e-MANTSHI

A KZNJETCOM Newsletter

September 2009: Issue 44

Welcome to the forty fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions.

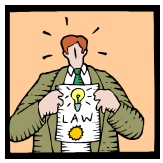
We received the following from Isaac Ncube from Zimbabwe:

"*E-MANTSHI NEWSLETTER*
I would appreciate being put in your mailing list for the above.
I am a Human Resources Practitioner working for a Company in the Private Sector in Zimbabwe. I have previously registered to study law with Unisa, and had stopped, although I wish to continue in the next semester. I have a keen interest in law.
I have Honours and Master Degrees in Business Administration, and 20 years work experience.
I came across your February 2009: Issue 37 publication on the internet whilst researching on the subject: Paternity: Compelling testing and the best interest of the child.

Regards,

Isaac Ncube"

Any other comments can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. Certain sections of *The National Land Transport Act, Act 5 of 2009* came into operation on 31 August 2009. These are sections 1, 3, 8(1), (3) and (4), 11(1), 40, 41, 42, 43, 46, 56 and 91. Section 91 provides:

91. Extraordinary measures in declared areas.

(1) If in any area in the relevant province the MEC considers that because of violence, unrest or instability in any sector of the public transport industry in the area or between operators in the area, the safety of—

(*a*) passengers using the relevant services; or

(*b*) residents; or

(*c*) any other persons entering the area,

has deteriorated to an unacceptable level, the MEC may, after consulting relevant planning authorities, by notice in the *Provincial Gazette*, define the area and declare it to be an area in respect of which the notification prescribing the extraordinary measures contemplated in subsection (2) may be made.

(2) The MEC may, by notice in the *Provincial Gazette,* give notice that—

(*a*) one or more or all the routes or ranks in such a declared area are closed for the operation of any type of public transport service, for the period stated in the notice;

(*b*) any operating licence or permit authorising any of the services referred to in paragraph (*a*) on a closed route or routes or at a closed rank or ranks in the declared area is suspended for the relevant period;

(*c*) subject to subsection (6), no person may undertake any of the services referred to in paragraph (*a*) on a closed route or routes or at a closed rank or ranks in the declared area or in terms of an operating licence or permit suspended as contemplated in paragraph (*b*) for the relevant period.

(3) Before making the notice in terms of subsection (2), the MEC must cause a notice to be published in the prescribed manner, stating—

(*a*) in summary form the nature and purpose of the proposed regulations;

(*b*) the route or routes and rank or ranks which are proposed to be closed, or that it is proposed to close all routes and ranks in the declared area;

(*c*) the period for which the proposed regulations will be in force;

(*d*) that interested or affected parties may request reasons for the proposed regulations;

(*e*) that any interested or affected persons are entitled to make representations;

(f) the time within which representations may be made, which may not be less than 24 hours;

(*g*) the address to which representations must be submitted, and

(*h*) the manner in which representations must be made.

(4) The MEC must consider any representations received under subsection (3) before making a regulation under subsection (2).

(5) The notification contemplated in terms of subsection (2) may provide that a contravention thereof or a failure to comply therewith constitutes an offence, and may prescribe penalties in respect thereof which may be a fine, or imprisonment for a period not exceeding six months.

(6) The notification may provide for the issuing of temporary permits to operators of motor vehicles of specified types, to operate services on a closed route or routes or at a closed rank or ranks for the period of their closure in substitution of the forbidden services.

(7) After giving notice as contemplated in subsection (3), the MEC may, by notice in the *Provincial Gazette*, temporarily suspend any operating licence or permit insofar as it authorises public transport in a declared area on a route or routes or at a rank or ranks not closed in terms of the notice contemplated in terms subsection (2), for the period the MEC considers appropriate.

(8) The MEC may in a like manner and at any time amend the notification made in terms of subsection (1).

(9) The Minister may, after consulting the MEC and relevant planning authorities, exercise any of the powers of the MEC in this section.

Recent Court Cases

1. Le Roux v Minister of Safety and Security and Another 2009(2) SACR 252 KZP

The mere compliance with the applicable provisions of the Criminal Procedure Act does not render an arrest without a warrant lawful – Constitutional principles must also be taken into account.

The mere compliance with s 40(1) *(b)* of the Criminal Procedure Act 51 of 1977 (the Act) does not render an arrest without warrant lawful; more care and diligence is required of the arresting officer. Even if a crime which is listed in Schedule 1 to the Act has allegedly been committed and the arresting police officer on reasonable grounds believes that such a crime has indeed been committed, this in itself does not justify an arrest forthwith. Since arrest is a drastic interference with an individual's rights to freedom of movement and to dignity, the court must look further than due compliance with the requirements of s 40(1) *(b)* of the Act to constitutional

principles and the rights to dignity and to freedom as enshrined in the Constitution of the Republic of South Africa, 1996. The arrest must be justified according to the demands of the Bill of Rights. The State action must be such that it is capable of being analysed and justified rationally. The court must not only be content with the finding that the arrest of a suspect fell squarely within the parameters of s 40(1) *(b)* of the Act; it must also look beyond the provisions of the section to the principles and provisions of the Constitution relating to the right to dignity and freedom in order to determine whether the arrest was justified. There is a duty on our courts to preserve the right to liberty against infringement. Unlawful arrest and detention constitute a serious inroad into the right to liberty and freedom. If an accused is not a danger to society, will stand trial, will not harm others or be harmed by them, and may be able and keen to disprove the allegations against him or her, an arrest will ordinarily not be an appropriate way of ensuring the accused's presence in court. The power of arrest and detention as contained in s 40 of the Act must be exercised in accordance with the established constitutional principles and the provisions of the Bill of Rights, guaranteeing the right to freedom and to dignity. (Paragraphs [20], [27], [30], [35] and [44] at *258b, 259g~260b, 260d-j, 2611, 263b--c.)*

In the present case, an appeal from the dismissal in a magistrates' court of the appellant's action for damages for wrongful arrest and detention, the court held that the detention of the appellant had not been necessary to secure his attendance before the court or to protect the public, but to demonstrate to black members of the police service that the arresting officer, a white person, did not have racial prejudice in favour of the appellant, also a white person. Her conduct when arresting the appellant was, obviously, not influenced by the need to maintain confidence in the administration of justice. In the premises, there was no rational connection between the detention of the appellant and the purpose the arresting officer intended to achieve. The appellant's detention could therefore not be said to be lawful and a reasonable interference with his liberty and fundamental dignity. (Paragraph [41] at *262 g-i.)*

2. Rudolph and others v Minister of Safety and Security 2009(2) SACR 271 SCA

In a claim for malicious prosecution plaintiff must prove, amongst others, *animus injuriandi* or *malice* on the part of defendants.

Held, that a claimant of damages for malicious prosecution had to allege and prove: *(a)* that the defendants set the law in motion (instigated or instituted the proceedings); *(b)* that the defendants acted without reasonable and probable cause;

(c) that the defendants acted with 'malice' (or *animo injuriandi);* and *(d)* that the prosecution had failed. In the present matter, requirements *(a), (b)* and *(d)* were not disputed by the respondents. (Paragraph [16] at *276h-277 c.)*

Held, further, that, although the expression 'malice' was used, the claimant's remedy in a claim for malicious prosecution lay under the *actio injuriarum.* What had to be proved was *animus injuriandi.* (Paragraph [18] at *277e.)*

Held, further, that the 'malice' had to be that of the person responsible for initiating the prosecution against the appellants. In the present case, the appellants were formally charged on Saturday 19 July 2003 by members of the SAPS at the Pretoria Moot Police Station. It would appear that that was the stage at which the proceedings were initiated. (Paragraph [19] at 277 *g-h.)*

Held, further, that there could be no question that the person who charged the appellants was aware of the fact that, by so doing, the appellants would, in all probability, be 'injured' and their dignity in all probability negatively affected. Knowing the facts surrounding the arrest of the first appellant, the police member concerned must, at the very least, have foreseen the possibility that no offence of illegal gathering had been committed and that, in charging the appellants, he or she was acting wrongfully. He or she nevertheless continued so to act, reckless as to the possible consequences of his or her conduct. He or she thus acted *animo injuriandi.* That being so, the appellants had proved the requirements of malicious prosecution and their second claim ought to have succeeded. (Paragraph [20] at *278b-d.)*

3. S v Mshengu 2009(2) SACR 316 SCA

A presiding officer can only convict an accused on a section 112(2) Act 51 of 1977 statement if he or she is satisfied that the accused is indeed guilty of the offence to which the plea is tendered.

The appellant, a 13 year-old boy, had stabbed his victim to death. He pleaded guilty to murder and a statement setting out the basis of his plea was tendered in terms of s 112 of the Criminal Procedure Act 51 of 1977. He was duly convicted and sentenced. He appealed to the Pietermaritzburg High Court, challenging his conviction on the basis that the statement tendered did not satisfy the requirements of s 112(2), in that it failed to admit that he was criminally liable for his conduct. The appeal against conviction was dismissed, but the sentence imposed by the trial court was set aside and the matter remitted to the trial court for sentence to be considered afresh. On appeal,

Held, that two issues arose: whether in view of the appellant's age, the statement tendered on his behalf complied with s 112(2) of the Act; if not, whether the matter should be remitted to the trial court (Paragraph [4] at *318c-d). Held,* further, that the primary purpose of the written statement in terms of s 112(2) was to set out the admissions of the accused and the factual basis supporting his guilty plea. Legal

conclusions would not suffice: the presiding officer could only convict if he was satisfied that the accused was indeed guilty of the offence to which a guilty plea had been tendered. If not, the provisions of s 113 had to be invoked (Paragraphs [5] and [7] at *318d-f* and *319b-e). Held,* further, that the statement *in casu* amounted to a simple regurgitation of the content of the charge sheet, and did not admit the charge in all its ramifications (Paragraph [9] at *319g-i).*

Held, further, that the accused was rebuttably presumed to be criminally non-responsible and it had not been ascertained whether his stage of development had been sufficient to rebut the presumption. The statement told the magistrate nothing about his state of mind at the time of the stabbing, or of his level of perception then. Nor if he was mature enough to answer for his behaviour. The conviction had to be set aside (Paragraphs [9], [10] and [12] at *319g-320c* and *320d.*

4. S v Nzama and another 2009(2) SACR 326 KZP

Where there is no evidence of improper inducement when an accused makes a confession, there is no authority to hold that any undesirable environmental features on their own constitutes a sufficient basis for reasonable doubt as to whether the confession was made freely and voluntarily.

The two appellants were convicted of housebreaking with intent to rob and robbery with aggravating circumstances, and of murder. Their convictions rested largely on confessions they had both made to a police officer and, on appeal before a full bench, it was accepted that the convictions would stand if it were determined that these confessions had been correctly admitted; equally, if the confessions were found to have been inadmissible, their convictions and sentences would have to be set aside. Both confessions had been taken by a police captain, H, of the Serious and Violent Crimes Unit, and two inspectors of the same unit had acted as interpreters. The investigating officer was a member of the same unit. It was argued on behalf of the appellants that the confessions should not have been admitted because of the environment in which they had been taken. Reliance was placed on the facts that the investigating officer was a subordinate of H, and that certain other police officers, including the investigating officer, might have been in the room at the time the confessions were taken. It was accordingly contended that it could not be safely concluded that the confessions had been freely and voluntarily made; the environment must inevitably have operated upon the minds of the accused as a threat or inducement to confess.

Held (per Wallis J, Levinsohn DJP concurring), that the undesirability of taking a statement in the presence of the investigating officer and other police officers was manifest. This was an environment that could provide fertile soil in which the

accused could plant a seed of suspicion regarding the police's behaviour in obtaining the confession. Such an environment might also inhibit the accused from speaking his or her mind, or from telling the person recording the confession about any misconduct or inducements that had been employed in order to compel the confession. However, it was necessary for the accused to sow the seed of suspicion; for example, by testifying credibly that prior to making the confession he had been assaulted or threatened or subjected to improper inducements. In such a case the fertile soil afforded by the environment in which the confession was taken might allow that seed to grow to the point where it might reasonably be doubted that the confession had been freely and voluntarily made. But where evidence of improper inducement was lacking or was not credible, there was no authority for holding that undesirable environmental features on their own constituted a sufficient basis for reasonable doubt as to whether or not the confession had been freely and voluntarily made. In particular, the suggestion that it was per se irregular for a confession to be taken by a police officer who was a member of the same unit as the investigating officer had been rejected by the courts. There was statutory authority for certain police officers to take confessions and it was not open to the courts, under the guise of assessing the free and voluntary nature of such confessions, to remove that right (Paragraphs [28]-[30] at *338g-340c)*.

Held, further, that it had been in principle undesirable both for the appellants to have been taken to H for their confessions to be recorded, and for two other officers of the unit to have acted as interpreters. Furthermore, it was possible that the circumstances in the room where the confessions had been taken were not ideal, in that other police officers may have entered and exited the room, and the investigating officer may have been at his desk elsewhere in the room for some of the time. However, neither appellant had claimed that any of these factors had operated on their minds as an inducement to make a confession, or as an implied threat detracting from the voluntariness of the confessions. Rather, both had claimed to have been assaulted or threatened and told what to say prior to making their confessions. These claims were clearly untenable and had been rightly rejected by the trial court. In the circumstances, the decision of the trial court to admit the confessions could not be faulted (Paragraph [32] at *340j-i)*.

Appeals dismissed. Convictions and sentences confirmed.

Dendy, M
"Damages for loss of support"

2009 De Rebus

Van Zyl, D
"The Judiciary as a bastion of the Legal Order in challenging times"

2009 Potchefstroom Electronic Law Journal

Kriegler, J
"Can Judicial Independence survive Transformation?"

2009 Public Lecture Wits School of Law

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

Contributions from the Law School

Magistrates' ethics: impartiality and intervention in the process by the magistrate

The Code of Conduct for Magistrates provides that a magistrate should be a person of integrity, who acts accordingly, and who administers justice to all without fear, prejudice or favour. She should execute her official duties objectively, competently and with dignity, compassion and control.[1]

The Code reinforces the oath or affirmation which all magistrates take when they are appointed as judicial officers, namely: that they will be: "faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the constitution and the law."

Despite this context, the impartiality, or perceived impartiality, of magistrates remains a problem. This has been attributed to the fact that many magistrates align

[1] The Magistrates' Code of Conduct (Items 1, 2 and 3; Regulation 54 A) promulgated in terms of the Magistrate's Act 90 of 1993.

themselves with the prosecution because they themselves were once prosecutors.

> "Many magistrates still see themselves as the trainers and allies of the prosecution. This problem is so systemic and common because many of us, who prosecuted were trained by magistrates. It is part of the system, for some of us, to see the accused and his/her legal representative as part of the problem. S v Roberts 1999 (2) SACR 243 (SCA) is a good example of the undesirable relationship between the prosecutor and the magistrate. We will, in most cases readily assist the prosecutor. The accused, on the other hand, will be prejudiced because of his/her legal representatives' faults. It has become standard practice for us to discuss cases with the prosecutor in chambers in the absence of the accused and his/her representative. How many times do we adjourn the court with the words: "The court adjourns, prosecutor please see me in my office." [2]

It is well established that a court has the right to question a witness at any stage of the proceedings, and in terms of section 186 of the Criminal Procedure Act 51 of 1977 a magistrate has the right even to subpoena any witness that she believes is necessary to hear in order to reach a just decision. However, it is equally well known that there are limits to the exercise of these powers, and of course they must be exercised in accordance with the code of conduct and oath of office of the magistrate.

In the case of *S v Rall* 1982 1 SA 828 A, the judge held that it would be both difficult and undesirable to define precisely the limits within which judicial questioning should be confined. He did however make it clear that the judicial officer's impartiality should not be compromised, or be seen to be compromised, by the parties to the trial. He suggested that witnesses should not be vigorously cross examined by the judicial officer, nor generally should the witness be asked leading questions. However, questions by the magistrate which the accused finds it difficult to answer without damaging his case are not objectionable in themselves.[3]

In *S v Maseleku* 2006 2 SACR 237 N, Nicholas J even went so far as to say that as the courts' overriding responsibility is to see that justice is done – and that to this end the court may: "come to the aid of an accused who is represented by inexperienced counsel…The corollary of this would seem to be that inexperienced counsel for the state should be assisted also."[4]

In the case of *S v Mdali* 2009 (1) SACR 259 (C) the court took this a step further and held that "a presiding officer has an obligation to assist the accused at all stages of the criminal trial, in order to give effect to the notion of basic fairness and justice as

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[2] Opening address by Cagney Musi, Chairperson of JOASA, at the Ethics workshop (4 October 2002 hosted by The Law Race and gender Unit (UCT) : Judicial Ethics Project held on Robben Island.

[3] *S v Gerbers* 1997 (2) SACR 601 SCA.

[4] At p 60.

provided for by the constitution."

In three recent cases, the high court has dealt with this thorny issue – and in all cases the high court found that the magistrates in the court *a quo* had overstepped the mark. Furthermore, the high court found that the effect of the magistrates' improper conduct had been to deprive the accused of a fair trial and that the convictions and sentences should therefore be set aside.

In the case of *S v Mosesi* 2009 (2) SACR 31 W, the appellant had been convicted in the court *a quo* of attempted extortion and sentenced to a fine of R 10 000 or 3 years imprisonment. He appealed on the grounds that the trial court had unfairly assisted the state in the presentation of its case. The facts as revealed by the record of proceedings showed that immediately after the prosecutor had led the evidence of the complainant, the magistrate had engaged the prosecutor in a discussion about the definition of the crime of extortion and corruption. He then adjourned the proceedings to consult legal textbooks on the issue. When he reconvened the trial, he told the prosecutor that the complainant's evidence did not establish one of the grounds of the crime of extortion. The court held that it was impermissible for the court to anticipate or second guess a litigant's strategy. The magistrate in this case should have waited until the prosecution had finished leading its evidence before getting involved. At the stage he intervened, the complainant had not been cross examined and the magistrate had not known whether additional prosecution witnesses were to be called. The court held that the magistrate's conduct alerted the state, at an early stage of the proceedings, to a deficiency in its case and gave the impression of partiality. He should have waited until both the prosecution and the defence had closed their cases before discussing the matter with both lawyers. The court held further that a court's impartiality must be evident not only in its questioning of witnesses, but also in the nature and scope of its questions to the lawyers involved.

In the case of *S v Owies* 2009 (2) SACR 107 (C) the two appellants appealed against their convictions of attempted robbery, murder and attempted murder. Their appeal was based on the argument that the magistrate had contaminated the trial with irregularities which resulted in an unfair trial and a failure of justice. The first irregularity was that the magistrate did not explain to the accused their right to legal representation and the importance of exercising this right. This was after the accuseds' attorney had withdrawn from the trial. The Cape Provincial Division held that where an accused person was facing serious charges, the judicial officer should go the extra mile to encourage them to get legal representation. The second irregularity was the manner in which the judicial officer had questioned the witnesses. The magistrate had taken over from the prosecutor and repeatedly and at length cross examined the prosecution witnesses – even before they had been cross examined by the defence. In one instance, the transcript of the court's cross examination of the accused ran to ten typed pages. The high court held that the magistrate had transgressed the acceptable limits to questioning by the judicial officer. The two irregularities had prejudiced the accused in their defence, rendering the trial unfair. As such the irregularities were incapable of being condoned, and the convictions were set aside.

The third case is that of *S v Le Grange* 2009 (1) SACR 125 (SCA). The three appellants had appeared in the high court on a count of murder. During the course of the trial the defence applied unsuccessfully for the recusal of the presiding judge on the grounds that he had irregularly curtailed or interrupted the cross-examination of certain state witnesses; and that he had questioned the accused inappropriately. The high court acknowledged that presiding over criminal trials was a difficult task, and that cross-examination could sometimes appear protracted and irrelevant. However, the court held that the presiding officer had to exercise self control. The court found that many of the questions put by the court *a quo* went beyond clarification and appeared to favour the state. It suggested that the presiding officer had already made up his mind on the guilt of the accused before the end of the trial. Accordingly, the trial was found to have been unfair and the convictions were set aside.

The balance to be struck by magistrates when questioning witnesses – especially the accused – is a delicate one. As we have seen the magistrate has a duty to intervene in proceedings to ensure that justice is done. And this may well entail questioning witnesses and discussing the elements of a crime with the lawyers – especially where the lawyers are inexperienced, out-of-their-depth or ill prepared. However this must be done in such a manner as to preserve impartiality and the appearance thereof, thus ensuring the accused's right to a fair trial is given effect to.

It appears from the recent judgments referred to that the timing of the intervention is of paramount importance. The magistrate should give both parties the freedom to run their case as they choose, after ensuring that both parties know and understand their rights and duties in this regard. If the magistrate does choose to discuss the case with the lawyers, this should be done after closing argument, and both parties must be given a fair opportunity to respond and if necessary to apply for the reopening of their case and/or recalling of a witness. Any such applications should be dealt with on their merits.

When the magistrate questions a witness, this should be done after the completion of the witnesses' re-examination. After the court's questions, both parties should be given the opportunity to question the witness on the issues raised by the magistrate and on the answers given by the witness, in the usual way – examination, cross examination and re-examination.
Following this procedure will be frustrating in some instances – where the magistrate perceives that the application of the recommended procedure will waste time. However, this must be weighed against the integrity of the judicial process; and against the fact that in the long term, short cuts taken in the court a quo will result in far greater inefficiency and injustice when convictions are set aside by the high courts.

Nicci Whitear- Nel
Senior Lecturer UKZN
Pietermaritzburg

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

(The following letter was published in the September 2009 edition of the attorneys' journal **De Rebus**)

The low-down on small claims courts

The letter in 2009 (Aug) *DR* 5 by Ian Jacobsberg of Johannesburg has been referred to me for comment in my capacity as chairperson of the Small Claims Court Committee of the Law Society of South Africa.

At the very outset I wish to state that, in general, the small claims courts are functioning fairly well, particularly insofar as the contribution by practitioners is concerned, but there are numerous problems regarding the administration of the courts by officials of the Department of Justice.

The offices of the clerks of the small claims court are staffed by inexperienced clerks and, for reasons unbeknown, they fail to grasp the bare essentials of preparing cases for referral to the commissioners. Although the clerks are repeatedly reminded of the fact that so-called labour-related matters are not to be referred to the small claims court, they persist in permitting them, which results in litigants wasting time and money in attending the courts only to be told by the commissioners that the case should not have been enrolled in that particular court in the first instance.

The clerks do not know what the essential requirements of a claim are and they do not canvas the particulars of a claim with the plaintiffs, which means that much time is spent by the commissioners in trying to unravel the *facta probanda* of the case. Had the clerk of the court done his work properly, this time-consuming exercise would not have been necessary.

The clerks are also at fault in not ensuring that returns of service are timeously placed in the court files, which results in files being handed to the commissioners without returns of service.

It also often happens that, as soon as clerks gain a measure of experience in running the small claims courts, they are rotated within a particular magistrate's office and the whole problem is repeated with the new clerk.

Another major cause of complaint is the poor availability of interpreters at the various courts. In many of the courts there does not appear to be a proper system in place whereby interpreters are allocated to the small claims courts for duty and many of the interpreters also fail to appear for duty on any particular evening due to the fact that they allege that they are not being paid by the Department of Justice.

I have on several occasions reported interpreters to the section of the Department of Justice dealing with the small claims courts and for the sake of convenience I repeat the particulars of the section hereunder:

> Funeka Thema, Project Manager:
> Small Claims Court, Department of Justice and Constitutional Development
> 329 Pretorius Street, Momentum Building Pretoria,
> Tel: (012) 357 8236 Fax: (012) 315 1585 or 086 640 3386,
> E-mail: FThema@justice.gov.za

As far as the service rendered by the commissioners is concerned, it does on occasion happen that a commissioner fails to arrive at court and he also fails to make alternative arrangements for another commissioner to do duty in his stead. Fortunately this does not happen very often.

The Department of Justice outsourced the rewriting of the manuals for use by commissioners and clerks, but the final document produced by the department had to be extensively reviewed and members of the Small Claims Court Committee of the LSSA are currently assisting in reviewing and rewriting the manuals.

JB Gresse,
attorney, Roodepoort

The Institute for Security Studies

ISS TODAY

10 September 2009: Challenges to the Rule of Law in South Africa

Dr Chandre Gould, Senior Researcher, Crime and Justice Programme, ISS Tshwane (Pretoria)

Since May 2008 South Africans have watched an unseemly and often confusing

legal wrangle between what appears to be sectional interests in the legal profession. Initially the matter centered on accusations by Constitutional Court judges that Judge John Hlophe tried to influence their decisions in the case against President Jacob Zuma. The legal battles and public debates that have raged since then seem to have too little to do with whether Hlophe did try to influence the judges or not, and a great deal to do with whether citizens can trust the independence of the judiciary. Over time the very public spat between judges has becoming increasingly shrill and polarised.

This comes hot on the heels of the decision by the National Prosecuting Authority (NPA) to drop charges of corruption against President Zuma, after a painful four-year process characterised by increasingly arcane legal challenges by Zuma to which the NPA responded in kind. The NPA's decision to drop the charges against President Zuma was a vindication for ANC supporters who had long argued that the NPA had acted unfairly in the manner in which it brought its case against him. On the other hand it was vocally criticised by those who argued that the fact that the former head of the NPA, Bulelani Ngcuka, together with the NPA Directorate of Special Operations, Leonard McCarthy, had sought to influence the timing of the trial to undermine Zuma's chance of being elected President of the African National Congress and ultimately of South Africa, was not sufficient basis on which to drop the charges against him.

Nevertheless, very serious questions were raised by the fact that the evidence of McCarthy's indiscretion was obtained by Zuma's legal team from the National Intelligence Agency. These, still unresolved, questions included why the National Intelligence Agency had been monitoring the head of the NPA's telephone calls and how and why Zuma's legal team had been informed about and granted access to the taped conversations.

Between these events that severely undermined the public's confidence in a range of important democratic institutions came what appears to be yet another blow to the rule of law. Shabir Shaik, who was convicted of fraud for buying political favour to determine the outcome of tenders in a massive arms deal, was granted medical parole. While there is every reason to extend medical parole to any desperately or chronically sick inmate of prisons in South Africa, the rules simply don't allow that. They allow medical parole to be granted only in the case of an inmate who is in the final stages of a terminal illness. For ordinary citizens whether or not Shaik is terminally ill ceases to be the most important aspect of the parole board's decision. The most important aspect is the strong perception that was created that Shaik was granted medical parole because he is a friend of the President.

Let us return for a moment to where this article started, with the matter against Judge Hlophe. In the Hlophe matter the public debate is no longer about the merits of the allegations for or against Hlophe, rather it is about the threat to the separation of power between the judiciary and the executive; the public's faith in the legal system; and the transformation of the judiciary.

It is about the threat to the separation of powers because in the process of weighing

the case against Hlophe the Judicial Services Commission was stopped in order for the President to change the lawyers appointed to the Commission at his discretion. The timing couldn't have been worse. Not only did the change coincide with the scheduled interviews and appointments of Constitutional Court judges, but also with the JSC's reconsideration of the Hlophe matter. The timing of the new appointments raised the spectre of executive influence. The subsequent decision by the JSC to drop misconduct charges against Hlophe only adds to this perception.

To a citizen attempting to understand this legal and political soup one thing seems clear - the judiciary and legal profession is fraught with tension and judges seem to have lost faith in the integrity of each other.

Let us consider so far the institutions which have been undermined in the processes described above: The integrity of the NPA has been tarnished, some may argue even irreparably; the integrity of the Directorate of Special Operations (also know as the Scorpions) was so severely tarnished by the Zuma case that it was closed down and replaced by the Hawks; the NIA appears to have bowed to political influence in both monitoring the head of the NPA and handing the tapes to the man who at the time sought to be the country's next President; the Judicial Services Commission's conduct in the Hlophe matter has been called into question; and there is a perception that if you are a friend of the President the laws simply don't apply to you (as in the Shaik case).

For there to be a rule of law citizens should be confident that in any matter that comes before a court, the decision taken by the judge will not be influenced by the status, gender, race, or political influence of those presenting the case for, or against the accused. The incidents referred to in this article have all had the effect of undermining the confidence of citizens in the justice system to deliver justice impartially. So what happens when citizens no longer believe in the independence and integrity of the justice system?

An environment is created in which some criminals may think they can act with impunity, and where citizens may be tempted to take the law into their own hands to act against those who prey on them. This is only exacerbated when public servants are not brought to book for an act of corruption and fraud – the Auditor General's recent report highlighting the extent of corruption in the public service is a case in point. In addition, in a situation within which the judiciary is no longer held in high esteem we may find less incentive for advocates to leave private practice for the bench, thus limiting the pool from which competent judges can be chosen. As in any situation the picture is not only bleak. Offsetting the bad news are encouraging stories of commitment by public servants to curbing crime; the many cases that are justly dealt with in the courts every day and the many good decisions taken by the government on any number of issues. However, it is not an exaggeration to say that the rule of law is under threat and that leaders of unquestionable integrity who can be believed and trusted by all citizens are desperately needed.

A Last Thought

"Conscience is a man's compass, and though the needle sometimes deviates, though one often perceives irregularities in directing one's course by it, still one must try to follow its direction."

Vincent van Gogh, as quoted in *Dear Theo: the Autobiography of Vincent Van Gogh* (1995) edited by Irving Stone and Jean Stone, p. 181

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