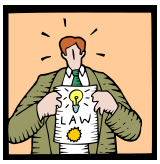
e-MANTSHI

A KZNJETCOM Newsletter

September 2016: Issue 124

Welcome to the hundredth and twenty 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. 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 Social Development has in terms of section 306 of the Children's Act, 2005 (Act No. 36 of 2005), amended regulation 107 in respect of fees payable to accredited child protection organizations or adoption social workers in respect of an adoption. The notice to this effect was published in Government Gazette no 40243 dated 2 September 2016. The following maximum fees have been determined:

(a) Group orientation - R305. 00 per session
(b) Interview or counselling (maximum of four hours) - R305. 00 per hour
(c) Home visits (maximum four hours) - R305.00 per hour
(d) Home study report - R609.00 per report
(e) Court processes - R609.00 per day
(0 Birth registration - R207.00 per hour
(g) Administration costs - R207.00 per hour
(h) After care services - R609.00 once off payment
(i) Child study report - R553.00 per report
(j) Origin inquiry/tracing - R200 per hour

2. An explanatory memorandum has been published in respect of a Judicial Matters Amendment Bill in Government Gazette no 40274 dated 16 September 2016. The Bill intends to amend a number of acts including the Magistrates' Act, 1944, the Criminal Procedure Act,1977 and the Magistrates Act,1993. Some of the proposed amendments are as follows:

The Magistrates' Courts Act, 1944, so as to-

(i) further regulate the benefits of magistrates who are required to dispose of proceedings which were not disposed of on vacation of the office of magistrate; and

(ii) further provide for the appointment of magistrates of regional divisions to adjudicate on civil disputes;

The Criminal Procedure Act, 1977, so as to-

(i) further regulate the prescription of the right to institute prosecutions;

(ii) further regulate the availability of certain witnesses in criminal proceedings;

(iii) further regulate the competency or compellability of witnesses to give evidence; and

(iv) effect technical corrections;

The Magistrates Act, 1993, so as to -

(i) effect technical corrections;

(ii) further regulate the composition of the Magistrates Commission; and

(iii) extend the age of retirement of magistrates;

The Bill can be accessed at the following website:
http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160818JMAB_BILL.pdf

Recent Court Cases

1. **S v VILAKAZI 2016 (2) SACR 432 (GP)**

Where an accused has been convicted on a single charge of possession of cocaine and heroin in terms of section 4(b) of Act 140 of 1992 a court cannot impose a separate sentence in respect of each drug: such amounts to an irregularity.

Ranchod J (Mabuse J concurring):

[1] This matter lay before me as a special review in terms of s 304 of the Criminal Procedure Act 51 of 1977 (CPA).

[2] The accused was arrested on the strength of a J50 warrant in terms of s 43 of the CPA on a charge of possession of drugs in terms of the Drugs and Drug Trafficking Act 140 of 1992 (the Act), viz 25 units of cocaine, which is listed in part II of sch 2 to the Act as a dangerous dependence-producing substance, and four units of diacetylmorphine (heroin) — listed in part III of sch 2 as an undesirable dependence-producing substance.

[3] He was brought before the magistrates' court on 19 March 2015 where he was legally assisted by one Ms De Klerk on instructions from the Legal Aid Board.

[4] The charge preferred against the accused was in terms of s 4*(b)* read with ss 1, 13, 17 – 19, 22 – 25 and s 64 of the Act — possession of drugs. Section 4 (read with s 13*(d)*) of the Act prohibits the use or possession of:
'(a) (A)ny dependence-producing substance; or
(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance, ...'
The section goes on to list the circumstances in which possession or use of the specified drugs is permitted. Section 13*(d)* provides that any person who contravenes a provision of s 4*(b)* shall be guilty of an offence. The penalty clause is contained in s 17 of the Act, and the relevant part is:
'Any person who is convicted of an offence under this Act shall be liable —
. . .
(d) in the case of an offence referred to in s 13*(b)* or *(d)*, 14 or 15, to such fine as the court may deem fit to impose, or to imprisonment for a period not exceeding 15 years, or to both such fine and such imprisonment; . . . .'

[5] The accused pleaded guilty to the offence and his legal representative handed in a prepared statement in terms of s 112(2) of the CPA. It is clear from the statement that he pleaded guilty to one count of being in possession of both types of dependence-producing substance simultaneously, namely dangerous (cocaine) and undesirable (heroin).

[6] The learned magistrate accepted the plea of guilty and sentenced the accused as follows:

'Count one: cocaine: (f)ined with R4000 or 15 months' imprisonment. A further R2000 or 18 months' imprisonment wholly suspended for five years on condition that accused is not convicted of possession or use of drugs or dealing in drugs, committed during period of suspension.

Count one: heroin: fined R2000 or 18 months' imprisonment. A further R1000 or nine months' imprisonment wholly suspended for five years on condition that accused is not convicted of possession, use or dealing in drugs, committed during period of suspension.'

The accused paid the total amount of the fine of R6000.

[7] Acting senior magistrate Ms Du Preez, who perused this matter for judicial quality-control purposes, concluded that the presiding magistrate had committed an irregularity. She is of the view that there are two aspects of the sentence imposed which should be reviewed. First, instead of imposing only one sentence for the possession of the drugs, the magistrate sentenced the accused for the possession of the two drugs separately which constitutes an irregularity. Secondly, when imposing the suspended part of the sentence the magistrate also added a condition that the accused should not be convicted of dealing in drugs during the period of suspension of the sentence. I am grateful to Ms Du Preez for her comments and to Mr Sibara and Mr Van Jaarsveld, state advocate and Deputy Director of Public Prosecutions respectively, for their helpful memorandum. It is pointed out in Hiemstra *Criminal Procedure* under the discussion of s 297 of the CPA that courts should guard against the possibility that a heavy suspended sentence for dealing in drugs can be put into operation by a later minor contravention. In *S v Ntele en 'n Ander* J 1986 (2) SA 405 (NC) at 408B – G the court expressed the view that whilst it is permissible to combine possession with dealing when suspending a part of the sentence the condition should be qualified in such a way that the suspended sentence could only be put into effect where the accused was sentenced to unsuspended imprisonment of more than six months in respect of the subsequent conviction. I respectfully agree with that view.

[8] In this matter before me the accused was found guilty of the mere possession of the illegal drugs and not dealing in the substance (which is a contravention of s 5) for which direct imprisonment under s 17*(e)* is mandatory. If it were a conviction for dealing in a substance and the condition includes possession it would in my view be fair as the penalty provisions for possession are fewer than those for dealing in drugs.

[9] In view of the irregularity referred to earlier and what I have said above the sentence should be set aside and replaced with an appropriate one. The conviction is in order.

[10] I accordingly propose the following order:
1. The conviction is confirmed.
2. The sentence is set aside and replaced with the following sentence:
'The accused is sentenced to a fine of R4000 or 36 months' imprisonment of which R1000 or 12 months' imprisonment is wholly suspended for 5 years on condition that the accused is not convicted of possession or use of drugs or dealing in drugs committed during the period of suspension. The suspended sentence is to be put into effect only if the accused were sentenced to unsuspended imprisonment of more than 6 months in respect of the subsequent conviction.'
3. The amount of R3000 paid by the accused in excess of the amount referred to in 2 herein shall be refunded to him.

2. S v SKHOSANA 2016 (2) SACR 456 (GJ)

The provisions of s 37(1)(d) of the Criminal Procedure Act 51 of 1977, which permits a police officer to take a photographic image of any arrested person is not unconstitutional.

Dosio AJ (Weiner J concurring):

Introduction
[1] The appellant was arraigned in the Kempton Park regional magistrates' court on a charge of housebreaking with intent to steal and theft. The appellant was accused 2. He pleaded not guilty and was found guilty. He had legal representation. He was sentenced to eight years' imprisonment.

[2] Leave to appeal, on petition to this court, was granted to the appellant against conviction and sentence.

Ad conviction
[3] It is trite law that the onus rests on the state to prove the guilt of the accused beyond reasonable doubt. If the version of the appellant is reasonably possibly true, he must be acquitted.

[4] In considering the judgment of the court a quo, this court has been mindful that a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record reveals that those findings are patently wrong. 1

[5] In *S v Monyane and Others* 2008 (1) SACR 543 (SCA) para 15 the learned Ponnan JA stated:
'This court's powers to interfere on appeal with the findings of fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect.

In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (*S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645*e – f*).'

[6] At issue in this appeal, is whether the appellant was one of the housebreakers who entered into the complainant's house. The complainant had CCTV video surveillance which captured the perpetrators entering his house. A photograph was also taken of the appellant and his co-accused on the cellphone of Mr Smart (the security officer), upon I their arrest.

[7] Counsel for the appellant submitted that the court a quo erred in finding the appellant guilty in that:
[7.1] The learned magistrate did not objectively assess the evidence.
[7.2] The learned magistrate descended into the arena by questioning the appellant's co-accused.
[7.3] The appellant's rights in terms of s 35 of the Constitution were not explained prior to the appellant's photo being captured on the cellphone of the security officer, thereby resulting in inadmissible evidence being accepted by the court a quo.

The learned magistrate did not objectively assess the evidence
[8] During the trial in the court a quo, the admissibility of the video footage and cellphone photograph was not challenged.

[9] The evidence depicted on the CCTV video as well as the cellphone photograph is real evidence.

[10] In *S v Ramgobin and Others* 1986 (4) SA 117 (N), the learned Milne JP held that for videotape recordings to be admissible in evidence, it must be proved that the exhibits are original recordings and that there exists no reasonable possibility of interference with the recordings.

[11] In this case, there was no cross-examination disputing that the complainant was the author of the CCTV footage, or that there was interference with the original recording. The CCTV footage was compiled and downloaded by the complainant prior to showing it to Gregory Mokgoswane (the police officer) and the security officer. There is no evidence of tampering with the CCTV footage and accordingly, the reliability of the evidence was furnished by the viva voce evidence of the complainant, which corroborated the visuals scrutinised on the CCTV footage. The video stills depict clearly the clothing of the people who entered the house. In the absence of any evidence disputing the authenticity of this recording, this court finds that the aforesaid video evidence was correctly admitted by the court a quo.

[12] In order for a cellphone photo to become relevant, it should firstly have a bearing on the issues to be decided by the court. Secondly, it should be verified as being a true image of what was captured by the person who took it. Thirdly, it should be clear and not edited. Fourthly, it should be presented in court to be viewed. Fifthly, the device on which the photo was captured should be reliable. If all these factors are present, the court can take judicial notice of it and admit it. In this case, the clothing the perpetrators were wearing was crucial. The security officer confirmed he took the photo and that it depicted the type of clothing the appellant and his co-accused were wearing. The photo was clear and it was presented in court for all to see. The accuracy of the security officer's I cellphone was not disputed; accordingly, this court accepts that it captured and stored the photo accurately.

[13] The complainant was an honest witness. The court a quo viewed the CCTV footage and the cellphone photograph and placed on record that the clothing that the appellant and his co-accused were wearing in J the photograph was indeed identical to the clothing of the perpetrators seen on the CCTV footage. This was corroborated both by the security and police officers. It was placed on record that the appellant was wearing a white shirt with an emblem resembling an eagle. There was accordingly sufficient corroboration regarding the attire of the appellant from all three state witnesses for the court a quo to have made these findings of fact.

[14] The appellant's co-accused in fact admitted that his clothing was the same as that worn by the perpetrator on the CCTV footage as well as the photo depicted on the cellphone. This aspect of the appellant and his co-accused wearing the same clothing as depicted on the CCTV footage was never disputed by either of the two attorneys. On the contrary, accused 1 confirmed during cross-examination that the appellant was wearing a shirt with a decoration resembling an eagle.

[15] The complainant testified that when he spoke to the appellant and his co-accused in the police van, they admitted that they had entered his property. They informed him that they were playing soccer somewhere and chose to break into a house by forceful entry. This was corroborated by the police officer who also heard them saying they were 'sorry' and that they were known to each other from playing soccer together.

[16] The appellant was pointed out to the security officer by an unknown man. The appellant was walking in Monument Road when he was arrested. This is approximately 250 metres from the complainant’s house. A short distance further in Viskal Street the appellant's co-accused was pointed out and was arrested. There is some discrepancy between the version of the security officer who says the appellant and his co-accused were walking towards each other, as compared to the police officer, who says he first arrested the appellant and then arrested his co-accused who was walking towards the veld. However, this court does not view this as a

material discrepancy. Both witnesses were honest and this court finds their evidence reliable and trustworthy.

[17] The evidence of the appellant is very short. His version is one of a complete denial. During cross-examination by the state, the appellant was confronted with the fact that his attire and that of his co-accused were the same as those appearing on the CCTV footage. His response was simply, 'I do not know.' The appellant's version of happening to be at the wrong place at the wrong time is simply not probable and the court a quo was correct in rebutting his version as false.

The learned magistrate descended into the arena by questioning the appellant's co-accused

[18] The questions asked by the court a quo of the appellant were very short. The court a quo sought clarification in respect of how the appellant came to Kempton Park, at which station he alighted, what time he was arrested and what time I he had an appointment with Thembi. It was a total of six questions.

[19] The questions asked by the court a quo of the appellant's co-accused were not grossly irregular. They were merely questions which pertained to what was seen on the CCTV footage. These questions should have been posed by the defence attorneys and the state. This court finds the questions asked by the court a quo were essential for a just decision of this case. Subsequent to the court a quo questioning the appellant's co-accused, both the defence and the state had an opportunity to ask further questions, yet none were asked.

[20] For an irregularity to vitiate the proceedings there must be a failure of justice. 2

[21] In the case of *S v Tyebela* 1989 (2) SA 22 (A), the learned Milne JA stated at 29H that an accused person is entitled to a fair trial which —

'presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires'.

[22] In *S v Le Grange and Others* 2009 (1) SACR 125 (SCA) (2009 (2) SA 434) the learned Ponnan JA in para 21 stated that:

'It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. . . . Fairness and impartiality must be both subjectively present and objectively demonstrated . . . bias denotes a state of mind that is in some way predisposed to a particular result . . . .'

[23] In *S v May* 2005 (2) SACR 331 (SCA) (2005 (10) BCLR 944; [2005] 4 All SA 334) para 28 the learned Lewis JA stated that:

'Judicial officers are not umpires. Their role is to ensure that the parties' cases are presented fully and fairly, and that the truth is established. They are not required to

be passive observers of a trial; they are required to ensure fairness and justice, and if that requires intervention then it is fully justifiable.'
[24] The questions posed by the court a quo to the appellant's co-accused were merely asked to obtain clarification. This court does not find that the court a quo lost its impartiality towards, or was biased against, either the appellant or his co-accused. In fact, the record shows that whilst asking questions pertaining to what appeared on the CCTV footage, the appellant's co-accused stated it was not he, to which the court a quo replied:
'I am not saying it is you, I am saying the same person that appears there on the CCTV was wearing the same thing as yours on that particular day, but the face is not clear.' 3

[25] For there to have been serious bias, this court would have expected the court a quo to have remarked: 'It is you.' However, that is not what transpired. In the absence of the appellant delineating clearly what prejudice accrued to him personally, as a result of the questions posed by the court a quo to his co-accused, this court finds the questions posed did not negatively impact on the impartiality of the court a quo. Accordingly, no prejudice to the appellant ensued. This court cannot find that the court a quo was predisposed to a particular result or that the court had prejudged the matter. On the contrary, this court finds the questions posed were fully justifiable to ensure fairness and justice.

[26] It is unfortunate that the court a quo commenced the questions to the appellant's co-accused by stating: 'This guy is just wasting my time.' This court would like to utter a salutary warning that presiding officers should always exercise the utmost patience and respect when questioning any witness or accused in a trial. Words or phrases which are used with the intention of rudeness or disrespect could in certain instances amount to an irregularity, thereby vitiating the proceedings. This court does not believe this case is one of those extreme situations.

The appellant's rights in terms of s 35 of the Constitution were not explained **prior to the appellant's photo being captured on the cellphone of Mr Smart, thereby resulting in inadmissible evidence being accepted by the court a quo**
[27] The admissibility of unconstitutionally obtained evidence is regulated by s 35(5) of the Constitution. The section provides as follows:
'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

[28] In terms of s 37(1)*(d)* of the Criminal Procedure Act 51 of 1977 E (CPA), any police officer may 'take a photographic image or may cause a photographic image to be taken of' any arrested person. Counsel for the appellant argued that the appellant's constitutional rights were not explained prior to the photo being taken. Counsel for the respondent argued that although an accused is usually informed of

his constitutional rights prior to his arrest, the complainant and the security officer, who were involved in the arrest, could not have had knowledge of such rights or the necessity of explaining them to the appellant.

[29] Although this photo was taken by a security officer and not a police officer, this court finds the photo aided the state witnesses in explaining their testimony as to what the appellant and his co-accused where wearing. This photo substantiated the testimony of these witnesses and became probative evidence.

[30] The admissibility of the photograph was not disputed in the court a quo. Accordingly, the evidence was not unconstitutionally obtained. Section 37(1) *(d)* of the CPA is not unconstitutional, and consequently not detrimental to the administration of justice. The court a quo was correct in attaching the necessary evidential weight to the contents of the photograph.

[31] After a thorough reading of this record, this court has no doubt as to the correctness of the court a quo's factual findings. I can find no misdirection which warrants this court disturbing the findings of fact or credibility that were made by the court a quo. The state proved the guilt of the appellant beyond reasonable doubt, and the court a quo correctly rejected the version of the appellant as not reasonably possibly true.

Ad sentence

[32] It is trite that in an appeal against sentence, the court of appeal should be guided by the principle that punishment is pre-eminently a matter for the discretion of the trial court and the court of appeal should be careful not to erode that discretion.

[33] A sentence imposed by a lower court should only be altered if:
[33.1] An irregularity took place during the trial or sentencing stage.
[33.2] The trial court misdirected itself in respect of the imposition of the sentence.
[33.3] The sentence imposed by the trial court could be described as disturbingly or shockingly inappropriate.

[34] The trial court should be allowed to exercise its discretion in the imposition of sentence within reasonable bounds.

[35] As was stated in the decision of *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220; [2001] ZASCA 30) para 12:
'A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court.'

[36] In the case of *S v Pillay and Others* 1977 (4) SA 531 (A) at 535E – G, the court held that:
'As the essential inquiry in an appeal against sentence, . . . is . . . not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably.'

[37] In *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) (2000 (1) SA 786; [2000] 1 All SA 229) at 588*a* – *b*, the Supreme Court of Appeal stated that an appeal court can only interfere with a sentence of a trial court in a case where the sentence imposed was disturbingly inappropriate.

[38] The following aggravating factors are present:
[38.1] The appellant was convicted of housebreaking in 2004 and 2008. He received six years' imprisonment in 2004 and six years' imprisonment in 2008, of which three years were suspended. Both previous convictions originate in Kempton Park.
I [38.2] The appellant is an unrepentant and incorrigible criminal.
[38.3] The items which were valued at R6000 were not recovered.

[39] The personal circumstances of the appellant are the following:
[39.1] He was 29 years of age, single and unemployed.
[39.2] He spent seven months in custody awaiting the completion of his trial.

[40] No misdirection was alluded to, and neither can this court say that in light of the similar previous convictions that the sentence imposed by the court a quo induces a sense of shock. The sentence imposed is not out of proportion to the gravity of the offence. In addition, the custodial sentences imposed on the previous convictions did not deter the appellant.

[41] In the result, having considered all the relevant factors and the purpose of punishment I consider eight years' imprisonment to be an appropriate sentence.

[42] In the premises I propose the following:
The appeal is dismissed both in respect of conviction and sentence.

1 See *S v Francis* 1991 (1) SACR 198 (A) at 198*j* – 199*a* and *S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645*e* – *f*.
2*S v Moodie* 1961 (4) SA 752 (A).
3 Page 38 line 19.

From The Legal Journals

McQuoid-Mason, D

"May doctors refuse to treat rape survivors in order to avoid having to give evidence in court?"

May 2016, Vol. 9, No. 1 South African Journal of Bioethics and Law.

Abstract

It has been reported recently that private doctors often refuse to treat rape survivors because they do not want to give evidence in court. Private doctors and hospitals must treat patients in emergency situations, but may otherwise refuse to treat patients provided such refusal is not unconstitutional. Rape survivors require emergency medical treatment and should not be refused treatment by private doctors and hospitals because practitioners do not wish to give evidence in court. Such refusal is unconstitutional. Sexual assault evidence kits may be used by both private doctors and hospitals. Given the high rate of sexual violence in South Africa it is recommended that both private and state doctors should have stocks of sexual assault kits, and the National Police Commissioner's national instruction for providing assistance to survivors of sexual offences. District surgeons 'on call' must treat rape survivors as requiring emergency medical treatment. They may not defer seeing them until the next day as this violates their constitutional right to dignity and exposes them to secondary victimisation.

Bauling, A

Maternity,paternity and parental leave and the best interest of the child: MIA v State Information Technology Agency (Pty) Ltd [2015] JOL 33060 (LC)

Obiter Volume 37 January 2016

Abstract

Since the enactment of Chapter 19 of the Children's Act 38 of 2005 (hereinafter "Children's Act") and the decision in Ex parte WH (2011 (6) SA 514 (GNP)) it has become possible for homosexual partners, or spouses in terms of a civil union (as regulated by the Civil Union Act 17 of 2006 (hereinafter "Civil Union Act")) to enter into surrogate-motherhood agreements. The effect of such an agreement would be that the spouses/partners become the biological parents of the child born of surrogacy. All children, regardless of their parentage or manner of conception, have the constitutionally enshrined right to "family care or parental care" (s 28(1)(b) of the Constitution of the Republic of South Africa, 1996 (hereinafter "Constitution")) and the best interests of the child should always be regarded as "of paramount importance in every matter concerning the child" (s 28(2)). It is in light of the acknowledgment of these rights of both homosexual parents, and children begotten from surrogacy, that the case of MIA v State Information Technology Agency (Pty) Ltd ([2015] JOL 33060 (LC) (hereinafter "MIA")) came before the Labour Court.

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

Contributions from the Law School

AUTHORITATIVE PRONOUNCEMENT ON THE PROPER INTERPRETATION AND IMPLEMENTATION OF THE AARTO : FINES4U CC AND ANOTHER V JMPD AND OTHERS 2014 (4) SA 89 (GJ)

The roll-out of the AARTO (a special dispensation aimed at, inter alia, promoting road traffic quality by providing for a scheme to discourage road traffic contraventions, facilitating the adjudication of road traffic infringements, and implementing a points demerit system) as a pilot project in the City of Johannesburg took a different turn when its proper interpretation and implementation became a subject of litigation in a court of law. The AARTO was passed into law in 1998, but its implementation came in phases. The first phase entailed the commencement of sections 1 - 16 and 36 effectively from 1 July 2007. The remainder (sections 17 – 35) is currently being piloted in the City of Tshwane and Johannesburg before extending its operation to the rest of the country. The pilot project has been running

from 1 July 2008 in Tshwane and from 1 November 2008 in Johannesburg. In 2010, proclamations were issued extending the full operation of the AARTO in metropolitan municipalities and the rest of the country, but these were subsequently withdrawn following a court challenge by the City of Cape Town over little guidance given to municipalities to assist them in preparing for the implementation of the said Act (see R Meintjies 'No entry – for the time being' (October 2010) Without Prejudice 50). Since then, there has been no indication as to when the AARTO will fully come into operation throughout the country.

Be that as it may, the AARTO continues to be implemented as a pilot project in Tshwane and Johannesburg. As a result, the South Gauteng High Court has had an opportunity to pass a judgment on the proper interpretation and implementation of the AARTO in Fines4U CC and Another v Johannesburg Metropolitan Police Department and Others 2014 (4) SA 89 (GJ) . In this matter, the first applicant, a close corporation involved in the business of administering traffic offence notices on behalf of its clients (which includes the second applicant), was served with five infringement notices in respect of the vehicles registered in the name of the second applicant. On 25 October 2012, in compliance with s 17(f)(i) of the AARTO, one Ms Cornelia van Niekerk, a sole member of the first applicant, acting in her capacity as the proxy for the second applicant, elected to make written representations at the JMPD offices. Due to Ms van Niekerk's past experience of the rejection of her representations, the next day she made an election on behalf of the second applicant to be tried in court as per s 17(1)(f)(iv), but her election forms were not accepted by the JMPD employees. Ms van Niekerk did not receive any response to her written representations, and in mid-November 2012 she decided to bring an application to court. This galvanised the JMPD into action, and, among the other steps taken, all five infringement notices were withdrawn.

Although the withdrawal of the infringement notices had the effect of rendering moot the issues raised in the application, the court nonetheless exercised its discretion and found that it was in the interests of justice that the issues be adjudicated upon for purposes of attaining certainty in the interpretation and implementation of the AARTO (para 20). The court was then called upon to decide five issues.

The first issue was whether a proxy is entitled to make an election that a corporate-body infringer be tried in court in accordance with s 17(1)(f)(iv) of the AARTO. The court held that this option was available to any infringer, including a corporate body infringer acting through a human representative who is its proxy (para 26).

The second issue was whether the first and/or third respondent (i.e. the JMPD and the City of Johannesburg Metropolitan Council respectively), as the issuing authority, is obliged to give a written reply to all representations made. In essence, this issue raised the question of a proper interpretation of s 18 of the AARTO, given the conflicting wording of s 18(4) and (5). Section 18(1) provides that'[a]n infringer who has been served with an infringement notice alleging that he or she has committed a minor infringement, may make representations with respect to that notice to the Agency (the Road Traffic Infringement Agency (RTIA) – my emphasis)'. Section 18(4)(a) goes further and requires the representations officer to inform the issuing

authority concerned if there are representations that indicate reasonable grounds as to why the infringer should not be liable for the penalty received. Upon receipt of these representations, section 18(4)(b) requires that the issuing authority '…must reply thereto within the prescribed time'. Section 18(5)(a) then requires that a representations officer 'must duly consider the representations and any reply thereto …' from the issuing authority.

The above provisions gave rise to the question whether according to section 18, the JMPD, as the issuing authority, was obliged to give its written reply to all representations made. It was contended on behalf of the applicants that the words 'must reply' in section 18(4)(b) indicate that the reply from the issuing authority was peremptory rather than directory. On the other hand, the respondents argued that the words 'any reply' in section 18(5)(a) indicated that the provision was directory. The court acknowledged that the word 'must' does not always have to be construed as peremptory depending on the circumstances (para 30). The court reasoned that:

'…[t]he sensible construction … is that the issuing authority may reply, but if it does so, must do so within the prescribed time. That construction would sit comfortably with the words 'any reply' in s 18(5)(a). To adopt the construction urged upon me by Mr McNally would mean that the words 'any reply' should have read 'the reply'. Furthermore, one may imagine that there could be thousands of representations made, to which the issuing authority may or may not wish to reply. Should it choose not to reply, the representations alone will be considered by the Agency. I do not believe that it could have been the intention of the legislature to burden the issuing authority with the obligation to reply to each and every representation, whether it wishes to do so or not.'

The third issue was whether the representations were considered by a proper representations officer. In this regard, the court held that the appointment of employees of the issuing authority (in this case, the JMPD) as representations officers of the RTIA was in contravention of the Minister's determination and the separation of powers envisaged in the AARTO (para 35). Therefore, this finding reinforces the Minister's determination in terms of which the requirements which must be met by a person who wishes to be appointed as representations officer are set out (see GN 258 GG 33038 of 19 March 2010). The requirements are: that the candidate for appointment must: (a) be the holder of at least a three year qualification in law from a recognised tertiary institution; or (b) have a three (3) year qualification in traffic or police management or equivalent qualification, from a recognised tertiary institution; or (c) have practiced as an attorney or advocate, traffic officer, magistrate, prosecutor or police officer for an uninterrupted period of at least three (3) years; and (d) not be employed as a magistrate, prosecutor, police officer or by an issuing authority; and (e) be in possession of at least a code B valid driving licence free of endorsements.

The fourth issue was whether there was a failure to register the notices on the National Contraventions Register (NCR) - a system to which infringement notices are registered. The court held that since it was common cause that the National Traffic Informaton System (eNATIS) – a national register for motor vehicles kept and

administered by registering authorities – was used by the JMPD as the NCR system from 22 December 2012, that showed that the infringement notices issued before then were not registered on the NCR as required by the AARTO (para 37).
The fifth issue was whether the cancellation of the five infringement notices was lawful. In reaching its conclusion, the court relied on the absence of any prejudice caused by the cancellation to the applicants even though that decision was made by the employees of the JMPD who ought not to have been appointed as representations officers of the RTIA. For this reason, the court refused to set aside the cancellation notices (para 40).
In conclusion, it would seem that a judgment such as the present is indeed in sync with the objective of running the implementation of the AARTO as a pilot project in Tshwane and Johannesburg. So doing assists in identifying the problematic aspects in the implementation of the AARTO before the nation-wide roll-out. The judgment in Fines4U certainly bodes well for a proper interpretation and implementation of the AARTO.

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Matters of Interest to Magistrates

Virtual evidence in courts –a concept to be considered in South Africa?

By Dr Izette Knoetze

Courts are pre-eminently human creations and serve two primary functions in society, namely they resolve disputes and deliver justice to litigants to the degree possible in a system conducted by fallible people (FI Lederer 'The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High Technology Courtrooms' (1999) *Faculty Publication Paper* 212 at 835) (www.scholarship.law.wm.edu, accessed 1-9-2016). A virtual court is the use of technologies that provide for hearing and trials with participants in distant areas, in which the physical location of the courtroom does not dictate the process or the conduct of the proceedings. Communications between the parties are conducted over high-speed, high-quality electronic networks that permit interactive data, voice and visual transmissions. According to Keith Kaplan ('Will Virtual Courts Create

Courthouse Relics?' (2013) 52(2) *The Judges' Journal* 32) a virtual court is a conceptual idea of a judicial forum that has no physical presence but still provides the same justice services that are available in courtrooms. Remote appearances and testimony are the key elements in virtual trials and virtual courtrooms.

Initially remote witness technology (first, closed circuit television (CCTV) and later videoconferencing) was adopted as a means of taking evidence from children, or other vulnerable parties, such as victims of sexual assault, to shield them from the physical presence of the accused in the courtroom and the risk of intimidation. While it is still most commonly used to enable vulnerable witnesses to give evidence from a location outside the courtroom, videoconferencing could enable other witnesses to give their evidence from a location outside the courtroom for a variety of other reasons, such as cost or convenience.

'Virtual' nature of participation

According to Anne Wallace ('"Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law, Information and Science* 5) 'remote witnesses' tend to fall into two categories. Firstly, there are those for whom physical participation in the courtroom may be quite easily possible and convenient in terms of access, but who are isolated from participation in the physical courtroom in their own interests, such as children and other vulnerable witnesses. They are 'remote' in a physical sense, but not necessarily geographically. The remote witness facility from which they give their evidence is most likely in the same building.

On the other hand, witnesses who give evidence on videoconference for reasons of cost or convenience are usually both physically and geographically remote from the courtroom. The remote witness facility from which they give their evidence may be another courtroom (closer to their work or home), or a public or private videoconferencing facility in that location.

Creating and operating technology in the courtroom

High-technology courtrooms are characterised by one core capability, a multi-faceted technology-based evidence presentation system that consists of a television-based document camera and a display system able to display not only what is placed under the camera, but also and critically, computer output. The computer input may stem from one or more installed desktop units, from a notebook computer and connected temporarily to the display system, or a combination of these. The display system may consist of televisions computer monitors, or large front or rear projection systems. A high-technology court record system and the capability for remote witness testimony by two-way, high-quality videoconferencing is also needed.

Legal framework for remote witness testimony

The two major reasons for the use of videoconferencing to take witness testimony have been firstly, the desire to protect vulnerable witnesses from trauma that they may experience in the physical courtroom, and secondly, the need to find ways to bring information and expertise to a courtroom from a witness located at a distance which makes physical attendance expensive, for example, if the witness resides in a rural area or particularly inconvenient, for instance an expert witness employed as an analyst in a DNA laboratory.

The use of technology in litigation requires that the laws of evidence recognise and provide for the various methods of taking and presenting evidence remotely. The taking of evidence by remote witness technology has largely been addressed in Australia by specific legislation and amendments to court rules.

Most Australian jurisdictions have also implemented legal regimes, which require or enable evidence given by vulnerable classes of witnesses for example children, and victims of sexual assault to give evidence remotely.

In South Africa s 158 of the Criminal Procedure Act 51 of 1977 (CPA) provides that criminal proceedings take place in the presence of the accused. An exception is provided for in s 158(2) (*a*) namely:

‘(2)(*a*) A court may, subject to section 153, on its own initiative or on application by the public prosecutor, order that a witness or an accused, if the witness or accused consents thereto, may give evidence by means of closed circuit television or similar electronic media.

(*b*) A court may make a similar order on the application of an accused or a witness.

(3) A court may make an order contemplated in subsection (2) only if facilities therefore are readily available or obtainable and if it appears to the court that to do so would –

(*a*) prevent unreasonable delay;

(*b*) save costs;

(*c*) be convenient;

(*d*) be in the interest of the security of the State or of public safety or in the interests of justice or the public; or

(*e*) prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

(4) The court may, in order to ensure a fair and just trial, make the giving of evidence in terms of subsection (2) subject to such conditions as it may deem necessary: Provided that the prosecutor and the accused have the right, by means of that procedure, to question a witness and to observe the reaction of that witness.

(5) The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings.'

Section 170A of the CPA provides for evidence through intermediaries.

Use of remote witness testimony in courts

This technology is used to conduct various types of court hearings in Australia, as an alternative to circuit hearings, directions hearings, pre-trial conferences, chamber applications, and applications for special leave to appeal (Wallace *op cit* at 3). In one example, videoconferencing was used as a temporary expedient to bring a magistrate 'on-line' to a country court, when the local magistrate was unexpectedly unavailable to deal with the roll. A magistrate who has finished their local list for the day can also be linked to a busier court elsewhere to assist with its caseload.

Videoconferencing is also being used to provide ancillary services to assist the court process. Thirty four United States (US) district courts, encompassing 60 actual sites, use videoconferencing for prisoner civil-rights-pretrial proceedings. Currently, the US Courts of Appeals for the Second, Tenth and District of Columbia, Circuits use videoconferencing for oral arguments.

The US Supreme Court has accepted, when necessary, child witness testimony via one-way video (*Maryland v Craig* 497 US 836 (1990)). The Florida Supreme Court sustained a robbery conviction based largely on the two-way video testimony of complainants testifying from Argentina (*Harrell v State*, 709 So. 2d 1364 (Fla. 1988)). In determining when the satellite procedure is appropriate, a finding similar to that of r 3.190(J) of the Florida Rules of Criminal Procedure is required. Rule 3.190(J) provides the circumstances under which and procedure by which a party can take a deposition to perpetuate testimony for those witnesses that are unavailable. Thus, in all future criminal cases where one of the parties makes a motion to present testimony via videoconferencing, it is incumbent upon the party bringing the motion to –

- verify or support by the affidavits of credible persons that a prospective witness resides beyond the territorial jurisdiction of the court or may be unable to attend or be prevented from attending a trial or hearing; and
- establish that the witness's testimony is material and necessary to prevent a failure of justice.

If all the above requirements have been adhered to, the trial judge shall allow for the satellite procedure.

- *Expert witnesses*

During the 1998 Australian Institute of Judicial Administration Conference in Melbourne, the State of Victoria demonstrated a two-way connection to its forensic laboratory, illustrating how a forensic chemist, in a laboratory setting, could testify without attending court. I submit that much of expert witness testimony may become remote as it is an effective way to reduce litigation costs.

- *Presiding officers*

Presiding officers may also utilise videoconferencing effectively during trial. In the matter of *United States v Salazar* 44 M.J. 464 (1996), two of its five judges appeared by separate videoconferencing systems.

- *Vulnerable witnesses*

The use of technology may also assist people with hearing, vision, mobility, or other problems. Internet-based videoconferencing proved to be critical in one such US case. With reliance on the judgments in the matter of *Harrell* (*op cit*) and *United States v Gigante* 971 F. Supp. 755, 756 (E.D.N.Y. 1997), a New Jersey Superior Court judge granted a plaintiff's application to testify and observe the trial from his apartment via videoconferencing link over the Internet. The plaintiff who was paralysed from the neck down and breathed with the aid of a respirator, stated that he was too weak to travel from Chicago to New Jersey for his medical malpractice suit.

The abovementioned scenarios are examples of how the use of technology can effectively improve access to justice.

Advantages and disadvantages of remote witness testimony

Lederer notes that, although videoconferencing is highly effective, such testimony is not perfect (*op cit* at 280). Short audio delays that are inherent in the technology prohibit the instant interruptions common in ordinary conversation. A further disadvantage is that, although video resolution and quality are good, extremely rapid movement may not reproduce properly.

Conclusion

Information and communications technologies play a key role in managing case load, publishing information for court users, managing knowledge within the court, supporting the preparation and conduct of litigation and presenting evidence, providing transcripts and preparing and publishing judgments.

It is proposed that South Africa, like Australia, enact legislation which addresses the issue of virtual courts and the use of technology in assisting remote witness testimony.

Technological changes will improve both access to and the efficiency of the justice system and should be embraced by all.

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A Last Thought

[1] 'An important requirement for admission as an attorney or advocate is to be a 'fit and proper' person. Lawyers are also struck from the respective rolls of advocates or attorneys if they cease to be "fit and proper". The requirements of being a "fit and proper" person is not defined or described in the legislation. It is left to the subjective interpretation of and application by seniors in the profession and ultimately the court. In the apartheid years, this requirement was applied arbitrarily, but today the question may be asked why some lawyers who have been found to be "fit and proper" do not act as such. The pre-admission character screening of lawyers seems not to be effective any more. Post admission moral development is imperative'.

[2] A successful practitioner, an attorney or an advocate, should possess and display certain qualities, most of which cannot be acquired through learning. Having these qualities could indicate that a person is indeed a "fit and proper" person for the profession. An appropriate academic training may, however, play a vital part in improving them- as they are "by nature at least latent."

[3] The following are listed as the least of qualities a lawyer should possess:

'Integrity- meaning impeccable honesty or an antipathy to doing anything dishonest or irregular for the sake of personal gain,

- Dignity- practitioners should conduct themselves in a dignified manner and should also maintain the dignity of the court.
- The possession of knowledge and technical skills,
- A capacity for hard work,
- Respect for legal order and
- A sense of equality or fairness'"

Per Legodi J; in *General Council of the Bar of South Africa v Jiba and Others (23576/2015) [2016] ZAGPPHC 829 (15 September 2016)*