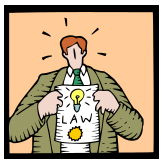
# e-MANTSHI

A KZNJETCOM Newsletter

**April 2016: Issue 119**

Welcome to the hundredth and nineteenth 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. A Courts of law amendment bill has been introduced into parliament. The explanatory summary of the bill has been published in Government Gazette No. 39943 of 22 April 2016. The purpose of the Bill is to amend various sections of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (the MCA), in order to address alleged abuses in the emoluments attachment order (EAO) system. It further seeks to amend the sections of the MCA dealing with the rescission or abandonment of court judgments to accommodate the Department of Trade and Industry's removal of adverse consumer credit information project. The amendments have a bearing on civil debts and are aimed at protecting debtors who often find themselves in financial difficulties as a result of debts incurred by them and who cannot escape the ''debt trap'' due to the abuses that seem to be taking place in this area of the law and also to put in place measures that will assist them in overcoming the effects of court judgments relating to their continued indebtedness. The Bill further amends the Superior Courts Act, 2013 (Act No. 10 of 2013), to provide for the rescission of judgments with the consent of the judgment creditor and for the rescission of judgments where the judgment debt has been settled.

2. The rate of interest for the purposes of section 1(1) of the Prescribed Rate of Interest Act, 1975 has been amended by a notice in the Government Gazette no 39943 of 22 April 2016. The rate of interest has been amended to 10, 50 per cent per annum as from 1 May 2016.

## Recent Court Cases

### 1. ZF v S [2016] 1 All SA 296 (KZP)

**Although the use of an intermediary in matters where a witness is over 18 years old is irregular it may not vitiate the proceedings.**

The appellant was charged with indecent assault, two counts of rape and assault with intent to do grievous bodily harm, and rape by way of a contravention of section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 read with section 51 of the Criminal Law Amendment Act 105 of 1997 and section 94 of the Criminal Procedure Act 51 of 1977. The complainant was his biological daughter. He pleaded not guilty to all the counts and gave no plea explanation but was convicted on all counts and was given an effective sentence of 17 years' imprisonment.
The present appeal was against conviction and sentence.
At the outset of the trial, the State brought an application in terms of section 170A of the Criminal Procedure Act for the use of an intermediary whilst the complainant gave evidence. There being no objection from the prosecutor, the magistrate granted the application. On appeal, however, the appellant took the point that section 170A(1) did not entitle the magistrate to grant such an application because the complainant was over the biological and mental age of 18 years. That was said to amount to an irregularity which vitiated the proceedings.

*Held* – The first question to be determined was whether the use of the intermediary amounted to an irregularity. The ordinary grammatical meaning was that the section applies only to those under the biological or mental age of 18. Therefore, the use of the intermediary in this matter gave rise to an irregularity. The first question flowing therefrom was whether the irregularity resulted in the evidence of the complainant being inadmissible – and if it did, whether the balance of the evidence could sustain

any of the convictions. The Court found no reason why the use of an intermediary in the present matter resulted in the evidence given by the complainant being rendered inadmissible. The irregularity was also found not to have led to a failure of justice.
On the issue of sentence, the Court found grounds to interfere only with the sentence imposed on the fifth count. The sentence on that count was set aside and replaced with one of 24 years' imprisonment, with the sentences on the other counts running concurrently with that one.

## 2. Radzilane v S (127/15) [2016] ZASCA 64

**It is not competent for a trial court to impose a new sentence pursuant to an application to enforce a suspended sentence.**

**Baartman AJA (Lewis and Zondi JJA concurring):**
[1] This is an application for special leave to appeal against the refusal by the court a quo of the applicant's application for leave to appeal. This court referred the application for oral argument in terms of s 17(2)(*d*) of the Superior Courts Act 10 of 2013 (the Act).

**Background**
[2] The facts that gave rise to this application are largely common cause. The applicant pleaded guilty to one count of theft in the regional court, Makhado. He admitted that he had unlawfully and intentionally, while in the employ of ABSA Bank, between 18 September 2008 and 9 October 2008, withdrawn R560 000 from the accounts of various ABSA clients. The trial court convicted the applicant on the basis of his plea and sentenced him, in terms of s 297 of the Criminal Procedure Act 51 of 1977 (the CPA), to seven years' imprisonment, wholly suspended for five years on certain conditions including that he repay the amount stolen in instalments as directed in the court order.

[3] The applicant made an initial payment of R210 031.53, consisting of his pension due from ABSA Bank and money held in his accounts at the time of his arrest. He made a further payment of R4 000, after which he paid no further amounts. The respondent applied to have the suspended sentence put into operation. The trial court, motivated by the substantial repayment he had already made and his personal circumstances, sentenced the applicant to three years' imprisonment in terms of s 276(1)(*i*) of the CPA (the new sentence). The applicant has served that sentence in full.

[4] The respondent appealed to the Gauteng Division, Pretoria against the imposition of the new sentence. Zondo and Ismail JJ upheld the appeal and set aside the new sentence and referred the matter back to the trial court to consider the application to put the suspended sentence into operation. On 20 September 2014, the court a quo

refused the applicant's application for leave to appeal its order. The present application is against that order.

**Special leave**

[5] It is settled law that leave to appeal is only granted where there are reasonable prospects of success. A mere possibility of success is not sufficient. In *Van Wyk v S, Galela v S*,1 this court emphasised the stringent requirements for granting special leave as follows:

1 *Van Wyk v S, Galela v S* [2014] 152 ZASCA; 2015 (1) SACR 584 (SCA), para 21.

'An applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal. This may arise when in the opinion of this court the appeal raises a substantial point of law, or where the matter is of very great importance, or where the prospects of success are so strong that the refusal of leave to appeal would probably result in a manifest denial of justice. . . .'

[6] The applicant has served the new sentence, irregularly imposed, and now faces the possibility of a further seven years' imprisonment. The apparent unfairness is of concern to both parties. In the circumstances of this matter, granting special leave is warranted. I deal with the grounds of appeal below to the extent necessary.

**Legal representation**

[6] The applicant was unrepresented at the appeal hearing; the court a quo had refused an application for postponement to obtain legal representation, reasoning that the applicant had had sufficient time, approximately 10 months, to obtain legal representation. The court below further considered that the matter had been ongoing since 2008 and ruled that in 2011, when it heard the appeal, it had been in the interests of justice that the matter be finalised. I cannot fault that finding.

**Appeal procedure**

[7] The applicant submitted that the court a quo was not competent to have upheld the appeal; instead, so the argument went, the respondent should have brought a review application. The court below dealt with the respondent's appeal as an appeal on a point of law: whether it was competent for the trial court to have imposed a new sentence pursuant to an application to enforce a suspended sentence. The court a quo held that it was not 'competent for the [trial court] to have imposed a new sentence …'.

[8] The provisions of ss 297(7) and (9) circumscribe the court's power when the conditions of suspension are not met – it may enforce the suspended sentence or further suspend it, '…subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension'. (See E Du Toit et al *Commentary on the Criminal Procedure Act* – vol 2 at 28-41). It follows that as a matter of law, the trial court erred when it imposed the new sentence,

making the respondent entitled to the order it obtained.

**Just and equitable**

[9] The applicant further contended that in the circumstances of this matter, as the applicant has already served the new sentence, it would be just and equitable to impose a lesser sentence. The CPA does not make provision for the trial court to impose a lesser sentence. However, the trial court will be at liberty to consider the deplorable delay in bringing this matter to finality and how it has prejudiced the applicant. The trial court imposed the new sentence on 24 March 2010 but the appeal was only heard in September 2011. The reasons for the delay appear from the condonation applications and it is not necessary to repeat them. Although the trial court found 'no good or sufficient reason' to further suspend the suspended sentence, it found good grounds to impose a lesser sentence. The applicant has served the lesser sentence. The applicant made it clear when the respondent applied to put the suspended sentence into operation that he is unable to make any further payments to the complainant.

[10] It follows that putting the suspended sentence into operation will result in a harsher sentence than originally imposed or intended when the trial court imposed the new sentence. These are factors the trial court will take into account in deciding whether to effect the suspended sentence or further suspend it on the same or other appropriate conditions.

**Conclusion**

[11] It is so that the applicant has already served a period of imprisonment and that it would be patently unfair if he were to serve a further seven years' imprisonment. Although I am reluctant to make any suggestion that may appear to fetter the trial court's discretion, as it seems clear that the applicant is unable to further compensate the complainant, I consider it appropriate to express the view that the trial court should consider further suspending the sentence for a period of five years, on condition that the applicant is not convicted of theft or any crime entailing dishonesty during the period of suspension for which he has been sentenced to a period of imprisonment exceeding three years without the option of a fine.

**Order**

1 The application for special leave is granted.

2 The appeal is dismissed.

## 3. Van Schalkwyk v The State (680/15) [2016] ZASCA

**Where an accused does not actually foresee the possibility of death there is no need to consider whether he had reconciled himself to the possibility of death occurring. In such circumstances s/he is not guilty of murder, but is guilty of culpable homicide.**

**Lewis JA (Tshiqi JA and Plasket AJA concurring)**
[36] I have read the judgments of my colleagues Baartman AJA and Willis JA. I do not agree with their conclusion, and thus write separately.

[37] Neither judgment deals with the fact that the State's case was far from clear. The State witnesses" accounts of how the appellant struck the deceased with the hay hook were different, and the appellant's version, which he no longer advances, was also different. The only thing that is clear from the record is that the appellant struck the deceased with the hay hook using some force. The experts to whom Baartman AJA refers differed in regard to the degree of force used, but nothing turns on that. The appellant in this court accepted that he was causally responsible for the death of the deceased, and that he should have foreseen that striking the deceased with the hay hook might have the consequence that the deceased would die. He was, his counsel argued, guilty of culpable homicide.

[38] The first question to be asked is whether the State proved, beyond reasonable doubt, that the appellant had actual foresight of the possibility of his conduct causing the death of the deceased.

[39] As the regional magistrate said, "by striking the deceased with the hook on the left side of the chest the accused ought to have foreseen that death may occur. The accused reconciled himself with the eventuality". The test, as noted by the full bench, was incorrectly stated by the magistrate. But it appeared not to worry the full bench since it found on the facts that the appellant had had actual foresight of the death of the deceased. No such finding was made by the magistrate, however, and it is far from clear to me how the full bench reached that conclusion.
[40] Baartman AJA has set out the factual background. What she does not do, however, is consider the inconsistent versions of the two eyewitnesses, Persoon and Kalanie. Kalanie's evidence is somewhat difficult to follow because the transcript of the evidence was for some unexplained reason not available. It was reconstructed from the magistrate's notes, and those of the prosecutor and the appellant's attorney.

[41] It is not disputed that the deceased was intoxicated the morning that he was killed – the post-mortem report revealed that. It is also not disputed that the appellant had confronted the deceased about his failure to tend to the cattle on the farm over the weekend, and that he had instructed the farm workers, including Kalanie and Persoon, to load crates onto two trailers that were hooked to a tractor.

[42] Kalanie said that before the incident, the deceased had stood on top of one of the trailers hooked to the tractor. He was holding a hay hook in each hand. The appellant told him to get off the trailer but the deceased ignored him. The appellant had been angry, and had pulled the hooks out of the deceased's hands. He then struck him with one of the hooks, held in the appellant's right hand, on the left side of the deceased's chest. He hit him only once, and then pulled the deceased towards him with the hook.

[43] He said that the deceased had staggered to the other side of the trailer and then fallen off. He got up and ran to the other side of the storeroom. The appellant had then driven away. He later told Kalanie that the deceased had fallen behind the storeroom. They drove to the spot together and the appellant asked Kalanie to turn him over and look to see where he had been struck. Kalanie had opened the deceased's overall jacket and saw that he had been struck in the chest. He was still alive at that stage, but stopped breathing as they stood there. The appellant had then taken off his hat and said he had not meant to kill the deceased. He also told Kalanie that he must not tell anyone that he had hit the deceased, but must say that he fell on the hook.

[44] The appellant's counsel asked Kalanie to demonstrate how the hay hook had been used to strike the deceased. The court observed, after the demonstration, that: "he hold hook with right hand 90 degree above head with the sharp edge of the hook facing forward and swing it 180 degrees half a circle wide forward towards the target in front of his arm in extend to his back with 90 degree bent in the elbow and from there hooks was above head". Kalanie then said that the appellant had hit with great force forward.

[45] Persoon's account was somewhat different, which the full bench acknowledged. When Persoon's version was put to Kalanie, he said that it was not correct, notably that people were in different locations, and that the deceased had not moved forward before the appellant struck him. He also said that he did not hear the appellant swearing at the deceased. Persoon, on the other hand, heard the appellant using vulgar and abusive language.

[46] Persoon's demonstration of how the appellant had struck the deceased was different. The hay hooks, he said, were held with the curved end upwards and the handles downwards, which was quite different from Kalanie's demonstration.

[47] Given that the appellant has abandoned the version he maintained at the trial (that the deceased fell on the one hay hook), we do not know what he would have said about the way in which he had struck the deceased. And so the facts that would give rise to an inference (the only reasonable inference to be drawn) that the appellant had actual foresight that the blow that he struck might kill the deceased,

are far from clear. They do not emerge from the evidence of the State witnesses. And they do not emerge from the evidence of the doctors. That evidence related purely to the nature of the wound inflicted and the degree of force used by the appellant. The evidence of Dr Isaacs as to how the blow was probably struck does not accord with either of the demonstrations of Kalanie or Persoon.

[48] The onus is on the State to prove that the appellant had actual foresight of the possibility of death. The evidence it adduced is such that no reasonable inference of actual foresight, let alone of accepting the consequences of his conduct, can be drawn. On the contrary, the appellant's reaction immediately after the deceased died was that he had not meant to kill the man. This was not just an expression of remorse: it was a clear indication that he had not actually foreseen death as a possibility.

[49] This is not a case where an accused, armed with a weapon used to injure, like a knife or a dagger, stabs another, having intended to injure and having foreseen the possibility of death, but carries on regardless. A hay hook is not a weapon: it is an implement used to move bales of hay. Although it tapers to a point, it is not a particularly sharp one. The appellant seized the hay hooks from the deceased because he wanted the deceased to get off the trailer and start taking crates to the seasonal workers on the farm. He was either angry or frustrated and struck out at the deceased. But that does not justify the finding of the full bench that:
"Regard being had to the nature of the weapon used the possibility of the consequences that ensued would have been apparent to any person of normal intelligence. *On the facts*, the only reasonable and inexorable inference to be drawn is that when he gave vent to his ire it was immaterial to the appellant whether the consequences would flow from his action; put differently, he proceeded nevertheless or persisted with his conduct indifferent to the fatal consequence of his action." (My emphasis.)

[50] The question that springs to mind is "What facts?" since there is so much uncertainty as to how the wound was inflicted and what the state of mind of the appellant was. In *S v Humphreys* [2013] ZASCA 20; 2013 (2) SACR 1 (SCA) Brand JA said (para 13):
"For the first component of dolus eventualis it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not dolus in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for dolus and negligence."

[51] In my view, that is precisely what the full bench did and my colleagues would do

now. They have inferred from the fact that a hay hook has a relatively sharp end, that the reasonable person would have foreseen that the impulsive striking out at a person in the position of the deceased might result in the death of the deceased, and that the appellant thus did foresee the possibility of death ensuing. That is to conflate the tests for negligence and dolus.

[52] The hay hook in question,…….. is not like a long knife with a sharp end that would inevitably inflict a serious or fatal wound. It was a farm implement used for a different purpose, not inflicting harm on a person. And there is nothing to suggest that the only inference to be drawn from the fact that the appellant struck the deceased with it is that he actually foresaw the possibility of death ensuing.

[53] There is even less to suggest that he continued regardless, reconciling himself to that possibility. While Baartman AJA concludes that, as a farmer with experience in using hay hooks for moving bales of hay, the appellant would have known what the consequences of hitting a person with one would be, it can hardly be said that the common experience of farmers hitting people with hay hooks is that they will be seriously, even fatally, wounded. Hay hooks are designed for moving bales of hay.
They are not weapons used to inflict harm on a person. And there is absolutely no evidence that the appellant had any experience of hitting a person with a hay hook himself, or seeing anyone else do it.

[54] Given the circumstances, and the nature of the implement used to strike at the deceased, the case is to be distinguished from that described by Holmes JA in *S v Sigwahla* 1967 (4) SA 566 (A) at 570F-H (referred to by Baartman AJA, but worth repeating to demonstrate the differences in circumstances):
“In the present case the salient facts are that the appellant was armed with a long knife which he held in his hand; that he advanced upon the approaching deceased; that as he came up to him he jumped forward and raised his arm and stabbed him in the left front of the chest; that the force of the blow was sufficient to cause penetration for four inches and to injure his heart; and that there is nothing in the case to suggest subjective ignorance or stupidity or unawareness on the part of the appellant in regard to the danger of a knife thrust in the upper part of the body. In my opinion the only reasonable inference from those facts is that the appellant did subjectively appreciate the possibility of such a stab being fatal. In other words I hold that there exists no reasonable possibility that it never occurred to him that his action might have fatal consequences, as he was advancing on the deceased with the knife in his hand and as he was raising his arm to strike and as he was aiming a firm thrust in the general direction of the upper part of his body.”

[55] Baartman AJA states that “the only reasonable inference is that the appellant struck the deceased to vent his anger”. That may be so. But it does not give rise to the next necessary inference, which is that he actually foresaw that the deceased might be killed by his conduct. As Leach JA said in *Director of Public Prosecutions,*

*Gauteng v Pistorius* [2015] ZASCA 204; [2016] 1 All SA 346 (SCA) para 34:
"As this court has pointed out, while the subjective state of mind of an accused person in a case such as this is an issue of fact that can often only be inferred from the circumstances surrounding the infliction of the fatal injury, the inference to be properly drawn must be consistent with all the proved facts."

[56] The only proven facts in this matter are that the appellant struck the deceased with a hay hook, which penetrated his heart and fractured a rib. The deceased was slight and thin, the appellant was much bigger and heavier, and the reasonable man would have foreseen that the hook might penetrate the body if he hit a person with it. Given that we do not know how the hook penetrated the body, and what degree of force was used, we cannot infer that the appellant actually foresaw the death of the appellant and struck him regardless of the consequences. There is also no dispute that, immediately after discovering the death of the deceased, he said in the presence of his employees that he had not intended to kill him. The inference to be drawn from that is that he did not foresee that death would result from his hitting the deceased with the hay hook. At the very least this is one reasonable inference that may be drawn from the facts, assuming that there may be others.

[57] The full bench thus erred in finding that the appellant actually foresaw the possibility of death. There is accordingly no need to consider whether he had reconciled himself to the possibility of death occurring. In the circumstances, I conclude that the appellant is not guilty of murder, but is guilty of culpable homicide.

[58] The appellant and the State agree that this court is in as good a position as the trial court would be to determine the appropriate sentence to be imposed for culpable homicide. There has already been considerable delay in the finalization of this matter, which is not in the interests of justice. The appellant has been in prison since the conviction by the trial court on 11 February 2014.

[59] The evidence of both Persoon and Kalanie was that he was a good employer, who had no history of abusing his workers. On the morning of the incident, he was provoked by the deceased who had not fed the animals on the farm and was drunk on a Monday morning. He lashed out impulsively. That does not mean that he should not be punished. He has caused the death of another person and must suffer the consequences. Society should not tolerate crimes of violence and especially those against employees on farms.

[60] The appellant's incarceration has led to many people being deprived of employment. His family is dependent on him. He is at this stage a man in his sixties. The trial court had before it the evidence of a probation officer and a social worker for the appellant. They reported that the appellant had serious health problems.

[61] I consider that a sentence of six years‟ imprisonment, three of which should be

suspended on the usual conditions, is appropriate.

[62] It is accordingly ordered that:
1 The appeal is upheld to the extent set out below.
2 The conviction of murder, and the sentence of eight years imprisonment, are set aside.
3 The order of the Northern Cape Division of the High Court is replaced with the following:
“The appellant is convicted of culpable homicide, and is sentenced to six years imprisonment, dated back to 14 February 2014, three years of which are suspended for a period of five years on condition that the appellant is not convicted of any crime, of which violence is an element, committed during the period of suspension.”

[Only the majority judgment has been reproduced here without the picture of the hook (Ed.)]

**From The Legal Journals**

**Jesse, D**

“If it is not original it is inadmissible – the uncertainty of ‘data messages’ in court proceedings.”

**De Rebus May 2016 32**

**Potgieter, E**

“NCA: The line in the sand – Can a cancelled agreement be revived?”

**De Rebus May 2016 41**

**Tshivhase, A E**

“Institutionalising a military judicial office and improving security of tenure of military judges in South Africa.”

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

## Contributions from the Law School

### Some thoughts on putative private defence

The primary focus of the Supreme Court of Appeal judgment in the *Pistorius* case (*Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431/[2016] 1 All SA 346/2016 (2) SA 317 (SCA)) was on correcting the errors of the court *a quo*. Hence it was held, in respect of the questions of law reserved for the Court's decision, that the principles of *dolus eventualis* were incorrectly applied to the facts of the case, and further that the trial court did not properly 'conceive and apply the legal principles pertaining to circumstantial evidence' (at para [42]). Having held that the accused did indeed have *dolus eventualis* in respect of the deceased's death when he discharged four shots through the toilet cubicle door of his residence, the Court then proceeds to examine 'a final counter to the State's case': the defence of putative private defence (at para [52] and following).

It might be noted that the Court's unequivocal finding that *dolus eventualis* had been established (at para [51]) would more logically only follow *after* a consideration of the merits of the defence of putative private defence. After all, establishing the *absence* of such a defence would be part of proving the presence of *dolus eventualis* i.e. proof that not only did the accused foresee the possibility that by shooting through the door he may kill the person behind the door, but that he foresaw the possibility that in firing the gun in this way he may be acting *unlawfully*. If the court were to hold that there was a genuine but mistaken belief on the part of the appellant that he was entitled to defend himself in this way, the resulting mistake of law would exclude intention, flowing from the lack of knowledge of unlawfulness, and the appellant could not be convicted of murder (see discussion in Burchell *Principles of Criminal Law* 4ed (2013) 400). Separating the inquiry into knowledge of unlawfulness from the general foresight inquiry, as the court apparently does by dealing with this matter *after* pronouncing on the presence of *dolus eventualis*, indicates that knowledge of unlawfulness involves an assessment distinct from that of the general inquiry into the presence of *dolus eventualis*. It does not.

Nevertheless, the court proceeds (at para [52]) to discuss the matter of putative private defence in the light of the leading case of *S v De Oliveira* 1993 (2) SACR 59 (A), where it was stated that

'In putative private defence it is not unlawfulness that is in issue but culpability ("skuld"). If an accused honestly believes his life or property to be in danger, but objectively viewed they are not, the defensive steps he takes cannot constitute private defence. If in those circumstances he kills someone his conduct is unlawful. His erroneous belief that his life or property was in danger may well (depending upon the precise circumstances) exclude *dolus* in which case liability for the person's death based on intention will be excluded…' (at 63i-64a)

Upon an analysis of the contradictory evidence led by the accused the court correctly held (it is submitted) that the accused 'did not entertain an honest and genuine belief that he was acting lawfully' (at para [53]), which confirmed the absence of a defence of putative private defence, and the presence of *dolus eventualis*. However, the court explains the notion of putative private defence in terms of 'rational but mistaken thought', using a phrase from the *De Oliveira* case (at 65d), concluding that the accused's expressed fear that the person behind the toilet door was a danger to his life 'was not the product of any rational thought' (at para [53]), and that 'it is inconceivable that a rational person could have believed he was entitled to fire at this person with a heavy calibre firearm' (ibid). As pointed out above, the defence of putative private defence does not require that the mistaken belief in the lawfulness of the conduct is *rational*, just that it should be *genuine*. The use of the phrase in *De Oliveira* specifically addresses the appellant's contention that he was 'half asleep' at the time of firing the fatal shots, with the court pointing out that such defence is 'inconsistent with a lack of awareness of what you are doing' (at 65d). The fact that the phrase 'rational but mistaken thought' has not been relied on in any other reported judgment in over 20 years dealing with putative private defence is telling.

Since the seminal case of *S v De Blom* 1977 (3) SA 513 (A), which brought about the demise of the *ignorantia juris neminem excusat* maxim in South African law, and introduced the mistake of law defence, there has been the possibility of raising a defence of putative defence, based on a genuine error of law. This defence has most often found application in the context of putative private defence, in cases such as *De Oliveira* and *S v Dougherty* (2003 (2) SACR 36 (W)). Useful as it is, the question is whether this defence could find broader application in the context of fatal responses to domestic abuse or battering.

The problem of how to deal with (to use the typical example, without excluding other similar victims) a battered woman, trapped in a cycle of violence and abuse, who kills her abusive partner, is a difficult one to solve. The justification ground of self-defence is often not available to the accused, where the killing is not in response to an imminent threat of harm or may not be regarded as a reasonable defensive act, as a result of which the act remains unlawful (see e.g. *S v Engelbrecht* 2005 (2) SACR 41

(W)). Since the case of *S v Eadie* (2002 (1) SACR 663 (SCA)), which has arguably practically eliminated the defence of non-pathological incapacity flowing from provocation or emotional stress (see Snyman *Criminal Law* 6ed (2014) 160, 163), the options for the battered woman who kills her abuser have narrowed even further in our law. Burchell (at 333) posits that the defence of putative private defence could provide a solution to this dilemma:

'[T]he subjective approach taken by the courts to the defence of putative private defence – a defence excluding the knowledge of unlawfulness aspect of intention – may arguably be better adapted to providing a just outcome for predicaments of ongoing domestic or other abuse rather than the inherently objective defence of private defence...'

However, the usefulness of putative private defence may be questioned in this context. As was illustrated by the *Engelbrecht* case, typically the victim of abuse is not unclear or genuinely mistaken about the lawfulness of her actions, and so it is difficult to see how the use of this defence will provide much assistance to this particular offender (as opposed to the defence of non-pathological incapacity based on provocation or emotional stress, as Burchell points out (ibid)). The possibility of the defence being used successfully is all the more unlikely if the formulation of 'rational thought' employed in *Pistorius* is understood to require that the accused can only rely on putative private defence if her mistake about the law is 'rational' as opposed to genuine. The *Oxford Concise Dictionary* 8ed *inter alia* uses the terms 'sensible', 'moderate' and 'reasonable' to explain the term 'rational'. Could any of these descriptors be applied to the act of unlawfully killing an abuser?

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## Matters of Interest to Magistrates

### JUDGE MABEL JANSEN: WHAT HAPPENS NEXT?

**Prof Pierre de Vos**

When a judge expresses bigoted views about an entire group of people based on their race, gender, sexual orientation or another such characteristics, it taints not only the judge involved, but also the judicial system in which that judge serves. It is for

this reason that it is untenable for an openly racist, sexist or homophobic judge to remain on the bench.

On Tuesday Gauteng Judge President, Dunstan Mlambo and judge Mabel Jansen agreed to ask the Minister of Justice to place judge Jansen on special leave. This is a necessary first step to safeguard the integrity of the judiciary after the racist opinions posted by judge Jansen on Facebook became widely known over the weekend.

On Facebook, judge Jansen expressed shockingly racist views about black people. Using trigger words known to anyone with a vague understanding of racism (“in their culture”, “they”) she expressed views which would lead any reasonable person to question her ability to make impartial and fair decisions in all cases that come before her.

As the Constitutional Court explained, where there is a reasonable apprehension of bias on the part of a judge, it impacts on the integrity of the judiciary. When a judge says or does something highly problematic it therefore does not only impact on the credibility of the decisions taken by that judge, but also runs the risk of casting doubt in the eyes of ordinary citizens on the ability of the judiciary as a whole to interpret and apply the law and the facts fairly and impartially.

Judges are therefore held to a higher standard in both their professional and private lives than most other individuals. It is expected that judges would act with some wisdom and circumspection, but what can be done if a judge fails to live up to these expectations?

The conduct of judges are regulated by the Code of Judicial Conduct which was adopted in terms of section 12 of the Judicial Service Commission Act.

Article 2(3) of the Code allows anyone to lodge a complaint with the JSC about any “wilful or grossly negligent breach of this Code” by a judge or acting judge. There are several provisions in the Code which could potentially be invoked in an impeachment case against judge Jansen.

Article 4 of the Code requires a judge to uphold the independence and integrity of the judiciary and to maintain an independence of mind in the performance of his or her duties. Where a judge, either in public or private, expresses bigoted generalisations about a group based on their race, gender, sexual orientation and the like, the judge is failing – both as a matter of fact and of perception – to maintain independence of mind. Such action can threaten the independence of the judiciary as a whole.

Furthermore, article 5 of the Code requires a judge:

always, and not only in the discharge of official duties, [to] act honourably and in a manner befitting judicial office. All activities of a judge must be compatible with the status of judicial office.

The posting of messages on Facebook that contain stereotypical, racist generalisations about people is not compatible with the status of judicial office. It will bring the individual judge and the judiciary into disrepute. The Code is clear that the requirement to act honourably extends to the private life of a judge and it would be no defence to argue that the objectionable statements were not made in a court but in a "private" discussion on Facebook. (Of course, only a fool would believe a discussion on a Facebook wall is private.)

Article 7 of the Code further states that:

A judge must at all times: personally avoid and dissociate him- or herself from comments or conduct by persons subject to his or her control that are racist, sexist or otherwise manifest discrimination in violation of the equality guaranteed by the Constitution.

A note to the this article in the Code reminds judges to strive to be aware of and to understand the many differences between persons and to remain informed about changing social attitudes and values. It also reminds judges that the multi-cultural nature of South African society calls for special sensitivity for the perceptions and sensibilities of all who are affected by court decisions.

Any person may lodge a complaint against a judge with the Judicial Conduct Committee (JCC) on the basis of a breach of any of the articles contained in the Code. Where the allegation relates to incapacity on the part of a judge giving rise to a judge's inability to perform the functions of judicial office in accordance with prevailing standards, or gross incompetence, or gross misconduct, as envisaged in section 177(1)(a) of the Constitution, the judge could be impeached.

In the light of the substantive provisions in the Code quoted above, it is difficult to imagine that the JCC will not find that the remarks made by judge Jansen constitute a prima facie case of gross misconduct on the part of the judge. The JCC has in fact on a previous occasion found that racially inflammatory statements made by judge Nkola Motata constituted such a prima facie case of gross misconduct.

The Judicial Services Commission Act creates a two stage process for the disciplining of judges.

First, the Act establishes a Judicial Conduct Committee (JCC), who must receive and consider all complaints against judges. The Committee comprises of the Chief Justice (who is also the chairperson of the Committee), the Deputy Chief Justice, and

four other judges, at least two of whom must be women, designated by the Chief Justice in consultation with the Minister.

The JCC considers a complaint against a judge and decides whether a prima facie case of gross misconduct exist which must be referred to the Judicial Conduct Tribunal for a full hearing.

As the JCC comprises only of judges, the judiciary retains some control over the disciplining of judges, which seems appropriate to me. The Chief Justice will usually have a deciding vote if those members of the JCC present at a meeting are deadlocked. The establishment of Judicial Conduct Committee will therefore remove some of the politics out of the JSC's consideration of complaints against judges.

Where the JCC makes a finding that the complaint prima facie indicates incapacity, gross incompetence or gross misconduct on the part of the judge, the JCC may refer the matter to the Judicial Conduct Tribunal (JCT) or may decide that it does not constitute an impeachable offence, in which case it will refer it to the Chairperson (usually the Chief Justice) for an inquisitorial inquiry. In the latter case the Chairperson may then impose remedial steps on the judge after conducting a hearing.

If the JCC decides that there is a serious case to answer that may lead to impeachment (as in all probability would be the case regarding judge Jansen) it will refer the matter to the Judicial Conduct Tribunal (JCT) which consists of two judges, one of whom must be designated by the Chief Justice as the Tribunal President; and one person who is not a judge but whose name appears on a list of persons who have been approved by the Chief Justice, acting with the concurrence of the Minister of Justice. The JCT is therefore dominated by judges — not by politicians or non-judges.

The JCT will then hear evidence and in an inquisitorial process try to determine where the truth lies. The aim would be to get to the truth behind the complaint and there would be no onus on any of the parties to prove or disprove any fact. In other words, the formal rules that apply in an accusatorial system would not apply and the aim of such an inquiry would be to get to the bottom of the complaint against the judge.

This is important as this would make it impossible for the Tribunal to reject a complaint merely because a judge provides a different version of events than the complainant or claims that his or her intention was not to act in breach of the Code. At such a hearing the judge would be able to lead evidence and have witnesses cross examined. The Tribunal may also subpoena witnesses and order them to produce any documents relevant to the inquiry.

However, at the moment it will not be possible for the JCT to hear the case of judge Jansen as an appeal is pending to the Constitutional Court about the constitutional validity of the JCT.

This appeal was lodged by two judges of the Constitutional Court – Nkabinde J and Jafta J – who were called to testify at the Tribunal set up to try Western Cape Judge President John Hlophe. One of the arguments advanced by the Justices is that section 24 of the Judicial Service Commission Act was unconstitutional because it permitted a prosecutor to be involved in the collection and leading of evidence before the JCT. This, they argue, is in breach of the doctrine of the separation of powers and affects judicial independence.

The Supreme Court of Appeal (SCA) dismissed their case in March, but as it is being appealed to the Constitutional Court, the JCT cannot hear a case referred to it by the JCC until the Constitutional Court has dealt with the matter and has answered the question of whether the JCT is unconstitutional or not.

In terms of section 177(3) the President is empowered to suspend the judge while the process before the JCC and JCT is underway, but only on the advice of the JSC.

After the JCT eventually hears the case, it would have to report to the properly constituted JSC on its findings and would also have to provide the JSC with all the relevant documents relating to the case. The JSC would then be empowered to decide to accept or reject the findings of the Tribunal as the JSC is the body constitutionally required to decide whether it wants to recommend impeachment of a judge to the National Assembly.

It would not be easy for the full JSC to reject the findings of the Tribunal as this may affect the legitimacy of the JSC in the eyes of the public. If the JSC endorses a finding of gross misconduct against the judge it must recommend that the judge be impeached by the National Assembly.

The support of two thirds of the members of the National Assembly is required to impeach the judge and have him or her removed from office. No judge has ever been impeached in South Africa and removed from office. Will judge Jansen be the first?

**The above article was posted on the Constitutionally Speaking website on 11 May 2016**.

## A Last Thought

**On Truth**

There is beauty in truth, even if it's painful. Those who lie, twist life so that it looks tasty to the lazy, brilliant to the ignorant, and powerful to the weak. But lies only strengthen our defects. They don't teach anything, help anything, fix anything or cure anything. Nor do they develop one's character, one's mind, one's heart or one's soul.

José N. Harris