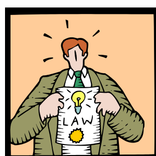
e-MANTSHI

A KZNJETCOM Newsletter

June 2019: Issue 154

Welcome to the hundredth and fifty fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for the Courts of Law has amended the Rules regulating the conduct of the proceedings of the Magistrates Courts' of South Africa. The rules that have been amended are rule 9(3), 19, 55, Part I, III and IV of Table A of Annexure 2 and the fees for Sheriffs. The amended rules will come into operation on 1 July 2019. The notice to this effect was published in Government Gazette no 42497 dated 31 May 2019. The amended rules can be accessed here:

www.gpwonline.co.za/**Gazettes**/**Gazettes**/**42497**_31-5_NationalRegulation.pdf

Recent Court Cases

1. Brown and Another v S (CC 18/2017) [2018] ZAECPEHC 76 (14 December 2018)

Section 63(1) of At 51 of 1977 cannot be interpreted to mean that bail money may be reduced in order to allow the accused to fulfil his financial obligations, like payment of his legal fees.

Makaula J:

[1] The first applicant brought an application for the reduction of his bail amount from R800 000.00 to R50 000.00 or whichever lesser amount the court deems meet. On 16 November 2018 Mr Griebenouw, who is the instructing attorney, gave evidence in support of the application. He testified that the first applicant ceded his bail money to him and Senior Counsel as security for their fees. The matter has now proceeded for a period longer than they had anticipated. The first applicant has continued to make payments towards the fees ever since the matter started. The legal team has now run out of funds and cannot be able to continue without fees being paid. The bail amount is needed to pay for disbursements in his office. Mr Price, who appeared on behalf of the applicants, needs the money to settle his indebtness with the South African Receiver of Revenue *(SARS).* He submitted that the first applicant had complied with all the bail conditions. He is not a flight risk. The police at some stage in error handed his passport to him. He returned it to the police on his own volition.

[2] The first applicant was arrested for charges of racketeering. He applied for bail in the regional court, Port Elizabeth which was granted in the amount of R800 000.00. He paid the amount set for bail. From the aforesaid date he has complied with the conditions set for his release on bail.

[3] Mr Griebenouw testified that bail was reduced in Kimberley High court for purposes of payment of fees. The order was attached in the Heads of Argument submitted by the first applicant. The order is in respect of Case No. KS 21/15 in the matter between the State and Ashley Brooks and Others issued on 16 March 2018 out of the High Court, Kimberley. The order reads:

"Having heard Adv Roothman for the State and Adv Griebenouw for the 1st, 2nd and 12th Accused, Adv Hodes (SNR) for the 3rd to 8th Accused Adv Hodes (JNR) for 4th to 6th Accused, Adv van Heerden for the 7th to 9th and Adv Scheuder for the 10th

Accused:

It is Ordered That:

1. The bail in respect of Accused 1, 2, 3, 4, 6, 7, 8, 9, 10 and 12 is reduced to R50 000.00 each".

[4] The order does not state the reasons for the reduction of the bail amount contrary to the submission made in the Heads of Argument which state that Mr Griebenouw:

"Has first-hand information therefrom because he appeared for the First, Second and Twelfth Applicant, <u>this was an application not only for fees to be reduced as is pointed out in the order</u>, but also that the reduced amounts be made payable to the legal representatives as fees". (My underlining).

As revealed above, the order speaks for itself and does not encompass what is stated as a fact in the Heads of Argument.

[5] I was further referred to S v *Panesh Heerall* KZN Case No. 177/2006 i.e. as also another precedent on point. Similarly, the order does not reflect the reasons for it. An affidavit of Mr Carl Johannes Albertus Van Der Merwe was attached. It states that bail was reduced from R500 000.00 to 25 000.00 solely for payment of fees. I shall not deal with this aspect for the following reasons.

[6] Both the aforementioned orders are not of assistance to this Court. Madlanga J eloquently stated in Turnbull-Jackson that the doctrine of precedent ordains that only the <u>ratio decidendi</u> of a judgment has binding effect. But even <u>obiter dicta</u> of higher courts in the judicial hierarchy may be of potent persuasive force.[1] An unreasoned order of a coordinate court has no precedent value for this court.

[7] Mr Price argued that section 63(1) of the Criminal Procedure Act[2] (the CPA) does not preclude the reduction of bail amount for purposes of payment of Counsel's fees.

[8] Mr Price further relied on sections 60(4)(a) - (e) and section 60(5) – (9) of the CPA, arguing that the first applicant has made out a case for the reduction of the bail money on a balance of probabilities. He argued that the principles relating to both bail in general and specific procedures should be considered.

[9] Mr Price submitted in argument that the first applicant has complied with his bail obligations for two and half years without fail. The first applicant is a successful businessman who is well known in the construction industry. He relied heavily on the bail amount to pay his legal fees, so he submitted. The Heads of Argument state that his legal representatives, comprise of the most senior attorneys and Senior Counsel of more than thirty years who are specialists in Criminal Law. He argued further that "the only issue to be decided is whether the reduction of bail to a reasonable amount will in any way encourage Mr Brown (first applicant) to commit further offences".

[10] Mr Price submitted that there is no prejudice which would be suffered by the State, were bail to be reduced. Instead, the first applicant would be prejudiced in

---

[1] Turnbull-Jackson v Hibiscus Coast Municipality & Others 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 54-57.

[2] 51 of 1977.

many ways if the reduction is refused. The first applicant would lose the privilege to be represented by a legal team of his choice. He would not get legal aid representation because of his income. The "new legal team" would have to produce a transcribed copy of the record, read and prepare for continuation of the matter. So it was argued.

[11] It was contended that the first applicant's right to a fair trial shall be infringed if the reduction were to be refused because the prosecutor refuses to agree to a reduction and the court believes that it cannot do so because it has not heard of it before. He further submitted that the recent delays in finalising the matter cannot be put at his door and not his responsibility in any way.

[12] Mr Le Roux, counsel for the State, submitted that first and foremost the bail amount was considered by the Magistrate after having considered all the various factors covered by the provisions of sections 59 and 60 especially the sections referred to above by Mr Price. He stated that there are no changed circumstances apart for the payment of fees, which necessitates that this Court should interfere with such conditions. He argued that the amount and the normal bail conditions imposed by the Magistrate seem to have served the purpose because the first applicant did not breach them and has attended court religiously. He further argued that the first applicant has presented as a "man of means" as he was able to repay an amount of R800 000.00 which was loaned to him by family and friends bearing in mind that such an amount was raised inside two days of bail having been fixed. Mr Le Roux contended that the decisions relied upon by the first applicant, which turn to be merely orders, were granted by agreement between the parties i.e. the State consented to the reduction. The assumption by Mr Le Roux may be correct but there is nothing *ex facie* the order that the State consented to the reduction of bail amount in order to allow the applicant's to pay their legal fees. The orders that have been presented are silent on the reason for the reduction let alone the fee aspect. I say this mindful of the evidence of Mr Griebenouw.

[13] I should start by giving a brief background regarding the delay referred to by Mr Price. The record of the proceedings is more than two thousand pages excluding the exhibits. The merits were argued on 6 August 2018 and I postponed the matter for judgment to 18 September 2018. On 18 September 2018 I postponed it to 15 November 2018 and later to 5 February 2019. It is misleading to say judgment was reserved for six months by 14 November 2018. The serious cases I dealt with from August 2018 to November 2018 made it impossible for me to finalise the judgment by the appointed dates. The reasons therefore were explained to counsel and fully stated in the record of proceedings. The interlocutory judgments I had to write in those matters are evident for everyone to see. That coupled with the fact that this matter is not a simple criminal case but an involved, complex matter in terms of the facts, the trial within a trial and the numerous questions of law involved which all require a great deal of preparation. These factors are on record and were explained and understood by both Counsel. It was even communicated to the Judge President of this division as part of case flow management accountability. The delay therefore is an integral part of the trial and cannot be relied upon as an excuse for the reduction

of the bail amount for the purposes or reasons stated.

[14] It is common cause that the first applicant has been attending court religiously and has never flouted the bail conditions laid down by the Court below. It is further not gainsaid by the State that the first applicant returned his passport when it was erroneously handed back to him by the police. It is further common cause that the applicant paid the amount set by the court below and that money is still held by the State as security for his attendance until the matter has been finalised. We have by now gone past the stage whether the amount which was fixed was excessive or not. The amount was never challenged at the time it was determined, instead is was paid within two days. Those consideration are not an issue for the purposes of this application. It is trite that the constitutional right to be released on bail, will become meaningless where an excessive amount is fixed[3] but not at this stage of these proceedings.

[15] Chapter 9 of the CPA, deals with bail. It starts from section 58 to 71. The provisions of the various sections have to be read in conjunction with one another. Section 58 of the CPA provides that bail shall endure until a verdict is given by a court in respect of the charges to which the offence relates. The provisions of the section are peremptory in this regard. If sentencing is postponed, the Court, if it sees fit may extend or withdraw bail.

[16] Section 59 of the CPA creates what is sometimes loosely referred to as police bail, i.e. bail determined by a police official of a certain rank or above and which is determined before the first lower court appearance of the accused.[4] Section 60 is very wide. It deals with the various factors which the court should take into account when deciding either to admit or refuse bail. It further deals with numerous other considerations available to a court in the exercise of its discretion in this regard.

[17] In *casu,* the court below, has in its discretion, dealt with the various considerations and decided to allow bail in the amount of R800 000.00 as being appropriate. The first applicant complied with that by paying the amount fixed and by complying with the condition set out by the lower court.

[18] The relevant portions of section 60 which are applicable in the determination of this matter are sections 60(2B) and section 60(13)(b). Section 60(2B) provides:

"(2B)(a) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), and if the payment of a sum of money is to be considered as a condition of bail, the court must hold a separate inquiry into the ability of the accused to pay the sum of money being considered or any other appropriate sum.

(b) If, after an inquiry referred to in paragraph *(a)*, it is found that the accused is-

(i) unable to pay any sum of money, the court must consider setting appropriate conditions that do not include an amount of money for the release of the accused on bail or must consider the release of the accused in terms of a guarantee as provided for in subsection (13)*(b)*; or

---

[3] Commentary on the Criminal Procedure Act by Du Toit *et* All Service 60, 2018 at page 9-77.

[4] Commentary on the Criminal Procedure Act Du Toit *et* All 9-20C Service 60, 2018.

(ii) able to pay a sum of money, the court must consider setting conditions for the release of the accused on bail and a sum of money which is appropriate in the circumstances".

[19] Subsection 60(13) provides:-

"(13) The court releasing an accused on bail in terms of this section may order that the accused-

(a) deposit with the clerk of any magistrate's court or the registrar of any High Court, as the case may be, or with a correctional official at the correctional facility where the accused is in custody or with a police official at the place where the accused is in custody, the sum of money determined by the court in question; or

(b) shall furnish a guarantee, with or without sureties, that he or she will pay and forfeit to the State the amount that has been set as bail, or that has been increased or that has been increased or reduced in terms of section 63(1), in circumstances in which the amount would, had it been deposited, have been forfeited to the State". (Emphasis added)

[20] Subsections 60(2B) and 60(13) are the only subsections which deal with the issue of fixing and payment of bail money. Subsection 60(13)(b) deals exactly with the amount of money that has been varied in terms of section 63 of the CPA in releasing an accused on bail. Subsection 60(13)(b) spells out that an accused shall only be released upon payment of the money determined by the court in terms of section 60(2B)(a) or section 63(1). The provisions of section 60(13) are peremptory and directs which amount of bail shall be paid.

[21] Section 63(1) of the CPA provides this:

"**Amendment of conditions of bail**

(1) any court before which a charge is pending in respect of which bail has been granted may, upon the application of the prosecutor or the accused, increase or reduce the amount of bail determined under section 59 or 60 or amend or supplement any condition imposed under section 60 or 62, whether imposed by that court or any other court, and may, where the application is made by the prosecutor and the accused is not present when the application is made, issue a warrant for the arrest of the accused and, when the accused is present in court, determine the application". (Emphasis added)

[22] Section 63 is meant to provide the necessary procedure for instances where changed circumstances require appropriate amendments to the conditions or amount of bail fixed at an earlier stage. The section spells out that upon an application by either the accused or the prosecution the court is vested with a discretion to either increase or reduce the amount of bail which had been earlier determined by a court in terms of the provisions of section 59 or 60 of the CPA.

[23] Section 62 empowers the court on an application by the prosecutor to add any

further condition of bail. This section is not relevant for purposes hereof.

[24] Section 63(1) empowers a court to amend or supplement any conditions imposed under section 60 or 62. The first applicant does not seek to amend or supplement any bail conditions. All he seeks to do is to reduce the amount determined under section 60.

[25] Section 58 is the only section that deals with the effect of bail and for how long bail, in the absence of an application in terms of section 68, shall endure. Section 68 deals with circumstances under which bail shall be cancelled. Furthermore, bail can be reduced or increased only in terms of section 63. Section 63 therefore cannot be read in isolation. It has to be read with the provisions of section 58, and section 60(2B). I have referred to these sections above.

[26] As section 58 stipulates, bail money may not be reduced other than for purposes stipulated in section 60(2B) of the CPA. It is inconceivable that bail money may be reduced before the completion of the trial in order to allow the accused to pay his counsel's fees.

[27] Mr Price submitted that the money "belongs" to him and his instructing attorney as it was ceded for their fees. Section 69 of the CPA stipulates:

> "69. Payment of bail money by third person:
>
> (1) . . .
>
> (2) Bail money whether deposited by an accused or any other person for the benefit of the accused shall, notwithstanding that such bail money or any part thereof may have been ceded to any person, be refunded only to the accused or the depositor as the case may be". (Emphasis added).

[28] That, the bail money was ceded to an attorney and/or counsel is not an entitlement that it should be refunded to them. It stands still as security for the attendance of the accused and shall endure until the finalisation of the matter. Section 63(1) cannot be interpreted to mean that bail money may be reduced in order to allow the accused to fulfil his financial obligations, like payment of his legal fees. The purpose of bail money is clear in terms of the provisions of Chapter 9 of the CPA.

[29] The second applicant has always been out on bail. He failed to attend court. A warrant for his arrest was issued and executed. He was arrested and has been in custody since. A fresh bail application was brought before me simultaneously with this application. He did not testify. I was not advised of the outcome of any inquiry to his failure to appear on that day. All I am told from the bar is that he has a drug problem and has no place to stay. The first applicant has offered him a place. My understanding at the time of issuing a warrant of arrest was that he failed to attend court. The police found him asleep when they executed the warrant. That was on the day of the trial. He has been in custody since. There is no concrete evidence placed before me that if I release the accused on bail, he would be in a position to observe the bail conditions that would go with his release. Taking into account the various factors and the background to his bail being cancelled I am not inclined to release the second applicant on bail.

[30] Both the attorneys and the advocate's profession have stringent rules that as

officers of the court they should not allow their personal interests to conflict with the interests of their client. This is stated in the context that the only lawful avenue that appears open to the applicant is for him to surrender himself to the police for his bail amount to be refunded bearing in mind the provisions of section 69. The legal representatives will have to deeply consider their present position.
[31] Consequently, I make this order.
Both applications are dismissed.

2. Eskom Holdings SOC Limited v Masinda (1225/2018) [2019] ZASCA 98 (18 June 2019)

A personal, purely contractual right, cannot be construed as an incident of possession of property. The mandament van spolie does not protect such a contractual right.

Leach JA (Wallis and Mocumie JJA and Mokgohloa and Weiner AJJA concurring)

[1] The issue we are called upon to decide in this appeal is whether the respondent (Ms Masinda) was entitled to a spoliation order when the appellant, Eskom Holdings SOC Limited (Eskom), disconnected the supply of electricity to immovable property she owns and possesses in Tsolo, Eastern Cape. The court a quo decided she was, and ordered that the electrical supply to her property be reconnected. The appeal against that order is with leave of this court.

[2] Eskom is a public company with its entire share capital held by the State.[5] It is the national generator and distributor of electricity and is licensed to provide electricity directly to customers in the area in which Ms Masinda's property is situated. Illegal electricity connections to Eskom's power grid, which by their very nature are fraught with peril, appear to have become a substantial problem in the area. Regarding itself obliged to take steps to avoid harm occurring due to dangerous and unauthorised connections to its grid, on 8 August 2017, Eskom sent a team made up of members from its various departments to hold an inspection in Tsolo. On doing so, various illegal connections to the Eskom grid were identified and then disconnected.

[3] One of the properties identified as having an illegal connection was that of Ms Masinda. The alleged defects in the supply installation on her property were unfortunately not set out in Eskom's papers with the clarity one would have expected. Rather it adopted a procedure, previously criticised by this court,[6] of adducing

---

[5] Sections 2 and 3 of the Eskom Conversion Act 13 of 2001.
[6] See eg *Drift Supersand (Pty) Ltd v Mogale City Local Municipality & another* [2017] ZASCA 118; [2017] 4 All SA 624 (SCA) para 31.

evidence by way of hearsay allegations in its main answering affidavit, supported by so-called 'confirmatory affidavits' by the witnesses who should have provided the necessary details, but who merely sought to confirm what had been said in the main affidavit 'in so far as reference [has been] made to me'. Despite this slovenly practice, it can be accepted that Eskom averred that the electrical supply installation included equipment of incorrect sizes, did not meet prescribed standards, had been erected by an unauthorised contractor, and constituted an immediate danger to the public.

[4] For this reason, the supply to Ms Masinda's property was disconnected. On doing so, certain Eskom officials approached Ms Masinda to ask her about her prepaid electricity meter and its connection to the national grid. Instead of providing the details requested, she began shouting at them, stating that she had applied for electricity and now that someone else had connected her, Eskom should not disconnect her. Ms Masinda denied these allegations, but as the matter is to be decided on the affidavits, they must be accepted for present purposes.

[5] Ms Masinda alleged in her replying affidavit that her meter and connection had been installed by a contractor whom she understood was Eskom's agent. This, according to Eskom, was inconsistent with what she had said at the time of the disconnection. It further alleged that it had quoted Ms Masinda for a 60 amp prepaid meter installation which she had not accepted. Whatever may have happened, it does appear that she was purchasing electricity which was then being drawn through a meter installed on her property. Unfortunately for her, according to Eskom, this was being done through an illegal and dangerous installation which led to her supply being disconnected.

[6] Ms Masinda was not prepared to take this lying down. By way of notice of motion dated 18 August 2017, but filed only on 1 September 2017, she launched urgent proceedings against Eskom in which she sought, *inter alia*, an order obliging it to forthwith restore the electricity supply to her home. In seeking this relief she relied, first, upon the mandament van spolie (commonly known as a spoliation application) and, secondly, upon an allegation that the decision to disconnect her electrical supply constituted administrative action as envisaged by the Promotion of Administrative Justice Act 3 of 2000 (PAJA). In respect of the former she contended that Eskom's officials had unlawfully disconnected the supply of electricity without her consent 'and without recourse to due legal process'. In respect of the latter she sought to review the respondent's action on the basis that it had been procedurally unfair or decided upon arbitrarily and capriciously in breach of the provisions of PAJA.

[7] Nothing really needs to be said in respect of the claim brought under PAJA. It was abandoned in the court a quo and not only was there no attempt to resurrect it in this court, but counsel for Ms Masinda specifically eschewed all reliance upon PAJA in attempting to support the order obtained below. The matter was therefore argued solely in respect of the spoliation, to which issue I now turn.

[8] The mandament van spolie (spoliation) is a remedy of ancient origin, based upon the fundamental principle that persons should not be permitted to take the law into their own hands to seize property in the possession of others without their consent. Spoliation provides a remedy in such a situation by requiring the status quo preceding the dispossession to be restored by returning the property 'as a preliminary to any enquiry or investigation into the merits of the dispute'[7] as to which of the parties is entitled to possession. Thus a court hearing a spoliation application does not require proof of a claimant's existing right to property, as opposed to their possession of it, in order to grant relief. But what needs to be stressed is that the mandament provides for interim relief[8] pending a final determination of the parties' rights, and only to that extent is it final. The contrary comment of the full court in *Eskom v Nikelo*[9] is clearly wrong. A spoliation order is thus no more than a precursor to an action over the merits of the dispute.[10]

[9] As I have mentioned, Ms Masinda sought restoration of her electricity supply on two alternative bases. In respect of the first, the spoliation, an investigation into the merits of her claim to receive such a supply would ordinarily not be called for. In respect of the second, the review under PAJA, she was required to establish that she had such a right to electricity which had been unlawfully taken away from her. The two alternative claims are the very antithesis of each other. Possibly as a result of this, the matter appears to have morphed into an application in which Ms Masinda sought and obtained a permanent order from the court a quo requiring Eskom to restore an electricity supply to Ms Masinda.

[10] Presumably the court did not intend for such electrical supply to be restored by way of an installation that was unlawful and a danger to the public but rather one which complied with the necessary requirements of safety – something, according to Eskom, the original installation had lacked. In this respect its order was immediately problematic as it seemingly went beyond requiring the re-establishment of what there was before, whereas spoliation only requires the *status quo ante* to be restored.[11] (This was probably the product of the court a quo applying the principles of spoliation in circumstances where, effectively, final relief was being sought.) In *Tswelopele*[12] Cameron JA dealt with the nature of the mandament and said:[13]

---

[7] *Nino Bonino v De Lange* 1906 TS 120 at 122 confirmed by this court in *Bon Quelle (Pty) Ltd v Otavi Municipality* 1989 (1) SA 508 (A) at 511H-I (*Bon Quelle*).
[8] See eg D G Kleyn *Die Mandament Van Spolie In Die Suid-Afrikaanse Reg* LLD dissertation University of Pretoria (1986) at 300-301 and the cases there mentioned.
[9] *Eskom v Nikelo* [2018] ZAECMHC 48 (21 August 2018).
[10] *Bon Quelle* at 513H-I.
[11] This may include doing more than simply restoring possession. It requires restoration of the property to its former state. See *Zinman v Miller* 1956 (3) SA 8 (T).
[12] *Tswelopele Non-Profit Organisation & others v City of Tshwane Metropolitan Municipality & others* [2007] ZASCA 70; 2007 (6) SA 511 (SCA) affirmed in *Ngomane & others v City of Johannesburg* [2019] ZASCA paras 18-20. See also *Rikhotoso v Northcliff Ceramics* 1997 (1) SA 526 (W) at 535B-C.
[13] Paragraph 24. This may cast doubt on the grounds of the judgment, but not the result, in *Fredericks & another v Stellenbosch Divisional Council* 1977 (3) SA 113 (C).

'its object is the interim restoration of physical control and enjoyment of specified property – not its reconstituted equivalent. To insist that the mandament be extended to mandatory substitution of the property in dispute would be to create a different and wider remedy than that received into South African law, one that would lose its possessory focus in favour of different objectives (including a peace-keeping function).'

For that reason he had earlier in the judgment accepted that the mandament is a preliminary and provisional order.[14]

[11] The obvious difficulty standing in the way of relief being granted was that the supply that was sought to be restored was said to be unlawful and constituted a danger to the public. This notwithstanding, the respondent's counsel argued that, as in spoliation proceedings the legality or otherwise of an applicant's possession is not an issue to be decided, the supply had to be reconnected before any dispute as to its legality could be determined.

[12] Although it is correct that spoliation requires restoration of possession as a precursor to determining the existence of the parties' rights to the property dispossessed, there may well be circumstances in which a court will decline to issue a spoliation order. Thus in *Ngqukumba*,[15] a case involving the spoliation of a motor vehicle, the engine and chassis numbers of which had been altered, the Constitutional Court stated:[16]

'. . . in this case we are not concerned with objects the possession of which by ordinary individuals would be unlawful under all circumstances. Had we been concerned with objects of that nature, then the mandament van spolie might well not be available; but that issue is not before us and need not be decided. The fact that we are here concerned with an article that *may be possessed quite lawfully* makes all the difference . . . At the risk of repetition, the simple point of distinction is that an individual can possess a tampered vehicle if there is lawful cause for its possession.'

[13] This dictum raises the possibility of a court refusing to order the return of property to a person who may not lawfully possess it, although to do so would require reconsideration of a line of authority in this court that has not hitherto been questioned.[17] In any event, Eskom was undoubtedly under a common law duty to take steps to guard against its electrical supply constituting a hazard to the public (I leave out of the reckoning certain regulations, the applicability of which are in

---

[14] Paragraph 23.

[15] *Ngqukumba v Minister of Safety and Security & others* [2014] ZACC 14; 2014 (2) SACR 325 (CC).

[16] Paragraph 15.

[17] *Yeko v Qana* 1973 (4) SA 735 (A) at 739D-G; *Bon Quelle* fn 3 at 512A-B; *Ivanov v North West Gambling Board & others* [2012] ZASCA 92; 2012 (6) SA 67 9SCA) paras 23-25. But see *Parker v Mobil Oil of Southern Africa (Pty) Ltd* 1979 (4) SA 250 (C).

dispute)[18] and the fact that the electrical installation that was removed did not meet required specifications and constituted a public danger, might well be sufficient for a court to decline to issue a spoliation order. After all, directing it to restore the electricity connections that were removed would compel it to commit an illegality.[19] In the light of my view on this matter, however, no final decision on this aspect of the case need be taken as, for the reasons that follow, the appeal must succeed.

[14] It is necessary to undertake a more detailed examination of the principles applicable to the mandament. Although it originally protected only the physical possession of movable or immovable property, this court pointed out in *Telkom v Xsinet*[20] that in the course of scientific development it was extended to provide a remedy to protect so-called 'quasi-possession' of certain incorporeal rights, such as those of servitude.[21] But not all incorporeal rights may be the subject of spoliation. As was explained in *Firstrand v Scholtz*:[22]

'The mandament van spolie does not have a "catch-all function" to protect the *quasi-possessio* of all kinds of rights irrespective of their nature. In cases such as where a purported servitude is concerned the mandament is obviously the appropriate remedy, but not where contractual rights are in dispute or specific performance of contractual obligations is claimed: its purpose is the protection of *quasi-possessio* of certain rights. It follows that the nature of the professed right, even if it need not be proved, must be determined or the right characterised to establish whether its *quasi-possessio* is deserving of protection by the mandament. Kleyn seeks to limit the rights concerned to "gebruiksregte" such as rights of way, a right of access through a gate or the right to affix a nameplate to a wall regardless of whether the alleged right is real or personal. That explains why possession of "mere" personal rights (or their exercise) is not protected by the mandament. The right held in *quasi-possessio* must be a ["right of use"][23] or *an incident of the possession or control of the property.*'(Emphasis added.)

[15] Depending upon the circumstances, the supply of electricity or water may be recognised as being an incorporeal right, the possession of which is capable of protection under the mandament. That this is so is apparent from the decision of this court in *Impala Water v Lourens*[24] in which the respondents sought and obtained a spoliation order directing the appellant, a supplier of water, to restore the flow of water to reservoirs on their farms. There had been a dispute concerning the legality

---

[18] It is presumed to have been negligent if anyone suffers damage or injury caused by means of electricity generated, transmitted or distributed by it. See s 25 of the Electricity Regulation Act 4 of 2006 and *Grootboom v Graaff-Reinet Municipality* 2001 (3) SA 373 (E).
[19] Cf *Zulu v Minister of Works, KwaZulu Natal & others* 1992 (1) SA 181 (DC) at 190I-J.
[20] *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA) para 9.
[21] See further *Bon Quelle* fn 3 at 514D-516E.
[22] *FirstRand Limited t/a Rand Merchant Bank & another v Scholtz NO & others* [2006] ZASCA 99; 2008 (2) SA 503 (SCA) para 13.
[23] The judgment used the Afrikaans word 'gebruiksreg'.
[24] *Impala Water Users Association v Lourens NO & others* 2008 (2) SA 495 (SCA); [2004] 2 All SA 476 (SCA).

of certain water charges levied by the appellant and, although proceedings to recover these charges were pending, the appellant exercised its powers under the National Water Act 36 of 1998 to restrict the flow of water to the respondents by closing certain sluices. The respondents' rights to receive water were not mere personal rights but were linked to and registered in respect of certain portions of each of the respondents' farms that were dependent on the supply of the water. This court, in dismissing an appeal against an order that the appellant restore the flow, held that such rights were an incident of the possession of each farm, and that the mandament was therefore available.

[16] Importantly, it was clear from the facts in that case that the right to the supply flowed from the exercise of possession of the immovable property. Put somewhat differently, whoever was in lawful possession of the relevant portions of land was entitled to receive water from the appellant. This has not always been recognised in previous decisions in which the courts have at times seemed to regard the mere supply of water or electricity, without more, as constituting an incident of possession – see eg *Eskom v Nikelo*.[25] In *Naidoo v Moodley*[26] and *Froman v Herbmore Timber*[27] it appears that the electricity was cut off with a view to forcing the applicants to vacate immovable property, so that, as with *Nienaber v Stuckey* 1946 AD 1049, where the complaint was of interference with access to a property, it was the possession of that immovable property that was being protected. *Nisenbaum v Express*,[28] which is sometimes referred to as an instance of the spoliation of a water supply, was rather an order for specific performance of a lease.

[17] The decision in *Painter v Strauss*[29] was cited as authority for that proposition in these latter cases but, on closer scrutiny, it is not. It involved a farmer who, after having rented out land, revoked the authority he had given to his tenant 'to arrange with the Department of Irrigation for the supply of water to the land'. The precise nature of the right revoked does not appear from the judgment, although at first blush it appears to have been contractual – which, if it was, would not have been protected by the mandament. (Counsel for the landowner, however, appears to have conceded that the right was capable of spoliation.) In any event, whatever the nature of the right revoked may have been, the court appears to have regarded it, rightly or wrongly, as similar to that of a servitude. The latter is of course capable of being registered, and would clearly be an incident of the possession enjoyed by the holder of a dominant tenement.[30] If that was so, it is a far cry from a mere personal right extended by contract which in no way attaches to property. The decision is thus not authority, as appears to have been accepted by the subsequent decisions which referred to it, for

[25] Footnote 5.
[26] *Naidoo v Moodley* 1982 (4) SA 82 (T) at 84A-E.
[27] *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 (3) SA 609 (W) at 610G-611D.
[28] *Nisenbaum and Nisenbaum v Express Buildings (Pty) Ltd* 1953 (1) SA 246 (W).
[29] *Painter v Strauss* 1951 (3) SA 307 (O) at 318F-H.
[30] See the judgment in *Bon Quelle,* fn 3 above.

the proposition that the mere supply of water or electricity to a property, in itself and without more, constitutes an incident of the possession of that property, protectable by the mandament.

[18] Furthermore, examination of recent decisions of this court shows the fallacy of such a proposition. Spoliation was granted in *Bon Quelle* not because of the mere existence of the supply of water, but because such supply had been received in the exercise of the rights of a servitude holder. And in *Impala Water v Lourens*,[31] which I have already mentioned, the mandament was available as the right to receive water was not a mere personal right.

[19] However, in the further decision already mentioned, *Firstrand v Scholtz*, it was held that the mandament was not available to enforce the re-establishment of a water supply. In that matter the first appellant had supplied water through a pipeline to several farmers within an irrigation area. The right to receive water through the pipeline was governed by agreements concluded with the farmers and was provided pursuant to payment of a fee for a period ending 31 December 2004. Because the parties were unable to agree on a fee payable thereafter, the appellants ceased to deliver water from 1 January 2005. The respondents, who owned properties that had been serviced by the pipeline, brought spoliation proceedings for restoration of the supply. They succeeded in the court of first instance but failed in an appeal to this court, which held that they had not been deprived of quasi-possession of any statutory water rights which they were entitled to exercise, but mere contractual rights relating to the use of the pipeline, which had expired.

[20] In these cases the mere existence of the water supply which was terminated, was held in itself to be insufficient to constitute an incident of the possession of the properties, and that more than a purely personal right was required in order to show that to be the case.

[21] This was echoed in *Telkom v Xsinet*,[32] a case which is probably the most comparable to the present in that it involved the supply by Telkom of electronic impulses to the Xsinet's premises, thereby providing the telephone and bandwidth system used by it to conduct its business as an internet service provider. Alleging that Xsinet was indebted to it in respect of another service, Telkom disconnected the supply. This court did not accept that the use of the bandwidth and telephone services constituted an incident of the possession of the property, even though those services were used on Xsinet's premises. It observed that it would be both artificial and illogical to conclude that the use of the telephone, lines, modems, or electrical impulses had given Xsinet possession of the connection of its property to Telkom's

[31] Footnote 12.
[32] *Telkom* fn 8.

system.[33] It also rejected the contention that Telkom's services could be restored by the mandament as those services constituted 'a mere personal right and the order sought is essentially to compel specific performance of the contractual right in order to resolve a contractual dispute'.[34]

[22] As was pointed out in *Zulu*, the occupier of immovable property usually has the benefit of a host of services rendered at the property.[35] However the cases that I have dealt with above graphically illustrate how, in the context of a disconnection of the supply of such a service, spoliation should be refused where the right to receive it is purely personal in nature. The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.

[23] In the light of this conclusion, it is necessary to revert to the facts of the present case. It is common cause that what had been installed on Ms Masinda's property was a prepaid system using a meter box that someone had wired into Eskom's grid. This system was used in conjunction with a prepaid card in order to effect the supply. Electricity is purchased using the individual number of the meter which is reflected on the card. The receipt issued in respect of the transaction bears a coded number which, once typed into the meter, registers a credit in respect of the amount of electricity purchased. The supply of electricity to Ms Masinda's property was therefore dependent upon it being paid for in advance.

[24] In seeking restoration of her electricity supply, Ms Masinda's claim could hardly have been more terse. She said no more than that Eskom's officials had unlawfully disconnected the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. In the light of what is set out above, this was both misplaced and insufficient to establish her right to such an order.

---

[33] Paragraphs 12 and 13.
[34] Paragraph 14.
[35] *Zulu* at 186E-190G.

[25] In addition, there is the common cause fact that Ms Masinda purchased her electricity on credit through the prepaid system which I have described. In these circumstances, her right to receive what she had bought flowed not from the possession of her property, but was a personal right flowing from the sale. Similar to the case in *Xsinet*, her claim was essentially no more than one for specific performance (and to the limited extent of a supply worth no more than the unused credit still due after her last purchase). This personal, purely contractual right, cannot be construed as an incident of possession of the property. As the mandament does not protect such a contractual right, for this reason too the claim ought to have been dismissed.

[26] This conclusion renders it unnecessary to decide the further ancillary issue, namely, whether Eskom was entitled to invoke the provisions of reg 7 of the Electrical Installation Regulations, 2009[36] in order to remove the installation on Ms Masinda's property. It was argued on her behalf that the regulations operated solely in an industrial and not a domestic environment. The full court in *Eskom v Nikelo* expressed its reservations as to their applicability in circumstances such as the present.[37] But as it is an issue unnecessary to decide, it is undesirable to comment further on the matter.

[27] For these reasons the following order will issue:

1 The appeal is upheld, with costs.

2 The order of the court a quo is set aside, and substituted with the following:

'The application is dismissed, with costs.'

From The Legal Journals

Myburgh, F

"The *in duplum* rule(s) and attorneys' fees."

2019 (82) THRHR 30

[36] Occupational Health and Safety Act, 1993 Electrical Installation Regulations, GN R242, *GG* 1975, 6 March 2009.

[37] Paragraph 28.

Ploos van Amstel, J

"Cross Examination"

(2019) 32.1 April *Advocate* 52.

The article can be accessed here:

https://www.sabar.co.za/law-journals/2019/april/2019-april-vol032-no1-pp52-55.pdf

Watney, M

"The prosecutorial discretion to institute a criminal prosecution: *Patel v National Director of Public Prosecutions* 2018 2 SACR 420 (KZD)"

Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg,Volume 2019 Number 2, 2019, p. 354 - 364

Abstract
Prosecutors as gatekeepers of the criminal system wield an enormous charging authority in both the adversarial and continental criminal justice models. The decision to either institute a criminal prosecution or to decline to do so has far-reaching implications for accused persons as well as complainants in criminal matters. Standing arraigned on criminal charges not only involves the incurring of expense to obtain legal representation to defend against the charges brought, but may also damage the reputation of the accused. Having the charges withdrawn at a later stage or even an acquittal after trial is scant consolation in those cases where a prosecution should never have been instituted. In those instances the former accused person has to rely on civil remedies for compensation. Failure to institute a criminal prosecution in circumstances where it should have been done will, on the other hand, have a negative impact on the complainant and probably also involve the expense of legal representation in order to have the initial decision reviewed. The incorrect exercise of the prosecutorial discretion will obviously in both instances be to the detriment of the criminal justice system. The South African news of late is unfortunately replete with reports and comments on alleged dubious prosecutions and or the failure to institute prosecutions in deserving cases. The Mokgoro commission of inquiry instituted by president Ramaphosa into the fitness of advocates Nomgobo Jiba and Lawrence Mrwebi to hold high office in the national prosecuting authority serves as but one example.

Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

'Intentional accidents' and the purpose of imposing duties following road traffic collisions*

1. Introduction

When is an occurrence not an accident? Ask any child this question and you will readily be informed: when something is done 'on purpose'. The celebrated jurist Oliver Wendell Holmes Jr has illustrated the elementary nature of the distinction between accidental and intentional harm with a neat aphorism: '...even a dog distinguishes between being stumbled over and being kicked...' (*The Common Law* (1881) 3).
However, despite the apparently self-evident truth of the statement that an intentional act causing harm is not an accident, the matter is not quite so clear in the context of South African road traffic law, and more particularly, s 61 of the National Road Traffic Act (93 of 1996, hereafter 'the Act'), which regulates the duty of a driver in the event of an accident (for a recent case discussing the requisite *mens rea* in relation to this offence, see *S v Taute* 2018 (2) SACR 263 (ECG)). The section provides, *inter alia*, that

(1) The driver of a vehicle on a public road at the time when such vehicle is involved in or contributes to any accident in which any other person is killed or injured or suffers damage in respect of any property or animal shall-

(a) immediately stop the vehicle;
(b) ascertain the nature and extent of any injury sustained by any person;
(c) if a person is injured, render such assistance to the injured person as he or she may be capable of rendering;
(d) ascertain the nature and extent of any damage sustained;
(e) if required to do so by any person having reasonable grounds for so requiring, give his or her name or address, the name and address of the owner of the vehicle driven by him or her and, in the case of a motor vehicle, the registration or similar mark thereof……

---

* This contribution is an abbreviated version of a more prolix discussion first published in (2003) 24(1) *Obiter* 174.

2. Can there be such a thing as an intentional accident? – interpreting section 61 of Act 93 of 1996

Where these duties imposed upon a driver in terms of the Act are not carried out, the driver concerned may be found guilty of an offence in terms of this section (read with s 89(1) of the Act), and be subject to the prescribed punishment (in terms of s 89(4) of the Act). It is to this area of the law, and more specifically, the cases decided in terms of the antecedent, and practically identical, provision under the uniform Road Traffic Ordinance of 21 of 1966 (promulgated by each of the then provinces: Transvaal, Natal, Orange Free State, and Cape Province, hereafter referred to as the 'Ordinance') – section 135 - that the discussion now turns.

2.1 *S v Moodley* 1971 (1) SA 320 (N)

The appellant had been convicted of a charge of assault with intent to murder, along with a number of contraventions of s 135 of the Ordinance, in the court *a quo*. The charges arose following an incident where the appellant deliberately drove his car on the pavement, as a result of which two persons were thrown onto the bonnet of the car, before being thrown off as the car continued at high speed. On appeal against the s 135 convictions it was argued on behalf of the appellant that what took place was not an 'accident', in that the appellant acted deliberately.
The court (per Friedman J) held that the word 'accident' was one of uncertain meaning, and that its meaning would be dictated by context (321H), citing dicta from the English case of *Board of Management of Trim Joint District School v Kelly* 1914 AC 667 in favour of this approach. Friedman J proceeded to dismiss the appeal in respect of the convictions under s 135 of the Ordinance, stating that an accident simply meant a collision between a vehicle and another vehicle or person, and to hold that the section excluded intentional causing of harm would 'lead to an absurdity which could never have been intended by the legislature' (322H).

2.2 *S v Mcelu* 1975 (2) SA 103 (THC)

The accused had been convicted under s 135(1)(c) of the analogous Transkei road traffic legislation (Act 5 of 1967), following an incident where his passenger, a young girl to whom he had given a lift, jumped out of the car while it was in motion, injuring herself. The accused's conduct had precipitated the passenger acting in this way, and his failure to assist after the incident gave rise to the conviction. The court had to consider whether what had occurred was indeed an 'accident', for the purposes of the section.
Munnik CJ cited with approval both the passages from the *Trim* case cited in *S v Moodley supra*, as well as a passage from Friedman J's judgment, concluding that the word 'accident' was indeed indeterminate in scope, and that the fact that an occurrence took place deliberately does not prevent it from being an accident in

terms of the section. However, regarding the latter point, Munnik CJ stated *obiter* that he did not agree with Friedman J's view that the legislature contemplated the deliberate running down of a pedestrian qualifying as an accident for the purposes of the section (105F-G). Furthermore, contrary to the dictum in *S v Moodley supra*, it was held that the section did not require that a collision take place (105H). On this basis the conviction was confirmed.

2.3 *S v Makotong* 1981 (2) SA 108 (NC)

Faced on appeal with the question whether a deliberate attempt to run down a pedestrian could be construed as an accident under s 135 of the Ordinance, the court (per Basson J) dissented from the argument advanced in *S v Moodley supra*, quashing the convictions handed down in the court *a quo*. Basson J acknowledged that the meaning of the word 'accident' had to be determined in context, being inherently vague, but stated that adopting Friedman J's view would run contrary to the intention of the legislature (111B-D) and the canons of interpretation (112A). It was held further that the correct perspective in determining whether an 'accident' had occurred was that of the driver (111G-H), and that far from being absurd to exclude a deliberate running down from the ambit of the section (as stated by Friedman J in *S v Moodley supra*), to argue the opposite was risible (112C-D).

2.4 *S v Desai* 1983 (4) SA 410 (N)

Whether a deliberate running down or collision could be classified as an accident was further considered in *S v Desai supra*, where the court (per Page J) expressed itself in favour of the approach adopted in *S v Moodley supra* (decided in the same Provincial Division), and rejected the views of Basson J in *S v Makotong supra*. Page J stated that it could not be said that the legislature had intended that a would-be murderer should escape liability under s 135 of the Ordinance, relying on the English case of *Chief Constable of West Midlands Police v Billingham* [1979] 2 All ER 182.

3. Analysis

The view expressed by Diemont J in *S v Moodley supra*, whereby deliberate running down or collision may be regarded as falling within the bounds of an 'accident' for the purposes of s 61, seems to be founded upon an attempt to fill in what Diemont J perceives to be a potential gap in the section. It is clear that the learned judge cannot countenance the possibility of a driver causing deliberate harm escaping liability under the section whilst her negligent counterpart would fall foul of the section – such a result would simply be 'absurd'. This is the reading of the *ratio decidendi* in *S v Moodley supra* according to Jansen J in *S v Visser; S v Nkwandla* (1990 (1) SACR 183 (E) 189i). Thus Diemont J appears to be informed by the presumption *interpretatio quae parit absurdam, non est admittenda* – '..any interpretation of a statute which leads to an absurdity must, as a matter of course, be avoided..' (Du

Plessis *Interpretation of Statutes* (1986) 96). Du Plessis notes that this maxim is also applied where the results of interpretation are not only absurd but unreasonable, i.e. unjust and inequitable (and cites the application of the maxim in *S v Moodley supra* as an example of this application (*ibid*)).

As noted above, the view expressed in *S v Moodley supra* was reinforced by the Natal Provincial Division in *S v Desai supra*. It is submitted however that the proponents of this view are mistaken, for the following reasons.

It is evident that the purpose of the Act is to regulate road traffic (cf *S v Makotong supra* 111D), rather than to supplement existing common law crimes. It is extremely doubtful that the legislature contemplated that s 61 would be used in cases of deliberate running down or collision – as Munnik CJ pointed out in *S v Mcelu supra* (105F-G), road traffic legislation deals with road safety, and consequently focuses on the ordinary road user, rather than the homicidal driver who uses his car as a murder weapon. It follows that s 61 should not be applicable to such assaults.

Moreover, the incidental fact that a murder or attempted murder takes place on a public road does not impose any duties on the perpetrator similar to those listed under s 61 – why should the incidental fact that the perpetrator used a motor vehicle as the murder weapon mean that he should be treated differently (*S v Makotong supra* 111A-B)? It may be argued that this constitutes an infringement of the equality clause (s 9(3) of the Constitution, 1996), in that murderers who use motor vehicles are susceptible to a wider ambit of criminal liability than murderers making use of more conventional means.

There has been some debate in the cases referred to concerning the question whether it could have been the intention of the legislature to exclude the homicidal driver from s 61 liability. Friedman J in *S v Moodley* (*supra* 322G-H) argues that to oblige the negligent driver to perform the duties stipulated under s 61, whilst excluding the driver who intentionally brings about a collision, is 'absurd'. Basson J (in *S v Makotong supra* 112C-D) argues in response that the true absurdity involves placing the duty on a murderous motorist to immediately undergo a moral metamorphosis and assist the person she was trying to kill but a moment previously. Page J (in *S v Desai supra* 418A) responds in turn that the fact that such assistance is unlikely is no reason to conclude that this was not what the legislature intended:

'On the contrary, such failure on his part seems to me at least as deserving of punishment as a similar failure on the part of one who has negligently injured another, and the fact that he is more likely than not to commit the offence is a very cogent reason why he should be deterred from doing so by the threat of conviction.'

Would it really be absurd to exclude the motorist who aims to kill (or seriously injure) from s 61 liability? It is submitted that it would not. Intentional killing (or injuring) amounts to the gravest and most blameworthy form of conduct, and consequently receives the most serious form of punishment. On the one hand there is the intentional 'hit and run' episode, where the conduct is deliberate, is taken into the bargain, and where the constituent parts of the conduct – the 'hitting' and the

'running' are part of a single course of events. On the other hand, there is the negligent 'hit', and then the 'running', whether intentional or negligent. There is a significant difference between these two situations. It is submitted that an important rationale of s61, mandating the compulsory stop after a collision, is to dissuade the motorist who has been involved in an accident, from seeking to evade liability and responsibility for damage, by fleeing the scene of the accident in the hope that no-one has seen him (cf *R v Boyd* 1960 (4) SA 218 (T) 221A-B). The existence of the s 61 offence provides an important deterrent for 'hit and run' conduct. However, it is submitted that s 61 holds no such deterrent value for the motorist who intends bodily harm, contrary to Page J's views cited above. It is unlikely in the extreme that an intending murderer will wait to help the victim at pains of a possible custodial sentence, when he faces a greater sentence for his murderous conduct. Moreover, getting away unnoticed is likely to weigh far heavier on his mind than a possible further conviction. Furthermore, whilst such motorist deserves to be punished for his conduct, it is submitted that this is subsumed within the punishment for the greater evil: the intentional infliction of bodily harm. Basson J's suggestion in *S v Makotong supra* (111G-112A) that the correct approach involves adopting the perspective of the motorist cannot be faulted in this regard, for how can the assessment of murder or assault be anything but subjective in nature? Thus, it follows that only there should only be an accident from the point of view of s 61 if from driver's perspective the conduct giving rise to the collision is unintentional, unforeseen, and unexpected.
Motorists who aim to cause harm should thus be treated differently – because what they are doing or trying to do cannot be regarded as accidental. Where such a motorist does assist afterwards, this may affect the quantum of punishment that she may receive, but does not impact on liability for the harm caused (*S v Makotong supra* 111B, 112D-E).
Finally, as pointed out by Basson J in *S v Makotong* (*supra* 112A), this approach accords with the interpretative maxim *in poenis strictissima verborum significatio accipienda est*, i.e. in the case of penal laws the strictest interpretation of their terms should be accepted (see Du Plessis *Interpretation of Statutes* 89-93, Devenish *Interpretation of Statutes* (1992) 171-172). Thus where the legislative provision (for the purposes of this discussion, s 61) is susceptible to varying interpretations, the one least burdensome to the accused should be adopted.

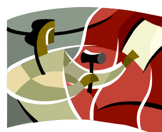
4. Concluding remarks

It is submitted that the Natal Provincial Division, in *S v Moodley* (*supra*) and *S v Desai* (*supra*) failed to give effect to the crucial distinction between a crime, characterized by the presence of *mens rea*, and an accident, where *mens rea* is absent. Moreover, it seems manifest that on the facts of these cases, ordinary popular language would not describe the conduct observed as 'accidental'. The appropriate perspective for such evaluation is in any event not that of the victim (as may be appropriate where the context is the matter of compensation) but that of the accused, or even (since

proof of intention is usually by inference) that of the person observing the accused's conduct at the time of the collision or attempted collision, as befits criminal liability.
There is little doubt that s 61 of the Act fulfils a very important function. It is certainly appropriate that a motorist who has inflicted harm to person or property should be compelled by threat of criminal sanction to not only furnish his details, but to assist the stricken victim, where this is required. The latter group of duties (see s61(a)–(d)) flow rationally from the 'prior conduct' exception to the general rule that a person is under no legal duty to protect another from harm, even though he can easily and ought morally to do so:
'..Where a person has through his or her own conduct created a potentially dangerous situation he or she is under a legal duty to prevent the danger from materializing..'(Burchell *South African Criminal Law and Procedure Vol I: General Principles* 4ed (2011) 78)

However, it is clear that there is no duty imposed in South African law upon a person who murders or attempts to murder to, for instance, check what injuries his victim has suffered or to provide the victim with assistance (see *S v Makotong supra* 111A-B). This reflects the pragmatic reality of the situation – the principal harm has already been attempted, for which the accused will be held accountable, hence there is little prospect of him remaining to repair the wrong he has done. Where conscience intrudes and this unexpectedly occurs, this is a matter to be reflected in sentence. Why should murderous motorists be an exception to the rule? In the absence of explicit legislative to the contrary, it is neither necessary nor desirable that a murderer's failure to assist or to report should be elevated to independent contraventions (*S v Makotong supra* 112E). Any attempt to do so in terms of s 61 simply amounts to a subversion of the ordinary and popular meaning of 'accident'.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg



Matters of Interest to Magistrates

The fight over Zuma's legal fees points to a fundamental unfairness in the legal system

(The following is an extract from the blog *Constitutionally Speaking* of Prof Pierre De Vos posted on 25 June 2019-The full entry can be accessed here https://constitutionallyspeaking.co.za/the-fight-over-zumas-legal-fees-points-to-a-fundamental-unfairness-in-the-legal-system/)

" What is to be done about the inequality of legal representation built into the criminal justice system, and about the fact that most South Africans who might need the legal system to enforce their constitutional or other legal rights, in effect, has no access to justice as they cannot afford the legal fees this would entail? I am not sure I have all the answers. I am not even sure there are easy answers that would fix the problem completely. But let me highlight a few possible things that could be done.

The most obvious and radical solution would be to view and treat lawyers more like we view and treat journalists; expecting them to work for free (perhaps in return for a small subsidy from the state) or for a very moderate flat fee.

Some lawyers will argue that this will decimate the legal profession, will reduce the quality of legal services offered to clients (at least to those who can pay), and will eventually lead to a lowering of the status and quality of the judiciary (who are appointed from among the members of the legal profession) – with devastating consequences for South Africa's democracy. In the absence of a radical overhaul of South Africa's economic system (probably not feasible without a complete transformation of the world economic order), this may not be entirely incorrect.

Improving the quality of legal aid services, and expanding its reach to allow a far wider range of people to benefit from legal aid (for both civil and criminal cases) may improve access to justice but would do very little to undo the system in which the rich and publicly funded get the best legal services, while those who can't pay get, at best, the bare minimum. (Also, good luck to the person charged with fixing and improving the legal aids system which is not currently running optimally.)

A third possibility is to change the civil and criminal procedure rules to try and reduce the often-overbearing role that well-funded lawyers are permitted to play when they go to battle for their rich (or taxpayer funded) clients. Here the Zondo Commission of Inquiry may be pointing us in the right direction.

The Zondo Commission (unlike some other Commissions) has so far avoided falling in the trap of turning an essentially inquisitorial fact-finding process into a formalistic accusatorial battle between well-funded lawyers. The aim is to find out what actually happened in a manner that treats everyone in a substantially fair manner. The rules of the Commission facilitate this by reducing the role of lawyers who represent various implicated of affected parties. The hearings are no longer structured as a battle between lawyers, guided by over-complicated technical rules that assume all relevant parties have equal access to equally competent and well-funded lawyers, and more of a genuine attempt to seek out the facts.

Perhaps it is time to consider a move away from the purely accusatorial legal system towards a hybrid accusatorial-inquisitorial system where the rules won't permit lawyers to use purely technical arguments that have little bearing on the actual, substantive, fairness of the hearing to protect their clients.
But even without any changes to legal procedures, the courts could play a role to minimise the unfairness that arises when one side in a court battle has unlimited funds and the other side does not. The courts could do so to advance the elusive goal of substantive equality in civil and criminal litigation.
So, where a party's lawyers raise spurious legal points, or appeal a judgment that is clearly correct and will never be overturned on appeal, courts may think of granting a personal cost order against the litigant using the procedural rules not to seek a just and fair outcome, but to delay the proceedings or the implementation of the court order."

A Last Thought

Recommendation:
….., serious consideration should be given ……. to extend the duration for the attainment of an LLB qualification from the current minimum of four years of study to a minimum of five years of study. This can be achieved in two ways: By
i. The introduction (or, in many cases, retention) of the option for students to graduate with a first Bachelor's degree (typically in arts/humanities or commerce, with some law modules included) and thereafter to register for a second Bachelor's degree in law (LLB) that can be completed in a minimum period of two years.
ii. The extension of the current four-year LLB programme to five years. This will allow for the LLB curriculum to incorporate (more) discipline-based non-law modules than is currently provided for in most four-year curricula, and for teaching and learning to have more time available to inculcate in students the graduate attributes described in the LLB Standard.
The intention of the second recommendation is not that the LLB curriculum be extended to provide for an "extended" year of study where, typically, the first year of study is presented over a two-year period.
Nor is the intention that the curriculum be extended by one year to accommodate extensive exposure for law students to clinical legal training or some other form of

"practical" legal training. Instead, the intention is primarily to create space for the incorporation of more discipline-based non-law modules into the LLB programme.

From the report - *The state of the Provision of the LLB qualification in South Africa* by the Department of Higher Education. The full report can be accessed here: https://www.che.ac.za/media_and_publications/accreditation-and-national-reviews/state-provision-bachelor-laws-llb