

acceptable (see Neethling and Potgieter *Delict* 78–82). It is unfortunate that Brand JA’s conservative approach to *stare decisis* was not applied in this regard.

### Conclusion

In conclusion, the decision in *Media 24* removed all doubt that patrimonial loss resulting from the defamation of a corporation should be claimed with the Aquilian action and not with the *actio iniuriarum*. The court’s view that *in casu* such patrimonial loss was purely economic in nature and that wrongfulness therefore lay in breach of a legal duty, is subject to criticism. To our mind, the loss was not purely economic because it flowed from the infringement of the plaintiff’s reputation, and the wrongfulness of such loss either lay in the infringement of the personality right to reputation of the corporation, or of its right to goodwill. Furthermore, the court’s view that general (or non-patrimonial) damages for infringement of a corporation’s reputation may be claimed with the *actio iniuriarum* mainly because it is the only remedy at its disposal, is also subject to criticism. There seems to be general agreement that the *amende honorable* or similar remedies are available or can at least be developed in our law to substitute the *actio iniuriarum*. It is also clear that the principal function of the *actio iniuriarum* in instances of juristic persons will not be the salving of injured feelings, but to punish the defendant, which is not a function of the law of delict. Finally an appeal is made to the Supreme Court of Appeal to conscientiously apply the principle of *stare decisis* and not to deviate too readily from its time-honoured and tested principles without good reasons for changing the law.

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### THEFT OF ELECTRICITY: A SHORT CIRCUIT?

*S v Ndebele* 2012 1 SACR 245 (GSJ)

The question whether or not electricity can be stolen was answered in the affirmative in the above trial matter which culminated in convictions of two of three accused.

#### 1 The broad facts

The accused were variously arraigned on two racketeering-related charges of contravening the Prevention of Organised Crime Act 121 of 1998 and together on a large number of counts of the predicate offence of theft described by the trial judge (Lamont J) as follows:

“Counts 3, 4, 5, 6 and 7 were each of theft levelled against all three accused and related in each case to a vending machine known as a credit dispensing unit. The remaining counts namely, counts 8 up to 78 287 were counts concerning theft

arising out of the alleged use of the vending machinery forming the subject matter of counts 3 to 7. Those counts can conveniently be summarised and considered in respect of the activities in relation to each of the five machines. In respect of each of the five machines it is alleged that the accused used each machines *to steal electricity and electricity credits*. All the counts can be grouped into those two categories and be understood in that sense” (2; my emphasis).

Dealing with the vending machines, the judge pointed out that Eskom concludes contracts with vendors in terms of which the machines (which Eskom owned at all times) are supplied to vendors. These machines, known as Credit Dispensing Units, can print vouchers which are used by customers to obtain a supply of electricity equal to the value of the voucher (5). As to the latter, the judge said:

“Vouchers are issued with a view to each voucher being used to obtain the right to use the amount of electricity purchased at a particular prepaid electricity meter situated at the customer’s premises (usually his house). The vouchers reflect the value of electricity being purchased, the date and time when the voucher was printed, the number of the vending machine and the code required to be entered into the particular meter for which the voucher is valid. It is immediately apparent that vouchers cannot be printed at random. Vouchers are printed for particular customers who provide their meter number and who intend to use the voucher almost immediately” (7).

The total value of the sales made by a given machine which has issued vouchers can be ascertained by Eskom. As the data from the machines had not been collated from the time that each machine had been removed from Eskom’s possession, the time of the removal from the owner’s control was established as was the removers’ lack of permission to remove them. The court held that it was apparent that the business of creating vouchers having a credit value and disposing of such vouchers was being carried on; that no person who possessed any of the vending machines could possibly have believed that those machines were lawfully possessed; and that no person who came into contact with the machines, situated as they were in a flat printing vouchers, could possibly have believed that these machines were not stolen. The judge compared the situation with that of the possession of an ATM in an apartment (20–23 *passim*).

## 2 Previous jurisprudence

The decision of Lamont J that electricity is capable of being stolen, is at variance with the earlier judgment of Farlam J, Brand J concurring, in the automatic review matter of *S v Mintoor* 1996 1 SACR 514 (C) in which the lower court had convicted the accused of stealing “eenhede elektrisiteit” (units of electricity). In setting aside the conviction and sentence, the Cape court referred to the rule of common law that “slegs ’n stoflike of liggaamlike saak” is capable of being stolen, and proceeded to mention the varying position on the European continent (Germany and Switzerland as against the Netherlands and France), England and the United States (certain US State criminal codes which provide for electricity “as matter which may be stolen” or which apply to both tangibles and intangibles). The court expressed the view that the European codes, being legislation in which the intention of the lawgiver had to be determined, were of no real assistance.

As for the law of England, the Cape court noted (with reference to *Low v Blease* [1975] Crim LR 513 and to Smith and Hogan *Criminal law* 1992) that it was accepted that electricity was not capable of being stolen and that the dishonest taking (away) of electricity constituted a separate statutory offence provided

for in the UK Theft Act, 1968. The court quoted Glanville Williams *Textbook of criminal law* (1983) 736:

“Electricity is not scientifically regarded as a physical thing like gas, but is a form of energy. A cyclist who holds on to the back of a lorry appropriates energy but does not commit theft; so appropriating electricity is not regarded as theft either” (515e).

In referring to the reception in South Africa of common law rules “as developed here in certain respects”, Farlam J stated the following:

“Wat ons geresipieerde gemene reg betref is dit, soos ek alreeds gesê het, duidelik dat slegs ’n stoflike of liggaamlike saak gesteel kan word. Tot dusver is hierdie gemeenregtelike reël nie in Suid-Afrika in die tersaaklike opsig uitgebrei nie. Geen Suid-Afrikaanse Hof het tot op hede pertinent beslis dat elektrisiteit gesteel kan word nie. Die basiese reël dat slegs liggamlike sake gesteel kan word, is deur die howe aanvaar” (516f–g).

The court stated that the only expansion of that basic rule was in respect of the theft of money (516g). It had two further strings to its bow: the existence of section 27(2) of the Electricity Act 41 of 1987 (as to which, see below) and the juridical undesirability of expanding the criminal law by court decisions, the task of such expansion “normally” (“normaalweg”) belonging to the legislature (516i–517b).

It does not appear that the courts in *Mintoor* had the benefit of expert evidence. Incidentally, to the above broad statement on “energy”, Glanville Williams (*supra*) added the following:

“To solve the problem of classifying electricity, its dishonest use, waste or diversion achieves the dignity of a special offence, under section 13 of the Act. (The name used in the marginal note is ‘abstracting electricity’; this is not very apt, since the electricity when unlawfully used returns to the power station, though at a reduced voltage; it is true, however, that power is abstracted)” (736–737).

Those statements seem to be the closest reference to the phenomenon of electrical energy in the realm of physics.

### 3 Legislation

At the time of the *Mintoor* decision, section 27(2) of the Electricity Act 41 of 1987, re-enacting section 51 of Act 40 of 1958 (its predecessor), provided as follows:

“Any person who without legal right (the proof of which shall be upon him) abstracts, branches off or diverts or causes to be abstracted, branched off or diverted any electric current, or consumes or uses any such current which has been wrongfully or unlawfully abstracted, branched off or diverted, knowing it to have been wrongfully or unlawfully abstracted, branched off or diverted, shall be guilty of an offence *and liable on conviction to the penalties which may be imposed for theft*” (my emphasis).

The Cape court held that the legislature had enacted that provision “on the clear assumption that electricity was incapable of being stolen” (*Mintoor* 516i–j). That was, with respect, a persuasive string to its bow.

However, a decade later the 1987 Act was repealed and replaced by the Electricity Regulation Act 4 of 2006. The legislature must have decided not to re-enact section 27(2); no provision similar to it is to be found in the 2006 Act. This would remove a string from *Mintoor*’s bow.

Was the omission to re-enact section 27(2) an oversight? Or was it a deliberate omission? Could the lawgiver in the light of such factors as the commercial

value of electricity, the reality of a phenomenon indispensable to society so much so that it is accepted as a “thing”, and the world of atomic physics, have proceeded on the basis of the well-established jurisprudential expansion of theft of incorporeal money? After all, electricity was as unknown to Roman-Dutch law as was the theft of credit. Is one to accept that the legislature erroneously left a vital national asset unprotected at criminal law?

#### 4 Prosecution’s approach

The state’s approach was two-fold. It submitted, firstly, that the factual finding in *Mintoor* was not correct and that that was to be established by the evidence it would lead; and, secondly, that the trial judge should develop the common law as envisaged by section 39 of the Constitution (4).

#### 5 Ndebele: Main reasoning

On the question of whether or not electricity or electricity credits are capable of being stolen, the reasoning of Lamont J reveals two main thrusts, namely, (1) the recognised development of the crime of theft in respect of incorporeals and/or intangibles; and (2) the necessity of considering what electricity is in that context (the nature of the *res* alleged to have been stolen).

##### 5.1 Theft of incorporeals

The judge stated that, as in Roman and Roman-Dutch law a *contrectatio* was the handling of a thing, an incorporeal thing which could not be touched and so taken in hand (in contrast to corporeal or movable things) was incapable of being stolen. In this historical context he quoted Snyman *Strafreg* (1992) 463 as saying that property stolen must be “n selfstandige deel van die stoflike natuur” (or, as reflected in Snyman *Criminal law* (2002) 479: “The property stolen must be *corporeal*, that is, an independent part of corporeal nature” (27–28).

The received rule concerning incorporeals, the judge continued, has been recognised as a difficulty particularly where money and shares are concerned. He proceeded to mention some of the authorities featuring in the jurisprudential development of what Snyman calls the “theft of credit”. (See the collation of authorities in Snyman *Criminal law* (2002) 492–498.) Referring to *S v Kotze* 1961 1 SA 118 (A), the judge stated that the fact that an account holder is not the owner of money in his bank account does not mean that he is not a person “with a special property or interest therein”. He cited *Nissan South Africa (Pty) Limited v Marnitz NO (Stand 1 at 6 Aeroport (Pty) Limited intervening)* 2005 1 SA 441 (SCA) paras 24–25 as holding that a person who receives money into his bank account in his name, knowing that he is not entitled thereto and who uses it, commits theft. Lamont J proceeded:

“The underlying objection to holding that an incorporeal is capable of theft is the requirement that there shall be a *contrectatio*. Inasmuch as a taking is required, so the argument goes, there can only be the taking of a physical movable. This matter was dealt with directly in *S v Harper and Another*, 1981 (2) SA 638 at 664 and following which held an incorporeal capable of theft. This concept has been recognised in our society, for example in *Nissan*, supra” (28).

With reference to the factual scenario in *Nissan*, the judge pointed out that a customer of a bank has a special interest to (*sic*) the credits arising out of his contract with the bank which owns and possesses the credits. Existing electronically, the credits constitute a cash value sounding in money. Where his credits

are diminished because of a mistaken payment to the account of another customer who knows that the credit is not due to it and uses such undue credit, the first-mentioned customer has lost a thing capable of being stolen; and “[t]here is no physical handling of anything”. The judge’s reasoning culminates as follows:

“Hence the *contractatio* is constituted by an appropriation of funds, which already exist in his account but to which the (second) customer is not entitled. This is not a *contractatio* constituted by a physical removal of something from the owner. It is the taking of an electronic credit given by mistake . . . *The contractatio is constituted by an appropriation of a characteristic which attaches to a thing and depriving the owner of that characteristic.* Inherent in the finding in *Nissan’s* case is that *this appropriation of a characteristic attaching to a thing does constitute theft*” (29) (my emphasis).

### 5.2 Interim remarks

One of the authorities relied on in *Nissan* para 24 is *S v Graham* 1975 3 SA 569 (A). In the unanimous judgment delivered by the inimitable Holmes JA, the need for the Roman-Dutch law to adapt itself to changing circumstances was affirmed (576E–577A) in *dicta* such as:

“It may well be that strictly according to Roman-Dutch law, only corporeal things were capable of being stolen . . . However, the Roman-Dutch is a living system, adaptable to modern conditions . . . In this regard, too, VAN DEN HEEVER, J A., said in his dissenting judgment in *R. v Sibiyi*, 1955 (4) . . . : ‘Nowadays in cases of theft we are apt to look at the economic effect of the act by which a person fraudulently converts value to his own use rather than be hypnotised by the concrete mechanics by means of which the crime is committed’.”

*S v Harper* 1981 2 SA 683 (D) was accorded considerable weight by Lamont J. In that case Milne J (as he then was) stated that the Appellate Division had, despite what was said in *Kotze supra*, in effect decided that a conviction of theft of an incorporeal is, in the case of a credit balance, permissible in our law and that in principle there is no reason why it should not be (666D–F). He *thereafter* stated (666H):

“The notion of requiring proof of a physical *contractatio* may possibly derive from the difficulty of proving any *mens rea* in the absence of such handling. Be that as it may, *once the Courts have moved away from the requirement of a physical handling, then the reason for saying that there can be no theft of an incorporeal in any circumstances would seem to have fallen away.* In fact this is clearly recognised by the decision of the Appellate Division in *S v Graham*” (my emphasis).

### 5.3 Electricity

To establish a factual basis for the charges, the state led expert evidence on physics and the scientific phenomenon of electricity. In dealing with the scientific evidence, Lamont J honed in on what he had described as “an appropriation of a characteristic”.

Electricity, created at a cost by Eskom using fuel sources which power turbines, is inserted into a grid at points whereof there are consumers who, if Eskom permits them, may receive and use such electricity subject to terms and conditions, especially the obligation to pay for the right to receive measured quantities of electricity. Eskom uses a closed circuit (30). The judge continued:

“The energy does not exist as an abstract concept it exists in reality in the form of energising electrons. The electrons which are driven, and which, while travelling we call electricity, are the free electrons moving through the circuit, belong to, are

processed and released by Eskom . . . .The process by which the electricity is delivered is that as an electron travels into the customer's circuitry, one leaves the customer's circuitry returning to the grid . . . . [O]nce the customer uses the circuit and allows electrons into his circuitry, the electrons of Eskom remain within his circuit, in substitution for those electrons having departed. In this way, the electrons change position, having originally being possessed by Eskom and having subsequently being possessed by the consumer. *As the electrons are driven by Eskom they have the characteristic we call electricity. The characteristic which attaches to the electron is the energy by which it moves. That characteristic is consumed when the electricity passes through a load in the customer's residence on the customer's circuit. The energy is transferred into the load used by the consumer (a kettle, a light, or other electrical appliance). That characteristic and the extent to which it has been used or transformed by the use of the electrical appliance is (sic) measurable. That characteristic is the characteristic which Eskom chooses to produce and sell to its customers. Once that characteristic energy is used by the electrical appliance or the load, it is no more. This also is the solution to the question of whether or not there has been a permanent deprivation. Electrons are not lost and eventually return to the grid from the customer's circuitry. However the characteristic attached to the electron, namely the force and energy it has while it is being driven towards and through the customer's circuit is removed from it"* (31–32; my emphasis).

#### 5.4 Further interim remarks

A lay endeavour better to grasp the context of the judge's exposition in the absence of access to the evidence presented to the court has led to sources of information available to the ordinary citizen.

As a matter of interest an online encyclopaedia [*Microsoft encarta encyclopaedia 2003* sv "electricity", "electron") states *inter alia*:

- "Electricity, one of the basic forms of energy. Electricity is associated with *electric charge, a property of certain elementary particles such as electrons and protons, two of the basic particles that make up the atoms of all ordinary matter.*"
- "Electricity consists of charges carried by electrons, protons, and other particles . . . . An electric current is a flow of electric charges between objects or locations."
- "Electron, negatively charged particle found in an atom. Electrons, along with neutrons and protons, comprise the basic building blocks of all atoms. The electrons form the outer layer or layers of an atom, while the neutrons and protons make up the nucleus, or core, of the atom. *Electrons, neutrons, and protons are elementary particles – that is, they are among the smallest parts of matter that scientists can isolate.*"
- "*Electrons form electric currents by flowing in a stream and carrying their negative charge with them.*"
- "*The electron is one of the most fundamental and most important of elementary particles. The electron is also one of the few elementary particles that is stable, meaning that it can exist by itself for a long period of time.*"

(Emphasis supplied.)

It would seem that an electron is indeed a part of matter, that is, a real thing. Flowing in a stream carrying their negative electric charge (a property of an electron) is likewise real and constitutes an electric current. The judge uses the

term “characteristic” which is no more after a load has consumed electric current; perhaps the equivalent term could be “property”.

## 6 *Ndebele*: Joining threads

Having held that it was inherent in the finding in *Nissan supra*, that the “appropriation of a characteristic attaching to a thing” is theft (29) and that this affords an explanation for the line of authorities (on theft of credit), the judge (correctly) held that *Mintoor* was out of step with such thinking. *Mintoor*, he said, “merely adopted the Glanville Williams reasoning as authority for the proposition that electricity could not be stolen” (30). Obviously, the court in *Mintoor* could not have had regard to authorities which post-dated its judgment, but then to criticise that case as having had no regard to other authorities referred to in *Ndebele* does, with respect, appear to be rather generalised. It is correct that the *Mintoor* court did not explicitly consider a case such as *Harper supra*, nor – by implication – the strong *dictum* by Milne J. Farlam J did refer to the general stance of our courts on the theft of credit; it must be assumed that he had regard to cases pre-dating his judgment. Probably the point of the criticism by Lamont J was that it was overlooked that a physical taking was no longer required.

It is suggested that *Mintoor* could have been differentiated on considerations other than its reliance on the stated English position. Firstly, it was said that no South African court had ever held electricity to be capable of theft; but *Mintoor* did not refer to any case ruling that electricity could *not* be stolen. Secondly, as the issue was *res nova* the case should not have been decided without argument. Thirdly, national legislation had changed since that decision. Fourthly, there was no expert evidence to assist the court in *Mintoor*. And, fifthly, it is to be noted that the Cape court did not refer to the comment by Smith which follows immediately on the report of *Low v Blease supra* and which reads:

“Abstraction of electricity was dealt with as a separate offence under the Larceny Act because of the difficulty of applying to it the common law concepts of taking and carrying away. *The same difficulties do not apply to the notion of appropriation. One can ‘assume the rights of an owner’ over electricity as well as, for example, gas.* It is a little surprising to find that something which is bought and sold at such a high price is not ‘property’. Nevertheless, the fact that the abstraction of electricity is dealt with in a separate section of the Theft Act suggests strongly that it was not intended to be theft, contrary to section 1. The Criminal Law Revision Committee may have been over-cautious in so proposing. The effect is that the trespasser who warms himself by the gas fire is guilty of burglary while the trespasser who prefers the electric fire is not . . . This is an odd result to record – particularly on the very morning when the press refers to a report urging householders to switch from electricity to gas on the grounds of economy” (my emphasis).

We return to *Ndebele*: Further down in his judgment Lamont J correctly considered modern day society. He held: “It appears to me that modern day society has advanced and accepted that there can be theft of this nature” (33).

Noting that since the 1950s “it has long been recognised that the abstract and incorporeal nature of a right, which has been taken in the context of notes and coins is a loss”, the judge further said:

“Once it is recognised in the Law of Theft that physical things can have a representative meaning and that it is capable to steal the representative meaning, it seems to me it recognises that there can be theft of electricity. The same reasoning applies to the submissions made in relation to electricity credits.”

On the state's submission that the court should consider developing the common law to encompass energy as a thing capable of theft, Lamont J held that he did not have to do so. It is to be inferred that the reasons for his stance were the versatile adaptability of the common law to the needs of society and his finding that society had already accepted that there can be theft of the nature in question (see *supra*).

## 7 Comments

[1] The judicial recognition of electricity as a *res* capable of being stolen is long overdue and realistic. It accords with present-day economics. Electricity, besides being a national asset and indispensable to society, is a capital intensive good and clearly is a commodity having value sounding in money. Certain definitions in section 1 of Act 4 of 2006, for example, reflect the latter point – see: “customer” (one who purchases electricity); “price”; “tariff”; “trading” (the buying or selling of electricity as a commercial activity).

[2] Legal academics, arguing from principles of our law, expressed views in favour of an extension of the law of theft to an incorporeal such as electricity. Harking back to the 1957 (6 ed) similarly-titled predecessor work (by Gardiner and Lansdown), Hunt and Milton in the 1982 second (revised) edition of *South African criminal law and procedure* Vol II 629 stated that air, water or electricity remain *res communes* in their natural environment but if they fall *in commercium* they are capable of theft. In similar vein Snyman *Criminal law* (1995) 456 submitted that as electricity (and other forms of energy) are parts or derivations of corporeal nature processed economically for the production of energy, they can also be stolen.

The decision in *Mintoor* threw a spanner in the works; in subsequent editions the respective authors properly reflected the law as laid down in *Mintoor*. (See Snyman (2002) 480 and (2008) 490–491; Burchell *Principles of criminal law* (2005) 788–789.)

Interestingly, Snyman in all his editions has retained his sentiment that “the rule that only corporeal property is capable of being stolen should, however, be viewed circumspectly” (cf Burchell 790 fn 60).

It is submitted that the authors' earlier stated views have been vindicated by *Ndebele*.

[3] The adaptability and versatility of our Roman- Dutch common law have been authoritatively pointed out on a number of occasions, not least in *Graham supra*. Van den Heever JA in his dissenting judgment in *Sibiya* (cited in *Graham supra*) was ahead of his time – but in today's world on target – in stating that one looks at the economic effect of the act by which a person converts value to his own use. Surely one must look at the economic effect of the act of a person who unlawfully appropriates electricity?

[4] The reliance by Lamont J on the judgment of Milne J in *Harper supra* is decidedly not without merit. The relevant *dictum*, bears repeating: “[O]nce the Courts have moved away from the requirement of a physical handling, then the reason for saying that there can be no theft of an incorporeal in any circumstances would seem to have fallen away.” In not confining the incorporeal to credit/money, the logic is unimpeachable. (However, as the facts of *Harper* concerned theft of credit, it may well be said that the *dictum* is *obiter*.)

[5] Our common law (in contrast, for example, to codified European law which necessarily requires legislation to meet economic and social needs) is organically adaptable to the exigencies of the times. Furthermore, there would seem to be no principled reason for not taking the judicial decisions on the theft of an incorporeal to their logical conclusion. It remains to consider the path traversed in the judgment *via* the notion of “an appropriation of a characteristic”.

It would seem that, in the mind of Lamont J, the notion of a “characteristic” serves to link the incorporeal with the corporeal; it is a justification and a means of expressing that, for example *money* is stolen: that is the charge even when “credit” is appropriated. In *Ndebele* the “credit” (nowadays an electronic credit in a bank account) is held to be the “characteristic” of the money (notes and coins) it represents; the credit or the right thereto has a value sounding in money. Whether or not the term “characteristic” is ideal, it does serve to signify an integral relationship with the underlying corporeal. By the same token, quantifiable energy (electricity), which has an economic value, could well be held to be the characteristic of the electrons (or stream of electrons) which are among the smallest particles of matter; the required integral relationship could thus be said to exist. One would thus be charged with theft of *electricity* (and not of “energy”) when quantifiable (electrical) energy is appropriated.

If the preceding is a correct understanding of Lamont J, there should be no reason to fear a limitless expansion to the theft of *res incorporales*: the rule that rights of action cannot be the subject of theft (*Ndebele* 28) would remain the law.

[6] A sentence towards the end of the discussion of the law (33) calls for a *caveat*. The trial judge had (as has been seen) engaged in a comparative exercise in drawing a parallel between the appropriation of credit and the appropriation of electricity *via* the concept of an “appropriation of a characteristic”. That every comparison limps is evidenced in the additional statement that “physical things can have a representative meaning and that it is capable to steal the representative meaning”.

The notion of “a representative meaning”, besides being vague, belongs to the realm of ideas and is apt to cause confusion precisely when one has to differentiate an incorporeal which is capable of being stolen from an idea which is not. The notion of “representation” probably stems from the accepted fact that credit *represents* tangible money (notes and coins) and has economic value. This cannot apply to electricity: electrical energy (also having economic value) does not represent the stream of electrons but is a property of the said stream. Furthermore, theft of (aboriginal) notes and coins involves physical appropriation and/or consumption. That cannot be the case of the particles of matter which are electrons. The latter continue to exist and to flow.

It is submitted that the sentence in question was an unnecessary adjunct to the *ratio* of the judgment.

[7] Whatever may be the views on the *ratio* in *Ndebele*, it is submitted that there are sufficient grounds to support the eventual finding on, and/or to warrant a development of, the common law. Apart from the considerations (such as social and economic realities) already referred to, these include the following:

- (a) A feature of the *res* that is the subject of theft is that the thing is identifiable and/or quantifiable. Electricity is capable of measurement.
- (b) The *res* must have an economic value (or be *in commercio*), which electricity decidedly has (or is).

- (c) Electrical energy, although invisible, is not intangible – as an unwise touching of a live connection will quickly demonstrate! The *something* which is electricity is an incorporeal with unique features.
- (d) It is said that an idea is incapable of being stolen because it is an incorporeal. Is it not perhaps more accurate to reason that the originator of an idea cannot be (permanently) deprived thereof? It may be adopted or plagiarised but the idea remains that of the originator; it cannot be taken from his/her mind. Contrast the (unlawful) taking of electricity: Eskom is deprived thereof.
- (e) The energy appropriated by the cyclist in the scenario sketched by Glanville Williams (in *Mintoor supra*), is quite distinguishable from electrical energy in a grid. The driver of the lorry has *no control* over the energy in question. In the case of electricity, Eskom does control the product it generates: it determines the places to be connected to its grid; it may also, for example, shut down the current or remove a connection; it can provide that electricity is accessible only on a pre-paid voucher system; etcetera. In other words, the *res* (electrical energy) is capable of control.
- (f) It is indisputable that Eskom owns and/or has property rights to or interests in the electricity it inserts into its grid. It is thus a person as envisaged in the definition of theft.

[8] A question (relating to the facts of *Ndebele*) as to whether it was necessary for the trial court to adjudicate on the theft of electricity *per se* may arise. It could be dealt with as follows:

- (a) The theft of the five vending machines requires no discussion. The accused stole *res corporales*.
- (b) The unlawful issuing of vouchers by the manipulation of said machines *should* present no particular challenge, given the development of the law regarding cheques and share certificates. The issuers of the vouchers converted value to their own use by selling the vouchers to consumers and pocketing the money due to Eskom. If the vouchers are the “electricity credits” referred to in the judgment, it may not have been necessary to go further. On the other hand, it is not sufficiently certain that the vouchers will be regarded as a form of money or credit, to which the extension of the law of theft has thus far said to be limited. In that light it was necessary to traverse the main issue.
- (c) The factual basis for a finding of theft of electricity *per se* would seem to be that the consumption of electrical power by the consumers (purchasers of vouchers) was objectively unlawful; the accused knowingly facilitated such unlawful appropriations. (It is not clear whether the consumers were regarded as knowing parties: the trial judge did say that no person who came into contact with vending machines printing vouchers in apartments could possibly have believed that the machines were not stolen.) In order to establish the unlawfulness of the appropriations in the absence of statutory prohibitions, it was *a fortiore* necessary to decide the main question.

[9] The finding that electricity is capable of being stolen has implications for other factual scenarios. The former section 27(2) referred to activities such as abstracting, branching off and/or diverting electricity and/or consuming same, etcetera. Such actions, clearly unlawful in terms of the objective *boni mores*,

may well be punishable as theft. (Supplementary charges, such as malicious injury to property in terms of the common law, remain unaffected.)

[10] Although the expansion of criminal sanctions may normally be a matter for the legislature, there is no bar on the recognition by the courts of the organic development of the common law. It cannot be said that the judicial developments pertaining to the law of theft must end with the incorporeal credit/money, or that a line must now be drawn shielding other *res incorporales* from organic development.

The possibility of the development of the common law generally is recognised by section 39 of the Constitution (see also s 8(3)(b)). Lamont J declined the state's invitation to act in terms of the permissive provision in section 39. It is apparent that he did not regard it as necessary. His approach appears to have been that he was but logically applying a judicially-recognised concept within the framework of our adaptable Roman-Dutch law.

[11] One might ask what the effect of an explicit utilisation of section 39 may have been. The conditions for a development regarding electricity are unquestionably ripe and such development would in all probability be effected *via* section 39. It would seem, however, that the section 39-route would operate *ex tunc*, implying that a conviction could not have ensued in the case under discussion but only next time round. If that be so, then the happy result of *Ndebele* has been to short-circuit the process!

JA v S d'OLIVEIRA  
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**JUDICIAL OVERSIGHT OVER THE SALE IN EXECUTION OF  
MORTGAGED PROPERTY**

*Gundwana v Steko Development* 2011 3 SA 608 (CC);  
*Nedbank Ltd v Fraser and Four Other Cases* 2011 4 SA 363 (GSJ)

## 1 Introduction

In 2004 the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) held that execution orders against residential property may only be granted by a magistrate and no longer – along with applications for default judgment – by a clerk of the magistrate's court. Furthermore, these orders may only be granted after all relevant circumstances had been considered by the court. The purpose of this amendment was to bring the process for obtaining execution orders in terms of the Magistrates' Courts Act 32 of 1944 in line with section 26 of the Constitution of the Republic of South Africa, 1996. The Constitutional Court declared section 66(1)(a) of the Magistrates' Courts Act unconstitutional and read words into the section to introduce judicial oversight over the process. (Although the Constitutional Court in *Jaftha* did not limit its order to residential property, the court in *Mkhize v Umvoti Municipality* 2010 4 SA 509 (KZP) paras 10–11, 19–26 and 37–42 held that the scope of the amendment was