

CASES / VONNISSE

THE NATURE AND AMBIT OF THE INTIMIDATION OFFENCE

***S v White* 2022 (2) SACR 511 (FB)**

1 Introduction

The offence of intimidation has been associated with controversy, particularly because of the historical link between the Intimidation Act (72 of 1982) and the legislative machinations of the apartheid regime. In the words of Gamble J, the Act may be regarded as “a piece of apartheid order legislation introduced at a time of increasingly repressive internal security legislation designed to criminalise conduct, largely in the field of resistance politics” (*Sandlana v Minister of Police* 2023 (2) SACR 84 (WCC) par 34). The nature and ambit of the intimidation offence has once again come under scrutiny in the recent case of *S v White* (2022 (2) SACR 511 (FB)). The decision in this case is examined here in the context of a general assessment of the offence. The offence can now only be committed by contravening section 1(1)(a) of the Act, as the Constitutional Court has struck down the section 1(1)(b) provision (as well as section 1(2)) as unconstitutional in *Moyo v Minister of Police* (2020 (1) SACR 373 (CC)), a development confirmed by the amendment of the Act by the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act (23 of 2022). (Some are of the view that the Constitutional Court could have gone further (Burchell *Principles of Criminal Law* 5ed (2016) 593–594).) However, for the purposes of the discussion that follows, it is useful to cite the full section 1(1) provision prior to amendment. (For ease of reference, the excised wording of section 1(1)(b) is italicised, to distinguish from the wording that remains part of the provision). Section 1(1) of the Act provides for the “prohibition of and penalties for certain forms of intimidation” as follows:

- “(1) 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,
 - (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 and 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; and*

(ii) *.....*

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.”

It is noteworthy that the Indian Penal Code of 1860 (Act 45 of 1860) also contains an intimidation offence. Section 503 of the Code provides as follows:

“Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.”

It may further be noted that the draft bill to replace the colonial-era 1860 Code, the Bharatiya Nyaya Sanhita 2023 (Bill 121 of 2023), also includes this offence at clause 349. The only proposed alteration to the current wording of section 503 is the inclusion of the words “by any means” to include any mode of delivery or causing of the threat (i.e., “Whoever threatens *by any means*, another”), which would clearly include, *inter alia*, threats transmitted electronically or via social media.

The significance of the Indian provision is that it may be concluded that the criminalisation of intimidation is not only a colonial project or an instrument of political oppression. Moreover, South Africa is not the only modern constitutional democracy making use of such a provision. But what ought to be the ambit of this offence?

2 Facts of *S v White*

After pleading guilty in the Hertzogville magistrates’ court to contravening section 1(1)(a) of the Intimidation Act, the accused was duly found guilty. The factual basis for this conviction was that, in the course of an argument, the accused threatened to kill the complainant if he (the complainant) were to date one Palesa, a woman that the accused considered to be his girlfriend (par 5–7).

The senior magistrate of Welkom sent the matter on special review to the High Court in terms of section 304(4) of the Criminal Procedure Act 51 of 1977, despite having no concerns regarding the proper legal representation of the accused, or regarding the validity of his plea, or whether the accused’s section 112 statement was properly handed in (par 2). Citing *S v Motshari* (2001 (1) SACR 550 (NC)), where it was held that the erstwhile section 1(1)(b) offence under the Intimidation Act should not be used in the context of private quarrels, the senior magistrate indicated misgivings whether the

conviction in this case should be upheld on review, and if it were so upheld, whether the sentence was appropriate (par 3).

3 Judgment

On review, the High Court pointed out that it was clear that there were a few procedural issues to deal with. First, the trial magistrate had incorrectly made the suspension order in terms of sections 2 and 3 of the Intimidation Act, instead of section 1(1)(a), which the review court was asked to address by the senior magistrate (par 3–4). Moreover, the High Court noted that the charge sheet was deficient in its formulation, as it included words that did not apply to the charge, including opposites (to “do” and to “abstain from doing”) (par 6). The accused’s statement in terms of section 112(2) more or less repeated the unfortunate phrasing of the charge sheet (par 7). In this regard, the court later reviewed these discrepancies and stated that if the prosecution wished to rely on statutory offences, it should “ensure proper compliance with the particular statute” (par 21). The court also voiced its concern that the accused had not properly understood the nature of the charge of intimidation, given that English was not his mother tongue (or indeed, the mother tongue of any of the role players in the court proceedings). However, leaving these issues aside, the primary focus of the High Court on review was on the issue implicit in the senior magistrate’s comments: whether the court should interfere with the conviction (par 4), in order “to consider the applicability of s 1(1)(a) [of the Intimidation Act] in somewhat trivial matters and/or where a common law offence is applicable” (par 8).

Ultimately the reviewing court decided that the conviction was very clearly not in accordance with justice (so much so that the trial magistrate need not be consulted as provided for in section 304(2)(a) of the Criminal Procedure Act) (par 23), and set the conviction (and sentence) aside on review (par 24). The court reached this conclusion after citing section 1 of the Intimidation Act by evaluating some cases in which offences under the Intimidation Act were examined – specifically, *S v Motshari* (*supra*), *Moyo v Minister of Justice and Constitutional Development* (2018 (2) SACR 313 (SCA)), *S v Holbrook* ([1998] 3 All SA 597 (E)), and *S v Ipeleng* (1993 (2) SACR 185 (T)). In addition, the court referred to the chapter on intimidation in Milton, Cowling and Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (1988) HA1, as well as the discussion on the intimidation offences in Snyman *Criminal Law* 6ed (2014) 455.

Having considered these sources, the court reasoned that the offence contained in section 1(1)(a) “was never intended to be applicable to the usual threats that appear every day between members of the public, but with no real consequences or harm” (par 17). The court therefore sought to distinguish between “serious issues” and “normal run-of-the-mill threats” (par 17). Furthermore, the court reasoned, the paucity of reported cases relating to section 1(1)(a) is indicative of justifiable prosecutorial reluctance to use this section where it could use common-law offences such as assault, extortion or malicious injury to property – “[o]ne does not need a 10-kilogram sledgehammer to kill a fly” (par 18). The court continued (par 18):

“If the prosecution is allowed to charge all persons in terms of the Intimidation Act instead of with appropriate common-law offences, these common-law offences may just as well be done away with. There is no reason at all for this.”

Therefore, it was concluded by the court, the subsection “should be used in deserving serious matters only” (par 21), which it was held were not present in the current case.

4 Discussion

4.1 *The history of the intimidation offence*

The history of the criminalisation of intimidation mirrors the turbulent history of South Africa (for a detailed history, see Hoctor “Intimidation” in Milton, Cowling and Hoctor *South African Criminal Law and Procedure* HA1-1). It was first established as part of the legislative armoury to counter unlawful labour-related practices (in the following pre-Union statutes: Act 15 of 1856 (C); Ordinance 2 of 1850 (N); Law 13 of 1880 (T) and Ordinance 7 of 1904 (O)), before being taken up into national legislation shortly after Union (in section 8 of the Riotous Assemblies and Criminal Law Amendment Act of 1914). After a further iteration of the legislation, repealing the 1914 Act, and repeating this offence, which principally continued to target workers aggressively seeking to enforce their demands (s 10 of the Riotous Assemblies Act 17 of 1956), the offence was considerably expanded by section 8 of the General Law Amendment Act (39 of 1961). This provision deleted the words “in respect of employment” from section 10 of the 1956 Act, which enabled the offence to be used in all contexts, not simply that of employment. Finally, the Intimidation Act was passed in 1982, at the same time that a number of security offences were created by legislation (found mainly in the Internal Security Act 72 of 1982, which in itself criminalised a broad form of intimidation in s 54(1)(d)). Further amendments to the Act (via the Internal Security and Intimidation Amendment Act 138 of 1991, followed by the Criminal Law Second Amendment Act 126 of 1992), *inter alia* broadened the definition of intimidation, introduced a new form of intimidation (set out in s 1(1)(b) of the Act), and switched the broad intimidation offence in the Internal Security Act to the Intimidation Act (s 1A).

After this development, the offences set out in section 1 of the Intimidation Act were as set out above (under heading 1 of this note).

Two provisions of the Intimidation Act were subject to compelling criticism. The first of these was the reverse-onus provision contained in section 1(2) of the Act (see, e.g., Snyman *Criminal Law* 456). The Constitutional Court has been resolute in striking down any provisions that incorporate a reverse-onus provision as posing an unjustifiable infringement on the right to be presumed innocent contained in section 35(3)(h) of the Constitution (see, e.g., *S v Zuma* 1995 (2) SA 642 (CC); *S v Coetzee* 1997 (3) SA 527 (CC)). The second provision to attract criticism was the offence contained in section 1(1)(b). This provision has been the object of vigorous judicial and academic criticism. Its formulation has been described as “tortuous” (*S v Holbrook supra* 600i), and the offence has been variously described as

“disconcertingly widely formulated” (Snyman *Criminal Law* 456), even as assuming “absurd proportions” (Plasket and Spoor “The New Offence of Intimidation” 1991 12(4) *Industrial Law Journal* 747 750).

Neither of these provisions subsists in South African law. The unconstitutionality of the section 1(2) reverse-onus provision was confirmed by the Constitutional Court (*Moyo v Minister of Police supra*) after being declared as such by the Supreme Court of Appeal (*Moyo v Minister of Justice and Constitutional Development supra*); and section 1(1)(b) was struck down as unconstitutional by the Constitutional Court in *Moyo v Minister of Police (supra)*, despite the majority of the Supreme Court of Appeal having a different view (*Moyo v Minister of Justice and Constitutional Development supra*). The basis for the finding of unconstitutionality in respect of section 1(1)(b) was its unjustifiable infringement on the right to freedom of expression. As indicated above, this provision was subsequently deleted by section 24 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act (23 of 2022). (For a discussion of the intimidation offence and the judgments in *Moyo*, see Watney “Freedom of Expression and Intimidation: Uneasy Relationship or Matter of Interpretation?” 2020 *TSAR* 377.)

4.2 *The approach of the court in White*

It is noteworthy that the reviewing court in *White* starts its analysis of the appropriateness of the intimidation conviction by citing the full text of section 1 of the Intimidation Act, quoting both the extant and repealed offences. This approach is perhaps understandable in light of the court proceeding to discuss the *Motshari* and *Holbrook* cases, which dealt specifically with the offence declared unconstitutional in section 1(1)(b), but whether such sources are indeed pertinent to the case at hand requires closer attention.

The context of the *Motshari* case was a domestic quarrel, between partners who had lived together in a somewhat fractious relationship for seven years, where the accused had threatened to kill the complainant, and had employed very insulting language towards her. Despite the threat and verbally abusive behaviour, the complainant was not sufficiently alarmed to leave their mutual home. On review, the court set aside the conviction for contravening section 1(1)(b), holding that the provisions of this section did not apply to the case at hand. The court in *Motshari* (which judgment was *inter alia* praised in *Sandlana v Minister of Police supra* par 42) stated that the “draconian penal provisions [of the Act] ... strongly militate against trivial and ordinary run-of-the-mill cases having been within the contemplation of the Legislature” (*supra* 554a–b), and approved of the approach of the earlier decision in *S v Holbrook (supra)*, where the court similarly held that the appellant’s actions did not amount to a contravention of section 1(1)(b). In this case, there had been a heated argument between the appellant and the complainant after the appellant had thrown the complainant’s cat into the swimming pool on the property on which they both resided. When the complainant insisted on reporting the matter to the estate agent responsible for the property, with a view to getting the appellant evicted, he threatened to kill her. The complainant was however undeterred, and had to be restrained

when she emerged from her dwelling with a firearm, to confront the appellant.

While the purpose of the court in *White* in citing these decisions is clear – namely that the decisions indicate the disjuncture that the courts in these cases found between the conduct on which these cases were based, and the conduct targeted in the section – it simply bears noting, once again, that the cases in question relate to section 1(1)(b) (although the ultimate conviction in the court *a quo* in *Holbrook* was a contravention of section 1(1) of the Criminal Law Amendment Act 1 of 1988). The court in *White* notes that the Constitutional Court in *Moyo* overruled the majority judgment in the SCA decision to strike down section 1(1)(b) as unconstitutional, although section 1(1)(a) did not face a constitutional challenge, and thus remains valid (*supra* par 12–13). However, notably, the court in *White* returns to the *Holbrook* decision, and its critique of the breadth of the section 1(1)(b) provision, and its statement that “the section is an unnecessary burden on our statute books” (*Holbrook supra* 603, cited in *White supra* par 14).

Why the focus on the *Holbrook* decision? Because, for the court in *White*, the “general tenor” of the dicta from *Holbrook* is valid (*supra* par 15):

“It is not necessary to completely do away with sub-section 1(1)(a), but it should be utilised in line with the purpose of the Legislature, bearing in mind the long title of the Intimidation Act, that is to prohibit certain forms of intimidation, the extreme sentences that may be imposed, the context in which the Act was promulgated, and the language used. There is certainly a place for it, but to use it in trivial matters as in casu is unimaginable.”

As discussed above, the Intimidation Act has been subjected to some penetrating, and justified, criticism. The scope of the Act has in particular been a matter for concern, being described by Mathews as a “dragnet law” (*Freedom, State Security and the Rule of Law* (1986) 59), but is the approach of the court in *White* to this offence correct?

4.3 The scope of the section 1(1)(a) offence

In assessing the scope of the offence, it is necessary to return to its rationale. The long title of the Act is not particularly revealing in this regard, simply stating that the purpose of the Act is to prohibit certain forms of intimidation. In short, the text of section 1(1)(a) merely describes certain conduct that the legislature wished to prohibit. Although the judgments in *Moyo* were naturally focused on the constitutionality of the challenged provisions of sections 1(1)(b) and 1(2), both the SCA and the Constitutional Court made more general observations about the intimidation offence, which are referred to in the discussion below. Wallis JA points out in *Moyo v Minister of Justice and Constitutional Development* (*supra* par 94), that the nature of the offence may be derived from its name, being directed at “behaviour constituting intimidation” and that the statutory purpose should be understood as having deterrence of such behaviour as its goal. On the face of it, the wording of this provision, though wide-ranging, is hardly vague or obscure. In fact, in the minority judgment of the SCA in *Moyo v Minister of Justice and Constitutional Development* (*supra* par 49), the offence contained in section 1(1)(a) is described as “narrowly tailored”.

While the rationale of the offence has altered over the period of its development through various legislative amendments (see above discussion), it is clear that it is not merely protecting against bodily harm or damage, although this is indeed incorporated in section 1(1)(a) (*Moyo v Minister of Police supra* par 68). As pointed out by Ledwaba AJ, writing for a unanimous bench of the Constitutional Court, “[t]he mischief that the Act seeks to correct is intimidatory conduct” (*Moyo v Minister of Police supra* par 67; see also Hoctor *Snyman’s Criminal Law* 7ed (2020) 401). Proof of such intimidatory conduct (i.e., conduct that falls within section 1(1)(a)), such as assault, causing injury or damage, or a threat to kill or assault or cause injury or damage, “will almost always constitute *prima facie* proof of unlawfulness” (*Moyo v Minister of Justice and Constitutional Development supra* par 77). It follows then that the intent to intimidate is central to the proof of the commission of this offence, and that liability would typically turn on the question of whether such intent accompanies the prohibited conduct.

Mathews has criticised the intent component of the offence as “all-encompassing” and “unfocused” (*Freedom, State Security and the Rule of Law* 58). However, it is clear that the intent component significantly narrows the offence. Whilst intimidation can be committed in a variety of ways, “by acts or conduct, or through the spoken or published word” (*Moyo v Minister of Justice and Constitutional Development supra* par 95 – for examples of such conduct see *supra* par 96), it can only be committed where such conduct is performed with a particular intimidatory purpose. Thus, an analogy can be drawn between the *mens rea* component of the common-law crime of housebreaking with intent to commit a crime, and the *mens rea* component of the intimidation offence. In respect of the housebreaking crime, the accused is required to have intent in respect of the unlawful breaking and entry into the premises or structure in question, but there can be no liability without a further intent to commit a crime on the premises (see Hoctor *Snyman’s Criminal Law* 484). With regard to the intimidation offence, the conduct specified in section 1(1)(a) (i.e., assault, injury, causing of damage, or threat to kill or assault, injure or cause damage) must be intentional, but the offence is not committed unless the accused further intends to by such conduct compel or induce a person to do or refrain from doing something, or to assume or abandon a particular standpoint.

The presence of such purpose must, as with all elements of an offence, be established beyond reasonable doubt, and thus the evidence for such intimidatory intent should be properly tested (see *S v Ipeleng supra*, where the evidence of whispered intimidation that was not heard or confirmed by any other person did not suffice for a conviction). Furthermore, the prosecution can no longer rely on the erstwhile reverse-onus provision in section 1(2) to require that the accused prove that he had a lawful reason for his conduct. Instead, the prosecutor is required to prove the absence of a lawful reason for the conduct.

It should further be noted that, with the demise of section 1(1)(b), the offence of intimidation can no longer be committed on the basis that the accused’s conduct has the effect of, or even “might reasonably be expected that the natural and probable consequences thereof would be” that a person perceiving the conduct would be put in fear. The test for intimidation is

therefore now entirely subjective in nature. It can no longer be premised upon criteria of objective reasonableness. The crucial consideration is whether the accused by his conduct *intended to intimidate*. The intention to assault or the intention to commit public violence, to take two examples where potentially intimidatory *conduct* may be in issue, would not suffice for liability for the intimidation offence.

The importance of this consideration is evident if one takes into account that in *Holbrook* (*supra*) the court applied the test whether “objectively viewed” a reasonable man would have regarded the conduct and words used by the appellant to be threatening to the safety of the complainant (*supra* 597). The approach and reasoning applied in *Holbrook* was adopted as “sound” in *Motshari* (*supra* 558). In *S v Gabatlhole* (2004 (2) SACR 270 (NC)), the court held, following *Motshari*, that the threat of the housebreaker caught in the complainant’s house, that he would return along with his “bandiet tjommies” (gangster friends), should be regarded as a less serious case (par 8), such that the conviction for the intimidation offence set out in section 1(1)(b) should be set aside. Whatever the correctness of the assessment of reasonableness, the approach is indeed sound, but only in relation to section 1(1)(b), where an objective assessment of the natural and probable consequences of the accused’s conduct is the test to be applied. However, in cases dealing with section 1(1)(a), where no such reasonableness criterion forms part of the provision, it is important that the courts not adopt this mode of thinking. It seems that this occurred in *S v Mramba* ([2008] JOL 21713 (E)), where the court (par 14) cites the passage from *Motshari* (554a–b), doubting that “trivial and ordinary run-of-the-mill cases” fall within the ambit of section 1(1)(b) of the Act, and then states that “[t]here is no reason why this remark should not also apply to section 1(1)(a) of that Act in the circumstances on which the charge was aimed against the accused”. After noting (par 18) that the magistrate in the court *a quo* did not have regard to the *Motshari* and *Gabatlhole* cases (which both dealt with section 1(1)(b), not section 1(1)(a), the basis for the conviction *in casu*), the court held that the conviction should be overturned and replaced with an assault conviction. It seems that the court in *White*, having cited cases such as *Holbrook* and *Motshari*, falls into the same error when it excludes threats “with no real consequences of harm” and “run-of-the-mill threats” (*supra* par 17) from the ambit of section 1(1)(a), in favour of “deservingly serious matters only” (*supra* par 21), having earlier stated that the use of section 1(1)(a) “in trivial matters as *in casu* is unimaginable”. Given that the court is not describing a threat to kill another as being *de minimis non curat lex*, the basis for assessing whether a threat has a “real consequence of harm” or is “run-of-the-mill” or “deservingly serious” can only be an objective, reasonableness assessment.

The approach of the court in *S v Cele* (2009 (1) SACR 59 (N)) is better. The court held that the conviction of the appellants for contravening section 1(1)(a)(ii) should be overturned after the court’s analysis of the words “we will crucify you” yielded the conclusion that the words did not constitute a threat (par 31). Whether this is so may be doubted but is a matter for the court to ascertain on the facts. However, it is notable that the court specifies that it made this finding, “notwithstanding how Govender [the complainant] interpreted them”. This approach immediately divorces liability from an

objective assessment of the seriousness of the threat, and focuses on the proper criterion: whether the accused acted in an intimidatory manner with the necessary intent to do so. Such an approach is admirably demonstrated in the case of *Van Zyl v S* ([2010] ZAWCHC 595), where the appellant was convicted *inter alia* on four counts of intimidation, as a result of telephonic threats that he had issued to the various complainants. On appeal, the conviction on the third count was overturned, as the court found that the State had failed to prove that there was indeed a threat intended to induce the complainant “to take up a particular view or to take up a particular course of conduct” (par 47). However, on the remaining counts (four, six and seven), the convictions for contravention of section 1(1)(a) were confirmed (see par 49–64). The court held in respect of each of these matters that although the respective complainants were not threatened or alarmed by the telephonic threats to burn down their shops (or alternatively, home, in the case of count seven), in each case the threat intentionally sought to intimidate the complainants to refrain from certain conduct (specifically, to not pay their fees to the corporation of which they were franchisees). The intimidation offence was thus established in each case, not on the basis of whether it was likely to effect real consequences (it did not, in any of the convictions for intimidation) or whether the complainant was actually intimidated, but rather whether the appellant had acted in an intimidatory manner, with the necessary intent to intimidate, as set out in section 1(1)(a).

4.4 *The need for the existence of the intimidation offence*

Snyman points out that intimidation is rife in South Africa (*Criminal Law* 455, cited in *White supra* par 17); given that it is necessary to protect against cruel, inhumane or degrading treatment, it is entirely appropriate that the criminal law provide a suitable and specific remedy for intimidatory conduct. Even those who have criticised the Intimidation Act acknowledge a role for the offence of intimidation in appropriate circumstances (see Mathews *Freedom, State Security and the Rule of Law* 57). Furthermore, the Constitutional Court (in *Moyo v Minister of Police supra* par 25) has stated:

“Intimidatory conduct that negates these rights [to dignity, personal freedom and security] has no place in an open and democratic society that promotes democratic values, social justice and fundamental human rights.”

It has, however, been stated on a number of occasions that the intimidation offence is not required, since existing common-law offences can cover the same ground (*S v Holbrook supra* 603b; *Motshari supra* par 11–13): in the *White* case, the court applauds (*supra* par 18) the use of “common-law offences such as assault, extortion or malicious injury to property” rather than resorting to section 1(1)(a). While there could be some overlap between the intimidation offence and other offences, it is by no means clear that common-law crimes present a viable alternative to the intimidation offence. Brief reference can first be made to the crimes listed in *White*.

First to be assessed is assault, which may be defined as “unlawfully and intentionally (1) applying force to the person of another, or (2) inspiring a belief in that other person that force is immediately to be applied to him or

her" (Burchell *Principles of Criminal Law* 591). There is a clear overlap between section 1(1)(a)(i) of the Act and assault in terms of the conduct requirement. However, while there may be such an overlap in terms of the second form of the intimidation offence (i.e., s 1(1)(a)(ii), see e.g., the *Cele* case *supra*), on the facts of *White*, there would be no overlap as the definition indicates that the threat of harm must be immediate, which is not the case in *White*, where the threat of harm was conditional on the complainant dating Palesa. In *Sandlana v Minister of Police* (*supra* par 44), the court's understanding of the content of section 1(1)(a) is that it involves an "imminent threat" of violence. This is simply not consistent with the wording of the provision.

More needs to be said here. A conditional threat could in fact constitute assault "where the accused is lawfully entitled to act in the way that she is threatening to act ... [but] could amount to assault if, on account of the threat, [the complainant] is prevented from doing what she is lawfully entitled to do" (Hoctor *Snyman's Criminal Law* 397–398, where the case of *R v Dhlamini* 1931 (1) PH H57 is cited in this regard). Since there were no lawful impediments to the complainant dating Palesa, could the accused in *White* then not be charged with assault after all? No, he could not, since even the unlawful conditional harm threatened would be required to be immediate, rather than related to some future aggression (Milton *South African Criminal Law and Procedure Vol II: Common-Law Crimes* 3ed (1996) 427, referring *inter alia* to *R v Sibanyone* 1940 JS § 40 (T); *S v Miya* 1966 (4) SA 274 (N) 276 277). It is also clear that assault differs from intimidation with regard to the respective intent requirements: in intimidation, the intent of the conduct is to "compel or induce ... to do or abstain ... or to assume or abandon a particular standpoint" (s 1(1)), whereas, in assault, the intent is simply to apply force to the person of another or to threaten such person with immediate personal violence (Burchell *Principles of Criminal Law* 599), and no further intended purpose is required.

The next offence mentioned in *White* is extortion, which may be defined as "when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure which induces her to hand over the advantage" (Hoctor *Snyman's Criminal Law* 369). The intimidation offence can be contrasted with the crime of extortion in that, in the case of intimidation, the intimidatory conduct or threat need not successfully produce the effect aimed at; whereas for there to be liability for extortion, the advantage must indeed be induced by the pressure. It seems that the pressure placed on the complainant in the extortion crime may take the form of a threat of physical harm (although this is not actually stated in the sources cited in support of this proposition in Milton *South African Criminal Law and Procedure* 690 n83, which are Voet *Commentarius ad Pandectas* 47.13.1; Matthaeus *De Criminibus* 47.7.1; *R v Kandasamy* 1912 NLR 146), on the strength of the *obiter dictum* in *R v Mhlongwa* (1928 PH H60 (N)), and the acceptance that extortion and robbery could overlap in *Ex parte Minister of Justice: R v Gesa; R v De Jongh* (1959 (1) SA 234 (A) 240). However, it is clear that, on the facts in *White*, there could only be liability for attempted extortion at best, since the advantage (the abandonment of a relationship with Palesa) had not yet been obtained. Although extortion could apply to

such non-patrimonial advantage since the legislative widening of the crime in this regard by section 1 of the General Law Amendment Act (139 of 1992), it is at least questionable whether the breadth of such an extortion charge would be appropriate *in casu* (see the comments in *S v Von Molendorff* 1987 (1) SA 135 (T) 168J–169A). Could it be said, according to the principle of fair labelling, that the stigma attaching to an (attempted) extortion verdict on these facts would be “an accurate and fair reflection of ... [the accused’s] guilt, and hence neither more nor less than he deserves” (Walker, Palmer, Baqwa, Gevers, Leslie and Steynberg *Criminal Law in South Africa* 4ed (2022) 25)?

Malicious injury to property may be defined as where a person “unlawfully and intentionally damages property belonging to another” (Hoctor *Snyman’s Criminal Law* 475). Given the facts in *White*, where the accused threatened that he would kill the complainant if the complainant did not desist from romancing Palesa, this crime would not apply. However, even if the threat had been to damage property, it is clear that this crime would not have application.

Similar considerations would apply to the crime of public violence (which consists in “the unlawful and intentional commission, by a number of people acting in concert, of acts of sufficiently serious dimensions which are intended violently to disturb the public peace or security or to invade the rights of others” (Milton *South African Criminal Law and Procedure* 74)) and the crime of *crimen iniuria* (the unlawful and intentional “impairing the dignity or privacy of another person” (Burchell *Principles of Criminal Law* 648)). Both these crimes are mentioned by Mbha JA in *Moyo v Minister of Justice and Constitutional Development* (*supra* par 49) as part of the group of “narrowly tailored offences” that exist to protect the individual against threats. However, Wallis JA (*supra* par 103), writing for the majority in the same case, points out that while there may be overlaps between these crimes (along with assault) and the intimidation offence, there are a wide variety of examples where this would not be the case. Indeed, neither public violence nor *crimen iniuria* would be applicable to the facts of the case in *White*.

It may therefore be concluded that there cannot be a facile replacement of liability for intimidation with any common-law crimes, as has been suggested. While there may be instances of overlap, taking into account either the facts of the *White* case or a host of other examples (such as those suggested by Wallis JA in *Moyo v Minister of Justice and Constitutional Development supra* par 97–102), it is clear that the section 1(1)(a) offence plays a unique role in combating intimidatory conduct.

4.5 How limited should the role of the intimidation offence be?

Given the concerns regarding the historical breadth of the intimidation crime (and, no doubt, the taint regarding its use as a controlling mechanism in response to conduct associated with political unrest and opposition before the advent of democracy in South Africa), there have been arguments in favour of limiting the offence to serious harm or threats of serious harm (Mathews *Freedom, State Security and the Rule of Law* 59). Such thinking

apparently animates the decision in *White*, where, as noted above, the court states that though it does not believe that section 1(1)(a) should be done away with in its entirety, for it to be employed “in trivial matters as *in casu* is unimaginable” (*supra* par 15).

There are a number of difficulties with this approach, however. First, it may be inquired what “serious” means in this context. While the majority of the Constitutional Court in *Economic Freedom Fighters v Minister of Justice and Constitutional Development* ([2020] ZACC 25) has held that this ought to be a question well within the capacity of the courts to assess (par 70), the inherent vagaries of the majority judgment itself give the lie to such confidence. Secondly, is intimidatory conduct not in itself sufficiently serious to merit being criminalised? Notwithstanding that there are circumstances in which a prosecution for intimidation is not appropriate, despite the conduct falling within the definition of the offence (as is the case with assault, for example – see *S v Visagie* 2009 (2) SACR 70 (W)), can it be gainsaid that, in the words of Wallis JA (in *Moyo v Minister of Justice and Constitutional Development supra* par 84), intimidatory conduct is “abhorrent in any democratic society”? Furthermore, the mere fact that intimidatory conduct took place in a domestic setting (as in *Motshari supra*) does not, in the context of the scourge of gender-based violence render such conduct inappropriate for the application of the offence (see *Moyo v Minister of Justice and Constitutional Development supra* par 97). After all, threats of violence are explicitly criminalised in section 1(1)(a) of the Act (*Moyo v Minister of Justice and Constitutional Development supra* par 28).

The question also arises in the present case, where the conduct is categorised by the court in *White* as “trivial”, despite it consisting of a death threat. While the court in *Ipeleng supra*, cited in *White supra* par 19) overturned a conviction for contravening section 1(1)(a) on the evidence, it was held in *White* that “there can be little doubt that the action taken, but not proven, was sufficiently serious to warrant prosecution in terms of s 1(1)(a)”. The alleged conduct was that the appellant had approached the complainants at work during a strike, asked them what they were doing at work, and told them that they would be killed for coming to work. In *S v Phungwayo* (2005 JDR 0496 (T)), the context for the conviction for contravention of section 1(1)(a) was a heated argument between the accused and his superior, as a result of which the accused uttered threats, including a threat to kill the complainant. On review, the court upheld the conviction, holding that “[a] threat to kill anyone is a serious matter and cannot be dismissed lightly”.

The point may be made that intimidation in section 1(1)(a) encompasses a threat “in any manner” to “kill, assault, injure or cause damage to any person”. While a threat to cause physical harm of any sort, with killing being the most serious manifestation of such harm, is clearly included in the ambit of the offence, even the threat of causing “damage” to a person suffices. In this regard, and in light of the approach of the court in *White* to the *Ipeleng* case, it is difficult to understand the rationale of the court in *White* in excluding the conduct that gave rise to this case from the ambit of the intimidation offence. It may be noted that in the context of the analogous offence in the Indian Code (s 503), the conduct in the *White* case would also

fall within the ambit of criminal liability (see the case of *Anna Kamu Chettiar* 1959 Cr LJ 1084). The only exception to liability would be where the threat was vague or ambiguous (BM Ghandi *Indian Penal Code* (1996) 578).

It may further be argued that the intimidation offence performs a function in South African law similar to the housebreaking crime. Holmes has argued in the US context that the object of punishing breaking and entering (like burglary, analogous to the South African housebreaking crime) is not to prevent trespasses, but “only such trespasses as are the first step to wrongs of a greater magnitude, like robbery or murder” (*The Common Law* (1881) 74). In the same vein, Wright argues that burglary is a legislative endeavour to apprehend criminal personalities at the earliest possible moment (“Statutory Burglary: The Magic of Four Walls and a Roof” 1951 100 *University of Pennsylvania Law Review* 411 444). If the housebreaking crime operates as a form of inchoate offence, creating criminal liability at a stage earlier in the passage of events than when the harm threatened is actually carried out, then can the same not be said of the intimidation offence? Is it not preferable to hold someone liable for a threat to kill than for the actual death of another?

Even if the accused did not intend ultimately to kill or physically harm the victim or damage their interests, but provided that the accused intended to intimidate the victim into acting (or not acting) in a particular way, this is entirely consistent with the principles of subjective criminality upon which the South African criminal law is based. Whatever the reaction of the victim, the accused’s intentional intimidatory conduct by way of a threat should give rise to criminal liability just as it would do in the case of assault. Intimidation in section 1(1)(a) of the Act is not limited to where actual physical assault, injury or damage is perpetrated upon a person to intimidate them, but crucially includes intimidation by way of threat.

Given the significant maximum penalties set out in the Intimidation Act for a contravention of section 1(1)(a) – imprisonment for a period not exceeding 10 years or a fine of R40 000 (which in terms of section 1(2) of the Adjustment of Fines Act 101 of 1991 would translate into a maximum fine of R400 000), or both – concerns about excessive sentences underlie the critique of the intimidation offence. However, these concerns should not be overemphasised. Just because a heavy sentence can be handed down upon conviction does not mean that this will necessarily transpire. The court will have to weigh all the factors relating to sentence and take a reasoned decision on this basis. This is no less the case in respect of the intimidation offence than in any other.

The flexibility available to judicial officers in crafting sentences can be seen in the cases of *Phungwayo*, *Van Zyl* and *White* itself. The court in *Phungwayo* (*supra*) acknowledged the gravity of a threat to kill, holding that the imposition of a direct sentence of imprisonment is justified. Nevertheless, the court took into account that the accused was a first offender, that the words were uttered in the heat of argument, and that the magistrate in the trial court over-emphasised the seriousness of the offence. The accused had at the time of review already served three months of a sentence of 18 months’ imprisonment. The court on review proceeded to suspend the balance of the sentence. In the *Van Zyl* case, the court, having examined the

offender's personal circumstances and the nature of the offence, took the view that direct imprisonment was not required, and that a suspended sentence would suffice (*supra* par 74). The trial court in *White* handed down a sentence of R1 000 or six months' imprisonment, which was wholly suspended (*supra* par 1). It may further be noted, by way of comparison, that the punishment for criminal intimidation in the Indian Penal Code is a period of up to two years' imprisonment, or a fine, or both (s 506). If the threat is to cause death or serious hurt, or destruction of property by fire, or to cause an offence punishable with death or imprisonment for life, or with a prison term that may extend to seven years, or to impute unchastity to a woman, the punishment is imprisonment for a period up to seven years or a fine, or both (s 506). Where criminal intimidation is committed by way of anonymous communication, the punishment may be extended by two years' imprisonment (s 507). It is noteworthy that the punishment provisions relating to the intimidation offence in the new draft Code are identical (cl 349(2)–(4)).

5 Concluding remarks

The court in *White* envisages a very limited role for the intimidation offence, seeking to apply it only in “deservingly serious” matters, which the court would categorise by adopting an objective criterion. For this reason, the threat to kill the complainant if he did not desist from exploring his romantic interest in Palesa was regarded as “trivial”. The court further advocates that the intimidation offence not be used if there is an alternative option among the common-law crimes.

It has been argued above that despite the problematic history of the offence, the intimidation offence still has a significant role to play. In this regard, the discussion of the proper use of the offence in *White* is a useful point of departure to examine the nature of the current offence, after the unconstitutional aspects of the offence have been repealed. It is submitted that the role of the offence should simply be to fulfil the legislative intent such that where a person acts in an intimidatory manner with the intent to intimidate, there should be criminal liability. There may be some overlap between the intimidation offence and common-law crimes. However, other grounds for liability do not cover all aspects of intimidatory conduct. Even where there is some overlap, other crimes do not sufficiently highlight the specific purposive role that the offence serves in protecting both rights and public policy.

As noted, intimidation can be profoundly harmful, and violates the rights to dignity, personal freedom and security (see *Moyo v Minister of Police supra* par 25). It follows that criminalising intimidatory conduct is legitimate in a constitutional democracy such as South Africa. While the section 1(1)(a) offence is broadly framed, the offence can only be committed where the accused intended to inflict harm (or threatened to do so) with the purpose of intimidation. This significantly narrows and focuses the ambit of the offence. In any event, where the offence is committed in circumstances where the court concludes that the offender is less blameworthy or is unlikely to reoffend, this can be reflected in the sentence handed down by the court. The concerns of the court in *White* should be seen in light of these

safeguards, and the need for the offence to combat the scourge of intimidatory behaviour in South African society.

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