

How does the law protect initiates and their rite of passage?

By Nicholas Mgedeza

In South Africa initiates annually go to initiation school. Teenagers are the most vulnerable to initiation. In this article, I scrutinise if the registered or unregistered traditional surgeons of the circumcision schools, who are ill-equipped to conduct initiation and the subsequent death of initiates could, in principle, be criminally liable or alternatively be charged with common law murder; culpable homicide or assault. I will look into the issue of determining culpability and constitutional perspective as benchmark of the initiate's rights, and lastly, I will make a determination on the legal effects of death as the result of negligent conduct of the traditional surgeons. Since there is no codified law in our jurisprudence, I make recommendation for enactment legislation to curb this unfortunate trend.

It is axiomatic that there are illegal circumcision institutions lingering in all corners of our country and, as the result of lack of know-how, unruly dispositions, hazardous health conditions, assault, incompetence and gross negligence, some initiates die while they are at the illegal initiation schools. However, one cannot overlook that such practises also take effect in the registered or legal initiation schools. The question is whether our jurisprudence does countenance that the person(s), under whose auspices the illegal and legal schools are under, can be charged with murder as the consequence for death of initiates, culpable homicide and assaults?

Applicability of elements of crime of murder

In our jurisprudence, murder is a common law offence. Murder is defined as the unlawful and intentional causing of the death of another human being (CR Snyman *Criminal Law* 5ed (Durban: Lexis Nexis 2008) at 447). Claassen's Dictionary of Legal Words and Phrases vol 3 defines 'murder' as: '*Murder* is an unlawful killing of another person with what is generally described as intent to kill. ... Where the crime of *murder* is fully discussed. "To constitute in law an intention to kill there need not, however, be a set purpose to cause death or even a desire to cause death. A person in law intends to kill if he deliberately does an act which he in fact appreciates might result in the death of another and he acts recklessly as to whether such death results or not."' In order to bring the routine and persistent death of initiates to a complete halt – at both legal and

illegal initiation schools – common law criminal liability for murder can be utilised in order to avert the recurrence of such deaths, to deter the traditional surgeons from persisting with such illegal or unwarranted conduct and as the form of retaliation against such perpetrators. In a criminal trial, the burden of proof is on the state to prove the guilt of the accused beyond reasonable doubt. Thus the state needs to prove all the elements of the crime of murder.

***Culpa* and causation**

The element of intention needs to be proved by the state to be successful. In principle, the intention can be direct (*dolus direct*) or indirect (*dolus eventualis*). Some deaths are attributed to maltreatment, malnutrition, abuse (mostly physical in relative to mental). In these circumstances, the culprit probably knows that he is committing an unlawful act (murder). Accordingly, there must be certainty from the culprit that the deceased (victim) will die. Another benchmark on which intention of the culprit can be measured is *dolus eventualis*. In the latter, the culprit should subjectively foresee the possibility that, in striving towards his or her main objective, the unlawful act may be committed or the unlawful result may cause death; and he or she reconciles himself or herself with such possibility (*S v Humphreys* 2015 (1) SA 491 (SCA)).

The institution of illegal initiation schools is analogous to the circumstance where a bogus medical doctor conducts an operation on the patient and consequently the patient passes away as a result of the operation. The mere fact that one conducts a sensitive life threatening practice, and lucidly knows that he or she does not have the comprehensive medical training in that field, should foresee the possibility that due to his or her lack of expertise knowledge, and nevertheless proceeds with such an activity, detrimental effects might ensue. If such facts exist, in principle, *dolus eventualis* might be proven without any hassle. Moreover, on the issue of causation, *condition sine qua non* test will suffice in determining the factual causation of the initiates' death. See *S v Tembani* 2007 (1) SACR 355 (SCA), *S v Lifatila* (Namibia High Court) (unreported case no12/2011, 5-6-2012) (Liebenberg, J) unless there is *novus actus intervenes* to the issue of causation.

Culpable homicide

Culpable homicide is the unlawful, negligent causing of death of another human being. This form of crime is different from murder in the form of culpability, to wit, negligence is a determining factor and the former is determined by an objective test (a reasonable man test). In the event the initiates are assaulted or neglected and as the result of such assault or neglect the initiate subsequently passes away, I deem that the traditional surgeon of both the legal and illegal initiation schools can be convicted of culpable homicide. In the matter of *S v Mutsinda* 2011 JDR 1017 (LT), the accused, who was certified to run an initiation school, pleaded guilty to culpable homicide after an initiate died as the result of beating and kicks and the accused was ultimately sentenced to undergo periodical imprisonment and a fine. Thus, this case substantiates that the traditional surgeon can be charged and convicted of culpable homicide as a result of his or her conduct that culminates in the death of an initiate. Furthermore, this lucidly indicates that – in the event the state failed to prove intention – this is not treated with impunity in that the state can prove negligence on part of the traditional surgeon and, as the result, can be convicted of culpable homicide.

Assault

On the issue of assault, it is reminiscent in my mind of the SABC 'Initiation school assault prompts three arrests' (www.sabc.co.za, accessed 10-12-2015) wherein it was alluded that 'Police in Ngqeleni in Eastern Cape have arrested three young men following an assault of five initiates at an initiation school at Qhokama village. ... [T]he initiates sustained severe head injuries'. Physical assault is designed to affect discipline and to prepare the initiates for the hardship of manhood. In principle, assault encompasses common assault and assaults with intent to cause grievous bodily harm (assault GBH). I submit that it is prudent to focus on the latter, assault GBH, as it is most common among the initiates. Legally, the definition of 'assault' denotes '... any unlawful and intentional act or omission –

- (a) which results in another person's bodily integrity being directly or indirectly impaired, or
- (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place' (Snyman *op cit* at 455).

The crime of assault GBH has the same meaning as aforementioned but what is supplemented therein is grievous bodily harm. So in essence, this type of assault has the impact of causing injuries to somebody else, namely, injury on the head as the result of being hit with the *knobkerrie*. It is quite inevitable that initiates or the guardian of the minors have the absolute right to lay criminal assault GBH against perpetrators at initiation schools, as assault is reprehensible and criminal conduct. Common law definition of assault will have to be proved in the court of law and they have to adduce evidence in a court to prove *facta probanda* in order to secure a conviction.

Constitutional dimension

In principle, our Constitution reigns supreme to other legal instruments. Section 2 of the Constitution provides that: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. 'What this means is that the provisions of the Constitution are binding on all branches and organs of the state. It also means that the provisions of the Constitution have priority over any other laws in the country. More importantly, it means that any law or conduct that is, for whatever reason, "inconsistent with the Constitution, will be null and void"' (John C Mubangizi *The Protection of Human Rights in South Africa: A Legal and Practical Guide* (Cape Town: Juta 2004)).

The inevitable factual point is that almost all the patrons at initiation schools are minors and the latter are conferred rights that are contained in the Bill of Rights like any other citizens. Sections 10 and 11 of the Constitution respectively grants every child (under 18 years of age) the inherent dignity and the right to have their dignity respected and protected; and the unfettered right to life. Thus the enormous death of the initiates as the result of botched circumcision (from both legal and unregistered initiation schools) culminates into infringement of the initiates' rights to dignity and right to life in particular. Moreover, the death that is attributed due to malnutrition and abuse is undoubtedly the infringement of s 28(1)(d) of the Constitution, which provides that: 'Every child has the right ... to be protected from maltreatment, neglect, abuse or degradation.'

The infringement of the aforementioned Constitutional provisions clearly indicate that the death of initiates from initiation schools is an outright violation of the Constitution. Moreover, on the social level, it is vividly known that such conduct is morally reprehensible and is *contra bonos mores*. Likewise, one may not sway from the fact that the initiation from such bogus initiation schools is deleterious to the lives of our future generations. One might contend that such schools are exercising religious and cultural activities. I might unequivocally be in agreement with such contention, however, one must not overlook that such schools are illegal, unregistered and the initiation procedure is conducted by unregistered traditional surgeons who lack precise knowledge of the entire procedure and, in some instance, conducts the procedure while inebriated. Therefore, the Constitution recognises the freedom of religion, belief and opinion, but the internal limitation thereon is that such must be consistent with the Constitution. This affirms the position that Constitution reigns supreme and the bogus initiation schools are unlawful institutions in that the personnel therein and traditional surgeon and other functionaries are not trained. In addition, they are effecting botch circumcision at the peril of the lives of the minor children.

Furthermore, in registered initiation schools, regulations must kick in to regulate and monitor the standard training of initiation schools as botched circumcisions taking effect and the initiates are dying as the result thereof. Moreover, criminal charges can be laid against the perpetrators of assault GBH as the common law defines such crimes and subsequently the state manages to prove all the elements of the offence.

Recommendation

In principle, it is inevitable that unregistered and some registered initiation schools immensely violates the initiates' Constitutional rights. Moreover, with our common law definition of murder, culpable homicide and assault GBH criminal charges can be laid against the unregistered traditional surgeons and registered traditional surgeons for murder (in instances of death of the initiates), culpable homicide and attempted murder in instances where the initiates escaped death. Alternatively, assault GBH charges can be laid in instances where the assault was grievous. However, the outreach programmes (which can be initiated and conducted by the bureaucracy, to wit, Department of Co-operative Governance and Traditional affairs and/or the Chiefs) will

be necessary to conscientise the parents, Non-Government Organisations, civic organisations, traditional leaders, social workers, police officers and regents and other stakeholders that criminal charges may be instituted against the traditional surgeons of the illegal and legal traditional initiation schools. In such a move government can partner with the National Prosecuting Authority in such outreach programmes. I deem that the laying of criminal charges will ostensibly avert the rampant unregistered initiation schools, and will be deterrence to all traditional surgeons from persisting with such preposterous act. In the same breath, parents and teachers must play a pivotal role in informing boys about the ramifications of attending illegal initiation schools and the guard against abuse and reporting channels about the crime committed on them at initiation schools, both legal and illegal.

Furthermore, the enactment of the national legislation to abolish such illegal schools, criminalise such lethal and intolerable conduct of traditional surgeons (both legal and illegal initiation schools) will be a conspicuous mobility by the nation to tackle this calamity. I deem that such legislation will be a solution to this impasse, which has been holding over for quite too long unlegislated. Consequently, the lives of the young generations and the future generations will be spared immensely as the perpetrators of these heinous acts will be prosecuted and conceivably be purged from the society or be deterred by the heavy fines that might be prescribed by the legislation on conviction by the court of law.

Conclusion

This precedented conduct and detrimental practices must come to a halt. Young men are perishing every year in such illegal and legal initiation schools. As initiation school forms part of our historic culture, it will be absolutely wrong for the government to close them. However, legislation must regulate the conduct of the initiation schools. Moreover, it will be prudent if illegal initiation schools are abolished in the legislature and the conduct of traditional surgeon is regulated in the legislature that such conduct must be criminally punishable and hefty sentences are prescribed by the legislature. In addition, outreach programmes must be initiated to educate the youth, parents, and educators and other relevant stakeholders about such illegal initiation schools and about the laying of criminal charges against the atrocious traditional surgeons at both legal and illegal

initiation schools. Lastly, I infer that murder charges can be laid against the traditional surgeons for the subsequent death of initiates.

Furthermore, common law definition culpable homicide and assault can be utilised to open criminal charges against perpetrators of such immoral acts and securing convictions against the unscrupulous traditional surgeons will conceivably act as the deterrence of such recurring act.

Nicholas Mgedeza *BProc Cert in Provincial and Local Government Law (Unisa)* is a non-practising attorney in Boksburg.