



Reportable:	YES/	☐ NO
Circulate to Judges:	YES/	☐ NO
Circulate to Magistrates:	YES/	☐ NO
Circulate to Regional Magistrates:	YES/	☐ NO

HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: K/S 36/2014

Heard: 09/03/2016 – 14/03/2016

Delivered: 15-03-2016

In the matter between:

THE STATE

v

CARLOS ANDREA DU PLESSIS

Accused

JUDGMENT

KGOMO JP

1. The accused, Mr Carlos Andrea Du Plessis, is 44 years of age. He stands accused, on the first three Counts, of Assault with the Intent to do Grievous Bodily Harm (GBH) and on the fourth Count of Murder read with the provisions s 51 of the Criminal Law Amendment Act, 105 of 1997.

2. The state alleges that in respect of Counts 2 and 3 he assaulted Petrus Afrikaner and Franklin Hoogstander, respectively, on 23 August 2014 on his farms, Makoenskloof, Douglas, Northern Cape, with a sjambok with the intent of causing them grievous bodily harm. In respect of Count 1 the accusation is that on the same date and place he lashed out at, but missed, Willem Abrahams with the same sjambok and with the same intent.

3. In respect of Count 4, the Murder, the accused is said to have murdered Alfred Phakedi on the same occasion, on the same farm and using the same or other unspecified instrument.

4. The accused, represented by Adv Barry Roux SC, has in terms of s 112(2) of the Criminal Procedure Act, 51 of 1977 (the CPA) proffered the following written guilty plea in respect of all charges (marked Exhibit "A"):
 - "1. I understand the charges in Counts 1 – 4 and plead guilty thereto, as explained hereunder. I respectfully request that my pleas of guilty be read with my explanation of my plea of not guilty on the charge of murder in regard to Count 4 in terms of Section 115 of the CPA.*
 - 2. I plead guilty voluntarily and without any undue influence.*
 - 3. AD COUNT 1*
 - 3.1 On 23 August 2014 and at the farm Makoenskloof, Douglas, in the district of Herbert, within the jurisdiction of this Honourable Court, I hit once at Willem Abrahams with a plastic sjambok.*
 - 3.2 I hit at Willem Abrahams when he ran past me. When I hit at Willem Abrahams he ducked away as a result of which I missed him.*
 - 3.3 When I hit at Willem Abrahams with the plastic sjambok it was not with the intent to cause grievous*

bodily harm to him. I never intended to hit so hard that the sjambok could cause a laceration to his skin. However, I accept that if the sjambok had made contact with him, it could have caused a tramline abrasion to his skin, and not a laceration.

3.4 *I had no right or excuse to hit at Willem Abrahams.*

3.5 *I accordingly plead guilty to attempted assault on Willem Abrahams.*

4. AD COUNT 2

4.1 *On 23 August 2014 at the farm Makoenskloof, Douglas, in the district of Herbert, within the jurisdiction of this Honourable Court:*

4.1.1 *I hit Andrè Petrus Afrikaner once with a plastic sjambok over the head;*

4.1.2 *I did not aim at his head but hit at him as he was running past me. In the process he was hit on his head, which I accept was wrong and indiscriminate;*

4.2 *When I hit at him I did not intent to do grievous bodily harm to him as I did not intend to hit so hard that the sjambok could cause a laceration of his skin;*

4.3 *According to the J88 report in respect of Andrè Petrus Afrikaner the injury was not serious. I accept however that it could cause an abrasion to his skin and in this instance in fact caused a tramline abrasion to his scalp (skin).*

4.4 *I had no right or excuse for hitting him with the sjambok as explained, and accordingly I plead guilty that I assaulted Andrè Petrus Afrikaner by hitting him once with a plastic sjambok over his head.*

5. AD COUNT 3

5.1 On 23 August 2014, at the farm Makoenskloof, Douglas, in the district of Herbert, within the jurisdiction of this Honourable Court:

5.1.1 I accept that I hit Franklin Hoogstander twice with a plastic sjambok. I understand and accept that the first lash made contact with the peak of his baseball cap as stated by him in his statement. The second lash was on his back;

5.1.2 I did not specifically aim at any body part but indiscriminately hit at him as he was running past me;

5.2 When I hit at him I did not intend to do grievous bodily harm to him as I did not hit so hard that the sjambok could have caused a laceration of his skin;

5.3 I had no right or excuse for hitting him with the sjambok.

5.4 I accordingly plead guilty that I assaulted Franklin Hoogstander by hitting him twice with a plastic sjambok.

6. AD COUNT 4

6.1 On 23 August 2014, at the farm Makoenskloof, Douglas, in the district of Herbert, within the jurisdiction of this Honourable Court:

6.1.1 I hit the deceased, Mosimanegape Alfred Phakedi, three or four times with a plastic sjambok.

6.1.2 One or two lashes were on his back, another lash was on the lower side of his abdomen and a further lash was on his right elbow.

6.2 When I hit him I did not intent to do grievous bodily harm to him as I did not hit so hard that the sjambok could have caused lacerations of his skin;

- 6.3 *I leave it in the hands of the Honourable Court to find whether 3 to 4 lashes with a sjambok would constitute assault with the intent to do grievous bodily harm, although I did not intend to cause serious injuries.*
- 6.4 *I knew that the lashes could cause tramline abrasions to his skin.*
- 6.5 *I had no right or excuse to hit him with the sjambok.*
- 6.6 *I accordingly plead guilty that I assaulted the deceased, Mosimanegape Alfred Phakedi, by hitting him three to four times with a plastic sjambok."*

5. The accused has undersigned his statement and has confirmed it before me.

6. In a comprehensive statement, Exhibit "**B**", termed "*Plea-explanation by the Accused in terms of s 115 of the Criminal Procedure Act, 51 of 1977, in regard to Count 4 [Murder]*" the accused states:

- "1. *I am the accused in this matter. I understand the charges against me. As will be seen from S 112 (of the CPA) statement, I plead guilty to assaulting the deceased (Count 4) and the complaints in Counts 1 & 2 and guilty to attempted assault in respect of Count 3. I plead not guilty to murder in respect of Count 4. I deal herein comprehensively with my plea of not guilty on Count 4, in order to enable the State to clearly identify the disputes for consideration in this matter.*

AD COUNT 4- MURDER

I am a businessman and hold a 50% shareholding in Discovery Properties (PTY) LTD ("Discovery"). Discovery is the owner of a farm known as Makoenskloof. At the relevant time there were 300 sheep and 70 cattle on the farm. There was (and still is) a pivot for irrigation. In order to give water to the animals on the farm the pivot must be started to supply water to the dam to in turn supply water to the animals.

- 2. *Alfred Phakedi (the deceased) was employed by Discovery and was the foreman on the farm. Willem Abrahams (the complainant in Count 1) ("Willem") and Andre Petrus Afrikaner (the complainant in Count2) ("Petrus") worked with*

the deceased on the farm. All of them lived on the farm in two adjacent houses.

3. *On 23 August 2014 at 03:42 I received a telephone call from the deceased, which he made from the cellular phone given to him by me to use for work purposes, (071 172 8913). The call was made to my satellite phone (087 285 25280). The deceased told me that people from Katlani were at his place and there was fighting. I could hear music in the background. I subsequently discovered from the telephone records provided by the state, that prior to phoning me, the deceased had made a phone call to Daniel Pitso (an employee on the mine) at 02:06 the same morning.*
4. *The same morning at 07:29 I received a further call from the deceased on my cellular phone (082 455 6604), informing me that he had a problem with the pivot. I asked him what the problem was and he explained that he could not get the pivot to work. I asked him to check if it was an electricity problem or a water problem, although I did not believe that it would be a water problem, as the water was from the river to the dam and then to the pivot.*
5. *The same morning at 08:42 the deceased again phoned me and told me that he could not get the pivot to work. The cellphone reception at the farm is poor and the call was lost, which I believe explains a further call by the deceased 08:51 regarding the same problem. I accepted that there was a problem with the electricity supply as it did not make sense that there could be a water problem. I told him I was on my way to the farm.*
6. *I went to the GWK (the Co-operation) to buy a circuit breaker as I thought that the most likely problem with electricity supply would be a defective circuit-breaker. When I was at GWK I saw sjamboks at the display area. I decided to buy one as we need it on the farm when we move the cattle into the crush for dipping and treatment purposes. The bull on the farm was in particular difficult to control. GWK did not have the correct circuit breaker. I did not buy the sjambok with the preconceived idea to assault anyone as there was no reason for me to want to assault the deceased or anyone else. I had always maintained a very good relationship with deceased, and a faulty circuit breaker could in any event not be attributed to him.*
7. *The same morning at 09:32 the deceased called me again to enquire if I was on my way as there was no water for the animals. I told him that I was on my way.*

8. *Upon my arrival at the farm I first went to the dam. I saw that the tap supplying water from the dam to the pump (suction side) was closed. I realised that it had nothing to do with an electrical problem. I opened the tap. I saw that the water trough of the animals was dry and must have been dry for a number of days. The deceased was not at the dam and I decided to go to his house to look for him as it was a working day. I was annoyed and upset but had no intent to assault the deceased.*
9. *When I arrived at his house (there are two houses) I got out of my vehicle (a bakkie) and walked towards the house where the deceased was sitting outside with Willem and Petrus. I did not have the sjambok with me, which was still in my vehicle. At that point I became more upset as I was thinking of the animals, which had been without water for some time and the employees sitting at home when they were supposed to work. I also believed they had been drinking the previous night until the next morning which explained the deceased's inability to open the tap and his staying at home.*
10. *I then decided to turn back and fetch the sjambok. I did so as I had in my upset state of mind then taken the irrational and inexcusable decision to fetch the sjambok to give the deceased a hiding. I had no justification to act as aforesaid and I had no right to give him a hiding.*
11. *The deceased smelled strongly of alcohol. The call he made to me at about 03:00 in the morning confirmed my view that they had been drinking. I asked him why he had not opened the tap so that the animals could have water, which he could not explain. The above, coupled with the fact that they were sitting at home (in my mind because of drinking) when they should be working and the fact that animals on the farm had previously died of thirst, caused me to lose my temper.*
12. *I grabbed the deceased and hit him with the sjambok over his lower back and his side. Although I was upset, I did not hit him hard. I also did not intend to hit him hard. I may have hit him in the process over his right elbow as well. At that time Willem and Petrus started to run away. As they ran past me I hit at them with the sjambok. I did not aim for any specific place on their bodies. It was rather a matter of taking swipes at them, which I accept was indiscriminate and without any justification.*
13. *I also took a swipe at Franklin Hoogstnder (the complainant in Count 3) ("Franklin"), who was unknown to me and who came running out of the house as I felt he was drinking with them*

the previous night. According to his statement I hit him twice with the sjambok, once on his back and once over the peak of his baseball cap. I cannot specifically remember hitting at him twice, but I accept it. Again I did not aim to hit him at a specific place on his body but I swiped at him as he was running past me.

14. ***During the process of hitting at the three complainants, the deceased ran away. He ran through the gate down the road and turned left into the bushes. I chased after him. After he had turned left into the bushes he fell. He in fact fell twice in that area, which is very rocky. He was cornered in the bushes I got hold of him, held him by his wrist and took him back to where my vehicle was. I took him back as I wanted to take him to the dam to show him what he had not done. Although I do not remember I could have hit him one more time with the sjambok when we walked back to my vehicle. However, I could not have hit him more than four times over his body in total.***
15. ***I accept and admit that over the period, as described by me, I hit the deceased three or four times with the sjambok. The injuries caused by the sjambok. There is a tramline injury to his lower back, a possible tramline injury to his right mid back, another tramline injury to his lower left side of his abdomen and a tramline injury to his right elbow.***
16. ***I definitely did not hit him over the head with the sjambok or with anything else. I did not assault him in any other way other than with the sjambok, but for grabbing hold of him, which could not have caused any injury. The post-mortem report by Dr Kanaomang confirms that he was not hit over the head with the sjambok. This is also confirmed by the forensic pathologist, Dr Perumal.***
17. ***I had no right to assault the deceased and the other complainants and I had no excuse at all for doing so. However, I need to emphasise that I did not go to the deceased's house to assault him. It happened at the spur of the moment when I lost my temper for the reasons referred to above. If I had planned to assault the deceased I would have taken the sjambok with me when I first got out of the vehicle.***
18. ***After the deceased had climbed onto the bakkie I wanted to drive to the dam to demonstrate to the deceased why the***

pivot did not work. However, on my way there I decided that there was no use for doing so as I lost my trust in him. I decided that I did not want them (the deceased and the complainants) on the farm anymore as I could not trust them to look after the animals. It must be borne in mind that I am not a farmer but involved in mining. I only visit the farm about three times a month. I was therefore dependant on the trust of the employees to look after the animals on the farm. At that point in time, I was mindful of the fact that about a month before the deceased had taken my vehicle on the farm to drive somewhere and then overturned the vehicle. This vehicle was only used on the farm as he did not have a driver's licence. He had taken the vehicle without my consent. I did not assault the deceased at the time but reprimanded him.

19. *I turned around and went back to their houses as I wanted them to pack their belongings and leave the farm. At the house I ordered the deceased and Katjie Pieterse (Katjie) to pack their belongings. After they had done so, they put their belongings on the back of the bakkie. Both of them got onto the bakkie. I first stopped at the pump station at the river to permit water to pump to the dam. I then took them to the main road where they disembarked. On the way the main road I phoned an employee on the mine, Ephrain Mhlotswane ("Ephraim") to come and pick them up by the main roadside and take them and their belongings to Douglas, where I knew all of them came from.*
20. *After they had disembarked the deceased and Katjie pleaded with me to drop them off in Douglas. At that time I did not see any signs that he was or could be seriously injured nor did he complain to me of any injuries or symptoms.*
21. *In fact, I knew that I had hit him three or four times with the sjambok, and I had no reasons to believe that he would have suffered serious injuries because of that. He was talking to me and he had packed his bags. I did not realise that he had sustained injuries in falling down when running away. If I had any idea that the deceased had sustained a serious injury, I would have taken him to the hospital.*
22. *Therefore, when I received a call the next day to tell me that the deceased had died I could not believe it, as I did not hit the deceased hard with the sjambok. I had no intention to kill the deceased. In fact, I had no intention to cause serious injuries to the deceased.*

23. *As It did not make sense to me that the deceased could have died from the three or four sjambok lashes I requested a second independent post-mortem by Dr Perumal.*
 24. *I am advised that Dr Perumal:*
 - 24.1 *will confirm that the deceased had sustained three or possibly four lashes caused by the sjambok;*
 - 24.2 *will state that the deceased could not have died as a result of the three or possible four lashes;*
 - 24.3 *will state that the head injury has no relevance to the sjambok;*
 - 24.4 *found various injuries to the body of the deceased consistent with him falling down and making contact with hard objects consistent with stones/rocks specific area. Dr Perumal took photos of the injuries to demonstrate the above;*
 - 24.5 *is of the view that his falling down could have caused him to bump his head against the stones/rocks, which could have caused a head injury.*
 - 24.6 *is of the view that the deceased did not die directly of a head injury but that the cause death is consistent with aspiration pneumonitis as a consequence of a seizure following blunt force trauma to the head. The seizure caused gastric aspiration, which caused aspiration pneumonitis.*
 25. *I unreservedly apologise to the Court and the family of the deceased and the complainants for my unacceptable, unlawful, inexcusable and irrational conduct."*
7. The upshot of the statement is that, if the state concurred, the accused would be convicted of:
 - 7.1 In Count 1: The attempted Common Assault of Willem Abrahams, as distinct to Assault to do Grievous Bodily Harm, which is agitated for by the state.
 - 7.2 Counts 2 and 3: The Common Assault on Petrus Afrikaner (Count 2) and Franklin Hoogstander (Count 3) and not the Assault GBH they are charged with.
 - 7.3 Count 4: Assault Common and not Murder.
 8. The state did not accept the attenuated plea-explanation as set out above. However, the admissions have been recorded as formal

admissions in terms of s 220 of the CPA. In the result s 113 of the CPA has kicked in.

9. In light thereof that the evidence of the eye-witnesses (Ms Katjie Pieterse, her husband Mr Willem Abrahams, and Mr Petrus Afrikaner) coincides largely with the plea-explanation and admissions of the accused or where there is some dichotomy such is insignificant. It would be superfluous to go into any detailed discussion on their evidence. The legal dispute pivots around whether the foregoing facts and circumstances constitute, in respect of the Murder charge, Common Assault or Assault GBH or Culpable Homicide. State counsel, Mr Barnard, has conceded fairly and correctly in my view, that the state has not proved the charge of murder against the accused.
10. The acceptable evidence of the mentioned witnesses is to the effect that the accused arrived at their living quarters around 10h00 in the morning. He hurled some insults, which could only have been directed at the deceased (his foreman), Willem Abrahams and Petrus Afrikaner because Ms Pieterse and Hoogstander are not his employees. The accused was apparently incensed by the fact that the pivot was run dry, in the sense that the pivot was operational but no water was pumped into the dam. As a result the cattle had no drinking water. One account was that the accused did not utter a word and lashed out at everyone, except Ms Pieterse, with the plastic-cosh (sjambok). However that may be, what is material to my decision is really what the accused did and not so much what he said.
11. The accused grabbed hold of the deceased by the shirt in the region of his chest. As he did so Abrahams, Afrikaner and Hoogstander used the opportunity to flee, but had to run past him. The blow aimed at Abrahams missed. The account by Abrahams and the accused is that the blow which went astray (*aberratio*

ictus) struck Afrikaner. Afrikaner, though, was adamant that the missed blow did not find its mark on him but what struck him was a blow that was specifically aimed at him. This difference is of no moment because the accused clearly did not mean to spare any of the men, but Ms Pieterse. From his own mouth comes the term “*indiscriminate*” in this context.

12. It is undisputed from the medical evidence of Dr Tebogo Kanaomang (for the state) who conducted the first port-mortem examination and Dr Perumal, a forensic pathologist, that the deceased must have been struck four times with the sjambok (the use of which is common cause), having regard to the tramline bruising (as opposed to lacerations) being located on the deceased’s back, abdomen and elbow. Dr Kanaomang testified that the tramline bruising is indicative that the accused used only moderate force. It must be added, though, that the deceased wore a T-shirt and a long pair of pants.
13. The deceased managed to escape from the clutches of the accused, ran along the gravel road on the farm, with the accused in hot pursuit. To try and shake off his pursuer he diverted into a bushy-rocky area on the farm, depicted in various photos of Exh “H”. What transpired there is only known to and can only be related by the accused. As he has done in paras 14-16 of his statement highlighted at para 6 of this judgment.
14. The accused, Ms Pieterse and Mr Afrikaner are agreed that the accused evicted them from the farm forthwith. He offloaded them next to the road and phoned a certain Mr Ephraim Mhlotswane, another employee, to drive them to their homes in Douglas.
15. It is common cause that at that stage the deceased was still steady on his feet and showed no signs of a head injury or physical weakness. He disembarked by himself from the accused’s bakkie.

However, by the time that Mr Mhlotswane fetched them the deceased complained of a throbbing headache. In transit Ms Pieterse supported his head with the soft clothing bags to make him as comfortable as possible whilst he lay down.

16. On arrival in Douglas the deceased's condition had deteriorated to the point that he had to be lifted from the vehicle and layed under a tree next to their house. That evening the deceased, although he was immobile, seemed to have been fairly coherent but had become soft-spoken. He was carried into the house. He drank a bit of water but declined the food. He was discovered dead the following morning. His death was reported telephonically to the accused who seemed surprised by the cruel turn of events and terminated the call abruptly.

17. From this set of facts state counsel urged upon me to convict the accused of culpable homicide on the murder charge. Counsel argued as follows:

"19. Firstly, if being assaulted by the accused who is clearly bigger in posture, it is inevitable that the deceased would have tried to escape and run away.

20. If then still being chased by the deceased, it is just inevitable that the deceased would try even harder to get away.

21. The deceased at that moment would certainly have been afraid and scared of the accused. When trying to flee from a person who is hitting you with a sjambok, there is certainly a realistic chance of falling and hitting your head against a rock or stone or hard object especially when under the influence of alcohol. This is especially the case when you are on a farm.

22. A person falling against a hard object and sustaining a head injury that causes death is not uncommon, remote or farfetched. Nor is it 'a freakish combination of circumstances'. The State therefor submits that it is indeed foreseeable.

See: **S v Bochris Investments (Pty) Ltd and Another** 1988 (1) SA 861 (A).

23. ---.

24. *It is submitted that the reasonable man under the circumstances would have foreseen the possibility of the deceased falling and fatally injuring himself and therefore would not have acted as the accused did. It is therefore submitted that the accused ought to have foreseen the possibility of death as a consequence of his conduct."*

18. State counsel relied heavily on **R v John** 1969 (2) SA 560 (RA). In that case a fight ensued between the accused and his wife in their hut. They were separated. The accused returned to the hut where he resumed the fight. Later, when the two of them emerged from the hut the deceased bit the accused's lip and fled towards the kraal head's hut, only to find that he was away, whereupon she ran off in another direction. The accused picked up a hoe and either deliberately removed the hoe from the handle or else the hoe fell out of the handle. He then chased after the deceased, having uttered threats to kill her. The deceased, who was six months pregnant, ran some 200 yards or so and either fell into or took refuge in a fairly large deep pool of water. She got into difficulties. The accused called for help and entered the water in order to rescue her. He was unsuccessful. The cause of death was noted as head injury followed by drowning. The court of Appeal found that the deceased sustained the head injury during the assault on her and ended consequently up in the pool of water and drowned.

19. At p 572A-C the Court came to the following conclusion:

"In my judgment, the appellant in this case ought to have foreseen that the deceased fleeing terror-stricken from him might, in her headlong flight, collide violently with some obstacle, fall heavily over some obstacle or into a hole or other pitfall, or, fearing death

or serious injury at the hands of the appellant, take any avenue of escape which happened to present itself to her even though such avenue was scarcely less dangerous than the threatened assault.

Although the appellant could not foresee in detail what might actually happen, he ought, for the reasons stated, to have foreseen that there was some risk of death involved in his aggressive pursuit and the deceased's headlong flight and it should have come as no surprise in the circumstances when the deceased either accidentally fell or deliberately ran into the pool.

The determination of the appellant's responsibility for the deceased's death necessarily involves a value judgment. In my view, the evidence establishes that the unlawful conduct of the appellant which consisted of his threat of death and aggressive pursuit, armed with a hoe-handle, of the deceased, was the cause of her death which he ought to have foreseen."

State counsel submitted that, therefore, on applying the law to these facts the state has established beyond reasonable doubt that the accused is guilty of Culpable Homicide on Count 4.

20. State counsel had contended earlier, during the s 174 of the Criminal Procedure Act application by the defence, seeking the acquittal of the accused on the murder charge, that he would agitate for a conviction on Culpable Homicide, as he indeed subsequently did. I requested counsel, after the close of the defence case, to address me fully on whether the state's argument was not a "*harking back*" to the outmoded and outlawed *versari in re illicita doctrine*. I am indebted to counsel for their helpful written submissions in this regard.

21. In **Rex v Sikona** 1937 SR 53 at 57 the Court held:

"If a person is running away under an apprehension of violence, it is not an unreasonable consequence that the person might fall

down and if, in the course of falling down, that person becomes injured, that is the guilty act of the person who caused her run away.”

And further:

“It follows that, if she died as the result of the fall, the Accused is responsible for her death, even though the death may be a somewhat unlikely consequence of her running away and falling.”

That was then.

22. The *versari* principle was outlawed in **S v Bernardus** 1965 (3) SA 287 (A) in which the court held that if someone unlawfully assaults another and in so doing causes his death, but under circumstances in which he could not reasonably have foreseen the death ensuing, then he is not guilty of culpable homicide.
23. In **S v Burger** 1975 (4) SA 877 (A) at 878H – 879E Holmes JA gave this lucid exposition on what the law requires before an accused is convicted of culpable homicide:

“As to the law, in general:

 - (i) Culpable homicide is the unlawful, negligent causing of the death of a human being; see S. v Ntuli, 1975 (1) SA 429 (AD) at p. 436A, and cases there cited.*
 - (ii) Basically there must be some conduct on the part of the accused involving dolus (such as an assault), or culpa (such as an operation by a surgeon without due care, or the driving of a motor vehicle without keeping a proper look-out).*
 - (iii) Such conduct must cause the death of the deceased.*
 - (iv) In addition there must be culpa in the sense that the accused ought reasonably to have foreseen the possibility of death resulting from such conduct; see S. v Bernardus, 1965 (3) SA 287 (AD). This is because culpable homicide is the unlawful, negligent causing of the death of a human being.*

- (v) *It follows from the foregoing that causation of death, even as the result of an unlawful act which is criminally punishable, is not of itself sufficient to constitute the crime of culpable homicide. To disregard the additional requisite of the reasonably foreseeable possibility of resultant death, would be to reinstate the doctrine of versari in re illicita, which was outmoded by S. v Bernardus, supra.*
- (vi) *If an accused does foresee - as distinct from ought to have foreseen - the possibility of such resultant death and persists in his conduct with indifference to fatal consequence (or if he actually intends to kill) the crime would be that of murder; see S. v Sigwahla, 1967 (4) SA 566 (AD) at p. 570B - E. Having regard to the requirements of foresight and persistence, the dividing line between (a), murder with dolus eventualis and (b), culpable homicide, is sometimes rather thin.*
- (vii) *Culpa and foreseeability are tested by reference to the standard of a diligens paterfamilias ("that notional epitome of reasonable prudence" - Peri-Urban Areas Health Board v Munarin, 1965 (3) SA 367 (AD) at p. 373F) in the position of the person whose conduct is in question. One does not expect of a diligens paterfamilias any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short, a diligens paterfamilias treads life's pathway with moderation and prudent common sense."*

24. Mr Roux made the following points worthy of consideration:

"2.11 Photo album Exhibit H shows various photos of the area where the deceased was running. It is quite clear from the various photographs that the ground surface is even with a lot of small stones and a small number of larger stones.

2.12 *The deceased was not the only person running in the bushes on the day.*

2.12.1 *Willem Abrahams, the complainant in Count 1 also ran away and did not fall;*

2.12.2 *Andrè Petrus Afrikaner, the complainant in Count 2 also ran away and did not fall;*

2.12.3 *Franklin Hoogstander, the complainant in Count 3 also ran away and did not fall; and*

2.12.4 *the Accused also ran and did not fall.*

3. *Furthermore, the area where the deceased fell is close to his house, he has been working on the farm and staying in that house for a considerable period of time and the probable inference must be that he knew that area well.*

4. *The State sought to introduce into the equation that that deceased was drunk and that it was known to the Accused that the deceased was drunk. This, according to the State, should have caused the Accused to foresee that the deceased would fall in the process of running away. Apart from the fact that the deceased had been drinking (notwithstanding contradictory evidence in that regard), there is no evidence that the ability of the deceased to run was impaired by alcohol intake. Accordingly, with respect, any alcohol intake remains irrelevant for purposes of determining policy considerations as referred to hereunder."*

On the latter point, Mr Roux is correct because two of the state witnesses denied that liquor was consumed that night.

25. Defence counsel then submitted that if state counsel's contention is sustained it would unwittingly amount to invoking the *versari* doctrine. The safe approach, in my view, is to adopt what **Snyman, Criminal Law, 5th Edition**, propounds at p88 that:
- "It is relatively easy to set out the courts' answer to this question: the appellate division has, especially in Mokgethi [1990 (1) SA 32*

(A) at 39-41], stated very clearly that it is incorrect to single out one of these theories as the only correct one and then to apply that theory in all cases. The court held that courts should adopt a flexible attitude, which implies that a court should not regard only one specific theory as the correct one. One criterion may produce the fairest result in one set of facts, while another set of facts may be served by applying another criterion. According to the appellate division, the overriding consideration in deciding upon legal causation is that a court should be guided by policy considerations. This means that a court should strive towards a conclusion which would not exceed the limits of what is reasonable, fair and just. The particular theories of legal causation --- such as 'proximate cause', adequate causation and the absence of a novus actus, are aids that may be applied in order to reach a just conclusion."

26. To convict the accused of culpable homicide would be to cast the net too wide. The authorities adverted to hereinbefore have established a sound basis on what approach a court ought to adopt. The terrain depicted on the photos appears to be relatively uneven and somewhat stony but not rugged. It is not hilly or strewn with big boulders. It cannot be said that the accused should have anticipated that the deceased would fall, and perhaps fall a second time. It also does not follow that everyone who falls on that terrain will bash his or her head on the sparsely strewn stones. A further dimension to have to be foreseen by an accused would be that the fall will result in a serious head injury that would result in the death of a deceased. I do not want to say that the death of the deceased was "freakish", but on the facts before me it was certainly unfortunate.
27. In the result I am satisfied that the accused did not unlawfully and negligently cause the death of the deceased. He is accordingly acquitted on the competent of murder, namely culpable homicide.

28. This does not end the matter, though. The final hurdle that the accused has to overcome is whether, on the facts and the law, he is merely guilty of Common Assault, as pleaded, or of Assault GBH. In his plea the accused, fairly, is alive to the possibility of being convicted of Assault GBH, if that would be the appropriate verdict. He says, *inter alia*:

“6.3 I leave it in the hands of the Honourable Court to find whether 3 to 4 lashes with a sjambok would constitute assault with the intent to do grievous bodily harm, although I did not intend to cause serious injuries.”

29. The assault on the deceased is different from that meted out to the complainants, as already described. In the case of the deceased he was grabbed and thrashed several times. He broke loose and was relentlessly pursued. When the accused caught up with him, after he had already fallen twice, the accused once again lashed him with the sjambok. The agreed dimensions of the sjambok are:

29.1 Length: 97cm;

29.2 Diameter at the point (whiplash): 900mm – 1cm;

29.3 Diameter in the middle $\pm$ 5cm; and

29.4 Diameter at the handle: 2cm.

30. The sjambok itself is not, in my view, a dangerous weapon and is on the light side. The weight was not sought nor established.

31. In the circumstances, on a conspectus of the evidence, the circumstances and law, I am satisfied that the accused is guilty of Assault GBH on Count 4 and is acquitted on the charge of Murder.

32. The accused is in the premises convicted as follows:

1. Count 1: Guilty of attempted assault.

2. Count 2: Guilty of Common Assault.

- 3. Count 3: Guilty of Common Assault.
- 4. Count 4: Guilty of assault with the intent to do Grievous Bodily Harm.

SENTENCE : 16/03/2016

KGOMO JP

- 33. In view of the fact that the evidence of this case is still fresh in our memories I do not wish to rehash it here. The accused is a 44 year old man who is married and has one child who is under three years old.
- 34. The first three offences that he is convicted of: Attempted assault and two counts of Assault Common are not serious offences. The fourth conviction, assault with intent to do grievous bodily harm is of a serious nature but the injuries themselves, four weals with a plastic-cosh, are not severe.
- 35. The accused's previous convictions, which I list hereinafter, are not serious transgressions of the law and display lengthy periods between them during which the accused had no brushes with the law:
 - 35.1 In February 1997 he paid an admission of guilt fine of R80-00 for *crimen injuria*;
 - 35.2 More than two years later in August 1999 he was convicted of driving a motor vehicle whilst he was under the influence of intoxicating liquor and was sentenced to pay a fine of R1800 or in default of payment to undergo nine (9) months imprisonment and a further nine (9) months imprisonment suspended for five (5) years on certain conditions.

- 35.3 About two years down the line, during May 2001, the accused paid R100-00 admission of guilt fine for assault, which is relevant to the present four convictions.
- 35.4 In October 2005 he was convicted of driving a motor vehicle under the influence of intoxicating liquor, and was sentenced to pay a fine of R3000-00 in default of which to serve 9 (nine) months imprisonment half of which was suspended for 3 (three) years on certain conditions.
- 35.5 During September 2007 he was convicted of the contravention of the Value Added Tax Act (VAT Act) and paid an Admission of Guilt fine of R2000-00.
36. The accused's career has been set out as follows:
- "18. He is involved in diamond mining.*
- 18.1 He is the person in the business who is skilled in and involved in controlling the operational side of the diamond mining.*
- 18.2 He is responsible for the employment of 14 employees in the business.*
- 18.3 His present financial position is poor by virtue of the termination of a joint venture between Rockwell Diamonds and Gump Mining. The joint venture was under the name of Gumrock and Rockwell Diamonds and Gump Mining held equal shares. As a consequence of the termination of the joint venture Gump Mining must pay over R5 million to Rockwell Mining, which he is unable to pay at present. The accused, as a 50% shareholder in Gump Mining, is exposed to 50% of such debt.*
- 18.4 He has commenced with a new business under the name of Aventuri Mining Contractors, which is also involved in diamond mining. The business is not yet at a point where it generates sufficient income to yield*

profits but the expected income will allow the operations to continue and to allow the business to pay the salaries of the 14 employees.”

37. What emanates from the accused's previous convictions is that he does not have a violent disposition. His last transgression of this nature occurred almost 15 years ago, which was considered minor and for which an admission of guilt was determined and paid. It is not worth being considered.
38. The accused's employees, who were assaulted and testified during the trial against him, said the accused was a good man and treated them well. His behaviour on the morning of the incident surprised them as it went against his nature.
39. The accused has pleaded guilty to the lesser offence in Counts 1-3. As far as Count 4, the Murder Charge is concerned, he pleaded as follows:
“I leave it in the hands of the Honourable Court to find whether 3 to 4 lashed with a sjambok would constitute assault with the intent to do grievous bodily harm.” Notwithstanding the fact that the state did not accept the factual matrix advanced by the accused, in the end the state in essence added substantially very little by adducing evidence to proof the charges preferred against him. The state did the right thing, though, in light of the interest shown in the case by members of the community.
40. The accused, in my view, has shown genuine remorse. This is demonstrated by the following deeds:
 - 40.1 He pleaded guilty and made a comprehensive (full) and frank disclosure of what he has done wrong.

40.2 He paid for the funeral costs of the deceased, Mr Alfred Phakedi, to the tune of R10 000-00. (Ten thousand rand).

40.3 Shortly after the funeral he gave an amount of R2500-00 to Mrs Elizabeth Phakedi, the deceased grandmother. His parents are both deceased.

41. Mr Roux has made the following further written submissions which may be watered down if paraphrased:

“48. Although the Accused is in a financially difficult position consequent upon the termination of the joint venture --- he seeks to bring about some restoration, even though he is not accountable for the death of the deceased. He feels morally responsible to take care of the grandmother of the deceased, who was dependant on the deceased. It is also important to note that he does not do so from a position of wealth, but rather in a situation where he is experiencing financial difficulty.

49 Already in February 2015 he requested his attorney to make contact with the State to enquire if he could make contact with the deceased's family in order to take financially restorative action. He did this not because he believed he caused his death but he blamed himself for the death on a moral basis.

50. The Accused offers to pay R3 000,00 per month to Mrs Phakedi for the rest of her life in lieu of the salary paid to the deceased. The salary of the deceased was R3 000,00 per month. He offers to increase this amount annually in accordance with the official inflation rate of 7%. It must be borne in mind that the contribution by the deceased to Mrs Phakedi would have been in a substantially lesser amount, as his total income of R3 000,00 per month and he only used a portion of it to make contributions to Mrs Phakedi.

51. *The Accused offers to pay retrospective the amount of R 3000,00 from the first month following the death of the deceased i.e 1 September 2014. The 7% annual increments will take place from 1 April 2016.*
52. *The Accused also voluntarily attended therapeutic sessions by a psychologist, Miranda Pretorius, to address anger management. This he has done to avoid any possible repetition of the incident. He also consults a psychologist, Löre Hartzenberg on a number of occasions in an effort to improve himself.*
53. *He also offers to compensate the complainants in Count 1 to 3 on the terms directed by this Honourable Court. The complainant in Count 2 sought re-employment from the Accused about 3 days after the incident. The Accused did not re-employ him, because he was concerned that it might have been interpreted as an interference with the criminal justice system. He offers to re-employ the complainants in Counts 1 and 2, should they so want.*
54. *If regard is had to the above, it is, with respect, clear that the Accused has embraced the values encapsulated in the concept of restorative justice, which is an essential ingredient of ubuntu.*
55. *In "Ubuntu and the Law, African Ideals and Post-Apartheid Jurisprudence," by Cornell and Muvangua, Justice Yvonne Makgoro, in an instructive article entitled "Ubuntu and the Law of South Africa" (p317-323) inter alia states "Without a doubt, some aspects of the values of Ubuntu are universally inherent to South African cultures. It would be anomalous if dignity, humaneness, conformity, and respect were foreign to any of South Africa's cultural systems."*

And Further

"I believe we should incorporate Ubuntu into mainstream jurisprudence by harnessing it carefully, consciously,

creatively, strategically, and with ingenuity so that age-old African social innovations and historical cultural experiences are aligned with present day legal notions and techniques if the intention is to create a legitimate system of law for all South Africans. Including Ubuntu will enhance the legitimacy of a jurisprudence, which is required to manage the challenges that Constitutionalism with entrenched human rights pose for us."

42. Mr Roux urged that the accused be kept out of jail as a custodial sentence may not serve any useful purpose: His business would collapse, his 14 employees would lose their jobs, the payments to the grandmother of the deceased on a monthly basis would not be sustained and he has a young family to care for.
43. In aggravating of sentence Mr Barnard, for the state, pointed to the accused's previous convictions. He attempted to introduce a racial element or connotation but such intimation is ill-conceived. There is not the slightest suggestion during the entire trial that the assaults were motivated by racial prejudice. The converse is in fact true.
44. The impact report on the deceased family was compiled on 15 May 2015 by Social worker Ms Lesego S Mosinki and undersigned by her supervisor Ms Mogomotsi Keameditse. As it predates the trial and verdict it was produced on the basis that the accused was the direct cause of the deceased's death. The report must therefore be approached in that context. It is nevertheless helpful in that it shows that:
 - 44.1 The deceased was unmarried and had no children;
 - 44.2 He maintained his grandmother, who is now 82 years old, and also contributed towards the maintenance and schooling of certain members of his extended family.

44.3 That the death of the deceased has, understandably, saddened them.

45. The approach in sentencing has been stated as follows in **S v Thonga** 1993(1) SACR 371 (V) at 370b-I whereat Etienne du Toit AJ stated seminally :

"A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case."

During the sentencing phase the trial court is then called upon to exercise its penal discretion judicially and only after a careful and objectively balanced consideration of all relevant material.

Certain guidelines may be laid down in this regard. In my view the punishment must firstly be reasonable, ie it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigating and aggravating. The sentence should, thirdly, reflect consistency, as far as is humanly possible, with previous sentences imposed on similar offenders committing similar offences, lest

society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account.

To all this would add that the trial Court does not impose sentence in vacuo. It, to the contrary, certainly does so within a certain time frame and at a certain stage in the development of the people(s) of a district, or a province, or a country, or even a continent. The criminal court is also an instrument in the hands of society, applying its laws, reflecting its values and its moral indignation at unlawful conduct, as well as the negative or harmful effect thereof on third parties or society itself. But in a civilised society punishment reflects also the interests of the offender himself. The trial court, in a criminal matter then, functions not in a technical laboratory, but as a living instrument, a vital component of the fabric of society, serving the interests of society and all of its law-abiding members.

*The criminal court primarily seeks to establish and maintain peaceful co-existence among the members of society within a territory, offering protection to life, limb and property by dispensing criminal justice. Furthermore, during the imposition of punishment, the trial court jealously guards the fine line between raw revenge or emotional punishment and the judicial, reasonable and objectively balanced (effective) exercise of its penal discretion. Judicial aloofness, not amounting to judicial remoteness, is called for. Seeking to prevent the need (or desire) for self-help from arising, courts of law simultaneously refuse to take emotional revenge on behalf of indignant society and its members. In this regard, the comments of M T Steyn J (as he then was) in *S v J* 1975 (3) SA 146 (O) at 159F-G are clearly apposite, as are the recent remarks of Harms AJA in *S v Mafu* [1992 \(2\) SACR 494 \(A\)](#) at 496-7.”*

46. Counsel are agreed that the complainants ought to be compensated based on their salaries and/or pain and suffering they endured. Account is also taken of the fact that the accused's employees were summarily evicted from the farm without any "notice pay". It should be noted that the blow aimed at Willem Abrahams missed him and that Franklin Hoogstander was not in the accused's employment. The sentences and compensatory fines and orders are set out below. (S 300 of the Criminal Procedure Act, 51 of 1977).

47. In the result the accused is sentenced and ordered as follows:

1. **Count 1:** R1000.00 (One thousand rand) or two(2) months imprisonment which is wholly suspended for three years on condition that the accused is not convicted of an offence involving violence to the person of another which is committed during the period of suspension and, in addition, pay an amount of R3000-00 (three thousand rand) to Willem Abrahams through the trust account of Herman van Heerden Inc: Standard Bank [0....].
2. **Count 2:** R1500.00 (One thousand five hundred rand) or three (3) months imprisonment which is wholly suspended for three years on condition that the accused is not convicted of an offence involving violence to the person of another which is committed during the period of suspension and, in addition, pay an amount of R4000-00 (four thousand rand) to Pertus Afrikaner through the trust account of Herman van Heerden Inc: Standard Bank [0....].
3. **Count 3:** R1500.00 (One thousand five hundred rand) or three (3) months imprisonment which is wholly suspended for three years on condition that the accused is not convicted of an

offence involving violence to the person of another which is committed during the period of suspension and, in addition, pay an amount of R3000-00 (three thousand rand) to Franklin Hoogstander through the trust account of Herman van Heerden Inc: Standard Bank [0....].

4. **Count 4:** Eighteen (18) months imprisonment or R8000.00 (eight thousand rand) which is wholly suspended for five (5) years on the following condition:
 - a) That the accused is not convicted of an offence involving violence to the person of another which is committed during the period of suspension.
 - b) That an amount of R57 000-00 be paid to Mrs E Phakedi, the grandmother of the deceased, which amount represents retrospective payments of R 3000-00 per month calculated from 1 September 2014 to 31 March 2016.
 - c) That the said amount of R57 000-00 be paid into the trust account of Herman Van Heerden Inc: Standard Bank [0....], on or before 30 April 2016.
 - d) That the probation officer/social worker at the Taung offices in co-operation with Mr Herman van Heerden be authorised to make such payments in their discretion in such amounts from the said R 57 000-00 to Mrs E Phakedi, as will be in the interests of Mrs Phakedi and as requested by Mrs Phakedi.
 - e) That a further amount of R3000-00 per month, with a 7% annual escalation from 1 April 2017 be paid into a nominated bank account of Mrs E Phakedi, with effect from 1 May 2016,

until the death of Mrs Phakedi or the death of the Accused,
whichever event occurs first.

F DIALE KGOMO
JUDGE PRESIDENT
Northern Cape High Court, Kimberley

Counsel:

For the State:

Assisted by:

Instructed by:

Adv T Barnard

Adv J Mabaso

Director Public Prosecutions

For the Respondents:

Instructed by:

Adv B. Roux SC

Engelsman Magabane