IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: 18445/2017

In the matter between:

TAARIQ PHILLIPS Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS,

WESTERN CAPE. Respondent

JUDGMENT DELIVERED ON TUESDAY 7 NOVEMBER 2017

GAMBLE, J:

INTRODUCTION

[1] The applicant (hereinafter referred to as "the accused") has been arraigned before this court on charges of murder and rape and is due to appear before Bozalek J on Monday 20 November 2017 when his trial is scheduled to commence. This application seeks to intervene in those proceedings, to oblige the State to accept a plea of guilty on a charge of culpable homicide as tendered by accused and to permanently stay proceedings against him on charges of murder and

rape. The facts of the crime itself are not strictly material to this application and will therefore only be referred to in summary.

[2] It appears that the accused and the deceased (a 21year old woman) were in a longstanding relationship when they attended a New Year's Eve party on 31 December 2013 at a venue near Paarl. It is said that the celebration was what is known as "rave party", an event at which a proliferation of loud electronic music, dancing and drugs were of the order of the day, as it were.

[3] It is suggested that the deceased simultaneously ingested quantities of the recreational drugs known as "LSD" and "Ecstasy", both said to be mind altering substances, and thereafter returned to her tent where she urged the accused to satisfy her pressing sexual desires. He seems to have willingly obliged without more. Sometime after midnight the deceased became comatose and was seen to be foaming at the mouth. She received emergency medical attention on the scene and was transferred to a hospital in Paarl for further treatment but she did not survive and died around 11 pm on 1 January 2014.

[4] The accused was charged with the murder and rape of the deceased and after various appearances in the lower court came before this court for the first time in November 2014 for a pre-trial conference. A trial date was set for 2 February 2015 but the matter did not proceed on that day because the accused had engaged an attorney of his choice who was not available to appear then. Accordingly the matter was postponed until 24 April 2015 to accommodate the defence attorney who had also indicated that he wished to make representations to the respondent ("the DPP") in relation to the proposed prosecution.

[5] At that next appearance the accused suggested that the cause of death as alleged by the State (strangulation) may be open to doubt and accordingly instructed medical experts of his own choice to advise him in relation thereto. A postponement was accordingly agreed upon for this purpose and the matter was removed from the trial roll. At that stage the State bluntly rejected a suggestion by the defence that the matter should be referred to an inquest in light of the potential for doubt regarding the cause of death. The defence it seems would have it that the cause of death arose from the consequences of the ingestion of a lethal drug cocktail, while the State has maintained throughout that the deceased was strangled by the accused.

[6] The matter was re-enrolled for trial on 13 June 2016 on the understanding that the defence would present the State with its expert evidence in relation to the cause of death and the State would be given an opportunity to consider the same in consultation with its own experts. Once again the matter did not proceed, this time on the basis that the accused was short of funds and the case was rolled over until 15 August 2016. The matter did not proceed on that day either because the accused was allegedly still short of funds and it was postponed for hearing on 6 February 2017.

[7] In the pre-trial phase the case was managed by Adv Susan Galloway, an experienced Senior State Advocate who reported to Adv Nicolette Bell, a Deputy Director in the office of the respondent. Ms Galloway dropped out of the matter in August 2016 because she was involved in another case. The prosecutor charged with presenting the case in court is Adv Esna Erasmus, herself a Senior State Advocate,

who, it appears reports to Adv Bonnie Currie-Gamwo, another Senior State Advocate, who was responsible for preparing the indictment in this matter, and hence was considered to be *au fait* with the docket and the State's case. All of these members of the respondent's staff report to the Director himself, Adv Rodney de Kock.

PROCEEDINGS BEFORE SAVAGE J

[8] Early in February 2017 Ms Erasmus met informally with the defence team and she suggested to them that consideration might be given to the conclusion of a Plea and Sentence Agreement in terms of s105A of the Criminal Procedure Act, 1977 ("the CPA"). Ms Erasmus says she did so because she was of the view that there had probably been consensual intercourse, that a rape charge was not sustainable and that the death of the deceased had arisen in the context of *"a sex act gone wrong",* as she put it. At that stage the parties also had an impromptu discussion with Ms Bell at which the suggestion of an inquest was once again put up by the defence.

[9] In light of these initial discussions, representations were made by the defence to the DPP on 2 February 2017 regarding the future conduct of the matter and Savage J postponed the case until 22 May 2017 to enable the State to consider its position in the light thereof. On 8 May 2017 the State gave notice to the defence that it intended to proceed with the trial and furnished the defence with certain additional medical reports which had come into its position in the interim. Claiming that they did not have sufficient opportunity to deal with the new medical evidence, the defence asked for time and Savage J once again granted a postponement until 3 August 2017. During the process of discussing the postponement of the matter, the

parties had various meetings with Savage J in chambers at which, inter alia, the dispute around the cause of death was discussed.

[10] Given that the cause of death was still disputed by the defence, a round-table meeting took place on 9 June 2017 between the various medical experts in an endeavour to reach common ground. That exercise failed and as a consequence thereof the defence indicated that they would not procure any further medical opinions and that they were ready to proceed to trial.

[11] On 31 July 2017 defence counsel requested a meeting with Ms Erasmus and attempted to procure the deceased's personal medical records. The State was not in possession thereof (and in any event regarded same as irrelevant) and the defence was told to utilise the provisions of s205 of the CPA if they were mindful to pursue that route.

[12] On 3 August 2017 the matter was set to commence before Savage J as arranged previously. Shortly before court commenced on that day counsel for the accused, Adv J.J.Moses, approached Ms Erasmus and informed her that the defence wished to enter into discussions aimed at concluding a plea and sentence agreement in terms of s105A of the CPA. Ms Erasmus says that she was taken by surprise as she had understood throughout that the accused wish to plead not guilty and attack the cause of death as part of his defence. In any event, this approach from Mr Moses led to a postponement of the matter until 8 August 2017 to enable the parties to explore the conclusion of such a document.

[13] Ms Erasmus says that she reported this development to Ms Bell (who is the co-ordinator of the High Court roll) and was told to discuss the matter further with Ms Currie-Gamwo because she had been responsible for drawing up the indictment. Ms Erasmus says that she was told to forward the draft plea and sentence agreement to Ms Currie-Gamwo in accordance with established office protocol. Although agreements concluded in terms of s105A are customarily drawn up by the State, Ms Erasmus says that in this matter the defence indicated that they were prepared to do the necessary drafting and she was happy for them to do so. Ms Erasmus says that she informed counsel for the defence that she required the document by no later than close of business on the afternoon of Friday 4 August 2017 as she still had to consider the contents thereof, discuss it with the mother of the deceased, the investigating officer and Ms Currie-Gamwo, all steps contemplated in s105A.

[14] In the result, the draft proposed by the defence was only emailed to Ms Erasmus by Mr Moses at 14h41 on Monday, 7 August 2017. In a covering note Mr Moses observed *"Herewith draft plea and sentence agreement for your consideration. I await to hear from you…."*

[15] Ms Erasmus perused the draft and said she was *"shocked by the quality"* of its contents. As far as she was concerned, the document failed to address in any significant detail the allegation that the accused had caused the death of the deceased. Ms Erasmus said that she was accordingly of the opinion that the applicant had failed to unequivocally admit the elements of the crime of culpable homicide and she immediately informed his attorney (Mr G.Duncan) of the fact that the State would

not accept the version put up by the accused. Ms Erasmus also informed Ms Currie-Gamwo of her view and says that the latter agreed with her.

[16] The following morning the parties met at court and then went to see Savage J in chambers in order to keep her abreast of the latest developments. The judge stood the matter down until later in the day to enable the defence to consider their position. In the process, says Ms Erasmus, she informed Mr Moses in broad terms of the sort of detail which the State required in the agreement in order that it could pass muster. A revised document (which I shall hereinafter refer to as *"the second draft"*) was presented to the State later that morning and, once again, says Ms Erasmus, she was unhappy with the contents thereof: instead of describing in his own words what had happened inside the tent the accused had apparently parroted the earlier wording used in general terms by Ms Erasmus when she conveyed to the defence what it was that the State required.

[17] The parties went to court shortly before lunch that day and Savage J was informed by the State that it had only recently received the latest copy of the proposed document (ie the second draft) and needed time to consider it. The matter accordingly stood down until Thursday, 10 August 2017.

[18] Ms Erasmus says that she thereupon forwarded the second draft to Ms Currie-Gamwo who told her that the document was still unacceptable and that further detail was required as to what transpired inside the tent. Ms Erasmus says that the mother of the deceased was also dissatisfied with the accused's explanation. Ms Erasmus conveyed to the defence the instruction from her senior that unless the

accused was willing to give a proper explanation (to the satisfaction of the State) as to what occurred inside the tent, her instructions were to continue with the prosecution.

[19] Savage J then postponed the matter for a week until Thursday 17 August 2017 to enable the parties to attend to the matter. Ms Erasmus was told by Ms Currie-Gamwo that she had in turn discussed the matter with Mr de Kock and that the final decision as to the conclusion of the agreement would be taken by him. Later that week Mr De Kock indicated that he too was not happy with the contents of the second draft presented by Mr Moses and ordered that the prosecution should continue. On 17 August 2017 Savage J was informed in chambers that the State was not amenable to the proposal put up by the accused but that the defence had asked for an opportunity to meet with Mr de Kock and Ms Currie-Gamwo. The matter was postponed yet again to accommodate the accused.

[20] After much to-ing and fro-ing a meeting ultimately took place on 8 September 2017, attended by Mr De Kock, Ms Bell, Ms Currie-Gamwo and Ms Erasmus as also Mr Moses and Mr Duncan. The outcome of the meeting was that the State's position remained unchanged: it did not accept the factual position put up by the accused, and in the result Mr de Kock directed yet again that the trial should continue. On 18 September 2017 Savage J was informed in open court by the parties that agreement could not be reached and the matter was accordingly postponed for the trial to commence on the first day of the new court term, Monday 23 October 2017. Due to the active involvement of Savage J in the negotiations around the conclusion of the plea agreement, it was deemed appropriate for the matter to be sent to trial before another judge and the matter was allocated to Bozalek J.

THE URGENT APPLICATION

[21] On Wednesday 11 October 2017 the accused launched the present application to be heard in the motion court on Monday, 23 October 2017. The application was brought in breach of the provisions of Rule 6 in that the time periods for the filing of papers was abridged and, although the matter was manifestly urgent in light of the fact that the trial was due to commence on that day, there was no prayer for condonation of the breach of the Rules or permission to proceed as a matter of urgency in the notice of motion. Consideration could therefore be given to striking the matter from the roll in the absence of such allegations, but the State did not take the point and it seems to me preferable to make a ruling on the merits of the application.

[22] The substantive relief sought in the notice of motion is as follows:

> *"1. That the current criminal proceedings under the abovestated case number in the above Honourable Court against the Applicant/Accused, be stayed pending finalisation of this application;*
>
> *2. That a solemn and legally binding agreement - the Agreement - has been negotiated and concluded between the State, as represented by the Deputy Director of Public Prosecutions, Western Cape, Adv N Bell and the State Advocate, Adv E Erasmus, on the one hand and the Defence, Adv JJ (Joey) Moses and Attorney, Mr G Duncan, on behalf of the Applicant/Accused, regarding the further conduct and finalisation of the criminal charges under the abovestated case number against the Applicant/Accused;*

3. *The essential terms of the Agreement are/were the following:*

3.1 The State would accept a Plea of guilty on Culpable Homicide by the Accused, Taariq Phillips, with a non-custodial sentence to be imposed;

3.2 The State would withdraw the other charges of Murder and Rape;

3.3 The Accused would plead guilty to Culpable Homicide as quid pro quo;

4. *That the State, as represented by the Respondent, be interdicted and restrained from proceeding with the Murder and Rape charges, as set out in the Indictment, against the Applicant/Accused, forthwith, and that a Stay of Prosecution be ordered in respect of those charges;*

5. *That the Respondent, as represented by the State Advocate in this matter, Adv E Erasmus, be held bound to the Agreement, including the terms of the written agreement as set out and agreed between the State and Defence, in the Plea and Sentence Agreement in terms of Section 105A of the Criminal Procedure Act, 1977, as amended (Act 51 of 1977) - annexure "TP6" to the founding papers;*

6. *That the Respondent and the Defence - the parties - be directed to present and submit the said Agreement as recorded in the written Plea and Sentence Agreement to the Court, as determined and/or directed by the Honourable Judge President or any other Judge designated by the*

Honourable Judge President, for its consideration and final decision regarding the said Agreement;

7. *That the Respondent is restrained and interdicted from using and/or referring to any information, statements and/or documents used and referred to in this Application in any subsequent trial based on the same facts as the current criminal trial against the Applicant/Accused, and that such evidence be declared inadmissible in such subsequent trial against the Applicant/Accused.*

8. *Costs, in the event of this Application being opposed, on the scale as between attorney and own client, from the date of concluding the Agreement until date of judgment;"*

The document referred to in paragraph 5 of the notice of motion, Annexure TP 6, is the second draft referred to earlier.

[23] The application was opposed by the State which filed a comprehensive set of answering papers on Wednesday 18 October 2017. On Monday, 23 October 2017 the matter was removed from the motion court roll at the direction of the Deputy Judge President and referred to this court for urgent hearing on that day. The accused was not in a position to reply to the State's papers because his attorney, Mr Duncan, was said to be overseas. The matter was accordingly postponed for hearing on Friday, 3 November 2017 with directions for the filing of replying papers and heads of argument. On that day the accused was represented by Advs. D. Potgieter SC and J.J Moses and the State by Advs A.D.R. Stephen SC and E.Erasmus.

[24] The court was informed that Bozalek J had postponed the criminal trial until 20 November 2017 pending the determination of this application.

THE ACCUSED'S CASE

[25] In a comprehensive founding affidavit the accused claims that the second draft constitutes a binding agreement between the parties albeit that it has not been signed by them. Repeated allegations are made regarding consensus having been reached through on-going negotiations between the defence team and Ms Erasmus resulting in a binding plea agreement which *"happened on or about towards the end of July 2017 and beginning of August 2017."*

[26] The accused says that –

> *"34. This agreement was to my mind, fortified when my legal representatives presented me with a written Plea and Sentence Agreement, which, so I was advised, was the format in which it had to be presented to the court in terms of the applicable law, which I was advised, is/was Section 105A….I duly and voluntarily agreed to the facts, circumstances and submissions as formulated by, and set out in the said written document which was drafted by my counsel and presented to the State Counsel, Adv Erasmus, for her consideration with regards to the form and content of the said agreement. This was presented and submitted to her a day before the trial date, on 7 August 2017, to be submitted to the court on the following day, 8 August 2017."*

[27] The accused then goes on to complain that the State was not happy with the contents of the document initially put forward and suggested amendments thereto. He claims that he was eventually persuaded by counsel and his family to agree to the contents of the amended document which was put forward to the State on his behalf. (This is the second draft upon which the accused relies for the relief sought herein.) The accused points out that Ms Erasmus then informed the defence team that she required the approval of her seniors before she could sign off the second draft and he takes her to task in this regard:

> *"40… My legal representatives and I were very perturbed and frustrated with this new unexpected bureaucratic hurdle, since all of us, including the presiding judge were under the impression that since there is a genuine agreement, and clear agreement regarding the contents of this document, annexure TP 6, it is ready to be presented to the court for its consideration and final decision."*

[28] After detailing the further delays which occurred, culminating in the round table meeting with Mr to Kock referred to above, the accused says the following:

> *"47. The long and short of this meeting was that the DPP-WC was of the opinion, and with which we disagree, that there was never, and could never have been, any agreement between the State and the Defence, and that all that was happening was* ***"negotiations"*** *that took place, which did not result in any agreement in this matter. Not he (Adv De Kock), neither his deputies,*

*would be prepared to **"sign off"** the written Section 105A Plea and Sentence Agreement. Hence the matter must proceed to trial."*

[29] The accused then goes on to set out his understanding of what had happened in the context of Section 105A. He contends that there was a multi-phased process, the first of which was an agreement that he would plead guilty to culpable homicide, that the State and the defence had agreed on a non-custodial sentence and thirdly that the charges of murder and rape would be withdrawn. The accused claims that these terms having been agreed upon, a binding agreement between him and the State had therefore been concluded from which the State could not resile:

> *"51. Hence the first stage of this process, the Negotiation stage, had been initiated and concluded. This resulted in the Agreement reached between the State and the defence, as set out above, which is the second stage of the process.*
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> *52. The next stage of this process, was to formalise and formulate the terms of the Agreement to the satisfaction of all parties concerned, i.e. the State and the Defence. The Defence then presented the formulation of the Agreement in the form of the Plea and Sentence Agreement, to the State - Adv Erasmus - the prosecutor. The latter considered it, did not agree thereto, and presented the defence with her additional terms to be included in the formulation of the Agreement. This, after consideration, consultations and receiving the necessary instructions from the client, myself, was then accepted and inserted and added into the written formulated Plea and Sentence Agreement. This*

formulation was thereupon accepted and agreed to by both the State and the Defence. This concluded the third stage of the Plea Bargaining process, which in the original plea bargaining process under the Constitution, common law and applicable statutory framework, would have been the Final Stage of the Plea Bargaining Process, thereafter to be presented to the Court."

[30] It bears mention that these allegations fly in the face of the covering note in Mr Moses' email to Ms Erasmus that a *"draft"* was being forwarded *"for consideration"*. They are also inconsistent with Mr Moses' address to Savage J on 18 September 2017 when counsel informed the court as follows after Ms Erasmus had sought a postponement on the basis that the parties had not reached agreement on the detail of the plea-bargaining agreement:

"…. (T)here were genuine attempts at reaching an agreement in respect of the section 105 (A) plea and sentencing agreement but we were then advised that my learned friend's senior colleagues was (sic) not amenable to agree to that and hence that has not materialised and we are now in the situation where we have to agree or have to request that the matter will then have to be postponed for trial, M'Lady."

[31] After accusing the State of reneging on a binding agreement and detailing various aspects of the alleged prejudice that he claimed he would suffer if the agreement were not enforced, (all of which are irrelevant to the matter at this stage), the accused sought to draw the following conclusions in the founding affidavit:

"58. I respectfully submit that I have demonstrated on all the probabilities that a valid, bona fide and solemn agreement has been entered (sic) and concluded between the State and the Defence.

59. The essence of that agreement is/was that the State would accept a Plea of Guilty on Culpable Homicide, with a non-custodial sentence, and withdraw the Murder and Rape charges, in return for me, the Applicant pleading guilty to Culpable Homicide (the quid pro quo) as abovestated.

60. The pre-section 105A plea bargaining process has therefore been completed, which resulted in a solemn agreement reached between the State and the Defence. In the circumstances the State is, and should be held bound to that agreement.

61. The written "Plea and Sentence Agreement in terms of section 105A" annexure "TP6" constitutes objective proof of the existence of the said agreement solemnly reached between the State and the Defence, even if it is/was not yet signed by an on behalf of the respective parties.

62. I am advised and thus respectfully submit that the section 105A plea bargaining process does not supplant the existing pre-section 105A plea bargaining process: it is merely a complimentary disposal mechanism (see authorities cited and referred to above).

63. Hence the State cannot, and ought not be allowed to, rely on the fact that the written "Plea and Sentence Agreement in terms of section 105A"

is/was not signed by and on behalf of the DPP, and therefore is a nullity. That type written document, annexure TP6 in fact, is a memorial of the terms of the agreement reached between the State and the Defence, and as such objective proof of the existence of the said agreement solemnly reached between the parties.

64. At best for the State, should they rely on the non-existence of a formally signed section 105A plea agreement, they themselves take the said agreement out of the ambit of section 105A, and bring it squarely within the ambit of the pre-section 105A plea bargaining process.

65. Under the latter plea bargaining process, they ARE, and should be held bound to, the agreement solemnly reached between the State and the Defence.

66. In the circumstances, the State should be held bound to the said agreement solemnly reached in terms of the pre-section 105A plea bargaining system, and I therefore respectfully pray for an order in terms of the Notice of Motion to which this founding affidavit is annexed."

COMMON LAW PLEA-BARGAINING

[32] As I understand it, the phrase *"the pre-section 105A plea bargaining system"* employed in the founding affidavit is intended by to refer to the common law position in which the criminal courts have always encouraged parties to settle their differences by concluding agreements relating to, inter alia, the withdrawal of charges

in lieu of a plea of guilty on other charges. The issue is dealt with in three cases relied upon by the accused, viz *Dense Concrete*[1],*Van Eeden*[2] and *Steyl*[3].

[33] In *Van Eeden*[4], Budlender AJ writing for the Full Bench summarized the position as follows:

> *"[11] The relevant events [in this matter] took place before the provisions of s105A of the..[CPA] had come into effect.*[5] *Section 105A now formally regulates and recognises the practice of plea bargaining. However, that practice existed before the enactment of s105A, and was recognised by law. In [Dense Concrete], the court undertook an extensive review of the literature on this subject. It concluded that plea bargaining was an integral part of the process of criminal justice in South Africa, and that plea bargaining as a means of achieving a settlement of the lis between the State and the accused was*
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> > *'*as much an entrenched, accepted and acceptable part of our law of procedure as are negotiations aimed at achieving a settlement of the lis between "private" citizens, in "civil disputes"….
>
> *The Court concluded that the respondent*

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[1] North West Dense Concrete CC and Another v Director of Public Prosecutions , Western Cape 2000 (2) SA 78 (C)

[2] Van Eeden v Director of Public Prosecutions , Cape of Good Hope 2005 (2) SACR 22 (C)

[3] Steyl v National Director of Public Prosecutions and Another [2015] ZAGPPHC 407 (9 June 2015)

[4] At 24j -25d

[5] The section came into operation on 14 December 2001.

> 'would and must be held to his part of the bargain. That a prosecutor should stand by an agreement solemnly given during the negotiations leading to a plea agreement should he regarded as a basic rule of that procedure.' "

[34] The facts in both ***Dense Concrete*** and ***van Eeden*** are however fundamentally different to the present scenario. There the State had come to an agreement with multiple accused that if one of them pleaded guilty to certain charges, the charges against the other(s) would be withdrawn. When the State sought to proceed against the other(s) in later proceedings, the court found that it was precluded from doing so on the basis that it was bound by its earlier undertaking. Importantly, the cases did not involve any agreement in relation to the sentence to be imposed.

[35] The case for the accused in the founding affidavit herein is decidedly ambivalent: on the one hand he seeks to hold the State precisely to the terms of the agreement concluded in the second draft and requires that document to be presented to the trial court when the matter continues as if it had been signed by the parties, and on the other hand, he says that the State is bound at the very least to an *"initial agreement"* concluded with Ms Erasmus that he would plead guilty to culpable homicide in exchange for the charges of murder and rape being dropped, and further that he would receive a suspended sentence.

THE STATE'S CASE

[36] The State's case in the answering affidavit is straight forward. It says that the parties embarked on a negotiation process to conclude an agreement as contemplated in s105A, the point of departure being a plea of culpable homidice in exchange for the dropping of the murder and rape charges and the imposition of a non-custodial sentence. It says that such agreement had to incorporate certain critical factual admissions by the accused, and thereafter the approval thereof by the deceased's mother and the investigating officer (as contemplated in s105A(1)(b)) and, finally, the approval by Mr de Kock, in consultation with his prosecutors at the lower level.

[37] In the main affidavit deposed to on behalf of the respondent, Ms Erasmus denies repeatedly that an agreement as contemplated under s105A has been concluded or that she was authorized to conclude a final and binding agreement with the defence. The State maintains further that such allegations of fact as are acceptable to it have not been made by the accused, that the approvals referred to under s105A(1)(b) are lacking, that Mr de Kock has not approved the plea bargain and that there is therefore no agreement under the CPA. In the circumstances, the State says it is entitled (in fact duty bound) to continue with the prosecution.

THE ACCUSED'S REPLY AND ARGUMENT

[38] In the replying affidavit (which was deposed to by Mr Duncan) the accused takes issue with Ms Erasmus's factual allegations and continues to assert the case made out in the founding papers. To the extent that these are motion

proceedings the rule in *Plascon-Evans*[6] applies and the State's version must carry the day. I did not understand Mr Potgieter SC to take issue with this approach in argument which means that the State's denials of the conclusion of an enforceable agreement stand.

[39] Rather, counsel for the accused adopted a different tack in argument. Any reliance on the second draft (as per paras 5 and 6 of the notice of motion) was jettisoned and counsel fell back on a *"pre-s105A"* approach, the argument being that common law position referred to by Budlender AJ in *van Eeden* was still available to the accused and that the State was bound by Ms Erasmus' alleged agreement to the point of departure referred to earlier.

[40] In my view, the argument is not well thought through because that for which the accused now contends is no warrant for the imposition of a non-custodial sentence: the route proposed in argument leaves him at the mercy of the trial court which is at liberty to impose whatever sentence it considers just in the circumstances and is not bound by the State's agreement not to ask for a custodial sentence. And therein lies the fundamental principle which underpins s105A: an accused is able to strike a bargain with the State regarding the sentence to be imposed and once the court has sanctioned that sentence, he/she can tender a plea of guilty safe in the knowledge that that very sentence will be imposed.

[41] The purpose of the plea bargaining process therefore is not only to enable the State to dispose of a criminal prosecution speedily and without incurring

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[6] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-5. See also National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA) at [26]

the expense and delay of a trial, but to provide the accused person with a guarantee that the sentence bargained for will be imposed[7]. This is because in terms of the provisions of s105A(9)(b)(ii), the accused (or for that matter, the State) is permitted to withdraw from the agreement in the event that the court is not prepared to sanction the sentence which the parties have agreed to.

[42] I am prepared to accept for the purposes of the argument that a *"pre-s105A"* common law approach is still available to an accused person. One can conceive of circumstances in the lower courts where, for instance, the prosecutor and defence counsel informally agree before the proceedings commence (as in *Van Eeden*) that a plea will be tendered by an accused on condition that only one charge is proceeded with or that the charges against a co-accused are dropped, but that in such circumstances no consideration is given by the parties to an agreement on sentence because the customary sentence would invariably be a fine or some other form of non-custodial sentence.

[43] But that is clearly not what happened here. In the instant case the parties entered into discussions intended to reach a plea-bargain agreement sanctioned under s 105A, expressly to avoid the imposition of a custodial sentence. The parties approached their negotiations in strict compliance with the structure of the section itself which reflects that the Legislature contemplated an incremental approach as those negotiations proceeded, safe in the knowledge that s105A guarantees the parties the opportunity to resile from the negotiations at the appropriate stage if either is dissatisfied with the outcome thereof.

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[7] Hiemstra's Criminal Procedure at 15-5 to 15-6

[44] As with any contractual arrangement care must be taken to distinguish between the terms which the parties intended were to have business efficacy and those which fall outside the operational ambit of a binding agreement.[8] It is not clear where the terms now relied upon would have featured in that context. Further, it is important to bear in mind that the Legislature has directed that a plea-bargain agreement must be in writing[9], and, in accordance with the general principles of contract, the written agreement will be the parties' "exclusive memorial". Accordingly, any pre-contractual discussions will be of no force and effect once the written agreement is concluded in light of the parole evidence rule[10].

PUBLIC POLICY CONSIDERATIONS

[45] Finally, in my view there are important policy considerations in this matter which run counter to the approach ultimately suggested by the accused. As *Hiemstra*[11] observes in relation to the principles underlying the concept of a plea-bargain, it is very much a question of give and take –

> *"The plea-bargaining regime is a fundamental departure from our adversarial system. On the one hand, the state agrees to compound the offence and, on the other hand, the accused waives several constitutional rights afforded in a trial. Certainty of the outcome and the exact sentence are attractive advantages to the accused. The state discounts the risk of an acquittal by*

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[8] ABSA Bank Ltd v Swanepoel 2004 (6) SA 178 (SCA) at [5] – [7]

[9] s105A(2)

[10] Union Government v Vianini Pipes (Pty) Ltd 1941 AD 43 at 47

[11] *op cit*

accepting a lesser sentence than might otherwise have been imposed. Avoiding a protracted trial with its attendant stress is an additional benefit to both sides.

Plea bargaining can be defined as the procedure whereby the accused relinquishes the right to go to trial in exchange for a reduction in sentence; the prosecutor bargains away the possibility of conviction in exchange for a punishment which would be retributively just and costs the least in terms of the allocation of resources. In the process of bargaining, numerous assumptions are made."

[46] At the end of that exercise the parties may reach consensus as to the extent of the accused's acknowledgement of criminal culpability and the appropriate sentence to be imposed in exchange for such acknowledgement. If so, the parties must reduce their agreement to writing and place it before the court for confirmation of the sanction. As said earlier, the court may approve thereof or it may come to a different conclusion. In them latter event, both the accused and the State are afforded the right to resile from their agreement. And, should that happen, and the trial continues, the State is precluded from referring at all to the abortive agreement[12]. That provision was expressly incorporated in the CPA to allow the parties the space to bargain freely with each other without compromising the accused's constitutionally protected fair trial rights.

[12] s105A(10)(a)

[47] To permit an accused, as in the present circumstances where a written agreement under s105A is not concluded due to the lack of consensus, to hold the State to its initial willingness to explore a plea-bargain and so secure a partial concession by the State made during the negotiation process, is to permit the accused to choose those parts of the negotiations which are favourable to him in the absence of an adequate *quid pro quo* from his side. This in my view offends the public policy considerations which underpin statutory plea-bargaining.

[48] There is a further consideration of public policy which emerges from the founding papers. When explaining his motivation to agree to the initial draft of the plea-bargain agreement the accused says the following:

> *"32. After numerous, lengthy and sometimes heated consultations between my legal representatives and I, I was persuaded and agreed that, in the circumstances of this case, it was both just, fair and equitable to both myself and the State, to accept and agree to the proposal based on the said undertaking by the State. The said undertaking by the State to accept a plea of guilty on culpable homicide with a non-custodial sentence, the withdrawal of the charges of murder and rape -**which I know I am innocent of** - the fact that the matter will be finalised swiftly and the anxiety about this case would be over, the huge financial burden and expenses my family and I had incurred thus far, and which might continue, and the fact that my deceased girlfriend's mother had indicated to Adv Erasmus that she also just wanted this matter to finalise and that she does not want me to go to prison, are some of the factors*

that weighed heavily with me, in accepting and agreeing to the said proposal and undertaking by the State." (Emphasis added)

[49] It is apparent from this passage that the accused has serious reservations about his criminal responsibility in relation to the death of the deceased, and has been motivated to offer a plea on the basis of expediency rather than genuine acceptance of his guilt. For a court to confirm a common law plea-bargaining arrangement in such circumstances, particularly where there is no warrant that the accused will receive a non-custodial sentence, in my view offends public policy. The court cannot be party to an arrangement of expediency.

[50] Moreover, in the absence of a validly concluded plea-bargain under s105A, there is nothing which precludes the accused from tendering a plea of guilty in terms of s112(2) of the CPA before the trial court, whether on grounds of expediency or in light of genuine acceptance of his guilt. But to ask this court to direct that such a common law plea-bargain be recorded and enforced against the accused would usurp the power of the trial court to come to a fair and just conclusion regarding the accused's guilt on the applicable test in that court, as opposed to the lesser standard of proof in civil proceedings such as these.

CONCLUSION

[51] I am not persuaded that the accused has made out a case for the relief which he seeks in relation to the confirmation of a common law plea bargain. Having agreed to persue the statutory option open to him under s105A he is required to adhere to the provisions of the CPA, which include the State's prerogative to resile

from the negotiations if it is not satisfied with the factual basis upon which the accused purports to accept criminal responsibility for the charges brought against him.

[52] And, when that situation eventuates, the State acts in terms of the CPA and there is nothing unlawful in its conduct which warrants either the interdictory or declaratory relief sought in prayer 7 of the notice of motion. The accused's fair trial rights are not infringed and remain intact at the commencement of the trial pursuant to the provisions of s105A(10).

[53] While the accused sought a punitive costs order against the State in the event of the application succeeding there is in my view no need to consider granting an order for costs in favour of the State on the basis that it has been substantially successful. The State has been represented by salaried staff of the respondent and has therefore incurred no costs.

ORDER OF COURT

The application is dismissed with no order as to costs.

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GAMBLE, J