THE INTIMIDATINGLY BROAD CRIME OF INTIMIDATION

S v Cele 2008 JDR 0123 (N)

1 Introduction

The criminalization of intimidatory conduct has been a feature of South African criminal law since the 19th century. Since the earliest forms of the offence, enacted by the pre-Union legislatures, the nature of the prohibition has gradually metamorphosised through successive legislative reformulations from being applied within a narrow labour-related context to a far wider sphere of application (for a more detailed discussion of this process see Hoctor "How Far Should the Crime of Intimidation Extend?" 2002 *Obiter* 409). The current formulation of the offence is to be found in section 1(1) of the Intimidation Act 72 of 1982 (hereinafter "the Act"):

> "Any person who –
> (a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint –
> (i) assaults, injures or causes damage to any person; or
> (ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or
> (b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural or probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication –
> (i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person …
> shall be guilty of an offence ..."

The "cosmic scope" of the offence (in the words of Mathews *Freedom, State Security and the Rule of Law* (1986) 57) has been the focal point of both academic (Mathews 57-5; Plasket and Spoor "The New Offence of Intimidation" 1991(12) *ILJ* 747; Plasket and Euijen "Section 1(1)(b) of the Intimidation Act 72 of 1982 and Freedom of Expression" 1998(19) *ILJ* 1367) and judicial criticism (*Holbrook v S* [1998] 3 All SA 597 (E); and *S v Motshari* 2001 1 SACR 559 (NC)). The judgment in *S v Cele* (2008 JDR 0123 (N)) reflects noteworthy judicial reluctance to allow a conviction for intimidation, and provides an opportunity to deal (necessarily briefly) with some pertinent matters.

2 Facts

Having been convicted of contravening s 1 of the Act, the three appellants appealed against their convictions and their sentences of six years' imprisonment. The facts which founded the conviction (see par [18]-[19]) are as follows: the appellants worked as warders at the Ncome Prison, whilst the complainant was the acting head of the prison. The prison was in the throes of internal unrest at the time, such that the previous head and other senior management had been forcefully expelled. The complainant had received a telephonic death threat two days previously. The appellants, who had not participated in the internal unrest in the prison, arrived 45 minutes late for duty on the day in question. Two of the appellants were further not properly dressed for duty. An inflamed verbal confrontation ensued between the complainant and an assistant director of the prison and the appellants at the gate of the prison concerning the appellants' conduct the previous day. Shortly thereafter the first and second appellants entered the complainant's office (in the presence of a third person who the State alleged was the third appellant, although this was denied by the defence who averred that it was in fact another person). The assistant director was also present. The combustive exchange of views continued, during the course of which (the court accepted as proved that) the words "we will crucify you" were directed at the complainant. This statement formed the basis of the intimidation charge.

3 Judgment

Rall AJ delivered the judgment of the court (with Kondile J concurring). Prior to addressing the substance of the convictions, Rall AJ severely criticised the presiding officer for his hostile attitude towards the appellants, for making insulting remarks and for allowing the prosecutor to engage in "an extremely aggressive and abusive attitude" in cross-examination (par [2]-[5]). This conduct, unbecoming of a judicial officer, did not have any bearing on the ultimate decision of the court, however (par [6]), and so does not require any further discussion.

The court set out the provisions of section 1 of the Act, identifying one offence contained within section 1(1)(a) and two offences contained within section 1(1)(b) (par [7]-[9]). A distinction was then drawn by the court between the fault requirements of the section 1(1)(a) offence, which consists of intention to cause a specified result, and the section 1(1)(b) offences, which do not require such intention (par [10]). The court then proceeded to criticise section 1(1)(b) as "an astonishing piece of legislation" (par [11]), holding that if literally interpreted it could give rise to liability based on unreasonable fear on the part of the alleged victim and despite lack of intention to intimidate (in relation to the first of the offences identified by the court as having been created by s 1(1)(b)), or (in respect of the second offence identified in relation to s 1(1)(b) by the court) based on whether the conduct would, objectively assessed, have probably caused fear even if this

did not in fact occur and the conduct was not intended to do so. Rall AJ (having expressed agreement with the criticism of the provision contained in *S v Motshari* 2001 1 SACR 550 (NC); and *Holbrook v S* 1998 3 All SA 597(E) – par [12]), consequently embarked on a "restrictive" interpretation of the provision, in order to limit its scope. Thus, it was held by Rall AJ that the section 1(1)(b) offences could only be committed in respect of words "if it is found that the accused intended the words to mean what they are alleged to mean" (par [13]).

Applying this interpretation of the law, Rall AJ decided that the words "we will crucify you" could only be interpreted as either "a threat that the appellants intended to demonstrate the falsity of the allegations against them" or "merely meaningless threats uttered in the heat of the moment" (par [29]). Given that in the court's view, intention to intimidate was required for all the various forms of the offence (set out in s 1(1)(a) and s 1(1)(b) – see par [13]), the court unsurprisingly quashed the convictions (par [31]-[36]).

4 Discussion

(a) Context of offence

It is clear that the commencement of the Act in 1982, along with a number of security offences including those related to terrorism, sabotage and subversion (most of which could be found in the Internal Security Act 74 of 1982), was seen as a transparent attempt to provide legislative means to deal with industrial unrest, and in so doing to counter the burgeoning political power of the trade unions (see generally Mathews 57-8; Plasket "Industrial Disputes and the Offence of Intimidation" 1990(11) *ILJ* 669; and *S v Mohapi* 1984 1 SA 270 (O) 274E-275A). The Act was amended to broaden its ambit (apparently as a consequence of a lack of success in securing convictions – Plasket and Spoor 1991 *ILJ* 750) by the Internal Security and Intimidation Amendment Act 138 of 1991 (which changed the object of the offence to include groups as well as individuals, and which introduced the form of the offence contained in s 1(1)(b)), and the Criminal Law Second Amendment Act 126 of 1992 (which deleted s 1(1)(b)(ii), thus abandoning the need for a causal link between the fear induced by the accused's conduct and any subsequent conduct on the part of the complainant). The present form of the intimidation offence has been criticized for criminalizing "some remarkably trivial or innocuous activities" (Mathews 57), for potentially impacting on "normal and acceptable political campaigning and debate, labour relations and … everyday life" (Plasket and Spoor 1991 *ILJ* 750), and for being "an unnecessary burden on our statute books … [given that] its objectives could probably be attained by the enforcement of common-law sanctions" (*Holbrook v S supra* 603b-c, cited with approval in *S v Motshari supra* par [11]-[12]). Snyman (*Criminal Law* 5ed (2008) 464 further describes s 1(2) of the Act (which provides that the onus of proving the "lawful reason" defence contemplated in s 1 shall be on the accused, unless a statement clearly indicating such lawful reason has been made by or on behalf of the accused

before the close of the State's case) as unconstitutional as it constitutes an unjustifiable infringement of the presumption of innocence set out in section 35(3)(h) of the Constitution (similar sentiments were expressed by the court in *S v Motshari supra* 554d-e; and *S v Gabatlhole* 2004 2 SACR 270 (NC) par [6], although in both cases it was not deemed necessary to decide the matter).

Notwithstanding such criticism, it is apparent that there is a need for the intimidation offence in South African law. Unlike the apparent position prior to the last amendment of the Act, it is no longer unusual for accused to be prosecuted for intimidation (for recent prosecutions see, *eg*, *S v Tsotsi* 2004 2 SACR 273 (E); *Mbambo v Minister of Defence* 2004 JDR 0633 (T); *Zulu v Minister of Defence* 2005 JDR 0262; *S v Phungwayo* 2005 JDR 0496 (T); *S v Mfazwe* 2007 JDR 0781 (C); and *cf* Snyman 463). It is acknowledged that intimidation is a serious offence (even by critics of the offence like Plasket J, in *S v Tsotsi supra* par [14]), that intimidation is rife in South Africa (Snyman 463), and further that the offence protects basic rights such as the right to freedom and security of the person (s 12 of the Constitution; see *S v Mfazwe supra* 24, where the charge was based on a series of threatening SMSs which rendered the complainant "very scared, frightened for his life, emotional and … very alone … [and] also very scared to testify", as well as the upholding of the complainant's "right to work" in the face of the accuseds' intimidatory opposition in *S v Mlotshwa* 1989 4 SA 787 (W) 797A-B).

Nevertheless, in a number of recent decisions the courts have sought to limit the scope of the intimidation offence by excluding it from particular factual scenarios. Thus, in *S v Motshari supra* it was held that the offence does not apply to a quarrel between cohabitees (see Hoctor 2002 *Obiter* 409). This approach was followed in *S v Gabatlhole* (*supra*), where the accused fulminated various threats against the complainant and his relatives upon being caught in complainant's house whilst engaged in housebreaking with intent to steal. Majiedt J took the view that the provisions of the Act did not apply to less serious cases ("minder ernstige gevalle") such as this. Kgomo J's reasoning in *S v Motshari* (*supra*) was also approved in *S v Mramba* ([2008] JOL 21713 (E) par [14]).

(b) Application

(i) (Re)interpreting section 1(1)(b)

In the case at hand Rall AJ could not countenance an offence as "far reaching" as section 1(1)(b) of the Act, and thus adopted a restrictive interpretation specifying intention as the requisite form of fault for all forms of the intimidation offence. However, whilst the breadth of the provision cannot be gainsaid, this does not impact on its meaning, which, it is submitted, is entirely clear. Such a reinterpretation is inconsistent with both precedent (*Holbrook v S supra* 601b-e) and academic opinion (Snyman 464-465; and Plasket and Spoor 1991 *ILJ* 751), which emphasize that negligence suffices

for a section 1(1)(b) conviction. It is submitted that the plain language of the provision, and in particular the words "might reasonably be expected that the natural and probable consequences thereof", create an unequivocally objective test.

Rall AJ's concern is that this will allow for persons to be convicted of intimidation even if the complainant misunderstands the threat or if the threat does not in fact cause fear (par [11]). Perhaps a comparison may be drawn with the offence of negligent driving (s 63 of the National Road Traffic Act 93 of 1996), where the offence may be committed by negligent driving in relation to other persons actually on the road or who could reasonably have been expected to be upon the road at the time in question (*S v Grobler* 1964 2 SA 776 (T) 782; *R v Oldfield* 1969 2 PH H(S) 86 (RA); *S v Van Rooyen* 1971 1 SA 369 (N); and Hoctor *Cooper's Motor Law: Criminal Liability* 2ed (2007) B11-16). In respect of this core road traffic offence it is thus evident that no harm need actually ensue in order for liability to ensue. The mere negligent creation of a risk of harm suffices for liability. Criminal liability in terms of section 1(1)(b) operates in the same manner. Whatever objections may be raised about the scope of the offence, it is clear that it is not an unprecedented form of liability.

Moreover, concerns about the "astonishing" scope of the offence may be somewhat overstated if one considers that for liability to ensue there would have to be unlawful conduct in the form of a threat. The issue of unlawfulness would need to be assessed in terms of objective reasonableness – only if the accused's conduct can be regarded as falling without the legal convictions of the community (based on a purely objective assessment of these norms) can it be regarded as unlawful. Each and every court is required to engage in determination of criminal liability based on the dictates of the Bill of Rights, and thus the issue of what is unreasonable, and thus unlawful, will be established on this basis. Any legitimate exercise of the right to freedom of expression (s 16 of the Constitution) cannot be unlawful. Even if the court determines that the conduct constitutes an unjustified exercise of such right, and that it may thus be viewed as unlawful, the accused's conduct must still be assessed to be negligent in order for liability to ensue. Thus the accused's conduct must diverge from that of the reasonable person, a test which is principally objective in nature, but which involves placing such reasonable person in the circumstances of the accused (thus incorporating subjective elements) (see Burchell *Principles of Criminal Law* 3ed (2005) 522ff). In assessing whether the accused's conduct has attained the standard of the reasonable person, the court will inevitably have to take account of the circumstances, such as a highly-charged labour dispute or an altercation fuelled by strong emotion. Given that liability can only ensue once both these tests (objective reasonableness and the reasonable person test) have been satisfied, it is by no means certain that liability will in fact follow where the threat is unreasonably misinterpreted by the complainant, or where the threat does not result in fear (*ie*, the concern of the court in *Cele*). A further safeguard resides in the application of the *de minimis non curat lex* maxim, such that a court may acquit an accused

where although his conduct is technically unlawful, such is its triviality that it ought not to have been prosecuted (see generally Labuschagne "De Minimis non Curat Lex" 1973 *Acta Juridica* 291; and for discussion of the application of this maxim to the crime of kidnapping, *S v Dimuri* 1999 1 SACR 79 (ZH)).

(ii) Correctness of the finding

Leaving aside for the moment the correctness of the court's interpretation of section 1(1)(b), it is submitted that, even if intention is adopted as the requisite form of fault for all configurations of the intimidation offence, the finding that the accused's conduct did not constitute intimidation is open to doubt. Rall AJ reasoned (par [22]) that the words "we will crucify you" could be construed: (i) literally, indicating an actual crucifixion of the complainant; (ii) figuratively, signifying some physical harm to the complainant; (iii) figuratively, signifying the destruction of something; or (iv) as a meaningless threat. The court concluded that even though the accused were angry, this did not mean that they would "necessarily threaten or resort to violence" (par [27]), and that the appellants' conduct "amounted to no more than a very angry and heated rejection of the allegations made against them and a forceful expression of a determination to resist the accusations and prove them false" (par [28]). This conclusion was bolstered by the court's view that in perceiving these words as intimidatory, the complainant was being "over-sensitive", as his thinking had been affected by the "general situation at Ncome" (par [30]).

It is instructive to refer to other decisions in commenting upon this conclusion. In *S v Malevu* (WLD 30 August 1987 case no A635/87 unreported), a conviction for intimidation was overturned on appeal as the court held that the words used by the accused (that non-strikers who continued to work would encounter problems and would be hurt) were "reasonably capable of being construed as conveying a mere warning" (see also the arbitration *Jones/Daimler-Chrysler SA (Pty) Ltd* [2004] 7 BALR 815 (P)). Could it be said that the words used by the accused in *Cele* were of similar import? In *S v Mfazwe* (*supra*) the complainant's highly emotional state, following a series of SMSs which threatened and ridiculed him, far from excluding the possibility that the messages could be viewed as intimidatory seems to have been regarded by the court as probative of this fact (24, 104). It may be enquired whether a direct confrontation with a group of aggressive, abusive men in the confines of an office who threaten to "crucify you" is less susceptible to being interpreted as intimidatory than a series of SMSs? A further useful comparison may be drawn with the case of *S v Phungwayo* (*supra*), where the accused was convicted of a contravention of section 1(1)(a) of the Act following a heated confrontation with his supervisor concerning unpaid salary which culminated in the accused issuing a death threat. Although the court in *Phungwayo* was of the opinion that in the circumstances disciplinary measures could have provided an alternative means of dealing with the matter, and reduced the accused's sentence on appeal, it is notable that the court found both the conviction as

well as a period of direct imprisonment to be appropriate in the circumstances of a heated dispute concerning a disciplinary matter in the employment context which had escalated into threats – circumstances which (but for the fact that the accused in *Phungwayo* was acting on his own) closely approximate those in the *Cele* case.

Turning to the question whether the words uttered could be regarded as intimidatory, it is notable that the court overruled the factual finding of the trial court that the accused acted intentionally in threatening the complainant with physical harm (a contravention of s 1(1)(a)(ii) of the Act, which reflects interpretation (ii) of the words uttered in terms of the court's set of alternatives). Even if it is accepted that this finding is correct (which would require that the plain meaning of the words did not apply and that the accused did not foresee the possibility of unlawfully intimidating the complainant and continue in their course of conduct (*ie*, that *dolus eventualis* was not present)), it is clear that interpretation (iii) could found liability. Thus, if the nature of the threat was not actual physical harm, but some other damage to a person (even to reputation (the court's example (par [22]) or the complainant's authority/capacity to function in his post), then this would amount to a contravention of section 1(1)(a)(ii). (The court seemed to accept that interpretation (iii) may apply (par [29]) but does not hold that liability should follow, perhaps due to lack of knowledge of unlawfulness on the part of the accused. Once again the possibility of *dolus eventualis* is not canvassed by the court.) The interpretation apparently favoured by the court is that the words uttered merely constituted meaningless threats (interpretation (iv)). Given the specific context in which the words were spoken – a dispute in which the authority of the complainant was being challenged – it is submitted that this finding is perhaps somewhat less plausible than that of the trial court, which held that the intimidation was intentional. Words uttered in the heat of the moment cannot simply be dismissed as unintended due to their context (see, *eg*, the case of *Phungwayo supra*).

Even if the above discussion concerning the upholding of the appeal against the section 1(1)(a)(ii) conviction is without foundation, it is difficult to follow how the court held that there could not be a conviction in terms of section 1(1)(b) of the Act. The court set store on the argument that the complainant's perception of the threats should not be determinative of liability, but as indicated above this is not the basis for assessing liability in terms of the section. The court concluded that "objectively speaking, it cannot be said that the words "complained of" had the meaning and therefore were likely to have the consequences alleged by the State" (par [33]). As formulated in *Holbrook v S* (*supra* 601d-e), the test would be whether "it might reasonably be expected that the natural and probable consequences [of the statement] … would be that a person who perceived and heard the statement would have feared for the complainant's safety". One might simply note further that the protected interests under section 1(1)(b) extend beyond the personal safety of the complainant to the safety of his (or her, or a third person's) property or security of livelihood. Whilst an

analysis of the court's acquittal of the accused in terms of section 1(1)(b) is bedevilled by the court's mistaken (as argued above) interpretation of the section, it is submitted that the threat made by the accused, objectively assessed, amounts to a contravention of this provision.

5 Concluding remarks

The offence of intimidation presents interesting challenges for the courts, requiring a balancing between the accused's right to freedom of expression and the complainant's rights to dignity and freedom and security of the person. Whilst there is a need for such an offence, the breadth of its definition allows for potential abuse in the application of the offence. It seems clear that the court in *Cele* was somewhat intimidated by the ambit of the offence, and sought to impose a restrictive interpretation on the offence. Unfortunately, it is submitted, this resulted in a misconstrual of the provision and a misapplication of the law. Instead, it is submitted, where judicial officers filter the requirements for liability through the lens of the Bill of Rights (and, where necessary, give effect to the application of the *de minimis* principle) then no injustice need arise. Thoughtful and nuanced sentencing can further assist in the rehabilitation of the intimidation offence from its tarnished past into a useful and necessary part of the South African criminal justice landscape.

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