is whether the proven facts, as found by the Court, constitutes the crime of murder.[8]

12.1. We are unable to argue that the Court erroneously made factual findings upon which the principles of *dolus eventualis* should be applied. The application of the principles of *dolus eventualis* to the facts cannot, in our submission, be viewed as a factual issue.

12.2. We respectfully intend to illustrate our argument by means of a hypothetical set of facts: that is to say if the facts were that the accused armed himself, walked to the bathroom, aimed the gun at the head of the deceased and fired four shots shouting 'die die', we would not have, with respect, any difficulty to argue that a finding of culpable homicide amounts to an erroneous application of the law.

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[7] Magmoed p 827 G – 828 C
[8] Magmoed p 799 I - J

13.

In **Magmoed** the Court accepted that the exclusion of evidence was clearly a question of law.[9]

13.1. We found support in **Rex v Thibani** 1949 (4) SA 720 (A) where the Court found at 729:" … *whether they establish the crime of murder or only culpable homicide. This is a question of mixed fact and law … the Crown has to prove the intention to kill, but this expression has an extended or legal meaning …"*

13.2. In **DPP Transvaal v Mtshweni,** [10] this court found that a mistake of law had been made where the court *a quo* failed to call a ballistic expert in terms of the provisions of s186 of the Criminal procedure act.

14.

The Court in Magmoed's finding that: *"[q]uestions concerning the admissibility of evidence are clearly questions of law …"*[11] strengthens support for the argument that the questions of law were correctly reserved by the Court *a quo*

15.

This will receive apposite attention later, but for now we argue that the fragmented approach in dealing with the circumstantial evidence and the exclusion of certain portions

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[9] *Magmoed supra at 781 G*
[10] 2007(2)SACR 217 (SCA)
[11] Magmoed p 784c-d

of circumstantial evidence are clearly issues of legal application and issues of substance and not merely an academic discussion.

15.1. The Court's finding that the trial Court erroneously excluded evidence will have *"a practical effect upon the outcome of the trial".*[12]

16.

We furthermore argue that should it be found that the Court incorrectly applied the principles of *dolus eventualis* then a conclusion that the Respondent should have been convicted of murder is, with respect, inescapable.

17.

If the Court applied the legal principles pertaining to multiple defences by an accused wrongly, then a finding that the accused's version was reasonably possibly true would be impossible and if reliance should then have to be placed on the objective facts, which is our submission, then it will result in a conviction on murder.

FINDING OF FACT

18.

The following findings are, in our respectful submission, relevant and should be used as the reference point on the question as to whether the Court *a quo* correctly applied the principles of *dolus eventualis* to the accepted facts (Question 4.1).

[12] Magmoed p 783 G-H and 823 H - J

18.1. The Respondent armed himself with a loaded firearm and approached what he thought was danger, with a firearm ready to shoot.[13]

18.2. He knew where he kept his firearm, which was on the opposite side of the bed where he slept on the evening of the incident

18.3. The Respondent passed the bedroom door on his way to the bathroom.

18.4. The Respondent walked from the bedroom to the bathroom.

18.5. He had to cock his firearm.[14]

18.6. The Respondent, while on his stumps, fired four shots at the toilet door.

18.7. Three of the four shots struck the deceased and she died as a result of multiple gunshot wounds.

18.8. The toilet door was hinged to open outwards, that is to say into the bathroom and was locked from the inside.[15]

18.9. The Respondent knew there was a person behind the closed door.

18.10. The Respondent fired not one but four shots into the toilet door.

18.11. *"The accused clearly wanted to use the firearm and the only way he could have used it was to shoot at the perceived danger."*[16]

19.

During sentence the Court expanded on the accepted facts and at page 1757 – 1758 confirmed the following findings:

19.1. The Respondent knew there was a person behind the door when he fired the shots.

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[13] Record page 1696 L 8 - 13
[14] Record p 981 l 2 - 7
[15] Record page 1666 L 8 – 1667 L 3
[16] Record page 1697 L 4 - 6

19.2. The Respondent deliberately fired shots into the door with the aim "*to shoot the intruder*".[17]

19.3. The Respondent knew when he fired the shots that: *"The toilet was a small cubicle. An intruder would have had no room to manoeuvre or to escape.*"[18]

19.4. The Respondent was trained in the use of firearms.

We argue that the only conceivable finding based on the abovementioned "facts" could at a minimum be that, In arming himself, walking to the bathroom with the intention to shoot, whilst knowing that there is a person behind a closed door of a small cubicle and intentionally firing four shots, should be that he intended to kill the person in the cubicle. The application of the principles of *dolus eventualis* to this summary of the accepted facts can only result in a finding that he acted with, at the very least, *dolus eventualis*.

CIRCUMSTANTIAL EVIDENCE:

20.

It is the appellant's respectful submission that besides the formal admission by the respondent that he shot and killed the deceased, which fact gave rise to the charge of murder (count 1), the appellant relied on circumstantial evidence to prove its case against the accused on the said charge.

20.1. It is respectfully submitted that this Honourable Court in **R v Blom** held that for a conviction to be justified on circumstantial evidence:[19]

[17] Record page 1758 L 1 - 4
[18] Record p 1758 L 5 - 9

"(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."

20.2. It is respectfully submitted that in **R v De Villiers**, this Honourable Court found that in assessing circumstantial evidence, the following approach is to be adopted:[20]

> "The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken*. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn.* To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, *but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence."*

20.3. It is respectfully submitted that more recently, this Honourable Court in

[19] 1939 AD 188 at 202-203.
[20] 1944 AD 493 at 508-509 (emphasis added).

S v Lachman reaffirmed *"that circumstantial evidence should never be approached in a piecemeal fashion. The court should not subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality."*[21]

20.4. It is respectfully submitted that a trial court *"must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof.* Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. *Those doubts may be set at rest when it is evaluated again together with all the other available evidence*. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence…. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, *it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."* – see **S v Hadebe and Others**. [22]

20.5. It is respectfully submitted that the question would accordingly be one of whether the mosaic as a whole or the tapestry of all the evidence is beyond reasonable doubt inconsistent with the accused's innocent version of material events, to sustain a conviction.

[21] 2010 (2) SACR 52 (SCA) at para [40].

[22] 1998 (1) SACR 422 (SCA) at 426*g-h*, citing with approval from **Moshephi and Others v R** (1980-1984) LAC 57 at 59F-H (emphasis added).

21.

It is however, with respect, of utmost importance to focus on the court *a quo's* erroneous exclusion of what the appellant argued to be the most important portion of the mosaic of circumstantial evidence; being the objective fact of the position of the fan(s), duvet and denim in the main bedroom.[23] The Respondent was unable to and failed dismally to contest the veracity of the photographs and the evidence of both Col van Rensburg and W/O van Staden.[24]

22.

The State argued, and repeats the argument here that if photograph 55[25] is a true reflection of the scene discovered by Col van Rensburg, the Court *a quo* would have had no option but to reject the Respondent's version as untruthful and not possibly true.

23.

The Court *a quo* did not even attempt to deal with the evidence and explained the erroneous exclusion with: *"Having regard to the evidence as a whole this court is of the view that these issues have paled into insignificance when one has regard to the rest of the evidence."*[26]

24.

We respectfully argue that not only did the Court *a quo* exclude relevant evidence but exhibited a fragmented approach in evaluating the circumstantial evidence.

[23] Record p 967 -969
[24] Record p 908 l 8 – 909 l 19
[25] Photograph 55 – Record p 2397 . See also Record p 2410 – photograph 68
[26] Record page 1667 L 20 - 25

25.

We argue with conviction that if the fan was in front of the door; the duvet was on the floor; and if the denim jeans were lying on top of the duvet, the respondent's version of events (whichever version the Court preferred) could never have been found to be remotely reasonably, possibly true.[27]

26.

With respect, conceivably, a more devastating illustration of the Court's fragmented approach to the evaluation of circumstantial evidence and willingness to exclude dealing with the evidence that may conflict with the finding it intended to make is the finding that Captain Mangena's evidence was not only helpful, but also *"largely unchallenged"* but with respect, thereafter failed to take into account his reconstruction of the scene.[28]

27.

The position of the deceased, standing upright, fully clothed and facing the Respondent was not given the attention it deserved as part of the mosaic of circumstantial evidence and was in fact ignored. [29]

This would have clearly impacted on the Court's unfortunate acceptance of a portion of the untruthful version of the respondent that if he intended to kill the person behind the door he would have aimed higher.[30] . The circumstantial evidence indicated that he aimed at the bigger portion of the body of a human being standing upright facing the door

[27] Record p 962 l 4 – p 963 l 17 and p 969 l 18 - 25
[28] Record p 1668 l 13 -17
[29] Record p 482 l 16 - 19
[30] Record page 1708 l 15 – 18

and the main issue is he did not fire at the legs of the person or at the floor or at a point higher than where the head of a standing person could foreseeably have been. Furthermore, he did not only fire one shot but fired four shots into the vicinity of where a standing person's torso would have been.

28.

We respectfully submit that the Court *a quo* only paid lip service to the fact that it took *"all the evidence into consideration and that includes all the exhibits and all the submissions by counsel."* [31]

The inherent danger of not evaluating all the evidence and of accepting certain portions of an accused's evidence is illustrated by the failure of the Court to ask the following questions

28.1. What did he think the person was doing in the small toilet cubicle?

28.2. Did he consider the person's position before he fired?

28.3. Why did he not fire at the floor and/or feet of the person behind the door or above the person's head?

29.

The court accepted a version that was not the respondent's defence.

31 Record page 1667 L 9 - 14

The respondent's defence is that he never willingly fired the shots. That excludes any acceptance of *"why he shot*" and *"why*" at a certain height or why he fired four shots

EVALUATION OF EVIDENCE:

30.

It is the Appellant's respectful submission that it "*is trite that a trial court must consider the totality of the evidence to determine if the guilt of any accused person has been proven beyond reasonable doubt."* – see **S v Libazi and Another**.[32]

30.1. It is respectfully submitted that this Honourable Court in **S v Mdlongwa** endorsed the following principles enunciated in **S v Van der Meyden** [33]on the aspect of the proper assessment of evidence adduced in a criminal trial:[34]

> "'A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true.' …
>
> *'A court does not base its conclusion, whether it be to convict or to acquit, on only part of the evidence.'*
>
> *'The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is*

32 2010 (2) SACR 233 (SCA) at para [17].

33 1999 (1) SACR 447 (W) at 448*h-i*, 449*g-h*, 449*j*-450*b*, per Nugent J (as he then was).

34 **2010 (2) SACR 419 (SCA) at para [11] (emphasis added).**

that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored."

30.2. It is respectfully submitted that in **S v Chabalala**, this Honourable Court thus amplified the *"holistic"* approach required by a trial court in examining the evidence on the question of the guilt or innocence of an accused: [35]

"The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt."

30.3. It is respectfully submitted that the process which ought to apply in evaluating all the evidence, against which it must be determined whether an accused's

[35] 2003 (1) SACR 134 (SCA) at para [15].

version is reasonably possibly true which would entitle the accused to an acquittal, was found by this Honourable Court in **S v Trainor** to be as follows:[36]

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."*

30.4. It is respectfully submitted that an accused's version must be regarded as *"inherently improbable"* if *"he [or she] present[s] conflicting versions to the court"*, so much so that it cannot be reasonably possibly true.[37] It is respectfully submitted that this must be all the more so where the actual or true account of material events lies solely within the peculiar knowledge of the accused.

[36] 2003 (1) SACR 35 (SCA) at para [9] (emphasis added).
[37] Compare, **S v Tladi** 2013 (2) SACR 287 (SCA) at para [11] (emphasis added).

31.

Without once applying the holistic approach to the circumstantial evidence the Court dealt with:

31.1. Gun shots, sounds made by a cricket bat striking against the door and screams in the early hours of the morning.[38]

31.2. The exchange of messages between the deceased and the Respondent. The court evaluated the evidence in isolation and remarked that the court; *"refrains from making inferences one way or the other …"* [39]

31.3. The deceased's cellular phone on the scene and again evaluated in isolation found that *"there could be a number of reasons … to pick just one reason would be to delve in the realm of speculation."* [40]

31.4. As far as the gastric emptying is concerned, the Court, with respect, here ventured to speculate that the deceased "might have left the bedroom while the accused was asleep to get something to eat." [41]

31.5. Although the Court was amenable to speculate, the Court, with respect, failed to evaluate the gastric content with the evidence of Ms van der Merwe around the "argument". [42]

32.

It is with respect clear that the Court focussed on the screaming and sounds and failed to evaluate all the circumstantial evidence holistically. We respectfully argue that the Court

[38] At para [49] (emphasis added).
[39] Record page 1683 L 22 – 1684 L 12
[40] Record page 1683 L 13 - 21
[41] Record page 1684 L 12 – 1685 L 6
[42] Record page 1685 L 7 - 10

merely ignored the bulk of the evidence of the crime scene bedroom and more specifically the bedroom ,the toilet cubicle reconstruction, which is in our view the gravest misdirection and a clear mistake of law in the application of legal principles pertaining to circumstantial evidence.

33.

If the *court a quo*, as it was duty-bound, took into account that the Respondent's version about events could not have been reasonably possibly true if the evidence of Van Rensburg and Van Staden, as well as the photographs,[43]were accepted, then the accused's version as to the events before and after the shooting cannot be reasonable true.

34.

The Court *a quo* made factual findings of the Respondent's actions in arming himself and the way in which he approached the bathroom. There is however a glaring gap in *"findings"* that led him to the decision to arm himself. The Court merely ignored the chain of events that would have led to the deceased standing upright, fully clothed, facing the door of the toilet when the Respondent fired four shots.. This whilst she never uttered a word.[44] is conceivably more devastating.

35.

A holistic approach to the evidence of the condition of the bedroom, the arming – and/or disarming of the alarm[45], the evidence pertaining to the gastric content,[46] her cell phone

[43] Record p 2397,2398 and 2410
[44] Record p 1000 l 1 – 19.
[45] Record p 929 l 23 – 930 l 25 and p 937 l 9 - 21
[46] Record p 186 l 18 – p 187 l 8 and p 542 l 11 – 16

in the bathroom and the Mangena toilet cubicle reconstruction as part of the scene would, with respect, inevitably have led to a rejection of the Respondent's version.

36.

The Court focussed on the screams and sounds of the cricket bat in isolation and failed to take all the evidence into consideration. It is significant that the Court, although evaluating the circumstantial evidence in isolation, never rejected the evidence but having considered the evidence in isolation, found that other reasonable inferences could be drawn from it or that it was not convincing enough.

We however submit, that holistically considered, there exists no other reasonable inference than that the respondent's evidence can never be found to be reasonably possible. He did not *"wake up"* to bring the fans in and the deceased did not, in the specific period, unbeknown to him, move to the bathroom with her cell phone and lock herself into the toilet.

37.

A proper evaluation of the condition of the scene in the bedroom would, with respect, have shed light on the gastric content and the evidence by Ms van der Merwe.

38.

We have in paragraphs 18 and 19 (*supra*) listed the major factual findings of the court *a quo* and intend illustrating hereunder that it did not correctly apply the principles of *dolus eventualis* and *error in objecto* to the accepted facts.

This in essence will be a discussion of the relevant legal principles pertaining to *dolus eventualis* and *error in objecto* in support of our argument that the court should find in favour of the appellant as far as question 4.1 is concerned.

DOLUS EVENTUALIS AND ERROR IN OBJECTO

39.

It is the Appellant's respectful submission that, as CR Snyman observes, in our criminal law there are three forms of intention that suffice for culpability, "*namely direct intention (dolus directus), indirect intention (dolus indirectus) and what is usually described as dolus eventualis.*"[47]

40.

It is respectfully submitted that in the recent decision of **S v Brown**, this Honourable Court espoused Snyman's definition[48] of *dolus eventualis*, holding as follows:[49]

> "*In CR Snyman Criminal Law… at 184* [*dolus eventualis*] *is defined as follows:*
>
> *'A person acts with intention in the form of dolus eventualis if the commission of the unlawful act or the causing of the unlawful result* <u>*is not his main aim, but*</u>*:*

[47] CR Snyman **Criminal Law** 6 ed (2014) at 177.
[48] CR Snyman **Criminal Law** 5 ed (2008) at 184-185.
[49] 2015 (1) SACR 211 (SCA) at para [104] (emphasis added).

(a) *He subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused and*

(b) *he reconciles himself to this possibility.'*

The learned author goes on to say the following:

> *'Another way of describing component (b) is to say that X was reckless as to whether the act may be committed or the result may ensue. However, it does not matter whether component (b) is described in terms of reconciliation with the possibility or in terms of recklessness.'*

Snyman gives an example of where a person might be held to have dolus eventualis at 185:

> *'If X has dolus eventualis, it is possible that he may in the eyes of the law have the intention to bring about a result even though he does not wish the result to follow. In fact, dolus eventualis may be present even though X hopes that the prohibited result will not follow. In this form of intention the voluntative element consists in the fact that X directs his will towards event A, and decides to bring it about even though he realises that a secondary result (event B) may flow from his act.'*

41.

It is respectfully submitted that a classic formulation of *dolus eventualis*, in the context of the crime of murder, is to be found in the decision of **R v Horn**, where this Honourable Court pointed out that such intent involves foreseeing "*a risk of death*", even if "*the risk is*

slight", but where the accused notwithstanding an appreciation of such risk proceeds "*to 'take a chance' and, as it were, gamble with the life of another.*"[50] This Court added that "*there are two essential elements in the enquiry, namely (1) an appreciation by the wrongdoer that his act entails a risk to life, and (2) recklessness on his part whether death ensues or not.*"[51]

41.1. It is respectfully submitted that endorsing **R v Huebsch**,[52] Van Blerk JA in a concurring judgment in **R v Horn** (*supra*), espoused the principle that it is sufficient to prove the foreseeability element of *dolus eventualis* if the State proves that the accused foresaw "*some risk to life*", which in turn "*means the possibility and not only the probability that death may result.*"[53] Van Blerk JA proceeded to hold that "*[i]t would be incongruous to limit a wrongdoer's constructive intent to cases where the result which he had foreseen was likely to cause death and not to infer such intent where the result he had foreseen was, although possible, not likely.*"[54]

41.2. It is respectfully submitted that Van Blerk JA moreover found in **R v Horn** (*supra*) that although an "*appreciation of death as a possible result is a fact which cannot be proved by an objective test*" (the test for intention remaining a "*subjective*" one),[55] such "*must [nevertheless] be proved as an actual fact by inference from all the circumstances.*"[56] Van Blerk JA[57] quoted with approval **R v Hercules**, where this Honourable Court enunciated the principle that

[50] 1958 (3) SA 457 (A) at 465B-C (emphasis added).
[51] *Ibid* at 465D.
[52] 1953 (2) SA 561 (A).
[53] 1958 (3) SA 457 (A) at 467A-B (emphasis added).
[54] *Ibid* at 467B.
[55] *Ibid* at 466D-E.
[56] *Ibid* at 466G-H (emphasis added).
[57] *Ibid* at 466H-467A.

because of the difficulty encountered in proving "*a person's mental processes*", such element would effectively be "*a matter of inference*" which is to be based on upon what the accused "*must have foreseen.*"[58]

41.3. It is respectfully submitted that by 1960, the formulation of *dolus eventualis* crystallised in **R v Horn** (*supra*) was regarded in academic writing as the best formulation of the principle.[59] On the basis of **R v Horn** (*supra*),[60] **S v Malinga and Others**,[61] **S v Nkombani and Another**,[62] **S v Sigwahla**,[63] and **S v Sikweza**,[64] the commentators MM Loubser and MA Rabie point out that "*[a]fter some uncertainty in older cases it now is established law that what must be foreseen is only the possibility and not necessarily the probability or the likelihood of the occurrence of the result in question.*"[65] Loubser and Rabie observe that *dolus eventualis* "*essentially involves a cognitive awareness or conclusion that the harmful result may occur in the particular circumstances*", but where the accused "*nevertheless proceeds with his action.*"[66]

42.

It is respectfully submitted that in **S v De Bruyn en 'n Ander**, this Honourable Court, per Holmes JA, held that *dolus eventualis*, where murder is committed, entails that

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[58] 1954 (3) SA 826 (A) at 831A (emphasis added).
[59] See, JC de Wet and HL Swanepoel **Die Suid-Afrikaanse Strafreg** 2 uitg (1960) at 128.
[60] 1958 (3) SA 457 (A) at 467B.
[61] 1963 (1) SA 692 (A) at 694G-H, where **R v Horn** 1958 (3) SA 457 (A) was followed.
[62] 1963 (4) SA 877 (A) at 891C-D.
[63] 1967 (4) SA 566 (A) at 570B-C.
[64] 1974 (4) SA 732 (A) at 736F-G.
[65] MM Loubser & MA Rabie 'Defining dolus eventualis: a voluntative element?' (1988) 3 *South African Journal of Criminal Justice* 415 at 416 (footnotes omitted).
[66] Loubser & Rabie (1988) *SACJ* at 435 (emphasis added).

"*[t]he accused foresees the possibility, <u>however remote</u>, of his act resulting in death to another, <u>yet he persists in it</u>, reckless whether death ensues or not.*"[82] In enumerating the "*multiple characteristics*" which comprise *dolus eventualis*, Holmes JA added that such form of intent involves:[83]

> "*1. Subjective foresight of the possibility, <u>however remote</u>, of his unlawful conduct causing death to another*
>
> *2 Persistence in such conduct despite the foresight*
>
> *3. An insensitive recklessness (which has nothing in common with culpa).*
>
> *4. <u>The conscious taking of the risk of resultant death, not caring whether it ensues or not.</u>*
>
> *5. The <u>absence of actual intent</u> to kill.*"

43.

In casu the respondent armed him with a firearm loaded with lethal ammunition, approached the bathroom with the intention to shoot. [84]

The respondent, who is trained in the use of firearms, knowing that there was a person behind a closed door, in a small cubicle, where an intruder would have had no room to manoeuvre deliberately fired four shots with the aim to shoot the intruder.[85]

[82] 1968 (4) SA 498 (A) at 510F-G (emphasis added).
[83] *Ibid* at 510G-H (emphasis added).
[84] para 18.11 supra
[85] para 19 supra

44.

It is respectfully submitted that in **S v Dlodlo**, this Honourable Court held that:[86]

> "*[t]he subjective state of mind of an accused person at the time of the infliction of a fatal injury is not ordinarily capable of direct proof, and can normally only be inferred from all the circumstances leading up to and surrounding the infliction of that injury. Where, however, the accused person's subjective state of mind at the relevant time is sought to be proved by inference, the inference sought to be drawn must be consistent with all the proved facts, and the proved facts should be such that they exclude every other reasonable inference save the one sought to be drawn.*"

45.

It is respectfully submitted that in delineating the principles that are relevant to *dolus eventualis*, this Honourable Court in **S v P** affirmed that in determining whether *dolus eventualis* was present, "*[t]he better approach is to think one's way through all the facts, before seeking to draw any relevant inference*."[87]

46.

It is respectfully submitted that, on the question of inferring the element of intention, particularly what was foreseen, from the facts, Holmes JA in **S v De Bruyn en 'n Ander** (*supra*), in eschewing a "*piecemeal processes of reasoning and rebuttal*", said that:[88]

> "*The Court prefers to look at all the facts, and from that totality to ascertain whether the inference in question can be drawn.*"

[86] 1966 (2) SA 401 (A) at 405G-H (emphasis added).
[87] 1972 (3) SA 412 (A) at 416E (emphasis added).
[88] 1968 (4) SA 498 (A) at 507F (emphasis added).

47.

It is respectfully submitted that in **S v Shaik and Others**, on the question of what the accused foresaw might happen as a "*possibility*" for purposes of *dolus eventualis*, this Honourable Court observed that "*if the facts are such that an adverse inference must be drawn, it will not assist the defence to show that the risk of injury or worse appeared unlikely, highly improbable or remote.*"[89]

48.

It is respectfully submitted that in **S v Beukes en 'n Ander**, this Honourable Court pertinently held that since:[90]

> "*The chances of an accused admitting, or of it appearing from other evidence, that he had indeed foreseen a remote consequence are very thin*", a Court "*draws an inference concerning an accused's state of mind from the facts which point to it being reasonably possible, objectively seen, that the consequence would eventuate.*"

The Court held further that:[91]

> "*[i]f such a possibility does not exist, it is simply accepted that the actor did not become conscious of the consequence. If it does exist, it is usually inferred from the mere fact of his taking action that he took the consequence into account.*"

[89] 1983 (4) SA 57 (A) at 62F.
[90] 1988 (1) SA 511 (A) at 511I (headnote translation) (emphasis added).
[91] *Ibid* at 511I-J (headnote translation) (emphasis added).

The Court found:[92]

> "*Daar is, sover ek kon nagaan, geen gewysde waarin pertinent beslis is dat 'n dader 'n gevolg voorsien het maar nie onverskillig teenoor die intrede daarvan gestaan het nie. Die rede is voor die hand liggend. Die kanse dat 'n beskuldigde sal erken, of dit uit ander direkte getuienis sal blyk, dat hy inderdaad 'n verwyderde gevolg voorsien het, is bitter skraal. 'n Hof maak dus 'n afleiding aangaande 'n beskuldigde se gemoed uit die feite wat daarop dui dat dit, objektief gesien, redelik moontlik was dat die gevolg sou intree. Indien so 'n moontlikheid nie bestaan nie, word eenvoudig aanvaar dat die dader nie die gevolg in sy bewussyn opgeneem het nie. Indien wel, word in die reël uit die blote feit dat hy handelend opgetree het, afgelei dat hy die gevolg op die koop toe geneem het.*"

49.

In summary, having regard to the afore-going case-law and authority, it is respectfully submitted that *dolus eventualis* is proved if the accused foresees a risk of death, however slight, but nevertheless decides to take a chance and gambles with the life of the deceased reckless to the consequences. It is respectfully submitted that such a state of mind on the part of the accused can be inferred objectively from the totality of all the facts.

50.

Having refrained from quoting the record, it is, with respect apt to quote the respondent's own views as to the foreseeability in relation to *dolus eventualis*:[93]

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[92] *Ibid* at 522C-D (emphasis added).
[93] record 1092 l 1 – 1093 l 21

> *"… M"Lady, if I had fired a shot into the shower, it would have ricocheted and possibly hit me … Firing into that door, in the small toilet, a ricochet of that ammunition would be possible and it would hit someone? Am I right? --- That is correct, M'Lady…"*

Acknowledging that the court *a quo* correctly rejected the evidence of the respondent it is perhaps and may still be appropriate to quote his acceptance that it is probable that someone in that toilet would be hit if shots are fired:[94]

> *" … If I think back today, My Lady, If there was someone inside the toilet and I knew about that and I fired at the door, then that would be a possibility, My Lady…That they could get shot, My Lady… It is a probability? --- Yes, My Lady*"

51.

The court *a quo's* finding, that the respondent armed himself and approached the bathroom with the intention to shoot, read with the accused's own perception of foreseeability and the objective facts inclusive of him firing four shots at the torso level of a normal human being in circumstances where there was no perceived or real attack on him, can with respect, only be evaluated as the respondent having at least the intention to kill in the form of *dolus eventualis*. He *gamble(d) with the life of another*.

ERROR IN OBJECTO

52.

52.1. It is the Appellant's respectful submission that the crime of murder entails "*the unlawful and intentional causing of the death of another human being.*"[95]

[94] Record p 1094 l 8 – l 25

52.2. It is respectfully submitted that murder "*is committed any time a person unlawfully and intentionally kills a human being, and not merely if a person kills that particular human being who, according to his conception of the facts, corresponds to the person he wanted to be the victim.*"[96] The learned author CR Snyman notes that "*[f]or this reason X in this case is guilty of murder. His mistake about the object of his act (error in objecto) will not exclude his intention, because the mistake did not relate to an element contained in the definition of the crime.*"[97] It is respectfully submitted that, in this instance, X's mistake does "*not relate to whether it was a human being he was killing*", but simply "*to the identity of the human being.*"[98]

53.

It is respectfully submitted that other South African academic writers, namely JC de Wet and HL Swanepoel,[99] JRL Milton[100] and JH Pain,[101] also point out that the fact that the accused kills the wrong person through mistaken identity has no bearing upon the requirements of the definition of murder, which crime pertains to the killing of a human being whatever the identity of the victim might be.

54.

It is respectfully submitted that in the case of *error in persona* in the context of murder, there is intent to kill a person; the fact that the person turns out to be someone different

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[95] CR Snyman **Criminal Law** 6 ed (2014) at 437 (emphasis added).
[96] Snyman **Criminal Law** *supra* at 189 (author's emphasis).
[97] Snyman **Criminal Law** *supra* at 189 (emphasis added).
[98] Snyman **Criminal Law** *supra* at 189 (emphasis added).
[99] JC de Wet **De Wet en Swanepoel Strafreg** 4 uitg (1985) at 145.
[100] JRL Milton 'A Stab in the Dark: A Case of *Aberratio Ictus*' (1968) 85 *The South African Law Journal* 115 at 118.
[101] JH Pain '*Aberratio Ictus*: A Comedy of Errors - And Deflection' (1978) 95 *The South African Law Journal* 480 at 489, 491, 500, 501-503.

from the person whom the accused actually wanted to kill (or whom he thought he was killing), is a mistake which is completely irrelevant and consequently does not negative intention.[102]

55.

It is respectfully submitted that the reason why advocates of this doctrine "*have no qualms about conviction following upon a case of mistaken identity… is that, in their view, there is a sufficient mens rea provided the accused strikes the person aimed at, whoever that person may turn out to be.*"[103] The crime of murder "*falls upon the body against whom the accused directs his activity.*"[104]

56.

It is respectfully submitted that in tracing the principle of immaterial *error in objecto* or *error in persona*, as aforesaid, to Roman-Dutch law writers, the authors, De Wet and Swanepoel, also cite with approval, what they call, Antonius Matthaeus' sound approach to the aspect.[105] JH Pain articulates Matthaeus' approach as follows:[106]

> "*Matthaeus explains that a person who through error kills an unintended victim is liable to capital punishment because, quite simply, he nevertheless killed with the necessary intent. Similarly with the man who injures Sejus in mistake for Titius, intends adultery with Pompeja yet lies with Fulvia, or steals the wrong item of property. But the man who by mischance kills another instead of the animal hunted, strikes the free bystander intending to kill his slave, or*

[102] **De Wet en Swanepoel Strafreg** *supra* at 145.
[103] Pain (1978) *The South African Law Journal* at 500 (emphasis added).
[104] Pain (1978) *The South African Law Journal* at 501 (emphasis added).
[105] **De Wet en Swanepoel Strafreg** *supra* at 146.
[106] Pain (1978) *The South African Law Journal* at 488-489.

calls upon virgins when desirous of whores, is exempt from criminal liability, because in these cases there is an absence of the requisite intention."

In these circumstances, according to Matthaeus, the mistake of fact in the mind of the accused as to the identity of the "unintended" victim does not negative intention.[107] For, the definitional elements of the crime remain the same.

57.

It is respectfully submitted that in **The Law of South Africa**, it is pertinent to note the distinction drawn between a material and immaterial or irrelevant mistake of fact:[108]

> "*A mistake of fact, in order to negative intention, must be material, in other words, it must relate to an essential element of the offence in question. … Not every error in obiecto will, however, negative intention and a mistake which relates merely to the identity of the subject matter of the crime or the victim does not qualify, for example, where a person intends to steal a diamond and takes a piece of glass instead. In spite of the accused's error, he or she still had intention to steal.*"

[107] Pain (1978) *The South African Law Journal* at 488-489. See also, Antonius Matthaeus **On Crimes A Commentary on Books XLVII and XLVIII of the Digest: Volume III** (Edited and Translated into English by ML Hewett and BC Stoop) (1994) **Book 48** at 377-378:

> "*The next item is for us to see what should be said if the attempt resulted in a killing, but not of that person whom the killer intended. For example, Sempronius killed Maevius by mistake, when he wanted to kill Titius. Must he then be punished more leniently, on the grounds that he was deprived of the successful outcome of his crime? In this case the better view, even according to custom and general practice, is that the death penalty must not be remitted. Obviously, Sempronius had the intention to kill and he actually did kill, although he did not kill the person he intended. General practice punishes an accomplished crime. This crime was accomplished, although against the person of another. Therefore it is fair that this be avenged by the sword. For, in the same way, if he who wished to insult Titius, insults Seius, whom he thinks to be Titius, he is liable for the iniuria to Seius [D.47.I0.I8.3]. And one who has prevailed upon a slave, whom he thought was a free man, is held liable to the master for the corruption of a slave [D.II.3.5.I]. How ridiculous it would be if Sempronius were to argue that punishment for theft must be remitted in his case, because by mistake he took Damon's goat while he wanted Damaeta's. Or if Clodius begged that the penalty for adultery be waived because when he desired Pompeia, he committed adultery with Lepida or Fulvia. If this defense is ridiculous in a case of theft or adultery, why should it be allowed in case of murder?*"

(Emphasis added).

[108] WA Joubert (founding ed) **The Law of South Africa: Volume 6** 2 ed (2010 Replacement Volume) at 92 (para 96) (footnotes omitted) (emphasis added).

It is respectfully submitted that in German criminal law, which also rejects the transferred malice doctrine,[109] "*a mistake about the identity of the object attacked is irrelevant, as long as the objects are of the same nature. Thus if D aims at V who is standing 20 metres away from him thinking it is A, whereas it is A's twin brother, B, he will be guilty of B's murder if he kills B. However, if D is a hunter and during a hunt at night in the forest shoots at a shape he takes for a wild boar, but which in fact is his fellow hunter V, he will only be guilty of negligent homicide, because the objects are of an unequal nature.*"[110] Michael Bohlander, in discussing the principles of German criminal law, explains that merely because the accused did not want or have a motive to kill Y, thinking that he or she was killing Z, does not negate legal intention for the killing of Y.[111] Similarly, with reference to Dutch and German law under the heading of *error in persona vel obiecto*, Jeroen Blomsma writes:[112]

> "*The defendant who shot Y, thinking it to be X, is held to have intended death… In contrast, some legal acknowledgement can be found for making the error in persona relevant. It can be argued that the actor would not have shot if he knew he shot the actual victim. Hamlet mourned that he had mistaken Polonius for Claudius. If the actor knew in advance that he would kill his son rather than his enemy, he would not have acted. It strains the common sense meaning of the*

[109] M Bohlander 'Problems of Transferred Malice in Multiple-actor Scenarios' (2010) 74 *The Journal of Criminal Law* 145 at 159.

[110] M Bohlander **Principles of German Criminal Law** (2009) at 72 (emphasis added). See also, Bohlander (2010) *The Journal of Criminal Law* at 158-159 (with reference to the *Rose-Rosahl* case (1859) Goltdammers Archiv 322 – decided in 1858 by the *Preußisches Obertribunal*); and H Mannheim 'Mens Rea in German and English Law-II' (1935) 17 *Journal of Comparative Legislation and International Law* 236 at 246, where it is noted:

> "A intends to kill B, but mistakes C for him, whom he kills. Such an *error in objecto* is, according to German law, unessential, always provided the two objects are of the same legal value."

[111] Bohlander **Principles of German Criminal Law** *supra* at 62-63.

[112] J Blomsma ***Mens rea* and defences in European criminal law** (2012) at 240-241 (footnotes omitted) (emphasis added).

word 'intend' to say that the defendant wanted to kill his son, as this was the very last thing he desired. However, it is clear that desires and motives are irrelevant to dolus and it is no longer a condition for dolus (eventualis) that the actor would have continued if he knew the (particular) result would occur. The fact that the defendant regrets his mistake should only be incorporated in sentencing."

59.

The court *a quo*, with respect correctly found that the court was confronted with a case of *error in objecto* and not *abberatio ictus* [113] Our respectful submission is that the court *a quo* failed to apply the principles of *error in objecto* by placing undue reliance on the respondent's *"… reaction that he had shot the deceased …".* [114]. We argue respectfully that his conduct as described [115], should have played no role whatsoever in evaluating his conduct as having acted in *error in objecto*. The court *a quo* elevated the respondent's reactions when he realised that he had shot the deceased as one of only, with respect, three factors used in excluding that the respondent acted with *dolus eventualis.*

60.

We respectfully submit that the court in an attempt to address the principles of *error in objecto,* accepted the explanation of the respondent (factor 2), whose evidence about the shooting was rejected, that if he had intended to kill the person behind the door he would have aimed higher at chest level. We respectfully have argued earlier that he neither

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[113] Record p 1704 l 15 – 21
[114] Record p 1708 l 18 – 21
[115] Record p 1707 l 9 - 25

aimed low or high but that the objective facts indicate that the shots entered the door at the torso level, and furthermore argue that if accepted it merely excludes *dolus directus* and not *dolus eventualis*.

SUMMARY OF ARGUMENTS

61.

We respectfully argue that the Court should find in favour of the appellant on all the questions as reserved by the court *a quo.*

61.1. The court not only approached the circumstantial evidence incorrectly but also incorrectly excluded relevant evidence. The court was only willing to take into account as circumstantial evidence the fact that the "bathroom window was indeed open" and "the toilet door was indeed shut"[116]. The court failed to evaluate the circumstantial evidence holistically especially with regards to the condition of the fan and duvet and the reconstruction of the shooting scene.

61.2. If the court approached the circumstantial evidence correctly the court would not have been able to find that the respondent's evidence may be reasonable possibly true.

61.3. The court a quo not only rejected the respondent's evidence but in fact constructed a version in direct conflict with the respondent's defence. The court in following the *ipsi dixit* of the respondent whose evidence pertaining to his intention when arming himself and approaching the bathroom was rejected, accepted his version of his intention when he fired the shots.

[116] record p 1706 l 19 – 22

61.4. The court erroneously applied the principles of *dolus eventualis* to the accepted facts by relying on the respondent's state of mind relating to the fact that he had shot the deceased. The court elevated his state of mind in relation to the death of the deceased to an exclusion of intention, discarding the principles of *error in objecto*

62.

It was never our argument that an accused's untruthful evidence should lead to his conviction[117]. Our respectful argument is that if an accused's evidence is rejected as untruthful the court will rely on the objective facts. This *in casu* would have resulted in a conviction on murder.

CONCLUSION

63.

We respectfully argue that the court should find in favour of the appellant/State on all the questions reserved:

63.1. On question 1 we respectfully submit that the court will find that the *court a quo* incorrectly applied the principles of *dolus eventualis* and *error in objecto* to the accepted facts and the conduct of the respondent.;

[117] record p 1699 l 1699 l 14 – p 1700 l 25

63.2. On question 2 we respectfully submit that the court will find that the *court a quo* incorrectly conceived and applied the legal principles pertaining to circumstantial evidence and multiple defences by an accused

63.3. On question 3 we respectfully submit that the court will find that the *court a quo* was wrong in its construction and reliance on an alternative version of the respondent as well as wrongly concluded that the alternative version was reasonably possibly true.

64.

We respectfully submit that the court may then act in terms of the provision of Section 322 of the Act.

65.

We argue that section 322(1)(b) is applicable and therefore the court may give the judgment that ought to have been given at the trial which is a conviction on the main count of murder.

The court may act in terms of the provisions of Section 322(4), which in our respectful submission empowers the court to order that new proceedings be instituted on the original charge as if the accused/respondent had not previously been arraigned

DATED at PRETORIA on this the 13TH day of AUGUST 2015.

…………………………………

G C NEL

…………………………………

A JOHNSON

…………………………………

D W M BROUGHTON

ADVOCATES FOR THE APPELLANT

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