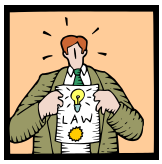
e-MANTSHI

A KZNJETCOM Newsletter

August 2022: Issue 188

Welcome to the hundredth and eighty-eight 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. Under section 19 of the *Criminal and Related Matters Amendment Act, 2021* (Act No. 12 of 2021), the President has fixed 5 August 2022 as the date on which the said Act comes into operation. The notice to this effect was published in Government Gazette no 47198 dated 4 August 2022. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2022/20220804-gg47198rg11468p75-Act2021-012-Commencement.pdf

Act 12 of 2021 can be accessed here:
https://www.justice.gov.za/legislation/acts/2021-012.pdf

2.Under section 1(2)(*b*) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 1975), the Minister of Justice and Correctional Services, published a rate of interest of 7,75 percent *per annum* as from 1 May 2022 for the purposes of section 1(1) of the

said Act. The notice to this effect was published in Government Gazette no 46739 dated 19 August 2022. The notice can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202208/46739gon2378.pdf

3. The Child Justice Amended Act, Act 28 of 2019 has been put into operation on the 19 August 2022 by a proclamation in Government Gazette no 46752 dated 19 August 2022.
The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202208/46752rg11475gon2400.pdf

Act 28 of 2019 can be accessed here:
https://www.justice.gov.za/legislation/acts/2019-028.pdf

4. The Minister of Justice and Correctional Services, has determined the categories or classes of persons who are competent to be appointed as intermediaries under the powers vested in him by section 170A(4)(a) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977). The notice to this effect was published in Government Gazette no 46795 dated 26 August 2022. The notice can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202208/46795reg11479gon2418.pdf

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Recent Court Cases

1. Lotz v The State (AR119/P) [2022] ZAKZPHC 40 (26 August 2022)

The qualification that a person must be cited in the charge sheet as a representative of the corporate body is of singular significance. While the warm bodied accused is dealt with as if he had personally committed the offence committed by the corporate body, any conviction that follows is the conviction of the corporate body and not the warm bodied accused, unless he is also charged and convicted in his personal capacity.

Mossop J:

[1] The appellant is an employee of Alrette Rentals CC, which trades as Avo Car Rentals (Avo). It has its place of business in Boksburg, Gauteng, where the appellant is employed as a manager. As its trading name suggests, Avo is in the business of renting out motor vehicles. On 1 July 2019, the appellant was convicted in the Newcastle district court of contravening section 50(1) of the National Land Transport Act 5 of 2009 (the Act). The State alleged that the appellant personally operated a public transport service vehicle upon a public road without holding the necessary permit or operating licence or, in the case of a special vehicle, a temporary permit issued in terms of section 20 of the Road Traffic Act 74 of 1977. The appellant was sentenced to a fine of R15 000 or, in default of payment, to undergo ten months' imprisonment.

[2] The appellant sought leave to appeal from the court that convicted and sentenced him, but such leave was refused. He was, however, granted leave to appeal against his conviction and sentence after petitioning the Judge President of this Division. On appeal, the appellant was represented by Mr Osborne and the State by Mr Sindane. Both are thanked for their helpful submissions.

[3] Most of the facts of this matter are not seriously in dispute. While Avo rents out motor vehicles, it also from time to time provides a passenger service to clients. In this instance, Avo agreed to transport four British hunters from O. R. Tambo International Airport to a hunting lodge near Dundee, KwaZulu-Natal. The vehicle that was used for this purpose was a Toyota Quantum motor vehicle (the motor vehicle) that is registered in the name of Avo. On 16 March 2019 on the N11, a public road within the province of KwaZulu-Natal, a road traffic official, Mr Clinton Clayton (Mr Clayton), pulled the motor vehicle over. The driver of the motor vehicle was a Mr Zamabuthle Dladla (Mr Dladla), an employee of Avo. Mr Clayton called for Mr Dladla to exhibit to him the necessary permits. While Mr Dladla had an operator's permit and a public driving permit, he was not in possession of a document referred to as a 'charter permit'. Mr Dladla was, as a consequence, directed by Mr Clayton to take the hunters to the hunting lodge and then to deliver the motor vehicle to the Newcastle pound.

[4] All of that is common cause. Where the versions diverge is what happened next. The State alleges that after the motor vehicle was delivered to the pound, the next day Mr Dladla and the appellant were present at the Ingogo Police Station. The appellant on the other hand, states that Mr Dladla returned to Johannesburg and reported the matter to him. After communicating with a Mr Ngema, described as being Mr Clayton's superior, the appellant and Mr Dladla travelled down to the Ingogo Police station on a mutually convenient date. Nothing, however, turns on this difference.

[5] The starting point of this appeal must be the charge sheet. It records that the accused is Jan Hendrik Lotz, the appellant, a South African citizen, aged 40, who was on bail and was arrested on 10 April 2019. That date would tend to establish that the appellant's version of when he went to the Ingogo Police Station must be correct, given that the offence was allegedly committed on 16 March 2019. There is no suggestion in the charge sheet that the appellant is charged in a representative capacity on behalf of Avo. Indeed, there is no mention of Avo at all in the charge sheet. He was thus charged in his personal capacity.

[6] The charge sheet further goes on to describe the main count, being the count upon which the appellant was found guilty, as follows:
'The Accused is guilty of the offence of contravening Section 50(1) read with sections 1, 124, 126 and 127 of act 05/2009.
In That [sic] upon or about 16 day of March 2019 the said accused did unlawfully operate a road public transport service vehicle to wit to FG76MHGP Quantum upon a public road to wit N11 Ingogo Road in the District of Newcastle without holding the necessary permit of [sic] operating licence or in the case of a special combi a temporary permit issued in terms of section 20 of R. T. A. Act 74/1977.
Not having one/or not necessary one to operate in the area where caught.'

[7] Section 50(1) of the Act reads as follows:
'No person may operate a road-based public transport service, unless he or she is the holder of an operating licence or a permit, subject to sections 47,48 and 49, issued for the vehicle concerned in terms of this Act.'
Sections 47, 48 and 49 referred to in section 50 relate to transitional provisions dealing with the rationalisation of certain types of transport services. They appear to have no relevance to the charge that the appellant faced.

[8] The prosecution of the appellant, as Mr Osborne pointed out in his heads of argument, appears to have been conducted without any reference to the provisions of section 332 of the Criminal Procedure Act 51 of 1977 (the CPA). The significance of section 332 is that it permits liability to be visited upon a corporate body for criminal conduct, despite its physical inability to think and act. To effect such a prosecution, section 332(2) reads, in part, as follows:
'In any prosecution against a corporate body, a director or servant of that corporate body shall be cited, as representative of that corporate body, as the offender, and thereupon the person so cited may, as such representative, be dealt with as if he were the person accused of having committed the offence in question:'

[9] The section contemplates that both the corporate body and the employee may be charged. Section 332(2)(d) of the CPA provides as follows:
'the citation of a director or servant of a corporate body as aforesaid, to represent that corporate body in any prosecution instituted against it, shall not exempt that director or servant from prosecution for that offence in terms of subsection (5).'

[10] The qualification that the person must be cited in the charge sheet as a representative of the corporate body is of singular significance. While the warm bodied accused is dealt with as if he had personally committed the offence committed by the corporate body, any conviction that follows is the conviction of the corporate body and not the warm bodied accused, unless he is also charged and convicted in his personal capacity.

[11] It is trite law that the burden in any prosecution is on the State to prove the guilt of the accused beyond reasonable doubt. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version and acquit the accused.

[12] From the facts that are common cause, certain difficulties for the State immediately become apparent:
(a) firstly, the appellant at no stage personally operated a vehicle in breach of the Act. He was not the owner of the business, nor was he the owner of the motor vehicle nor was he the driver thereof. He was not even in the province of KwaZulu-Natal when the offence was allegedly committed. There was thus no evidence to demonstrate that the appellant personally conducted the service that the State finds offensive and contrary to the law. He was consequently not required to possess a charter permit and he could not be convicted of not having one. While it is so that in evidence the appellant appears to have admitted that Avo did not comply with the prescripts of the law concerning charter services, that admission was of no significance in the prosecution of the appellant;
(b) secondly, the appellant was never charged in his capacity as a representative of Avo. He ought to have been cited in his name as a representative of Avo but was not. The failure to include those words meant that he was cited in his personal capacity. The consequence of that, ultimately, was that he personally acquired a criminal conviction. As Mr Cornelius du Plessis (Mr du Plessis), the true proxy of Avo, who testified for the appellant at his trial explained, what had happened had come
'. . . as a big shock and I felt sick to this day when I heard that it might be a criminal that the person will get a criminal record. It is still a shock to me …'; and
(c) thirdly, while this may not have immediately been obvious, there are no sections 124, 126 and 127 to the Act, all of which were apparently relied upon by the State in the prosecution of the appellant, and which were therefore mentioned in the charge sheet. The last section in the Act is section 96. What sections the State relied upon are therefore not known.

[13] Given these difficulties, the guilt of the appellant was not established by the State, and he should not have been convicted in his personal capacity. The question of whether the appellant was authorised to appear on behalf of Avo at the trial, which enjoyed some attention at the trial, ultimately is of no significance since Avo was never charged. Even if Avo had itself been prosecuted, which it was not, the

appellant was not the proxy of that corporate body. Mr du Plessis unequivocally stated, regarding a document that authorised the appellant to 'handle all the issues related the vehicles [sic] in the company name', that
'I am the proxy of the company and the vehicle.'

[14] While it is possible that Avo may have been guilty of operating without a charter permit, although I prefer to express no definite view on the matter, it is not possible to substitute Avo for the appellant on appeal.

[15] In its heads of argument, which were delivered out of time, the State, correctly in my view, took the view that the conviction of the appellant could not be defended and conceded the appeal.

[16] Accordingly, the appeal must succeed. I would accordingly propose the following order:

1. The appeal is upheld.

2. The appellant's conviction and sentence are set aside.

From The Legal Journals

Curlewis, L & Gravett, W

Should Magistrates take down Confessions?

OBITER 2022 394-403

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/14325/18867

Van Der Linde, D C

No corpus delicti in Murder Cases: A Review of South African Judgments Dealing with Murder Cases without a Body

2022 (36) Speculum Juris 165–182

Abstract
Reported murder cases where the body of the suspected deceased is missing are quite rare. Although one's inherent sense of logic would militate against prosecuting such a case, no common-law rule or statute prohibits the State from pursuing it. Faced with the onus of proving all the elements of the crime of murder, the State will bear a heavier evidentiary burden to prove that the accused is responsible for not only the disappearance of the suspected deceased but that the accused had in fact killed that person. In this regard, the State will have to rely on the only available evidence which will invariably be circumstantial evidence and inferential reasoning. This article will discuss those South African cases where a court had to determine whether an accused was guilty of murder where the body of the suspected deceased was missing. This discussion will take place against the backdrop of the underlying doctrinal principles in cases involving a missing deceased, specifically the State's burden to prove all the elements of the crime and the principles surrounding circumstantial evidence. The cases are divided into two categories: earlier cases and recent cases. The former were confined to relying on the principles of circumstantial evidence and involved a high degree of inferential reasoning (or postulation). Although the latter categories of cases also involve an evaluation of circumstantial evidence, the court is assisted by the proliferation of the use of forensic evidence which bolsters the State's case of murder.

The article can be accessed here:
https://www.ufh.ac.za/sj/SJ2022-001%20PUBV%20Dr%20van%20der%20Linde.pdf

Okpaluba, M C & Maloka, T C

The Fundamental principles of recusal of a Judge at Common law: Recent developments.

OBITER 2022 276-300

Abstract
The common-law principle that no one should be a judge in his or her own cause is the basis upon which the rule against bias or apprehension of bias was founded. In constitutional parlance, this translates into the requirement that a judge or anyone

under a duty to decide anything must be impartial, which is, in turn, the foundation for the recusal of a judge in adjudication. This cardinal principle of adjudication has produced an abundant case law indicating the circumstances in which a judge should, or ought to, recuse him- or herself on the ground of bias or reasonable apprehension of bias in common-law jurisdictions. This article focuses on the fundamental principles guiding the notion of recusal in the common-law courts. There is, first, a presumption of judicial impartiality, which is the preliminary but important hurdle an applicant for recusal of a judge must overcome. The inquiry proceeds no further if this presumption is not successfully rebutted early in the proceeding. The second hurdle is the test for recusal that the facts put forward in support of the allegation of bias or apparent bias must meet. This test is a two-dimensional reasonable standard test of a reasonably informed observer who would reasonably entertain an apprehension that the judge would (not might) be biased towards one party in the case. This test enables a court to determine whether the allegation of lack of judicial impartiality in any given case could lead to the recusal of the judge. The discussion that ensues is based on decided cases selected from specific Commonwealth jurisdictions where such matters have recently been dealt with. Indeed, these cases show that recusal of a judge in adjudication is, in practical terms, the application of the common-law principle of natural justice that a person cannot be a judge in his or her own cause. It is also a clear manifestation of the age-old adage that justice must not only be done, but must manifestly and undoubtedly be seen to be done.

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/14253/18861

Khan, F & Hagglund, K

An analysis of the Common Purpose doctrine and Rape in South Africa with special focus on Tshabalala v The State [2019] ZACC 48

OBITER 2022 404- 415

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/11632

Contributions from the Law School

SCIENTIFIC CAUSES, LEGAL CAUSES AND MORAL CAUSES – a look at *Maqubela v S*[1]

1. INTRODUCTION

Determining legal responsibility for causing death becomes difficult where there may be a moral pull towards a finding of guilt. Some findings of causal responsibility may disregard scientific proof despite such proof having shown no tangible causal connection between the conduct of an accused and the death of the deceased. The case of *Maqubela*[2] is a good example of the distinction between moral causal responsibility and legal causal responsibility, and is a cautionary reminder to judicial officers to apply legal principles despite a moral inclination towards a finding of guilt.

2. BACKGROUND

Maqubela[3] was an appeal of the decision of the Western Cape High Court. In that case, the accused (Thandi Maqubela) was found guilty (inter alia) for the murder of her husband (acting judge Patrick Maqubela). The accused raised an appeal against this verdict on the ground that causation had not been established. From the judgement of the Supreme Court of Appeal (SCA) it was evident that the cause of death established by medical evidence was "cardio pathology"[4] and that this was not linked to any prior conduct on the part of the accused. In fact, on analysis of the evidence, the State was not able to provide any evidence which indicated causal conduct on the part of the accused which could have induced the cardio pathology. However, surrounding circumstances related to the marital and financial relationship between the deceased and the accused is what appeared to have swayed the High Court to find the accused guilty.

The deceased and the accused were married in 1991. On 2 June 2009, the deceased told a friend (Judge Jake Moloi) that he intended to divorce the accused. Subsequent to this discussion, the deceased did not appear in court for the matters allocated on his roll. On 7 June 2009, the decaying corpse of the deceased was found in his apartment. His body was on the bed, covered in a sheet, with a pillow over his face. No foul play was suspected, with the state pathologist reporting that although there appeared to be some blood on the deceased's face, it was in all likelihood caused by

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[1] This work features as part of the writer's PHD Thesis which is currently under examination.
[2] *Maqubela v The State* [2017] ZASCA 137.
[3] Ibid note 1.
[4] *Maqubela v The State* supra note 1 at para 4.

either tuberculosis or cancer. After a post-mortem however, the deceased was found to have been in good health at the time of his death, and it appeared that the blood had come from his lungs, possibly due to suffocation. Further investigations were conducted, and the accused was arrested and charged with murder. Subsequent to her arrest and bail hearing, some disturbing facts emerged, which showed that the deceased and the accused were not in a happy marriage, largely due to the deceased's alleged infidelity and extra-marital affairs.[5] At the trial, further post-mortem evidence was produced. This revealed that the deceased was not the picture of health at the time of his death, and that "natural causes" could not be excluded as the cause of his death. Despite the contradictory causes identified, the trial court found the accused guilty of murder.

On appeal, the SCA held that where scientific proof established objectively that the cause of death was probably by natural causes,[6] "guilty consciousness"[7] on the part of the accused could not serve to negate this probability[8] as being causally irrelevant.[9]

3. ANALYSIS

It is judicially appropriate to rely on inferential reasoning in determining legal causation but only where medical evidence suggests improbabilities.[10] While the judicial measure of proof of causation is based on an assessment of probabilities,[11] it must yield to scientific probability, in the absence of any other probable causes.[12] Where medical evidence shows that the cause of death was probably by natural causes, and no evidence of another probable cause is tendered, a court would be able to rule out medical probabilities that were not medical certainties. Courts must determine causation on the facts which have been established and proved as being reasonably probable. In this case, the argument from the prosecution was that the accused induced the cardio-pathology[13] by "unknown (and medically undetectable) means (which) caused the death of the deceased".[14] In this case, the medical evidence presented by Professor Saayman was uncontested and could not be excluded by "non-medical facts".[15] These non-medical facts (or rather allegations as

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[5] K Geldenhuys 'Black Widow – the Judge Maqubela case – part 1' *Servamus* March 2017 available at https://journals.co.za/doi/epdf/10.10520/EJC-57fb8da6a accessed on 27 August 2022.

[6] The medical evidence proved that the immediate cause of death of the deceased was "cardio-pathology" (at para 3).

[7] At para 2.

[8] Which was the factual cause as well. The court herein appears to rely on the second leg of the causation inquiry, but inappropriately imputes moral responsibility to the analysis.

[9] At para 13:

> "The inadvertent application of the scientific measure of proof to the medical evidence, which produced an inconclusive answer as to the cause of death, had the serious consequence that the trial court failed to recognize that the opinion of Professor Saayman that the deceased probably died of natural causes, was the correct finding, when the judicial measure of proof was applied to the medical evidence."

[10] At para 5, 9, 16.

[11] At para 5.

[12] At paras 9, 10. 11.

[13] Which was confirmed by Professor Saayman as the probable cause of death.

[14] At para 3(c).

[15] At para 12.

there was no evidence to support the allegation) could not justify the courts conclusion:

"If the trial court had applied the appropriate measure of proof to the evidence of Professor Saayman, it would have concluded that the deceased probably died of natural causes. Accordingly the trial court's 'pivotal question for decision' should have been proof of natural causes as a probable cause of death, precluded a finding of murder".[16]

The SCA held that it was illogical for the trial court to conclude, without proof of another probable cause, "that the medical evidence was inconclusive as to the cause of death".[17] Objective medical facts and sound logical reasoning both proved the probability of death as noted by Professor Saayman.

In the circumstances, even if the "mendacity" and "guilty consciousness" of the accused were taken into account, in this case it was insufficient to rule out death by unnatural causes as only an allegation was made as to the "non-medical" cause without proof of its probability. The trial court erred in failing to appreciate the distinction between the scientific measure of proof and the legal measure thereof, and how the legal measure ought to be applied to evidence which is probable.[18] In this case, the scientific measure did not provide a certainty, only a probability, which is sufficient in terms of the legal measure. Considering the two conflicting expert evidence testimonies which both presented different probabilities as to the cause of death, the SCA concluded that the probability which is more probable takes precedence.[19] The trial court erred in concluding that "the medical evidence was inconclusive"[20] particularly as it also agreed that "[it] is indisputable than an inference of sudden death by reason of cardio pathology would be consistent with the proven medical facts".[21] The trial court unreasonably and illogically excluded the medical evidence because the court *wanted* to find the accused guilty because she exhibited "consciousness of guilt"[22]. The SCA concluded that this was the only reason why the trial court discounted the medical evidence:

"Quite clearly, 'the absence of a probable or certain cause of death'[23], was regarded by the trial court as an essential element in answering 'the pivotal question' in order

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[16] At para 16.

[17] At para 4:

> " As regards the medical evidence, the finding by the trial court that '[i]t is indisputable that an inference of sudden death by reason of cardio pathology would be consistent with the proven medical facts' was logically inconsistent with the trial court's subsequent finding, that the medical evidence was inconclusive as to the cause of death. This inconsistency is only explicable on the basis that the trial court failed to appreciate the distinction between the judicial measure of proof, being the assessment of probability and the scientific measure of proof, being scientific certainty, in determining whether a cause of death had been established on the medical evidence. This led the trial court to the erroneous conclusion that the medical evidence was 'inconclusive' as to the cause of death. This conclusion shows that the inappropriate scientific measure of proof ie scientific certainty, was applied to the expert medical evidence."

[18] At para 6.

[19] At para 8.

[20] At para 10.

[21] At para 10.

[22] At para 16.

[23] Quoted from the trial court's decision.

to justify an inference of proof of murder beyond reasonable doubt being drawn, based solely upon the conduct of the appellant 'showing consciousness of guilt'."[24]

The legal measure of proof must be applied to the scientific evidence (or any evidence as to the probable cause) in a way that is logical and reasonable. Inferential reasoning is only so required where the probabilities (medical or otherwise) are inconclusive, "However, the primary rule of inferential reasoning is that an inference of murder must be consistent with *all* the *proven* facts."[25] It had not been proven as *a* fact that the deceased death was by unnatural means, it had only been alleged as a possibility for which no evidence to support the allegation was tendered. The only established probability was the medical evidence which indicated that the deceased's cause of death was by natural causes (cardio pathology). It is correct that in the presence of any other evidence of probabilities, reliance on an accused persons 'consciousness of guilt' and 'mendacity' could be deferred to as it was legally sound, but, in this case the evidence of cause was not inconclusive.[26] In its final summation the SCA noted that

"the trial court incorrectly relied upon the evidence of guilty conduct on the part of the appellant, without more, to prove the guilt of the appellant. In the result, the appeal against the conviction of murder must succeed."[27]

In the presence of medical evidence which was not only probable, but certain and conclusive,[28] and the absence of any other factors (or any other probable causes)[29] which could break the causal nexus, the court was principally bound to conclude that the accused caused the death of the patient. Neither the presence of compassion, the nature of the father-son relationship nor the fact that the patient's death was otherwise imminent,[30] could result in a conclusion that the lethal doses were not the cause of the patient's death. Where the accused in *Maqubela* harboured a "guilty consciousness". Had the accused in *Maqubela* been found guilty of attempted murder, a court would have in all probability relied on her "guilty consciousness and mendacity" as an aggravating factor in the consideration of sentencing. But as there was no evidence as to what her conduct was, this conviction would also not be possible either.

4. CAUSATION CAUSES PROBLEMS

As much as lawyers are concerned with causes and consequences, so too are doctors. Philosophical, doctrinal and theoretical differences have caused academics and philosophers to conclude that courts act arbitrarily when applying the legal standards of causation to matters that are non-legal, in an effort to ensure a decision which is fair. Considerations of overall fairness call on the legal convictions of the community as decisive of whether the perpetrator *ought* to be punished, but only after

[24] At para 16.
[25] At para 17.
[26] At para 18 and 19.
[27] At para 19.
[28] Cf *Maqubela* re. 'Inconclusive'.
[29] Which would create reasonable doubt.
[30] At 535-536.

the other elements of criminal liability have been *prima facie* proved or are common cause.

Although unlawfulness is technically assessed before fault, it is unlawfulness in the sense of whether the conduct is prima facie lawful or not that is relevant here. Whether the conduct is justifiable (as in a defence which excludes unlawfulness) presents only after the accused is proved to have committed an *actus reus*.[31] South African courts have consistently applied this principle fairly, correctly concluding that although the conduct caused death, it was justifiable.[32]

The law ought to properly separate considerations of cause from unlawfulness. However, conceptual differences abound between the law and medical practice where the latter treats causation as a ground for justification.[33] Theoretical and philosophical differences regarding the purpose of causation is the source of confusion.[34] In the practice of medicine where the purpose of cause and effect is different from the legal purpose, how should courts respond? It is submitted that as per the dictum in *Maqubela,* the accepted legal principles and the purpose that causation serves in law, should be and are applied, absent of the fact that a physician may claim to have acted with a particular primary purpose.[35] In so doing, the courts confirm that purpose and motive (on their own) play no role in determining causal responsibility[36] – it cannot establish the link, neither can it sever it.

Courts are confronted with striking a balance towards achieving a fair and just outcome of the judicial process, for all parties concerned. Herein, I argue that this balance can be achieved, but only through the correct doctrinal elements and principles. Policy considerations of fairness, reasonableness and justice can and should be used to determine legal responsibility as a whole, but do not necessarily have a foothold in causation without a holistic analysis of all of the doctrinal elements.[37]

While the tests of legal causation are based on policy-based issues of fairness and reasonableness, it does not give the courts a licence to reach causal conclusions

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[31] See fair labelling considerations and the distinction between passive euthanasia and active euthanasia for its prima facie lawfulness. (Which acts are crimes and which are not).

[32] Confirmed by the AD and SCA, overturning HC decisions which were inconsistent, cf *S v Mokgheti* 1990 SA 32 and *Maqubela*.

[33] The Doctrine of double-effect.

[34] McGee notes at 487 that

> "choosing to extend, and then apply, the category of omissions to include the conduct in Bland amounts to no more than the fictional device of deeming the conduct to be an omission, and this is a convenient way of smuggling notions of justification in under the guise of omissions, or amounts to 'warping' the category to serve their purposes. Using the device of deeming is objectionable because it evades the real questions and shrouds them under the obscurity of a distinction that in fact has no moral relevance".

[35] That is a consideration for overall lawfulness, and justification. Primary purpose will in turn be gauged from the factual construct of the nature of the illness and the treatment. Where the treatment is improper, then the physician's primary purpose as claimed, is disproved.

[36] Where the conduct is *prima facie* unlawful.

[37] Causation in Law and Medicine Ian Freckelton and Dan Mendelson, eds. (Ashgate Publishing Company. Dartmouth Publishing Company, Burlington, Vermont, 2002) at xxv:

> "Stapleton suggests that in such cases the courts should refuse to accept a formulation as being about "causation" and "causal tests", and instead insist that the parties argue directly about issues of policy and principle relevant to the question of responsibility."

illogically or unscientifically.[38] In the context of end-of-life cases, the individual under scrutiny is a medical practitioner, whose first and only view of causation is that of medical causation, which is purpose[39] driven. Causation in law is also purpose driven, but the legal purpose is not the same as the medical purpose.

At the core of the criminal justice system lies causation, driven by the purpose of affixing and limiting legal liability in a manner that is reasonable and logical. Causation's purpose is to ascribe causal responsibility reasonably and fairly, based on the facts and the evidence which have been presented.[40] It would be unreasonable and unfair to affix causal responsibility where factual evidence to the contrary exists.[41] In law, causation answers the question "did he do it?" not "should he be punished for doing it?"[42] The purpose of the causal analysis is to consider the proximity of the accused's conduct with the consequence. If his conduct is remote, he will not, in law, have caused the consequence.[43]

Causation is a definitional element of the crime of murder. In law the inquiry into causation serves to determine whether there is a link between the accused's conduct and the consequence of said conduct, so as to make it provisionally unlawful.[44] The unlawful consequence under judicial scrutiny can manifest as a result of a number of factors, which may collectively contribute to that result. The courts must then determine which of those factors can be excluded from the analysis and which create causal responsibility; in other words which factor or factors is or are causally relevant in criminal law to affix causal responsibility for the unlawful consequence. In essence, the law attempts to draw a straight line between point A (the act or omission of the accused) and point B (the death of the victim) by eliminating those factors that are causally insignificant, in a way that is reasonable, fair and logical.

5. PURPOSE OF A POLICY FOR LIMITING CAUSAL RESPONSIBILITY

The aim and the purpose of the policy is to affix causal responsibility where it reasonably belongs and to whom it reasonably belongs, logically. It is submitted that regardless of which test is preferred by any jurisdiction or even by a presiding judge in a particular jurisdiction, the purpose of the policy remains the same. The question of whether the accused ought to be punished is not a causal issue, it is a moral one, and should not form part of the causal criterion; it should also not be used to

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[38] Cf *Maqubela* and *Mokgethi*. Where a cause is proved in fact, and is also the only probable cause (through novus actus, etc), a court cannot conclude that the accused was not the legal cause. All it can do, and must do is conclude that, although the accused has caused the death, he has not acted unlawfully, because his conduct was reasonable (so as to be justifiable). Legal causation is not for establishing whether the accused should be punished; only that his conduct is an *actus reus*, and the elements (including causation) have been proved beyond a reasonable doubt.

[39] The primary aim and purpose is to heal and not to harm. In achieving that purpose, secondary 'aims' may exhibit, but are discounted on the strength of the primary aim.

[40] Causation in Law and Medicine, Ian Freckelton and Danura Mendelson eds. (Ashgate Publishing Company/. Dartmouth Publishing Company, Burlington, Vermont, 2002) at xxiii; 4.

[41] *Maqubela*.

[42] And in *Maqubela* "he didn't do it, but let's punish him anyway".

[43] *Mokgethi* at page 40.

[44] But because neither consent nor motive are defences excluding unlawfulness to a charge of murder, a guilty verdict would be unavoidable.

manipulate the delimitative criteria to justify a decision which is merely *morally*[45] appropriate. The undesired consequence of legal responsibility interloping in the causal analysis, or for failing to recognize that causation seeks to determine causal responsibility and not legal responsibility *in toto*, is that an
"*actus reus* will not be regarded as a legally relevant consequence of the accused's act unless the accused is to be held legally responsible (ought to be punished) for the *actus reus*; and if the accused is to be held legally responsible for the *actus reus*, he will be held to have caused the *actus reus*."[46]

Neethling and Potgieter note that
"wrongfulness lies in the infringement of a legally protected interest (or an interest worthy of protection) in a legally unacceptable way….The assessment of whether an interest is worthy of protection as well as whether the infringement thereof is legally unacceptable is determined by the legal convictions of the community or the *boni mores* criteria."[47]

Thus, the legal convictions of the community can do this: they can determine whether the accused person ought to be excused from liability because he did not act unlawfully (is his conduct justified), but
"…legal causation determines for which harmful consequences caused by the wrongdoer's wrongful, culpable act he should be liable – in other words, which consequences should be imputed to him,"[48]
through evidence of the contributory and probable causes. The delimitation policy seeks to establish causal responsibility and so in its proper sense ensures that
"The wrongdoer is not liable for harm which is 'too remote', hence the term 'remoteness of damage' for legal causation."[49]

6. CAUSATION AND *VERSARI* (the fallacy between acts and omissions)
All conditions are facts, but not all conditions are causes in fact. It is sound legal policy to limit liability by discounting those conditions which do not materially contribute to the prohibited consequence in a material and immediate fashion in the absence of proof thereof. To hold otherwise would be unfair, unreasonable, illogical and unjust. In order to determine which conditions materially and immediately caused the consequence, various theories or tests can be used. The tests are flexible in the sense that they may not offer concrete or exact criteria for determining proximity and closeness of the link. They do however offer practical insight as to how remoteness and proximity can be gauged to reach a result which fairly and reasonably point to the legal cause of the end result. These theories all support the purpose of limiting causal

[45] Who's morals discussed in Chapter 6. See also *Maqubela* herein.
[46] Gordon 1960 PHD at 114.
[47] Neethling J and Potgieter JM Wrongfulness and legal causation as separate elements of a delict: confusion reigns . TSAR 2014.4 889 at 890.
[48] Ibid.
[49] Ibid.

responsibility, and thereby legal liability.[50] The mechanics of the various theories support the legal policy of limiting legal liability. However, as much as courts use imprecise language and phrases like 'common sense' to explain the purpose of the policy and the efficacy of the theories, we must guard against the undesirable consequence of 'common sense' being taken and viewed outside of the legal causal context, or the scientific one.

Common sense must not be taken to mean the view of the general public, because, it can lead to injustice, as was the result of the trial courts in *Mokgethi* and *Maqubela*; common sense means common sense *in law* based on objective evidence. Common sense in causation is determined through the use of the delimitative criteria of remoteness between the reprehensible conduct and the unlawful consequence; not on the fact that the conduct was by itself reprehensible. The common-man may feel that the perpetrators ought to be punished for killing the deceased, but the law would not be able to find him guilty if such remoteness is established. To do otherwise re-introduces the principle of *versari in re illicita* which in South African legal jurisprudence has long since been abolished.[51]

The *flexible approach* as expounded in *Mokgethi* must be understood to mean flexibility in choice of delimitative criteria to achieve a reasonable and fair conclusion. It should not introduce as a further criteria the question of unlawfulness, which is a distinct and separate inquiry. Neethling and Potgieter note in this regard that

"These elements should be clearly distinguished as far as is realistic and possible, since their classification is based on considerations of fairness, efficacy and logic, which should not be disregarded lightly. If, for example, a component of wrongfulness is dragged into legal causation without due consideration, one could be caught up in a confusing net of ideas…This danger applies particularly to wrongfulness and legal causation…"[52]

The purpose of the policy is to establish remoteness. If the factual cause under scrutiny is not remote, then it is reasonable, fair and just to conclude that it is also the legal cause. Accepting that remoteness

"is at once the most difficult and most 'useful' of the criteria, because it is the vaguest. It is accepted in Scots law that mere remoteness in time is irrelevant – the fact that the victim lingers for a long time before dying of the wound inflicted by the accused does not affect the latter's legal responsibility for this death[53] (Hume, i. 185). There must probably be a *novus actus interveniens* before responsibility is affected. The effect of remoteness is to make it easier to regard a subsequent event a *novus actus interveniens*, since it can be said that the original act had spent its effect at the time

[50] But even if cause is established, ultimate liability can be disproved if the conduct is lawful, or if the accused person has a defence excluding unlawfulness, as determined by the legal convictions of the community.
[51] *S v Van der Mescht* 1962 (1) SA 521 A.
[52] Neethling J and Potgieter JM, Wrongfulness and legal causation as separate elements of a delict: confusion reigns. TSAR 2014:14.4 889 at 890.
[53] The rule that if death occurred 12 months after the assault, then the assault is not the cause of death.

of the intervention, so that the latter must be regarded as the substantial or effective cause of R (an actus reus),"[54]

There are tools in the law's arsenal to gauge remoteness, but unlawfulness is not one of them.

Whether remoteness severs the link between the initial reprehensible conduct and the unlawful consequence can be determined through use of the various causal theories of delimitation. Flexibility means freedom to choose from amongst the delimiting tests. It does not mean engaging in the unlawfulness inquiry. In this regard, I agree with Neethling and Potgieter who note that although the flexible approach which is based on considerations of policy, reasonableness and fairness as established in *Mokgethi*, one must guard against the merging of concepts, which are fundamentally different.[55]

However, where causing of death in particular circumstance is, in terms of the legal convictions of the community, justifiable, then although an accused person would have caused death, he is not criminally liable for being the cause.

Hart and Honore also confirm that unlawfulness is a separate and distinct element of criminal responsibility, and argue that it ought not to be merged with any of the definitional elements of criminal liability. Hart and Honore maintain that legal responsibility is the following question: Should the accused be punished for the consequences of his conduct?[56] This question can only be answered after the conduct of the accused has been proved as fulfilling all of the definitional elements for criminal liability, including causation. A moral reaction to the question might be that the accused ought to be punished, but he cannot be punished if he is not causally responsible for the *actus reus*.[57]

7. CONCLUSION

The courts should not, as was the case in the trial court in *Maqubela,* seek to affix causal responsibility based solely on moral responsibility by ignoring the legal policy

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[54] Gordon, PHD dissertation (1960) "Criminal Responsibility in Scots Law" http://theses.gla.ac.uk/2753/1/1960gordonphd.pdf (accessed on 17 January 2021), at 118-119.

[55] Neethling J and Potgieter JM, Wrongfulness and legal causation as separate elements of a delict: confusion reigns. TSAR 2014:14.4 889 at 891:

> "To ascertain whether legal causation is present, a flexible approach is followed. The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice. However, the existing criteria for legal causation (such as direct consequences and reasonable foreseeability) may play a subsidiary role in determining legal causation within the framework of this elastic approach…From this it appears that the nature and function of legal causation are fundamentally different from that of wrongfulness, and that one should be careful not to confuse these two delictual elements despite the fact that, … some of the factors which may codetermine wrongfulness, such as foreseeability, may also be relevant in establishing legal causation. Nevertheless, the different functions of these two elements should not be disregarded."

[56] When intention and causation have been proved.

[57] Hart and Honore, at 5:

> "it is one thing to urge the replacement of causal notions by considerations of legal 'policy', and another to urge that there is nothing to replace: the first may be desirable, but the second may be false, and a certain dogmatism and incoherence in the modern outlook is due to the failure to distinguish these two questions".

imperative of limiting causal responsibility, reasonably, fairly and logically. These 'tests' should not be misconstrued and misused or manipulated in order to justify a decision that in *this* case the accused person should be *legally* responsible (criminally liable) for the consequences of his actions despite not being *causally* responsible, merely because he exhibited guilty consciousness and mendacity.[58] Unlawfulness comes *ex post facto* causation, not before it, and certainly not to prove it.[59] From the SCA,[60] it is clear that our courts are able to effectively do this.

Lack of moral responsibility may mean lack of legal responsibility. The presence of moral responsibility can only mean that the accused is legally responsible and thus criminally liable, if legal responsibility has been *prima facie* proved. In this sense, moral responsibility rests with the court to decide whether the accused has a defence which excludes unlawfulness but not whether he caused the consequence.

It is open to the courts (or the legislature) to determine when the consequences of an accused person's conduct do or do not attract legal responsibility and thus criminal responsibility, but not that he did not in law cause the consequence. This answer cannot be achieved though consideration of the causal nexus. All that the causal nexus does (in conjunction with the other elements of criminal liability), is to determine whether the accused's conduct (and resultant consequence) satisfies the definitional elements of the crime he is charged with.

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[58] *Maqubela*.
[59] *Maqubela*.
[60] *Maqubela* and *Mokgethi*.

Matters of Interest to Magistrates

Hildebrand[61] and Seedat[62]-The Importance of the Law of Precedent or Stare Decisis

Is a sentencing court, upon a conviction of an Accused of an offence charged in terms of section 51[63] of Act 105 of 1997, after a finding that the requirement of Section 51(3)[64] has been satisfied, entitled to impose any sentence it deems appropriate or does it have to impose imprisonment that only part of may be suspended?

This debate is regularly raised in courts and in debates between presiding officers and for that matter counsel, with a substantial number of the view that where an accused person is charged with an offence in terms of section 51(1) or 51(2) even if substantial and compelling factors exist a sentence of direct imprisonment has to be imposed and only a part thereof may be suspended. The basis of this argument is contained in section 51(5)[65]which provides: -
'(5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act.
And further section 297 (4)[66] which provides :-
'(4) Where a court convicts a person of an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a) (i) of subsection (1).'

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[61] Hildebrand v The State [2015] ZASCA 174
[62] Seedat v The State [2016] ZASCA 153; 2017 (1) SACR 141 SCA

[63] Act 105 of 1997 – Criminal Law Amendment Act- to provide for minimum sentences for certain serious offences. Schedules are attached to the Act that determine the prescribed minimum sentence that may be imposed.

[64] (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections. it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence. *(b)* If any court referred to in subsection (1) or (2) decides to impose a sentence 15 prescribed in those subsections upon a child who was 16 years of age or older. but under the age of 18 years. at the time of the commission of the act which constituted the offence in question. it shall enter the reasons for its decision on the record of the proceedings.

[65] Act 105 of 1997
[66] Criminal Procedure Act, Act 51 of 1977 as amended.

The view is that once an Accused is charged with an offence listed in the schedules to Act 105 of 1997 even if the court is of the view that a term of imprisonment is uncalled for and is not in the interests of justice, legislation demands that it has to be imposed. This amelioration of the discretion of the sentencing court in deciding what is an appropriate sentence does not sit comfortably with many presiding officers.
In an article published in the De Rebus, Desmond Francke[67] has in my view correctly pointed out the danger of legislation, that in his view, compels courts to impose sentences that are fairly obviously disproportionate and completely out of kilter with the moral blameworthiness of the convicted person, particularly in those matters dealing with chastisement of minors. This is fairly obviously badly drafted legislation; it is clearly not a model of clarity. This results in the lament by Mr. Francke that parents criminally charged for assaulting their child under the current sentencing regime, the parent faces a minimum term of ten years' imprisonment which may only be partly suspended.

I completely agree with the comments in his first paragraph where he says;
"The proportionality principle makes the blunt tool of punishment a valid and morally acceptable element of social order. Without proportionality as the governing sentencing principle, sentencing would either be the arbitrary application of state power or an ineffective response to criminal conduct. One all-too-common sentencing scenario involves mandatory minimum sentence for the crime of '[a]ssault with intent to do grievous bodily harm on a child under the age of 16 years'.

Similarly, a Regional Magistrate in Benoni[68] when sentencing a care-giver to 30 days direct imprisonment for assault with intent to do Grievous Bodily Harm after the care-giver struck two children a total of three times with a broken bat stated: -

'I cannot for one minute believe that society would expect this court to take you out of society, but sir, as I have quoted to you, I have a problem I can defer from that prescribed sentence, and certainly I will, but according to the Criminal Procedure Act, I only have incarceration as an option. I cannot replace it with correctional supervision, I cannot suspend the sentence it is prohibited, I cannot postpone sentencing it is also prohibited.'

This quotation of the Presiding Officer when giving reasons for sentence encapsulate the lament of Francke and indeed most sentencing officers. However in the same case, S v Hildebrand, the Supreme Court of Appeal held that the learned Regional

[67] Desmond Francke BIuris (UWC) at the time was a magistrate in Ladysmith. This article was first published in De Rebus in 2021 (June) DR 20.

[68] As quoted in the SCA judgment of Hildebrand v The State [2015] ZASCA 174 @ [5]

Magistrate was incorrect and it was in fact open to the presiding officer to suspend the entire sentence[69].
The proponents of the view that in terms of the prevailing legislation the entire sentence cannot be suspended are of the view that the subsequent decision of the Supreme Court of Appeal in S v Seedat[70] rendered the Hilderbrand dicta as no longer good law.

Their findings[71] and views are premised on the fact that the "Hildebrand" decision of the Supreme Court of Appeal is incorrect and that the same but largely differently constituted court[72] in "Seedat" found it was wrong. This is based on a fairly common viewpoint by some magistrates that Seedat has apparently over-ruled Hildebrand[73]. With respect this viewpoint is premised on a flawed application of the Law of Precedent or Stare Decisis.

The proper application of the Law of Precedent or Stare Decisis

A reminder of the doctrine of stare decisis or Precedent is illuminating. The Constitutional court in Ayres[74] recently reiterated the importance of Precedent in court decisions and in my view Precedent resolves the issue. Precedent or Stare Decisis is a juridical command to the courts to respect decision already made in a given area of the law. The practical application of the principle of *stare decisis* is that courts are bound by their previous judicial decisions, as well as decisions of the courts superior to them.

In other words, a court must follow the decisions of the courts superior to it even if such decisions are clearly wrong. The importance of this principle is best illustrated by the Constitutional Court[75] when they held: 'Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.'

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[69] Hilderbrand [Supra]
[70] S v Seedat 2017 (1) SACR 141 (SCA).
[71] As per Desmond Francke's article that is largely followed by those who suggest a sentence may not be wholly suspended.
[72] Supreme Court of Appeal, Tshiqi JA, as he then was is common to both matters and authored the Seedat judgment, Bosielo JA authored the Hildebrand judgment.
[73] This comment to a sharing of the Hildebrand matter on a regional magistrates forum was elicited from the Western Cape, "Colleagues, I cannot understand why you still refer to or use the Hildebrand case of 2015. The Hildebrand case (decided by 3 judges) ignored and did not address sec 297(4) of the Criminal Procedure Act at all. That was rectified in the attached later decision of S v Seedat (decided by a full bench of 5 judges). See specifically paragraph 37 of the judgement in this regard." Support on the e-mail thread came from a colleague in the Western Cape.

[74] *Ayres and Another v Minister of Justice and Correctional Services and Another (CCT 47/21) [2022] ZACC 12; 2022 (5) BCLR 523 (CC) (25 March 2022)*

[75] Per Brand AJ, Camps Bay Ratepayers' and Resident Association and Another v Harrison and Another 2011 (4) SA 42 (CC)

Similarly, in Ruta[76], they held:
"[R]espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution.[77]"
The correct approach to the application of Precedent is that the doctrine of precedent obliges courts of equivalent status and those subordinate in the hierarchy to follow only the binding basis or the ratio decidendi of a previous decision. Anything in a judgment that is subsidiary is considered to be 'said along the wayside', or 'stated as part of the journey' (*obiter dictum*), and is not binding on subsequent courts[78].
Cameron JA[79] in the "Two motives" case explained that:- [Citations omitted]
"The most authoritative and illuminating exposition in our law of the distinction between what is binding in a previous decision, and what is stated 'by the way', is that of Schreiner JA in *Pretoria City Council v Levinson*. He referred to an earlier explanation by De Villiers CJ in *Collett v Priest*, who stated that the ratio of a decision 'is the principle to be extracted from the case', and 'not necessarily the reasons given for it."

On this basis alone the contention that Seedat might have over-ruled Hildebrand is without foundation as a simple consideration of the two judgments reveals that Hildebrand is directly on point and the ratio decidendi of Seedat has little to do with the ratio of Hildebrand.

For completeness it is necessary to briefly deal with the two cases: -
The issue was directly dealt with in Hildebrand by the SCA and the Headnote summary says:-

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[76] Ruta v Minister of Home Affairs [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 21.

[77] Van der Westhuizen J – "precedents must be respected in order to ensure legal certainty and equality before the law. This is essential for the rule of law. Law cannot 'rule' unless it is reasonably predictable. A highest court of appeal — and this Court in particular — has to be especially cautious as far as adherence to or deviation from its own previous decisions is concerned. It is the upper guardian of the letter, spirit and values of the Constitution. The Constitution is the supreme law and has had a major impact on the entire South African legal order – as it was intended to do. But it is young; so is the legislation following from it. As a jurisprudence develops, understanding may increase and interpretations may change. At the same time, though, a single source of consistent, authoritative and binding decisions is essential for the development of a stable constitutional jurisprudence and for the effective protection of fundamental rights. *This Court must not easily and without coherent and compelling reason deviate from its own previous decisions, or be seen to have done so*. One exceptional instance where this principle may be invoked is when this Court's earlier decisions have given rise to controversy or uncertainty, leading to conflicting decisions in the lower courts.

[78] Per Cameron JA as he then was in True Motives 84 (Pty) Ltd v Mahdi 2009 4 SA 153 (SCA)

[79] Supra at [103]

‘Summary: Appeal against sentence – appellant convicted of two counts of assault with intent to cause grievous bodily harm on two young children – sentenced to 30 days imprisonment on each count – Section 51(5) of the Criminal Law Amendment Act 105 of 1997 not precluding a sentencing officer from suspending the sentence imposed where minimum sentence departed from. [my emphasis]

Pointedly Hildebrand deals directly with facts that concern most presiding officers where minimum sentences are fairly obviously disproportionate. The facts are important;
“following his plea of guilty on two counts of assault, with intent to cause grievous bodily harm, perpetrated on two minor children the accused was sentenced by the regional magistrate to imprisonment for 30 days on each count. His appeal against sentence to the North Gauteng High Court, Pretoria failed, he appealed to the SCA with the leave of the High Court.”

The accused was the fiancé to the complainants’ mother. The complainants are twelve years and six years old respectively. He was staying with them in a flat with their mother. On 11 February 2011, upon returning home, the appellant found the complainants throwing articles out of the flat’s window onto the neighbours’ premises. It was not the first time that they had done this. As the accused had previously admonished them against this conduct he lost his temper and out of frustration grabbed a broken bat and hit both children on their buttocks.

Three bruises were occasioned by the assault on the two complainants, a pre-sentence report recommended a sentence in terms of section 276 (1) (h) of Act 51 of 1977 however the Regional Court Magistrate stated and this view still seems to hold some sway amongst presiding officers in the Lower Courts:
‘I cannot for one minute believe that society would expect this court to take you out of society, but sir, as I have quoted to you, I have a problem I can defer from that prescribed sentence, and certainly I will, but according to the Criminal Procedure Act, I only have incarceration as an option. I cannot replace it with correctional supervision, I cannot suspend the sentence it is prohibited, I cannot postpone sentencing it is also prohibited.

Whereas the High Court agreed with the learned Regional Magistrate the Supreme Court of Appeal decisively disagreed and held importantly as its ratio decidendi:
“[10] It should be clear that s 51(5) refers to ‘a minimum sentence imposed in terms of this section’. Self-evidently, this section does not apply to sentences imposed after a finding that substantial and compelling circumstances exist, because such a sentence is not one imposed in terms of s 51. The sentence imposed by the regional magistrate accordingly did not fall within the restrictive provisions of s 51(5)”

Further at;

'[8] Section 51 of the Act provides for the minimum sentences for certain specified offences. Once a court finds that the offence for which an accused has been convicted falls under offences specified by s 51 of the Act, then that court has no option but to impose the minimum sentence prescribed unless it can find substantial and compelling circumstances. However, once it is satisfied that there are substantial and compelling circumstances which justify the imposition of a sentence other than the one prescribed by the Act, it can impose any sentence which it regards as appropriate'

The facts of Seedat[80] are somewhat different, the appellant, Mr Aboo Baker Seedat, aged 60 at the time, was charged in the Regional Court with rape, read with the provisions of ss 51 and 52 of the Criminal Law Amendment Act, Act 105 of 1997. (the minimum sentence legislation). He had legal representation and pleaded not guilty. It was alleged that he raped Ms J M, then a 57-year-old woman, by inserting his penis into her vagina. He was convicted and sentenced to 7 years' imprisonment in the Regional Court.

On appeal to the Gauteng Division, the High Court[81] dismissed the appeal against conviction but set aside the sentence imposed and substituted it as follows: (para 50): 'That the sentencing of the accused is suspended for a period of five years on the following conditions: [my emphasis]

(i) That the accused pays the complainant a total amount of R100 000 as follows:'

Although the inexact and imprecise use of language in the formulation of the sentence by the High Court is unfortunate what is clear is that the High Court postponed the passing of sentence on condition that the accused paid over to the complainant compensation in the amount of R100 000. The ratio decidendi[82] of the judgment was that suspending the passing of sentence and ordering compensation is not competent in terms of s 297 and there is no provision in law permitting a court to so *suspend* the sentencing of an accused. The unintended consequence occasioned by the error committed by the high court was that there was no competent sentence imposed on the appellant. [My emphasis]

Following upon that the court re-stated principles in relation to the principles and considerations of a court when imposing sentence in serious gender based violence matters and that sentences of compensation in lieu of imprisonment need to be imposed with great circumspection and would only rarely be appropriate. This is arguably the greatest value of this judgment. A direct term of imprisonment of four years was substituted by the High Court.

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[80] [2016 [ZASCA] 153 Per Tshiqi JA

[81] Per Mavundla J and Strauss AJ

[82] The other ratio decidendi of the judgment is that in terms of section 311 of the CPA the State has the right to appeal a sentence imposed in the high Court.

Whereas the Supreme Court of Appeal in Seedat did state at :
"[37] section 297 (4) envisages that only part of the sentence imposed by the High Court should be suspended and not the whole sentence. So even if the court sought to impose a suspended sentence, it could not suspend the whole sentence."

The idea that this statement is authority for the proposition that Hildebrand has been over-ruled and not binding law is incorrect, a reading of the two cases reveal that in Seedat there was no consideration of the ratio of Hildebrand, that the effect of a finding in terms of section 51 (3) was that section 51(5) was no longer applicable and that the court was free to impose any sentence. The comments in Seedat, even if correct, cannot usurp the binding ratio decidendi of Hildebrand, at best it is a conflicting decision, with respect the statement is in my view is best seen as an obiter dictum.

A simple reminder of the law of Precedent reveals that in order to have over-ruled Hildebrand the SCA in Seedat would have to consider the ratio of Hildebrand and have specifically over-ruled it or considered it and declined to follow it, in particular it needed to make a finding that a sentence imposed after a finding of substantial and compelling circumstances existing in terms of section 51 (3) was still a sentence imposed in terms of the prescribed minimum sentencing legislation contained in Act 105 of 1997 and that the sentence was therefore regulated by section 51(5) and section 297 (4) of the CPA. It patently did not do so, its comments if they do support the contention advanced by practitioners supportive of the arguments of Mr. Francke that imprisonment has to be imposed in these circumstances are, with respect, at best an obiter dictum.

For these reasons the precedent law contained in Hildebrand demands that once a finding is made in terms of section 51 (3) the court is entitled to impose that lesser sentence. It is not bound by section 51(5) of Act 105 of 1997 as the sentence imposed after a finding of factors as envisaged in section 51(3) is not a sentence in terms of section 51 at all. The court is thus free to impose the sentence that is both just and proportionate. Section 51(5) has no application.

[28] Quite simply section 51 (5) of Act 105 of 1997 does not apply as it only applies to sentences imposed in terms of section 51, in other words if the prescribed minimum sentence is imposed it cannot be wholly suspended and the same must apply to section 297 (4) of Act 51 of 1977.

The Western Cape High Court in Hall[83] after stressing that the application of stare decisis was integral to the Rule of Law at [46] reminded us:

[83] Hall v S [2021] ZAWCHC 231 delivered on 12 November 2021 Per Goliath DJP and Montzinger AJ.

‘In a later decision[84], the Constitutional Court again gave further constitutional imprimatur to the continued principled application of *stare decisis* and stated that:
"The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."
The learned Acting Judge in Hall[85] succinctly outlined,
“The practical effect of the doctrine of precedent is that provincial and local divisions are bound by decisions made within their own territorial areas of jurisdiction, and not by other provincial and local divisions of the High Court. However, High Courts are bound by the decisions of the Supreme Court of Appeal and the Constitutional Court. By extension inferior courts, such as Magistrate's Courts, have limited jurisdiction and are bound by decisions of the division of the High Court in a particular province. If no relevant decision exists as regards a specific circumstance, and a decision regarding such a circumstance was made by a High Court in another province, the magistrate will then follow that decision.”

This application of statre decisis is illuminating when looking at the Western Cape High Courts was subsequently seized with the same issue in S v Dawjee[86] where the apparent contradiction between Seedat and Hildebrand was ventilated and fully argued, with respect, the High Court of the Western Cape decisively and correctly applied stare decisis.

The question that arose in the sentencing of accused 6 was, could the court suspend part of the minimum sentence despite the authority in S v Seedat, the learned judge Allie J correctly in my view examined the decisions in Seedat and Hildebrand and was not convinced that they were necessarily in conflict with each other:
The Court noted that the ratio decidendi of Seedat is that there is no provision in law permitting a court to suspend the imposition of sentencing of an accused, compensation can only be ordered if a sentence is imposed.[87] The unintended consequence occasioned by the error committed by the High court in sentencing Seedat was that there was no competent sentence imposed.

The learned judge Allie states:-

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[84] Camps Bay Ratepayers (supra) @ [28]
[85] Hall, (supra) at [47]

[86] *S v Dawjee and Others (CC45/2015) [2018] ZAWCHC 63; [2018] 3 All SA 816 (WCC) (10 May 2018)*

[87] Dawjee at [192-193]

'I am not convinced that Seedat is in conflict with Hildebrand and Malgas. The former concerned a sentence which judges[88] sought to impose where no term of imprisonment was given. In Hildebrand v The State and in S v Malgas[89] the court confirmed that a sentencing court's discretion is not eliminated by the prescribed minimum sentence once it is deviated from[90].

Quite simply on an application of the law of Precedent, as lower courts we are bound to apply the ratio of Hilderbrand, which quite simply is that once a sentencing court find the existence of substantial and compelling circumstances any sentence imposed thereafter is not a sentence in terms of Act 105 of 1997 and the court is entitled impose any appropriate sentence it deems fit after exercising its discretion judiciously.

I struggle to understand why one would not want to exercise this judicial discretion free of the constraints of being dictated to by the prescripts of legislation that might cause a disproportionate sentence to be imposed. Even if there was to be considerable merit in what was stated in Seedat that only a part of the imprisonment sentence can be suspended and Hildebrand might be wrong as the lower court or as "bottom feeder[91]"presiding officers we are required to follow it[92]. Stare decisis as explained in Hall[93]'s judgment, the need for certainty and the constraints of the Rule of Law demand it.

Indeed, in my view Seedat's greatest value is that to propose restorative justice in rape and sexual assault matters needs to be thought through very carefully and applied with great circumspection. The seriousness and prevalence of the offence strongly militates against such sentences being imposed. It is, with respect, easy to follow Hildebrand as it avoids precisely the complaint that disproportionate sentences are imposed because of the requirement that a term of unsuspended imprisonment has to be imposed.

Garth Davis
Regional Magistrate Durban

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[88] My correction, the learned judge Allie refers to the imposition of a postponement of sentence being done by the magistrate whereas it was, in fact imposed by the High Court on appeal per Mavundla J and Strauss AJ-Gauteng High Court
[89] 2001(1) SACR (SCA) 49
[90] Dawjee [194]
[91] A term sometimes used to reinforce that in terms of hierarchy of judgments and precedent that lower courts are bound to follow the ratio of Higher Courts and the magistracy forms the bottom of this hierarchy.
[92] Many of the views in the Regional Court that Seedat has over-ruled Hildebrand is found in the Cape, this is so notwithstanding the fact that the only decieded case that I can find at this time is the decision of Allie J in Dawjee. The ratio of Hildebrand as confirmed by Dawjee is binding on the Western Cape and in terms of the guidelines in Hall binding on the inferior courts.
[93] Hall Supra at [47].

A Last Thought

"Not only does the proviso to section 217 not aid the accused, but it might also lead to an erosion of the perception of the independence and impartiality of the magistracy. When magistrates are routinely called by the state to testify on behalf of the state at trials-within-trials, this might create the appearance of a cosy relationship between the magistracy and the executive, to the apparent detriment of the doctrine of separation of powers. It also does not bode well for the judicial independence of magistrates if they routinely have to take the witness box in trials-within-trials and be subject to cross-examination by the accused's attorney. Moreover, in such cases, the presiding magistrate would sit in judgment of the testifying magistrate, and might ultimately be called upon to make a finding regarding the credibility of the testifying magistrate.

With the enactment of the Constitution, there is generally "less anxiety over whether accused persons are afforded sufficient protection against unfair practices by the police" (Zeffertt and Paizes Evidence 537). That is because the right to a fair trial is now placed at the centre of our criminal justice system. Our courts have developed and articulated several rules and principles to ensure that confessions are obtained in a manner that does not render the trial unfair or is otherwise detrimental to the administration of justice.

For these reasons, the authors argue that magistrates should no longer be required to take down confessions. The mere fact that magistrates can be called by the state to give testimony about the circumstances under which confessions were made, could create the public perception that magistrates routinely assist the state in furthering its case. The public image of the magistracy might also be seriously impugned if magistrates – in fulfilling an extrajudicial function – are regularly subject to cross-examination by the accused at a trial-within-a-trial, and by the presiding magistrate sitting in judgment over the testifying magistrate.

Moreover, in accordance with the test formulated by Zondo J in the NSPCA case, the act of taking down a confession clearly constitutes a non-judicial act, which is neither provided for in the Constitution nor is it closely related to the core function of the judiciary. There is also no compelling reason why the function of taking down a confession should be performed by a member of the judiciary. As such, the separation of powers is offended by the performance of such a function by

magistrates, and, in our view, is therefore unconstitutional."

Per Curlewis, C & Gravett, W in the article *Should Magistrates take down confessions* in Obiter 2022 page 403