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Dissociation From the Common Purpose – The Ambit of the Defence in South African Law*

1 Introduction

The doctrine of common purpose helps facilitate criminal prosecutions involving collective criminal conduct. Its utility is evident where more than one person participates in the commission of a crime, making it difficult to prove a direct causal connection between the act of a particular accused and the ensuing harm (for discussion of the common-purpose doctrine, see Burchell, Schwikkard and Mosaka *Burchell's Criminal Law* 6ed (2025) 426ff; Hoctor *Snyman's Criminal Law* 8ed (2025) 228ff; Kemp (ed) *Criminal Law in South Africa* 4ed (2022) 283ff). The doctrine's utility in collective criminal conduct accounts for the apparent ubiquity of common purpose, along with its ringing endorsement by the Constitutional Court in a range of decisions (such as *S v Thebus* 2003 (2) SACR 319 (CC); *S v Jacobs* 2019 (1) SACR 623 (CC); *S v Tshabalala* 2020 (2) SACR 38 (CC)). The increased facility of conviction brought about by application of the common-purpose doctrine in turn shifts the spotlight onto the question whether an accused, having initially associated with a common purpose to commit a crime, can rely on a defence that can exclude criminal liability for participation in group conduct. This is particularly significant in light of the fact that an initial common purpose to commit a particular crime can expand to encompass a different crime (as occurred, for example, in *S v Musingadi* 2005 (1) SACR 395 (SCA) par 33–34).

Such a defence, which serves an important legitimating function for the doctrine, does exist, and is known as dissociation or withdrawal from the common purpose. (Although the terms may be used interchangeably, for present purposes the term "dissociation" will be used. For discussion of the dissociation defence, see Burchell *et al Burchell's Criminal Law* 454–457; Hoctor *Snyman's Criminal Law* 236–237; Kemp (ed) *Criminal Law in South Africa* 288–289). Once an accused has associated themself with a common purpose, whether such common purpose arises as a result of a prior agreement or by active association (these forms of common purpose were recently affirmed in *S v Thabethe* 2025 (2) SACR 335 (SCA) par 53, 118; for

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discussion, see Hoctor "Distinguishing the Forms of Common Purpose Liability – *S v Govender* 2023 (2) SACR 137 (SCA)" 2023 *Obiter* 913), it is required that they dissociate (or voluntarily withdraw) themself from the common purpose to avoid criminal liability for the ultimate harm committed by the group.

It bears noting that an act of association (whether in the form of an agreement with the other participant(s) prior to and founding the criminal conduct, or a spontaneous contemporaneous confederation with the conduct of other participant(s)), and a concomitant intention to commit the crime in question, must precede any consideration of the dissociation defence. There can be no *dissociation* without preceding intentional conduct constituting *association* (see, e.g., *S v Van Wyk* 2013 JDR 0667 (SCA), where the court overturned a conviction based on the appellant's failure to dissociate from the common purpose to kill the deceased, holding that there had not been an association with the ensuing murder on the part of the appellant).

There are two aspects of the dissociation defence: (i) an act of dissociation; and (ii) the abandonment of an intention to commit a crime (in respect of dissociation from active-association common purpose, see *S v Singo* 1993 (1) SACR 226 (A) 233A–F/1993 (2) SA 765 (A) 772B–I). While the State bears the burden of proof of all the elements of liability required to establish guilt beyond a reasonable doubt, an accused relying on the dissociation defence would at least have to adduce evidence in support thereof (where the accused fails to testify, the chances of the defence succeeding are very slim; see *S v Mkhize* 1999 (2) SACR 632 (W) 639C–E, followed in *S v Masina* 2017 JDR 2027 (GP) par 28.2).

In respect of (i), the act of dissociation, Snyman has set out a set of propositions reflective of the law in this regard (Hoctor *Snyman's Criminal Law* 236–237). These include: a clear and unambiguous intention to withdraw; a positive withdrawal rather than mere passivity; that the withdrawal be voluntary; that it should take place before the commencement of the execution of the crime; that the type of act required for withdrawal depends on various circumstances; and that the role played by the accused in devising the plan to commit the crime is determinative of what they need to do to withdraw from the common purpose. These propositions are revisited below, in light of the case law.

In respect of (ii), the intention of the accused in a common-purpose situation cannot be overstated. After all, as indicated above, it is the accused's intentional joining with the common purpose of the group that founds liability in terms of the common-purpose doctrine. It follows that the expression of the intent requirement in a common-purpose situation is crucial. Where the form of intent in question is *dolus eventualis* (as is frequently the case), the accused's actual subjective foresight that the harm may possibly occur, along with the accused's conscious acceptance of this risk, must be established beyond reasonable doubt. Ongoing foresight of and reconciliation with the risk of harm occurring will negate an accused's claims to have dissociated from the criminal conduct, even if the accused has acted in a manner that may be consistent with dissociation (*S v Singo supra* 233D–F/772F–I).

Courts have long wrestled with the concept of "effective dissociation" (Makiwane *The Nature of Association and Dissociation for Common Purpose Liability* (LLM dissertation, University of South Africa (UNISA)) 1999 31–32). As articulated by the court in *S v Ndebu* (1986 (2) SA 133 (ZS) 136F–G), the pertinent question is what is meant by the word "dissociate". In particular, it is important to ask when it could be determined that a particular course of action or inaction is sufficient to constitute an effective dissociation from the common purpose.

The discussion below traces the development of the defence of dissociation from the common purpose in South African law. The note concludes with a brief analysis of the nature and ambit of dissociation in its current form. The form of this piece – a note – precludes a more expansive treatment of the subject matter, although it is hoped that the review that follows provides a concise and thorough treatment of the significant cases dealing with the dissociation defence, and stimulates further research in the area.

2 The development of the defence of dissociation (or withdrawal) from the common purpose through the case law

The question of dissociation (or withdrawal) from the common purpose seems to have received little attention in the courts in the first part of the twentieth century, when the doctrine was still nascent (on the historical antecedents of the common-purpose doctrine, see Hoctor "The Genesis of the Common Purpose Doctrine in South Africa" 2023 *PELJ* https://dx.doi.org/10.17159/1727-3781/2023/v26i0a16385 1). The term "dissociation" was raised by the court, and then discarded on the facts, in the application of the common-purpose doctrine in *S v Dambalaza* (1964 (2) SA 783 (A) 787H–*in fin*). While the doctrine of common purpose has followed its own developmental path (Hoctor 2023 *PELJ* https://dx.doi.org/10.17159/1727-3781/2023/v26i0a16385 1), it is useful to refer to the approach adopted in the Rhodesian/Zimbabwean courts, where common-purpose judgments both drew on South African judgments and provided persuasive authority for South African courts.

2 1 The Rhodesian/Zimbabwean cases

The question of dissociation emerged in some judgments of the erstwhile Rhodesian Appellate Division. In *R v Njenje* (1966 (1) SA 369 (SRA) 378D–H), the court held that where the accused, who had a minor role in the criminal enterprise, had run away from the scene of the crime, he could be held to have effectively dissociated himself from the common purpose. Similarly in the unreported case of *R v Nyamande* (166/67, 22 December 1967, SRA) the sixth appellant, who ran away before the common goal of setting a bus on fire could be achieved, it was held that he could not be convicted of the principal offence (contravention of s 37(1)(*a*) of the Law and Order (Maintenance) Act Chap 39, discussed in *R v Chinyerere* 1980 (2) SA 576 (RA) 579A–F). This approach was also adopted in the *Chinyerere* case (*supra* 579F–H), where the court held

that, in light of the *Njenje* and *Nyamande* cases, there was "clear authority … for the proposition that a conspirator can withdraw from the enterprise even at the last moment, and in the event of his withdrawal he is entitled to his acquittal on the main charge".

The judgment in *Chinyerere* was described in *Ndebu* (*supra* 136G) as the only reported case in the Roman-Dutch jurisdictions dealing with the question of dissociation in the judgment of the Zimbabwe Supreme Court. It is unclear why the *Njenje* case was not mentioned in *Ndebu* in this regard, but the court's comment correctly refers to the paucity of jurisprudence at this stage regarding the question of dissociation from the common purpose, most notably, for present purposes, in the South African context. The lack of guidance in the preceding case law evidently underpinned a rather cautious approach to the question as to what is constituted by a "dissociation". In *Ndebu*, the second appellant had fled the scene of a housebreaking, apparently hearing the first appellant fire the gunshot that fatally wounded the deceased as he reached the gate of the premises.

While the court was prepared to accept that the last-minute withdrawal or repentance could affect sentence (it did not engage with the analogous decision in *Chinyerere* other than to affirm that it was "undoubtedly right on the facts" (*Ndebu supra* 136I–J)), it regarded the legal situation in respect of conviction as "not altogether clear" (135E–F), and sought to discern what "dissociation" entailed, consulting English writers and case law (135F–136E). The court used these sources in opining that "in certain cases something more positive is required of the one seeking to dissociate himself than merely to run away" (*Ndebu supra* 136I–J, followed in *S v Lungile* 1999 JDR 0773 (SE) 76). On this reasoning, the court held that the second appellant, having associated himself with the risks associated with housebreaking and armed robbery, having actively contributed to the breaking-in, and having "linked his fate and his guilt with that of his armed companion" (*Ndebu supra* 137C–D), could not be regarded as having dissociated himself from the killing of the deceased. The conviction of the second appellant for murder was therefore confirmed, although his death sentence was set aside in favour of a finding of extenuating circumstances, which justified a lengthy prison sentence instead.

The court's reasoning in respect of the finding that there had not been dissociation on the part of the second appellant is instructive. Having particularly noted that he had *dolus eventualis* (which the court describes as "constructive intention" or "legal intention") in respect of the killing (he "subjectively foresaw the possibility of a killing, and was reckless as to whether or not it would occur" (*Ndebu supra* 137D–E)), the court stated the following:

> "His flight neither averted the danger nor purged the recklessness. I have no doubt that in such circumstances mere flight was not dissociation, any more than hiding under a bed would have been. Had he disarmed or dissuaded his companion or protected the householder in some way he might perhaps have purged his constructive intention. But what he did is inadequate." (*Ndebu supra* 137E–F)

The court's description of the appellant's conduct needing to be purgative in respect of his *dolus eventualis* is somewhat curiously phrased. The

preceding paragraph of the judgment is indicative of the court's logic where it states that "[t]he mind that needed changing was not his but his companion's" and that his "constructive intention to kill depended on a decision by his companion" (*Ndebu supra* 137C–D). What can at least be safely concluded regarding "dissociation" in *Ndebu* is that a mere change of heart does not in itself suffice for dissociation, nor even constitute objective evidence of such change of heart; something more is required.

2 2 S v Nomakhlala 1990 (1) SACR 300 (A)

The discussion moves now to South African case law. A few years after the *Ndebu* case was decided, the question of what conduct constitutes dissociation from a common purpose arose before the Appellate Division in *S v Nomakhlala* (1990 (1) SACR 300 (A)). In this case, the elderly deceased was assaulted and killed by a group of men. The two appellants appealed their murder convictions, which were founded on the common-purpose doctrine. Their appeals were ultimately successful, but apparently on different grounds. While the court held that it had not been established that the second appellant had actively participated in the murder, in relation to the first appellant it was held that while his initial association in the common purpose to kidnap the victim was clear, his immediate dissociation from the killing of the victim, when it became clear that this was the intention of the perpetrators, was sufficiently indicative of his own lack of intent to kill for his appeal against conviction to be upheld.

In particular, the court (per FH Grosskopf JA) noted the first appellant's refusal to obey the instruction to stab the deceased with a knife that was handed to him, which was followed by an immediate withdrawal from the scene (*S v Nomakhlala supra* 303H–I). It is moreover noteworthy that the court did not accept the urging of the State that the first appellant could not be regarded as having dissociated himself from the killing, as he had not tried to "dissuade his alleged companions or to protect the deceased in some way" (*S v Nomakhlala supra* 303I–J). Instead, the court made allowance for the first appellant, stating that he was not a "comrade", and that given the "circumstances which prevailed in the townships generally at the time it might not have been very prudent" for the appellant to engage in such actions (*S v Nomakhlala supra* 304A–B). The court accordingly distinguished its own approach from the approach followed in *Ndebu*, where the second appellant from the outset appreciated the possibility of death ensuing, and merely sought to run away. In contrast, the court reaffirmed that the first appellant in *Nomakhlala* "actually refused to comply with an instruction to stab the deceased when he realized what the assailants had in mind for the deceased" and then "withdrew from the scene of the crime" (*S v Nomakhlala supra* 304B–D).

It is noteworthy that the *Nomakhlala* case was distinguished by EM Grosskopf JA in *Singo* (*supra*) as not really a case of dissociation from a common purpose, but rather of lack of association (although the court's statement (232G–H/771H–I) – that the appellant's "dissociation from [the] action of the murderers served to demonstrate his lack of association from the common purpose rather than to constitute dissociation therefrom" – does not add clarity to this explanation). The statement in *Nomakhlala* that the

limited participation and minor role played by the appellants "tend to refute the argument that they were parties to such common purpose" (*S v Nomakhlala supra* 303B–C) seems to support the view that the matter was decided on the basis of lack of association, as indeed does the statement that it could be reasonably inferred that the first appellant did not have subjective foresight of the death of the deceased occurring (*S v Nomakhlala supra* 303E–G). Indeed, on this reasoning, the acquittal of the first appellant is required on the basis of a lack of common purpose to murder.

However, the court did not follow such reasoning to its logical conclusion but instead continued to examine the question whether the first appellant withdrew from the common purpose, holding that he "immediately dissociated himself from any further active participation" (*S v Nomakhlala supra* 303H–I), as manifested by his refusal to stab the deceased and his departure forthwith from the scene. FH Grosskopf JA then proceeded to hold that the trial court's finding – that the first appellant had not dissociated himself from the common purpose to murder – as well as arguments to this effect by counsel for the State, based on *Ndebu*, were without justification (*S v Nomakhlala supra* 303H–304D). Unlike the second appellant, in relation to whom there was reasonable doubt that he had "actively associated" himself with those who intended to kill the deceased (*S v Nomakhlala supra* 305G–H), the first appellant was therefore held to have dissociated from the common purpose to kill, and his appeal against conviction was upheld on this basis (*S v Nomakhlala supra* 304C–D). That there was indeed a dissociation from the common purpose in respect of the first appellant in *Nomakhlala (*contrary to EM Grosskopf JA's assessment), is supported by the Constitutional Court judgment in *S v Molimi* (2008 (2) SACR 76 (CC) par 32), and *S v Namane* ([2016] ZAFSHC 224 par 51).

2 3 S v Nzo 1990 (3) SA 1 (A)

The Appellate Division was once again required to consider what constituted a dissociation in *S v Nzo* (1990 (3) SA 1 (A)). The majority of the court upheld the legal correctness of the murder conviction of the appellants (for a killing that occurred when they were not present) on the basis of their continuing participation in the common design to commit sabotage, in terms of which the possibility of fatalities was foreseen. However, the court accepted that when the murder was committed, the first appellant had already withdrawn from the common purpose. The circumstances were that the first appellant had left Port Elizabeth (where the murder took place) to travel to Lesotho. En route to Lesotho, he was, however, detained in Aliwal North, in connection with his identity document. When detained by the police, the first appellant embarked on a voluntary and detailed explanation of the operation of the underground sabotage cell of which he was a part (*S v Nzo supra* 8I–10F). The court *a quo* did not regard the making of this complete statement as amounting to a dissociation from the murder, but the majority of the Appellate Division disagreed, and thus held that he should be absolved from liability for the deceased's killing (*S v Nzo supra* 11F–G). The rationale for this finding was not merely the timing of the statement – that it took place prior to the killing – but that by revealing this information to the

police, the accused was irrevocably stepping away from his role in the sabotage cell. The court put it thus:

> "What I find so remarkable is that this trained terrorist who had been involved in serious acts of sabotage suddenly turned traitor and almost anxiously told the police about his deeds when he had no reason to do so. He must have realised that by doing so he was destroying every possible chance he still had of continuing his mission since the police would certainly not let him go after getting to know who and what he was and what he had done. And even if they would be foolish enough to release him, his anonymity was destroyed; he could be of no further use and would, on the contrary, rather be a liability to his confederates by remaining in Port Elizabeth. Unless, therefore, he wanted no further part in the mission why did he behave in this manner?" (*S v Nzo supra* 11A–D)

This authoritative approach to dissociation in the *Nzo* majority judgment was followed in cases such as *Singo* (*supra* 232E–F/771F–G), *S v Nduli* (1993 (2) SACR 501 (A) 504E–F), *S v Maelengwe* (1999 (1) SACR 133 (NC) 152C–D), *Lungile* (*supra* (SE) 76), *Musingadi* (*supra* par 34), *Molimi* (*supra* par 32), *S v Mzwempi* (2011 (2) SACR 237 (ECM) par 96), and *Namane* (*supra* par 52). While the question of dissociation was favourably regarded by the Appellate Division in *S v Phala* (1992 (2) SACR 1 (A)), this related to an appeal against the sentence imposed in the trial court, rather than to criminal liability. The appellant had, at short notice, participated in a robbery where he played a lesser role (he stood guard outside the shop). When he saw that the robbery had taken place in the shop, he had a change of mind about his participation in the crime. He therefore ran away from the scene and his collaborators (*Phala supra* 3E–G). While the court accepted that by doing so, he had conclusively demonstrated his desire voluntarily to dissociate from the common purpose, even though there was no indication that the robbery would not be successfully concluded (*Phala supra* 4A–B), this was clearly after the crime had already been completed, and so he could only benefit from a lesser sentence.

2 4 S v Beahan 1992 (1) SACR 307 (ZS)

It is necessary to return to Zimbabwe for the next important case in the question of what constitutes dissociation. The court in *S v Beahan* (1992 (1) SACR 307 (ZS)) *inter alia* made reference (322B–F) to the earlier cases of *Chinyerere*, *Njenje* and *Ndebu*, noting the statement in *Chinyerere* (*supra* 579G, cited above under heading 2 1) that "a conspirator can withdraw from the enterprise even at the last moment" which withdrawal will entitle them to an acquittal on the main charge, if not the offence of conspiracy. The court then summarised as follows:

> "I respectfully associate myself with what I perceive to be a shared approach, namely that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than a communication to the co-conspirators of the intention

> to dissociate is necessary. A reasonable effort to nullify or frustrate the effect of his contribution is required." (*S v Beahan supra* 324A–C)

The court drew a distinction from the "principle enunciated" in *Chinyerere*, indicating that where such legal principle was of variance, it should be departed from (*Beahan supra* 324C). In terms of the application of its approach, the court held that, depending on the circumstances, "mere absence of physical presence from the crime, or a physical change of place or flight from the scene, even if in consequence of voluntary action" may not serve to dissociate a participant in the common purpose from the ensuing criminal activity (*Beahan supra* 324D–F). However, if the absence is involuntary, and flows from arrest or by "flight intended to evade detection and apprehension", there cannot be said to be dissociation, and the participant remains responsible "for all the actions the others do and continue to do, as much as he had done them himself, provided they fall within the scope of the common objective" (*Beahan supra* 324F–G).

Moreover, the court in *Beahan* held that, where the participant played a significant role in the planning of the unlawful conduct (as *in casu*), "in order to effectuate a withdrawal … reasonable measures to nullify or frustrate the consequences of his contribution" (*Beahan supra* 324H–I) are required. On the basis of this line of reasoning, no dissociation was held to have occurred on the part of the appellant.

2 5 S v Singo 1993 (1) SACR 226 (A)/1993 (2) SA 765 (A)

In *S v Singo* (*supra*), the Appellate Division heard an appeal against a murder conviction. The victim was an old woman who was believed to have bewitched a young girl. The appellant was part of the group that attacked the deceased and ultimately killed her. He admitted that he had thrown large stones at the deceased but then stated that he had been hit by a stick by someone in the crowd, located behind him, and this caused him to leave the scene and return home. After the initial attack (in which the appellant had participated) had concluded, the deceased apparently got up, only to be set upon by the crowd once again, this time with fatal results.

The question for the court to determine on appeal was whether the appellant's departure from the scene could be categorised as dissociation from the common purpose to kill. The court sought to distinguish the present case from the previous authority discussing dissociation (the *Chinyerere*, *Ndebu*, *Nzo* and *Beahan* cases) on the basis that these cases dealt with conspiracy – in other words, that liability was founded on a prior agreement (*Singo supra* 232F–G/771G–H).

As a result of such distinction from the previous cases and proceeding on the basis that the form of common purpose to be considered in *Singo* was "active association", which was "manifested simply by conduct" (*Singo supra* 233A–C/772B–E), the court was at liberty to formulate its own approach (for the requirements of active-association common purpose, see *S v Mgedezi* 1989 (1) SA 687 (A) 705I–706C). The court did this by stating, given the initial active association by the participant as evidenced by conduct and intent, that the participant then desisting from active participation would not usually in itself exclude common-purpose liability being attributed to him for

the "conduct of the others committed after he had desisted" (*Singo supra* 233C–F/772E–H). However, the court held that "where the participant not only desists from actively participating, but also abandons his intention to commit the offence, he can in principle not be liable for any acts committed by others after his change of heart" (*Singo supra* 233E–G/772G–I).

It was held that the latter position was the case *in casu,* giving rise to effective dissociation of the appellant from the actions of the crowd prior to the fatal wounds being inflicted, and thus resulting in an attempted murder conviction replacing the original murder conviction (*Singo supra* 234A–C/773C–E). Notably, the court stated that "in the circumstances there was … nothing more which he could have been expected to do to demonstrate a change of intention" than leaving for home (*Singo supra* 234A–B/773C–D).

The judgment in *Singo* has been criticised, notably by Paizes, who *inter alia* doubts whether the court was correct in finding that the appellant had ceased to have the intent to kill, and that he had indeed dissociated himself from the actions of the crowd (Paizes "Common Purpose by Active Association: Some Questions and Some Difficult Choices" 1995 *SALJ* 561). In relation to the first reservation, Paizes contends that the appellant "must, at the very least, have foreseen the real possibility that [the victim] would be killed by one or more of the angry stone-throwers …[which] would be enough to establish fault in the form of *dolus eventualis*" (Paizes 1995 *SALJ* 563). With regard to the question of dissociation from the conduct of the crowd, Paizes compellingly places this in dispute:

> "[H]e left because he had to, since he was concerned about his injury … He did not attempt to deter the others; he had no change of heart; he did not even display any remorse or even displeasure or distaste at what was happening or what was bound to happen. Had he not been injured, there is nothing to suggest that he would not either have continued throwing stones or, at the very least, stood by passively while the others continued to stone the victim, conduct which would, in either event, have been enough in the circumstances to render him responsible for the fatal act when, inevitably, it came." (Paizes 1995 *SALJ* 565)

How significant would the approach adopted in *Singo* prove to be? The *Singo* judgment has been cited as authority for the existence of a dissociation defence (*Nduli supra* 504E–F; *S v Davids* 1998 JDR 0995 (C) 20–21; *S v Magagula* [2001] ZAGPHC 9; *S v Ntsie* [2004] ZANWHC 21 par 8; *S v Mmabatho* 2005 JDR 0384 par 22; *Musingadi supra* par 34; *Molimi supra* par 32; *Mzwempi supra* par 96; *Namane supra* par 53). *Singo* has also been cited as authority for the basic requirements of such a defence – that is, intent to commit the crime in common with other participants and active association with the conduct of the others (*Davids supra* 21–23; *S v Saia* [2000] ZAGPHC 7 18; *Ntsie supra* par 8; *Mmabatho supra* par 22; *S v Wana* 2015 (1) SACR 374 (ECP) par 202). *Singo* has not, however, been influential in any further discussion as to the specific content of the defence in terms of conduct.

2 6 S v Nduli 1993 (2) SACR 501 (A)

Shortly after the judgment in *Singo*, the Appellate Division had reason to consider the issue of dissociation in the context of an armed robbery at a

garage, which resulted in the death of the co-owner of the garage (*S v Nduli supra*). The appellant, who claimed that he had dissociated himself from the common purpose, had been stationed outside the garage. Although he was not directly involved in the killing and robbery, the court found that the fact that he had remained at his post until the other participants emerged from the garage having committed these crimes, and had met up with the other participants thereafter, militated against any possible finding of dissociation (*S v Nduli supra* 506D–J, 507B–D).

The court defined dissociation as "some or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration" (*S v Nduli supra* 504d–e, cited in *Maelengwe supra* 152E; see *Molimi supra* par 32 where this judgment is noted as authority on dissociation; *S v Mpili* 2015 JDR 2434 (KZP) par 21; *S v Jusaya* 2019 JDR 1899 (ECP) par 70; *S v Raphefo* [2016] ZANWHC 6 par 10). The court noted that in light of *Nomakhlala*, *Nzo* and *Singo*, dissociation would function as a good defence in respect of the "eventual commission of the offence by his erstwhile associate or associates" (*S v Nduli supra* 504D–F). As regards what the test for dissociation entails, the court stated that while it remained a matter of fact and degree which type of conduct was required to demonstrate such intention to dissociate,

> "[t]he more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to dissociate himself from it at the time." (*S v Nduli supra* 504E–F)

The court referred to the dictum in *Beahan* (cited above under heading 2 4), noting on the facts, as in *Beahan*, that the applicable form of common-purpose liability is prior agreement (*S v Nduli supra* 504F–J). While the court regarded the situation in the present case as being a more conclusive application of the *Beahan* dictum, in that the appellant had, despite ample opportunity, failed to notify the other participants in the common purpose of his intent to withdraw, and that he had failed to nullify or frustrate the implementation of the planned unlawful act, it pointedly did not adopt the *Beahan* dictum as authority for South African courts (*S v Nduli supra* 507A–C).

It may be noted that the gradual development of the dissociation defence through the case law in the early 1990s generated some academic commentary, which sought to give content to the concept. Apart from the erudite contribution by Paizes, in which he not only critically assessed the judgment in *Singo*, but provided a broader analysis of common purpose, the following writers may be noted: Khuluse ("Dissociation From a Common Purpose – A Review" 1992 *SACJ* 173); Parmanand ("Dissociation in Common Purpose – A View From Venda" 1992 *SACJ* 180); Hales ("Dissociation From Common Purpose – A Zimbabwean View" 1992 *SACJ* 187); and Parmanand and Ramaite ("Dissociation From A Common Purpose" 1994 *Stell LR* 82). Perhaps the most influential analysis of dissociation at this time was by Snyman, who in the third edition of *Criminal Law* published in 1995 (254–55), provided a set of propositions articulating the ambit of the defence. (These are listed under heading 1 above. Although the last proposition – that the role played by the accused in devising the plan

to commit the crime is determinative of what he needs to do to withdraw from the common purpose – was mentioned in the text of the 1995 discussion, it was only fixed as one of the relevant considerations in the fifth edition of *Criminal Law* in 2008 (271). The list has since been cited in succeeding editions without amendment, and is set out in its most recent iteration in the eighth edition of *Snyman's Criminal Law*, published in 2025, at 236–237.)

2 7 S v Lungile 1999 (2) SACR 597 (SCA)

In *S v Lungile*, the Supreme Court of Appeal was required to consider the dissociation defence in the common-purpose context, where once again the circumstances were robbery and murder. Here the court distinguished the *Singo* decision, where there was no prior agreement and the common purpose was manifested by conduct (*Lungile supra* (*SCA*) par 20). The court, as in the *Nduli* judgment, chose not to decide whether the dictum in *Beahan* applied in South African law, or whether it could be regarded as "a rule of law or a rule of thumb" (*Lungile supra* (*SCA*) par 20). Nevertheless, the court indicated that it "may well be the correct position", in the context of prior-agreement common purpose, along with "participation to some substantial degree in its execution", that "something more than a mere withdrawal is required to establish a legally effective dissociation, e.g. a notification to the co-conspirators and a nullification or frustration of the further implementation of the enterprise" (*Lungile supra* (*SCA*) par 20). In any event, since there was simply no effective dissociation, as the appellant had merely fled the scene, an act which the court regarded as a neutral factor, and susceptible to the interpretation that the fleeing was linked to a desire not to be arrested or to make good his escape, the court dismissed this defence on the facts (*Lungile supra* (*SCA*) par 20). This approach was cited with approval in *Raphefo* (*supra* par 12).

2 8 S v Musingadi 2005 (1) SACR 395 (SCA)

Murder and robbery once again formed the context for the inquiry into dissociation from the common purpose in the Supreme Court of Appeal case of *Musingadi*, where the deceased was killed because she could identify one of the participants (the second appellant) in the robbery. The third and fourth appellants admitted their role in the robbery, in that they had tied up the deceased and had departed with the stolen money, which was later shared (*Musingadi supra* par 29–30). However, they argued that their departure was indicative of their desire to dissociate themselves from the killing of the deceased, which occurred subsequent to their departure. While the trial court accepted that the third and fourth appellants were not present when the deceased was killed, it held that these appellants were responsible for her captive state, that they left her in a helpless state with their collaborators, that at least one of their collaborators, to their knowledge, was intent on killing the deceased, and that they knew that the deceased would be powerless to resist such an attack (*Musingadi supra* par 31).

With regard to the question whether the third and fourth appellants had indeed dissociated themselves from the murder, the court held that it had

become clear to them that "the robbery was developing into a murder which would be facilitated by their own prior conduct" and so it followed that "by departing the scene, and leaving the helpless deceased to her probable (and actual) fate, the appellants must be taken to have acquiesced in the expansion of the common purpose unless they took steps effectively to dissociate themselves from that development" (*Musingadi supra* par 34). The court stated unequivocally that South African law recognises a defence of dissociation (or withdrawal), citing the cases of *Singo*, *Nduli*, *Lungile* (*SCA*)) and *Nzo* (*Musingadi supra* par 34). Once again, although the *Beahan* dictum (*supra* 324*b*–*c*) was cited by the court (*Musingadi supra* par 34), this case was not explicitly accepted as authoritative (par 35), albeit that the court clearly found it helpful (see also par 37).

The court, indicating that "not every act of apparent disengagement will constitute an effective dissociation", explained that much will depend on the circumstances, that is:

> "on the manner and degree of an accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of the circumstances is not exhaustive. To reduce this composite of variables to a workable rule of law may be artificial, even unwise." (*Musingadi supra* par 35*)*

(This dictum was followed in *S v Kekala* 2009 JDR 0718 (NWM) 17; *S v Nkosikhona* 2024 (2) SACR 200 (GJ) par 38; and *S v Xulu* 2025 JDR 4656 (ECB) par 258.) After referring to a few English and Australian sources dealing with the question of withdrawal, the court concluded that in making the assessment of whether there has been a dissociation, the courts in a number of countries proceed from the following premise:

> "that the greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective dissociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment." (*Musingadi supra* par 39*)*

(This dictum was followed in *Kekala supra* 19; *S v Motimele* [2023] ZALMPPHC 64 par 22; and *Namane supra* par 44.) On the basis of this approach, the court concluded that the third and fourth appellants had not done enough to dissociate themselves from the common purpose, and that merely walking away "leaving the deceased tied up and at the mercy of [the second appellant] who, they knew, was intent on killing her" was not enough (*Musingadi supra* par 40). For dissociation to be effective, the court held that the third and fourth appellants "had to at least have untied the deceased; and perhaps more was required of them" (*Musingadi supra* par 40), and consequently their murder convictions on the basis of *dolus eventualis* were confirmed (the murder conviction of the first appellant was similarly maintained (*Musingadi supra* par 49–50)). It is evident that after the authoritative judgment of the Supreme Court of Appeal in *Musingadi*, the defence of dissociation from the common purpose could be said to be well established in South African law.

2 9 Cases post S v Musingadi

The case law that has followed *Musingadi* has broadly conformed to the development up to this point. While other judgments have been cited in dissociation cases, these have typically not deviated from the stricter approach to dissociation applied in *Musingadi*. An interesting variation on the *Musingadi* approach, where this judgment was not cited, may be found in *S v Wana* (*supra*). Once again, the context for the judgment was an armed robbery with fatal consequences, and the accused pleaded that he had dissociated himself from the planned commission of the offences when they occurred (*Wana supra* par 197). The court in *Wana* (par 198) cited the definition of the dissociation defence in *Nduli* (*supra* 504d–j), which includes the description from the *Beahan* case of the nature of the withdrawal, although the dictum in *Beahan* does not factor into the *Nduli* decision. Next, the court in *Wana* (*supra* par 200) cites the reasoning in *Lungile* (*supra* (*SCA*) par 20), which once again references the dictum in *Beahan* without explicitly adopting it.

Notably, the court in *Wana* proceeds to adopt the dictum in *Beahan* as "sound principle and one which is consistent with our law" (*Wana supra* par 204; see the application of this confirmation in *S v Jusaya supra* par 71, and *S v Monco* 2024 JDR 4573 (ECM) par 197–198). The court provides the following synopsis of the *Beahan* dictum:

> "[The] dictum … proceeds from the logical premise that the greater the involvement and the more advanced the execution of the criminal enterprise, the more clearly an accused person who relies on dissociation must establish a basis for a finding of dissociation. That is not to say that such an accused attracts an onus. Rather it is to suggest that the accused should establish the performance of some positive act of withdrawal or dissociation. It is also necessary to establish that the accused had a clear and unambiguous intention to withdraw from the criminal enterprise." (*Wana supra* par 202)

Flowing from this the court asserts that "a co-conspirator who has by his conduct and actions played a central role in the initiation of a conspiratorial enterprise and who proceeds to facilitate its execution", in order to establish effective dissociation from the crime, is required, dependent on the facts of the matter, to "actively set out to undo the conspiracy or where that is not possible thwart its execution" (*Wana supra* par 204). The cases of *Raphefo* (*supra* par 12–13), *S v Bantom* (2019 JDR 1784 (ECP) par 108) and *S v Kgitsane* (2024 JDR 0880 (FB) par 11–13) similarly rely on the authority of *Beahan* and *Lungile* to motivate for the requirement that dissociation be "effective, timeous … relevant" (*Bantom supra* par 108).

Nevertheless, as indicated above, the bulk of cases emphasise the pre-eminence of the *Musingadi* case in respect of the approach to be followed where dissociation from the common purpose is in issue. A number of judgments dealing with dissociation rely solely on the *dicta* in *Musingadi* in application (*S v Molema* [2010] ZAFSHC par 24–27; *S v Mahlangu* [2011] ZAGPJHC 226 77–79; *S v Ratlhagane* [2012] ZANWHC 50 par 79, 83 (where the court acknowledges that *Beahan supra* 324b–c is cited in *Musingadi supra*); and *S v Ngwadla* [2020] ZANWHC 17 par 18).

The Supreme Court of Appeal addressed the issue in *S v Nube* ([2015] ZASCA 136 par 22), where having cited the test for dissociation (par 21) set out in *Nduli* (*supra* 504d–e) (discussed above under heading 2 6), it explained that this "salutary approach" was further expounded in *Musingadi*, citing paragraphs 35 and 39 (set out above under heading 2 8). This section of the judgment in *Nube* was in turn cited with approval in *Raphefo* (*supra* par 14), and the *dicta* from *Nduli*, *Nube* and *Musingadi* are together marshalled to explicate the dissociation defence in *S v Tilayi* (2021 (2) SACR 350 (ECM) par 35–36) (see also, with regard to *Nduli* and *Musingadi*, *S v Sithole* [2017] ZAGPPHC 169 par 27–28). Similarly, *Nube* and *Musingadi* are cited relating to the application of the dissociation defence in *S v Seyisi* (2024 JDR 5051 (ECMk) par 108).

3 The ambit of the current dissociation defence

Based on the case law, a short précis of the state of the dissociation defence may be attempted. The current law on dissociation demonstrates that withdrawal from a common purpose is not lightly inferred by the courts. The set of propositions of Snyman (set out under heading 1 above) have been widely accepted (see, e.g., *Musingadi supra* par 35; *Kgitsane supra* par 9). As noted, they have stood the test of time, and are used as a framework for this summary.

- The withdrawal must objectively convey that the accused no longer aligns themself with the common purpose. Thus, the accused should evidence "a clear and unambiguous intention to withdraw", which should invariably be explicated by testimony indicating an "avowal of abjuration" (*Singo supra* 233F–G/772I, cited in *Magagula supra* 16; *Mkhize supra* 639C–E; *Masina supra* par 28.2). When an accused has formed a common purpose to commit a crime and foresees the possibility that an additional crime may be committed in the course of executing that purpose and they, nevertheless, appreciate that risk, there needs to be a clear shift in intention, which can only be inferred from the accused's overt actions indicating a conscious departure. Merely fleeing the scene before the commission of a crime does not, in itself, signify a change in intent where the accused has taken steps to associate with that crime. The accused must take additional steps to unequivocally signal that they no longer wish to be part of the common purpose. When there is a prior agreement, physical presence at the crime scene is not necessary for liability. In the same way, leaving the scene before its commission will not absolve the participant in a common purpose unless they have, through their words or actions, demonstrated that they no longer accept into the bargain the consequences of their foresight. In most cases, such as a robbery where the participants are aware that one of them is armed with a deadly weapon and, thus, all possess *dolus eventualis* for murder, having foreseen the risk of death yet accepted it, they must take active steps to demonstrate that they no longer accept that risk. This includes taking reasonable action to prevent its occurrence. If the accused has already played a role in setting the crime in motion, fleeing the crime scene should not inevitably entail avoidance of liability, as merely leaving the scene does not, in itself, indicate a change in

intention. This, as the courts have indicated, is a question of fact and evidence (*Singo supra* 233F–G/772I).

- A positive withdrawal rather than mere passivity is required (in *Ndebu supra* 137E–F, the court points out that dissociation could not be constituted by "hiding under a bed"). An accused who merely stands by, walks away, or refrains from further participation may still remain associated with the common purpose. Effective dissociation therefore requires some overt act by the accused to demonstrate a break with the common purpose. As the Supreme Court of Appeal has reiterated in the recent case of *Motsitsi v S* ([2026] ZASCA 44 par 23), what is required in order to succeed with a defence of dissociation is to show that the accused's conduct was not merely the product of a "passive decision", but rather "a deliberate one intended to distance himself from the plans and conduct of his co-accused".
- The withdrawal should be voluntary (in *Lungile supra* (SE) 76, the court said that it was a "startling proposition" that armed robbers could escape liability by seeking to run away on the arrival of the police).
- The withdrawal should take place before the commencement of the execution of the crime (see *S v Magoro* 1996 (2) SACR 359 (A) 364H–J; *S v Myaka* 2012 JDR 1745 (GSJ) par 27, where, for example, there was common purpose by prior agreement, and where the court held that the appellant could have dissociated by not accompanying the other appellants to the scene of the crimes).
- The type of act required for withdrawal depends on various circumstances (see *Musingadi supra* par 35).
- The role played by the accused in devising the plan to commit the crime is determinative of what they need to do to withdraw from the common purpose. In assessing whether the defence may be relied on in a particular set of circumstances, the centrality of the role of the accused in the common purpose is a key consideration in respect of what conduct is required to effect dissociation (*Tilayi supra* par 38; *S v Phate* 2024 (2) SACR 421 (GJ) par 12–13, 19). Therefore, dissociation must be proportionate to the accused's prior involvement.

These descriptions of conduct illuminate what might be considered to constitute an act of dissociation. However, the assessment of intent on the basis of inferential reasoning necessarily entails a close connection with the accused's conduct. As discussed above (under heading 1), the requisite act of dissociation must be accompanied by a clear intent to dissociate on the part of the accused. Where the accused does not genuinely wish to dissociate from the common purpose, but in fact foresees the possible harm that may take place (even in their absence, where the common purpose entails prior agreement) and reconciles themself with such possibility, then they may be held liable on the basis of *dolus eventualis* (as in *Musingadi supra* par 40). Where it is the purpose of the accused that the harm be inflicted by others in their absence, then liability may be established on the basis of direct intent (*dolus directus*), as in *Phate* (*supra* par 20). As stated in *Kgitsane* (*supra* par 11), dissociation "cuts off the intent to commit the deed", as opposed to avoidance of responsibility, which merely distances the perpetrator from the incident.

In terms of practical examples of the type of conduct required for dissociation, a number of judgments have unequivocally held that the act of running away or walking away from the crime does not amount to dissociation in itself (*S v Latha* 1994 (1) SACR 447 (A) 454G–H; *Molema supra* par 26; *Namane supra* par 58; *Bantom supra* par 108; *Kgitsane supra* par 11–12; *Phate supra* par 13), and can, as such, be regarded as a "neutral" factor (*Tilayi supra* par 38).

Furthermore, merely suggesting that the crime being committed should be abandoned, without acting on this conviction, does not constitute the dissociation defence (*Maelengwe supra* 152E–F; *S v Katangola* 2009 JDR 0756 par 13).

As indicated by the *Musingadi* judgment, and the cases following this decision, more positive action may be required. Thus, it has been held that failing to "nullify or frustrate the effect" of the individual unlawful acts of the other participants (*Bantom supra* par 108; see also *Mahlangu supra* 78; *Motimele supra* par 36), by, for example, warning the intended victim (*S v Naidoo* 2007 JDR 0830 (SCA) par 9), or failure to refrain from accompanying other participants to the scene of crimes (*Myaka supra* par 27) all militated against dissociation. Similarly, simply leaving the scene without alerting police (*Nkosikhona supra* par 39), or failure to notify the police or law enforcement authorities of the common purpose to commit a crime (*Nube supra* par 23; *Monco supra* par 199; *Kgitsane supra* par 13); or failure to inform the police in sufficient detail to prevent the crime (*Wana supra* par 209) have been held to be indications of no dissociation.

4 Concluding remarks

It may be concluded that, as previously mentioned, and as stated in *Singo* (*supra* 233F–G/772I), the test for dissociation may be difficult to apply, but "ultimately it is a question of fact and evidence". The approach adopted in *Tilayi* (*supra* par 34, citing *Nduli and Nube*) is an instructive one in this regard, because it is stressed that the focus in assessing withdrawal is not on a particular crime, but on the common purpose to offend as such. This reflects the dynamic nature of a common purpose, in that what begins as a common purpose to commit crime A may change into a common purpose to commit crime B (as in *Musingadi supra* par 33–34).

This may account for the apparent difference in approach to dissociation in relation to the *Nomakhlala* case (see heading 2 2 above), where FH Grosskopf JA regarded the conduct of the first appellant (X) as amounting to dissociation, whereas EM Grosskopf JA (in *Singo*; see heading 2 5) did not. It is clear from X's evidence that he readily joined the common purpose to kidnap the victim, depriving the victim of his liberty (*Nomakhlala supra* 303D–E). When such common purpose developed into a common purpose to murder, X dissociated from the common purpose. Thus, EM Grosskopf JA was correct in stating that X was not party to the common purpose to murder, but this is because X withdrew from such common purpose when it became clear that murder was the intention, as FH Grosskopf JA states (*Nomakhlala supra* 304C–D). In assessing

dissociation, it is therefore crucial for the court to take account of the possible developing nature of a common purpose.

What seems clear is that in assessing dissociation, the approach adopted in *Musingadi* is now authoritative. The more lenient approach, epitomised by the *Singo* judgment (see under heading 2 5), has not been directly followed for some time, and certainly not since *Musingadi* was decided. Thus, the correct approach to dissociation is founded upon the premise that the greater the accused's participation, and the further the commission of the crime has progressed, the more will be required of an accused to constitute an effective dissociation (*Musingadi supra* par 39–40). In the words of the illustration adopted in *Ndebu* (*supra* 135H–I): "A declared intent to withdraw from a conspiracy to dynamite a building is not enough, if the fuse has been set; he must step on the fuse" (cited in *Musingadi supra* par 36, where the source of the quote is indicated to be *Eldredge v United States* (1932) 62 F 2d 449 451). Since intention is inferred from conduct and the surrounding circumstances, the question of dissociation cannot be separated from the accused's outward behaviour. Just as active association must be proved by conduct showing participation in the criminal enterprise, withdrawal should likewise be proved by conduct showing a genuine break from it. A mere internal change of heart is not enough. There must be some objective indication that the accused has abandoned the common purpose; otherwise, the circumstances may still support an inference of continuing intention.

It also seems clear, as reflected in *Wana* (and cases following *Wana*; see under heading 2 9), that the dicta in *Beahan* have finally been included in the dominant approach to dissociation in South African law, given their acknowledgement, if not entirely overt approval, in *Musingadi* (*supra* par 34, 37).

Thus, a general concluding principle serves to summarise the development of the law in this regard: in order for the dissociation defence to operate, where the accused has been involved in the criminal enterprise prior to the commission of the offence, "[a] reasonable effort to nullify or frustrate the effect of his contribution is required" (*Beahan supra* 324C). It is for the courts to assess the reasonableness of such effort on the facts of each case, in light of the body of precedent outlined above. It is evident that the accused must, through word or conduct, show that they no longer associate themself with the commission of the crime. This requires reasonable steps to nullify the effect of their prior participation, for example, warning the victim, alerting law enforcement, freeing a vulnerable victim, or otherwise frustrating the offence.

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