e-MANTSHI

A KZNJETCOM Newsletter

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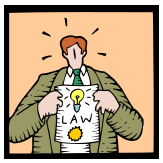
Welcome to the hundredth and fifteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Trade and Industry has, under section 171 of the National Credit Act, 2005 (Act No 34 of 2005) made Regulations which were published in Government Gazette no 39379 dated 6 November 2015. The amended schedule reads as follows:

1. Definitions
   In these Regulations, any word or expression defined in the National Credit Act, 2005 bears the same meaning as in the Act and -
   the Act" means the National Credit Act, 2005 (Act No. 34 of 2005) and the Regulations made under the Act.

2. Amendment of Regulation 42 (1) of the Regulations
   Interest applicable to different products
   (1) Regulation 42(1) of the Regulations is hereby amended by the substitution of the following "Table A:"

3. Amendment of Regulation 42(2) of the Regulations

Maximum Initiation Fees

(1) Regulation 42(2) of the Regulations is hereby amended by substitution of "Table B" :

TABLE B Sub-sector	Maximum Initiation Fee
Mortgage agreements	(a) R1 100 per credit agreement, plus 10 % of the amount in excess of R10 000 (b) But never to exceed R5 250
Credit facilities	(a) R165 per credit agreement, plus 10% of the amount in excess of R1000 (b) But never to exceed R1 050
Unsecured credit transaction	(a) R165 per credit agreement, plus 10% of the amount in excess of R1 000 (b) But never to exceed R1 050
Developmental credit agreements - For the development of a small business - For low income housing (unsecured)	(a) R275 per credit agreement, plus 10% of the amount in excess of R1 000 (b) But never to exceed R2 600 (a) R550 per credit agreement, plus 10% of the amount in excess of R1 000 (b) But never to exceed R2 600
Short term credit transactions	(a) R165 per credit agreement, plus 10% of the amount in excess of R1 000 (b) But never to exceed R1 050
Other credit agreements	a) R165 per credit agreement, plus 10% of the amount in excess of R1 000 (b) But never to exceed R1 050
Incidental credit agreement	Nil

4. Amendment of Regulation 43 of the Regulations

(1) Regulation 43 is hereby amended by the addition of the following sub-regulation after sub-regulation (3):

"An initiation fee must only be charged when a new credit agreement is established with a consumer and must not be charged on a transactional basis where there is no new credit agreement with the consumer."

5. Amendment of Regulation 44 of the Regulations

Maximum Service fee

(1) Regulation 44 is hereby amended by -

(a) the substitution of the sub-paragraph immediately preceding sub-regulation (1) of the following sub-paragraph -

"The maximum monthly service fee, prescribed in terms of section 105 (1) of the Act, is R60".

(b) addition of the following sub-regulations after sub-regulation (2)

"(3) The service fee covers the cost of administering a credit agreement which is the operational cost of the credit provider such as rent, labour, communication, banking, processing of repayments and any other costs related to the administration of a credit agreement.

(4) A service fee must be charged for a calendar month in which it is due and payable and on a pro rata basis where the credit agreement was concluded during the course of that calendar month.

Recent Court Cases

1. S v SEEDAT 2015 (2) SACR 612 (GP)

A sentence of restorative justice could be considered in a case where the accused have been convicted of rape and where the minimum sentence was

not applicable.

The appellant was a 63-year-old businessman who was convicted in a magistrates' court of rape and was sentenced to seven years' imprisonment. He appealed against the conviction and sentence and also applied for leave to adduce further evidence in terms of s 309B of the Criminal Procedure Act 51 of 1977. The complainant testified at the trial that the appellant delivered a bedside lamp to her residence and after he plugged it in and showed her that it worked, he grabbed her, threw her against the dressing table, pulled off her trousers and panties and then threw her down and penetrated her anally. He then turned her around and had frontal vaginal intercourse with her. The doctor who completed the J88 did not testify and the form was handed in by consent. The form indicated that there were abrasions to the vagina and inflammation of the anus and there was evidence of dry penetration of her vagina. The further evidence sought to be led by the appellant was that of a doctor who stated in an affidavit that it was improbable that the 57-year-old complainant would not have had bruising on other parts of her body, given what had happened. This affidavit was confirmed by another doctor but it appeared that the confirmatory affidavit, which stated specifically that the deponent had seen the first affidavit, was actually deposed to and commissioned before the supposedly first affidavit. As regards sentence, it was contended on behalf of the appellant that the magistrate had erred in not considering a compensatory sentence, in the circumstances where the complainant stated that she did not wish the appellant to go to jail and that she would be satisfied if he bought her a Toyota motor vehicle and gave her compensation of R240 000, which the appellant was willing to do.

Held, as to the application for leave to lead further evidence, that the second doctor who made the confirmatory affidavit could not have read the affidavit of the other doctor before it even came into existence, and therefore the conclusion was that he had not told the truth but committed perjury in alleging that he had read it. His confirmatory affidavit could therefore not be of any assistance to the court, were it to be led as further evidence. (Paragraph [13] at 616*g*.)

Held, further, that the evidence of the doctors proposed to be led could not explain away the clinical findings regarding abrasions to the vagina and the inflammation of the anus, and the doctor did not challenge the finding that there had been anal penetration. The conclusions in these affidavits were merely speculative and would not contribute towards the resolution of the important question whether the state had proven its case against the appellant beyond reasonable doubt. There would therefore be no purpose in granting leave to lead further evidence. (Paragraph [17] at 618*b* – *c*.)

Held, further, that, on the evidence, the appellant had committed two separate acts of rape and should have been convicted of repeat rape in terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997. In the circumstances where the state had not applied to have the charge amended and the magistrate, after having heard evidence, had not deemed it necessary to address the issue of repeat penetration and neither during the appeal had the parties been invited to address the court on

this aspect, it would be a travesty of justice at such a belated stage to convict the appellant of repeat rape. (Paragraph [30] at 623*b* – *c*.)
Held, as to sentence, that the magistrate had not considered applying the provisions of s 297 of the Criminal Procedure Act 51 of 1977 and postponed the sentence for a period on condition that the appellant pay compensation. As the minimum-sentencing provisions of Act 105 of 1997 were not applicable it was open to the magistrate to postpone the imposition of sentence for a period and make a restorative justice award. In the circumstances it was appropriate that the appellant be ordered to compensate the complainant; however, the amount suggested by her was excessive and there was nothing to show how the amount had been arrived at. In the circumstances an award of R100 000 would be appropriate. (Paragraphs [40] at 625*g* and [49] at 628*d*, paraphrased.)

2. S v MARINGA AND ANOTHER 2015 (2) SACR 629 (SCA)

The purpose of ss 155 and 156 of Act 51 of 1977 was to avoid a multiplicity of trials where there were a number of accused and where essentially the same evidence on behalf of the prosecution was led on charges faced by all the accused, and thereby avoid prejudice to both the accused and the prosecution.

The two appellants were two of seven accused facing trial in a regional court on a total of 399 charges, including fraud, forgery, uttering and corruption. The first appellant was charged with all the counts, barring those related to the corruption charges, while the second appellant was charged with only 34 counts of fraud. The appellants objected to being tried together with the other accused, on the basis that this was contrary to ss 155 and 156 of the Criminal Procedure Act 51 of 1977, as they did not all face the same charges. The offences were all committed within a period of two months and were therefore committed at about the same time and place, and were in furtherance of a common purpose designed to fraudulently sell property belonging to the Johannesburg Metropolitan Municipality and to transfer those properties to buyers, in order for the accused to collect the proceeds of those sales. In order to successfully affect such transfers it was necessary for officials in SARS and the Deeds Office to cooperate in the furtherance of the common purpose. The officials were bribed and therefore the corruption charges were part and parcel of the overall design of the scheme. There was a whole mosaic of evidence that was necessary to prove the scheme, as well as the participation of the various accused in its different facets. It was contended on behalf of the appellants that they would suffer prejudice by having to sit through the whole trial while evidence would be presented that would not involve the charges which they faced.
Held, that the purpose of ss 155 and 156 was to avoid a multiplicity of trials where there were a number of accused and where essentially the same evidence on behalf of the prosecution was led on charges faced by all the accused, and thereby avoid prejudice to both the accused and the prosecution. (Paragraph [14] at 634*a*.)

Held, further, that the prejudice that the appellants would allegedly suffer was exaggerated, in that the corruption and other charges were but a part of the scheme that would be proved. On the other hand, if separation were ordered, the state would suffer prejudice, in that it would have to have three separate trials with the same witnesses who would have to testify about the same facts. This was inimical to the interests of the state, and against the principle that there should not be a multiplicity of trials relating to essentially the same facts and body of evidence. The prejudice asserted by the appellants was, in the greater scheme of things, minimal. The magistrate had exercised his discretion in refusing a separation and there was no indication that such discretion had not been exercised judiciously, and the appeal accordingly had to be dismissed. (Paragraphs [20] at 636*d* and [21] at 636*f*.)

From The Legal Journals

Meintjes-Van Der Walt, L & Knoetze, I

"The Criminal Law (Forensic Procedures) Amendment Act 37 of 2013: A critical analysis"

2015 SACJ 131

Naude, B

"Ensuring procedurally fair identification parades in South Africa"

2015 SACJ 188

Tshehla, B

"The impact of the right to a fair trial on sentence: *Ndateni v The State* (959/13) [2014] ZASCA 122 (19 September 2014)"

2015 SACJ 204

Watney, M

"The role of restorative justice in the sentencing of adult offenders convicted of rape"

2015 TSAR 844

Theophilopoulos, C

"The admissibility of data, data messages, and electronic documents at trial"

2015 TSAR 461

Watney, M

"Formulation of charges in a criminal trial: imprecision of language leads to imprecision of thought?"

2015 TSAR 640

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

Contributions from the Law School

Some thoughts on an apparently redundant defence, and some unhelpful judicial terminology, in the context of *dolus eventualis*

The recent Supreme Court of Appeal decision of *Nkosi v The State* (20727/14) [2015] ZASCA 125 (22 September 2015) raises a few interesting aspects. I shall address just two of these in the course of the short discussion below: the question of the effect of mistake as to the causal sequence, and the use of terminology relating to *dolus eventualis*.

The facts of *Nkosi* are both depressingly familiar and unusual at the same time. The depressingly familiar: the context of the convictions on charges of murder, robbery with aggravating circumstances and unlawful possession of a firearm and ammunition was a robbery, committed by a gang of armed robbers. The unusual: the murder charge (the sole issue before the Supreme Court of Appeal) arose out of the death of one of the robbers, as a result of the robbery victim lawfully shooting him in self-defence – could the appellant be convicted of the murder of his fellow robber on these facts? The trial court had no difficulty in making this finding, but it was argued on behalf of the appellant, relying on the authority of *S v Molimi* 2006 (2) SACR 8 (SCA), that the deceased had embarked on a 'frolic of his own', which could not be imputed to the other members of the common purpose.

The Supreme Court of Appeal made short shrift of this argument however. The relevant part of the factual scenario in *Molimi* related to the taking of a hostage, who was shot dead by a third party, after the other robbers had fled, and some distance from the original robbery. In this case, by contrast, the shootout which ensued between the robbery victim and the deceased took place in the very same room where the robbery occurred, and, it was held by the court, the possibility of such shootout had been foreseen by all the armed robbers. The cases being clearly distinguishable, the court held that the appellant's argument could not avail him. Moreover, since *dolus eventualis* had been established in respect of the killing, in that the appellant foresaw the possibility that, if resistance were to be encountered that the firearms could be used with potentially fatal consequences, and he nevertheless proceeded with his course of action, liability for murder had been established beyond reasonable doubt. The appeal was consequently dismissed.

The decision is completely in accordance with the law relating to common purpose and *dolus eventualis*, and the court may be praised for a sound decision, clearly and correctly motivated. Whilst it is worthy of more thoroughgoing analysis, for present purposes I shall limit discussion of the judgment to the two matters identified above.

First, this decision appears to be yet another nail in the coffin of the 'mistake as to the causal sequence' defence, first authoritatively presented by Van Heerden JA in *S v Goosen* 1989 (4) SA 1013 (A) at 1026H, which provides that there is no *dolus eventualis* if the unlawful consequence occurs in a manner that differs markedly from the course of events foreseen by the accused. Though stoutly defended by Burchell (*Principles of Criminal Law* 4ed (2013) 360-2), this defence has been criticised by Snyman (*Criminal Law* 6ed (2014) 192), who points out that the Supreme Court of Appeal has simply ignored the existence of this defence in cases such as *S v Nair* 1993 (1) SACR 451 (A), *S v Lungile* 1999 (2) SACR 597 (SCA), and *S v Molimi supra* where it *should* have found application on the facts. The *Lungile* case, where a murder conviction was confirmed for a group of armed robbers where, in a shootout between the robbers and the police, an employee of the store died as a result of being struck by a police bullet, formed an important part of the reasoning of the Supreme Court of Appeal in *Nkosi*. In contrast, *Goosen* and the defence of mistake

as to the causal sequence is not mentioned at all. While courts typically find that armed robbers foresee the chance of using a weapon, possibly with fatal consequences, should resistance ensue – this is the primary reason why weapons are taken with by robbers on their nefarious pursuits, after all – it could be argued that a proper application of the mistake as to the causal sequence defence should avail the accused where, as in the present case, death ensues, not for a victim of the robbery but for a fellow robber, and not as a result of a bullet from a robber's gun, but from that of the robbery victim. The case of *Nkosi* therefore casts further doubt on the continued use of the mistake as to the causal sequence defence in South African law (for a case in which the defence was approved, see *S v Mitchell and another* 1992 (1) SACR 17 (A)). Kemp *et al* (*Criminal Law in South Africa* (2012) 190) suggest that the defence is only likely to be of use 'in cases where the consequence occurs in a truly freakish manner, or where the accused is not a person of normal intelligence and/or life experience'. Of course, in such cases there may well be doubt whether the accused in fact subjectively foresaw the consequence in the first place.

The second matter which shall be addressed concerns the language utilised by the court in dealing with *dolus eventualis*. Whilst it is well established that subjective foresight of the possibility of harm is required for liability, in the absence of direct evidence of state of mind, which is rarely available, such intention is established through a process of inferential reasoning, which comprises necessarily objective elements (Snyman 186). Although such objectivity in the process of proof should not be conflated with the test for a subjective element of liability, the word 'reasonable' has been used by writers (Burchell 357; Snyman 180) as a term to describe the degree of possibility which must be foreseen for liability to ensue.

As pointed out elsewhere (Hoctor 'The degree of foresight in *dolus eventualis*' (2013) 26(2) *SACJ* 131 152), one has to be careful in using the term 'reasonable', which by definition implies an *objective* inquiry, in the context of the test for intention. How does one clearly define what constitutes a 'reasonable' possibility of harm? How is this different from the first leg of the classic test for negligence (*Kruger v Coetzee* 1966 (2) SA 428 (A) 430E-F), which asks whether a reasonable person would have *foreseen the reasonable possibility* of harm ensuing? Utilising the same criterion in the test for intention and negligence does not assist in maintaining the distinction between the subjective and objective forms of *mens rea.*

Another unfortunate error which creeps into judicial discussion of *dolus eventualis* from time to time is the reference to 'foreseeability' rather than 'foresight'. For purposes of liability for *dolus eventualis* what is required is proof of actual *foresight* of the possibility of harm. This may be distinguished from *foreseeability*, which refers to whether an event may be reasonably anticipated or known about before it occurs. Once again, since *reasonable foreseeability* is a requirement for negligence, it is essential to distinguish between *foreseeability* and (actual) *foresight*. Only the latter should be present in discussing *dolus eventualis*, as a form of intention.

The court in *Nkosi* is prey to fudging these important distinctions. Thus, in explaining the liability of the robbers, the court states that

'…the appellant and his cohorts were clearly cognisant of the *reasonable likelihood* that they may have to use their firearms. And it was equally *reasonably foreseeable* that one or more of their victims may be armed and would use those arms.' (para [5], my emphasis)

The subjectivity of the inquiry is blurred by the terminology used. Matters are not improved by the statement that the robbers 'reasonably foresaw' the likelihood of resistance (para [6]), nor by the court's reference to having already dealt with 'the foreseeability element' earlier (para [10], as opposed to the *foresight* element, for another example of this error, see *S v Humphreys* 2013 (2) SACR 1 (SCA) para [14]), nor by the court's conclusion that the appellant 'reasonably foresaw subjectively' the possibility of encountering resistance and thus having to use firearms (para [13]).

It is readily acknowledged that, as Burchell points out (at 355), in establishing intention the inference that the accused had intention must be the only one which 'can reasonably be drawn from the proved facts'. Nevertheless, the test for intention remains resolutely subjective in nature, and the use of any terms which may indicate otherwise only serves to create potential confusion in this regard. I beg the reader's indulgence for once again resorting to an oft-cited statement in closing.

Criminal law is a blunt and powerful instrument in the hands of the state, which operates so as to seriously infringe human rights. It simply must be clear, coherent and consistent. In other words, the words we use are vested with significance. Austin's apothegm is surely true for the criminal process, particularly the courts, and bears iteration: 'words are our tools, and, as a minimum, we should use clean tools' ('A plea for excuses' (1956-7) 57 *Proceedings of the Aristotelean Society* 1 7).

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Matters of Interest to Magistrates

Justice seen to be done?

Years and years ago, in the vibrant days when we were all still students, we were taught that “negligent” assault was not on the cards at all. The phenomenon worrying me since those years was the fact that an accused could negligently kill a person but he would not be guilty of negligently assaulting (which is included in the killing of a person) a person.

Allow me to elucidate by painting a scenario which often plays itself off in our modern day existence. Take the hypothesis where a motorist, quite profoundly under a state of intoxication, simultaneously knocks down two innocent pedestrians on the side of the road. One of the pedestrians resultantly departs this life whilst the other one is crippled with everlasting prognosis.

The accused is not charged with being in a deplorable state of inebriation, but he is nevertheless charged with (1) murder and (2) attempted murder. The evidence does not at all prove intent in the form of either *dolus directus, dolus indirectus* or *dolus eventualis*. The magistrate however finds on the proved facts (quite correctly) that the accused was utterly negligent and finds him guilty of culpable homicide on the 1st count of murder. This is unfortunately not the end of the road for the magistrate because he/she must also pass judgment on the second count of attempted murder, and, in accordance with our reigning law he/she has no option to but to acquit the accused on that charge, because no intent to kill was proved! Why; the uninformed would ask could he not at least be convicted of negligently assaulting the complainant?

My gut feeling (if there is something like that in the adjudication of crimes!) acquaints me with the feeling that justice did not prevail! Was justice seen to have been done? That is the question that will most certainly be posed; not only by the complainant, but also by the society at large. Fortuitously we as jurists can say at the end of it all: “On the other hand, in order to do justice, one may end up displeasing certain sectors of the community in order to ensure a correct application of the law”. Of course this argument cannot be faulted, but what about public confidence in our legal system?

Section 258 of the Criminal Procedure Act is quite clear – the competent verdicts on murder and attempted murder are listed there. All those competent verdicts, culpable homicide excluded, requires “intent”.

Safia Karriem has very eloquently narrated the following relevant excerpt in an article headed *Elevating culpa to crime* which was published in De Rebus in September 2015: “As murder has a culpa-cousin and not assault, it begs the question as to the rationale for such different treatment in our law. It could be argued that public policy dictates that where the unlawful negligent conduct of an accused, which causes the death of another human being, the accused be subject to criminal responsibility. If public policy is indeed employed as a basis for such inequitable treatment, than the dictates of public policy should be interrogated and the soundness or otherwise be scrutinised.” (2015 De Rebus 161)

I wish to repeat - since my early days this (to me) was a serious discrepancy in our law – you can kill (which includes assault) somebody negligently, but you cannot assault somebody negligently! In that sense I agree with the old saying, “The law is an ass my friend”.

Louis Radyn

Retired Senior Magistrate

A Last Thought

“ [45] The case law is replete with examples of the correct juridical approach to contradictions between two witnesses and differences between a witness’s evidence and a prior statement. The argument is often advanced, as it was in the current matter, that, because the witnesses’ accounts of events disagree, they lack veracity. Nicholas JA in *Credibility of Witnesses* in (1985) SALJ 1985 32 stated the following at p. 35. ‘*In most instances considerable time and effort is spent in establishing and*

basing argument on, contradictions and discrepancies. This argument is fallacious'. At p. 36 the learned Judge of Appeal continued:

> "*It follows that an argument based only on a list of contradictions between witnesses leads nowhere so far as veracity is concerned. The argument must go further, and show that one of the witnesses is lying. It may be that the court is unable to say where the truth lies as between contradictory statements, and that may affect the question whether the onus of proof has been discharged: but that has nothing to do with the veracity of the witness."*

At p. 41 he proceeded :

> "*In the light of experimental evidence, it is not surprising that eyewitness accounts are often not an accurate representation of reality, and that there are often profound differences in eyewitness accounts of the same event, even when it is observed by the witness under the same external conditions. This shows the futility of the exercise, frequently performed by cross-examiners, of raking at tedious length over the evidence of different eyewitnesses in order to uncover contradictions, variances, omissions, discrepancies, differences and inconsistencies. For the most part it shows no more than what is to be expected, namely that eyewitnesses differ from one another in their accounts and are liable to error.*"

[46] The flynote to the report of the judgment in *S v Mafaladiso en Andere 2003 (1) SACR 583*, which accurately captures the substance of the Court's judgment, sums up the applicable principles as follows:

> "Material differences between witness's evidence and prior statement - Juridical approach to contradictions between two witnesses and contradictions between versions of same witness is, in principle identical - In neither case is aim to prove which version is correct, but to satisfy oneself that witness could err, either because of defective recollection or because of dishonesty - Court must carefully determine what witnesses actually meant to say on each occasion - In this regard adjudicator of fact must keep in mind that previous statement not taken down by means of cross-examination, that there may be language and cultural differences between witness and the person taking down statement and that person giving statement is seldom, if ever, asked by police officer to explain statement in detail - It must be kept in

mind that not every error by witness and not every contradiction or deviation affects credibility of witness - Non-material deviations not necessarily relevant - Contradictory versions must be considered and evaluated on holistic basis - Circumstances under which versions made, proven reasons for contradictions, actual effect of contradictions with regard to reliability and credibility of witness, question whether witness given sufficient opportunity to explain the contradictions and connection between contradictions and rest of witness' evidence, amongst other factors, to be taken into consideration and weighed up - Lastly, there is final task of trial Judge, namely to weigh up previous statement against *viva voce* evidence, to consider all evidence and to decide whether it is reliable or not and to decide whether truth told, despite any shortcomings."

Applying that approach to the evidence in the current case as a whole, the argument that the evidence of the three witnesses is unreliable and lacks veracity as a result of certain discrepancies is misplaced."

Ninaber v S; In re: Ninaber v Claasen N.O and Another (A409/13; A185/14, 9834/14) [2015] ZAWCHC 180 (1 December 2015)