e-MANTSHI

A KZNJETCOM Newsletter

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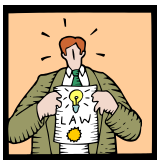
Welcome to the hundredth and twenty sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 National Road Traffic Regulations have been amended by the amendment of Regulation 250 and 293. These amendments have been promulgated in Government Gazette no 40420 dated 11 November 2016. Regulation 250 now reads as follows:

"250. School children and persons not to be conveyed in goods compartment of a motor vehicle for reward

(1) No person shall on a public road convey school children in the goods compartment of a motor vehicle for reward.

(2) No person shall convey any other person in the goods compartment of a motor vehicle for reward: Provided that the provisions of this sub regulation shall not apply in respect of a vehicle which complies with the provisions of the NLTA.".

The amended Regulation 250 shall come into operation 6 months from the date of publication in the Gazette (11/05/2017).

Reg 293: Goods vehicles with a GVM of more than 3 500 kg up to 9 000 kg are now limited to a maximum speed of 100 km/h – Implementation date - 11/11/2016. *The maximum general speed limit of 120 km/h was applicable to the vehicles up to 11/11/2016.*

Note the provisions on speed governors that will come into force on 1 December 2016 (Reg 215, as published in GG 38142 on 31 Oct 2014).

Speedometers

"Reg 215. *(*1) No person shall operate on a public road a motor vehicle which is designed for or capable of reaching a speed of 60 kilometres per hour or more on a reasonably level road, unless such vehicle is equipped with a speedometer which is in a good working order.

(1A) No person shall operate a–

(a) minibus;

(b) midibus;

(c) bus, or

(d) goods vehicle the gross vehicle mass of which exceeds 3 500 kilograms,

first registered after 1 December 2016, unless such minibus, midibus, bus or goods vehicle is fitted with a speed governor, restricting the speed of such motor vehicle to the speed limits as contemplated in regulation 293".

Recent Court Cases

1. **S v MOTHWA 2016 (2) SACR 489 (SCA)**

The doctrine of recent possession is not limited to a specific period but is dependent on the circumstances and particular nature of the property involved.

The appellant was found in possession of a motor vehicle three days after it had been taken in the course of a robbery from a man who had rented the vehicle from a car-hire company. The appellant testified that he had been asked to take the car to Botswana by one Charles. This person told him that it belonged to his nephew and gave to him the registration papers as well as an affidavit permitting him to drive it. The registration details of the vehicle had been changed since the robbery. In

convicting the appellant on a charge of robbery, the court a quo relied on the doctrine of recent possession. It appeared that no investigation had been conducted to verify the information provided by the appellant.
Held, that there was no rule about what length of time qualified as recent for the purposes of the doctrine of recent possession. It depended on the circumstances generally and, more particularly, on the nature of the property stolen. Properties such as money and motor vehicles were easily circulated. (Paragraph [9] at 492*e*–*f*.)
Held, further, that the fact that the appellant was arrested three days after the robbery and had immediately given an explanation for his possession to the investigating officer, which was supported by other documents, made his version more probable. The evidence of the appellant at the trial had also been clear, consistent and straightforward and could not be rejected as not being reasonably possibly true. In the circumstances the state had failed to prove his guilt beyond a reasonable doubt and the appeal against the conviction of robbery had to succeed. (Paragraph [11] at 492*g/h*–493*b*.)

2. S v GAMA 2016 (2) SACR 530 (GJ)

It is irregular for a presiding officer to not permit cross-examination on an unsigned statement of a complainant where the complainant has made two statements but only signed one.

The appellant was convicted in a magistrates' court of robbery with aggravating circumstances and sentenced to 15 years' imprisonment. Two statements purportedly made by the complainant were made available to the defence before the trial, one of which was signed and the other unsigned. In her evidence under cross-examination the complainant testified that both statements had been read back to her by the police officer, but that she only signed one statement. There was no explanation of how, if at all, the statements differed. When the appellant's legal representative attempted to cross-examine the complainant on the unsigned version of the statement, the court effectively stopped the cross-examination, stating that the court did not know whose statement it was. It was contended on appeal inter alia that the court's disallowing of cross-examination of the statement constituted an irregularity.

Held, that whether the statement had been signed by the complainant or not, it was a statement purporting to be her statement and made available to the defence at its request for 'her original statement'. The statement was a relevant document and ought to have been admitted as evidence and to have been available for the appellant's legal representatives to cross-examine on. (Paragraph [10] at 533*a*–*b*.)

Held, further, that the failure to allow cross-examination on the unsigned statement, alternatively the failure to make available the original statement of the complainant to the appellant so that she could be cross-examined on that statement, constituted an irregularity in the proceedings. Such failure vitiated the proceedings unless it was clear that no prejudice had been caused to the appellant thereby. (Paragraph [12] at 533*d*–*e*.) As there had been clear prejudice to the appellant, the conviction and sentence had to be set aside. (Paragraph [34] at 539*e*.)

3. S v KUYLER 2016 (2) SACR 563 (FB)

The trial against an accused and the section 204 Act 51 of 1977 enquiry are two separate entities in the proceedings and the purpose of the latter is to establish whether the witness answered all questions frankly and honestly.

In regard to an enquiry in terms of s 204 of the Criminal Procedure Act 51 of 1977, to determine whether a witness should be discharged from prosecution in terms of s 204(2), it can be regarded as settled law that the process to come to the judicial decision that the witness answered all the questions frankly and honestly is to be guided by the following:
(a) The enquiry is sui generis and to be regarded as separate from the main trial on the merits of the charges.
(b) The enquiry is to be held after the conclusion of the main trial, that is, at the earliest after judgment on the merits of the criminal charges, to comply with the fair-trial principle in both the main trial and the 204-enquiry.
(c) The court must establish on a balance of probabilities whether the witness complied with the requirement to answer frankly and honestly all questions.
(d) The test is subjective: did the witness testify to the best of his ability in the prevailing circumstances, to comply with the aforementioned requirement to answer frankly and honestly all questions?
(e) The witness must therefore be allowed to advance reasons and/or present evidence to justify his discharge from prosecution.
(f) The state has an interest in the enquiry and locus standi, for as far as it is the representative of the national prosecutorial authority, to advance reasons and adduce evidence.
(g) The court shall apply its mind to the evidence and give judgment.
(h) The 'opinion' or judicial decision will direct the outcome: if the court finds that the witness did not testify frankly and honestly, it records that discharge from prosecution on the specified charges, as well as competent verdicts thereto, is refused. If the court finds that the witness did answer all the questions frankly and honestly, it must (shall) grant the discharge on the specified charges and the competent verdicts thereto; and must (shall) record the complete order on the record of proceedings in question. (Paragraph [53] at 573*i*–574*e*.)

4. S v FENI 2016 (2) SACR 581 (ECB)

The process to elevate indigenous languages for use in court proceedings has not reached the stage where it could be said that these languages should be used in courts.

Mbenenge J:

[1] The accused was charged with and convicted of housebreaking with intent to steal and theft by the Magistrate for the District of Zwelitsha. He pleaded not guilty to the charge. The trial proceeded. He was found guilty and thereupon sentenced to undergo two years imprisonment, on 6 December 2012. The proceedings had been conducted and recorded in isiXhosa which appears to have been the mother tongue of the presiding officer and all the parties in the case.

[2] In terms of section 303 of the Criminal Procedure Act 51 of 1977 (the CPA) the record of the relevant proceedings ought to have been submitted by the Clerk of the Magistrate's Court, Zwelitsha to the Registrar of this Court within one week after 6 December 2012.

[3] The record was received by the Registrar on 24 July 2015, more than two and half years from the date the accused was sentenced and approximately more than six months after the accused had completed serving his sentence.

[4] When the matter was dealt with on automatic review, the Magistrate was queried as follows:

"1. The accused was sentenced by the Magistrate, Zwelitsha, to undergo 2 years imprisonment on 6 December 2012. In terms of the Criminal Procedure Act 51 of 1977 the record of the relevant proceedings should have been transmitted by the Clerk of the Magistrate's Court, Zwelitsha, within one week after the date on which the accused was sentenced.

2. The record of the proceedings in this matter was received by the Registrar, Bhisho High Court on 24 July 2015.

3. There has clearly been an ordinate delay in transmitting the record

3.1 After the expiry of more than two and-a-half years the accused was sentenced; and

3.2 more than 6 months after accused had completed serving his term of imprisonment

4. The Magistrate is called upon to account for the delay. In his response the Magistrate should have regard to *S v VC* 2013 (2) SACR (KZP) at [2].

5. What informed the decision to conduct the proceedings in isiXhosa, and not in English?"

[5] In his reply the Magistrate states that the accused was sentenced to undergo three years imprisonment on "*each count*" and that the term of imprisonment was not ordered to run concurrently. He further states that the record was submitted 6 months after of the imposition of the sentence. The delay, according to the Magistrate, was occasioned by the paucity of sworn indigenous translators, hence it

took time before the services of a translator could be engaged and the record transcribed. The reason proffered for conducting the proceedings in isiXhosa is the "*campaign that Government embarked on in October/November 2008 through pilot projects to promote the use of indigenous languages in the country's courts called indigenous language courts.*"

[6] This is a classic case of an accused's fundamental rights of automatic review, including the right to have proceedings reappraised by a judge speedily, having been compromised by administrative incompetency.[1]

[7] I am mindful of the efforts that have been made by the government to promote the use of indigenous languages in courts with a view to giving expression to section 35(3)(k) of the Constitution.[2] It does not appear that those efforts have been successful principally due to the challenges associated therewith. These challenges were stated by Ndlovu J in *S v Damani*[3] as being:

"Difficulty experienced by a presiding magistrate, prosecutor, defence attorney in articulating legal terminology in IsiZulu, including quotation from statutes and legal precedents.
Translation into isiZulu of court annexures, roneo forms and statements in police dockets.
Difficulty for the transcribers in preparing court records for review or appeal purposes, hence undue delay caused in this regard
Different isiZulu dialects occasionally posed problems to court officials and litigants, despite all of them being, otherwise, Zulu-speaking."

[8] The challenges adumbrated above apply with equal force in the case of isiXhosa. The Magistrate refers to pilot projects embarked on during the latter part of the year 2008 and seems to be oblivious to subsequent developments on the subject. Ndlovu J[4] refers to recommendations made by the Sub-committee: Legislation on Indigenous Language Courts pursuant to a meeting held during

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1 *S v VC* 2013 (2) SACR 146 (KZP) at 148, especially para 5, where Steyn J referred to the following rationale for the expeditious transmission of review records as stated in *S v Manyonyo* 1997 (1) SACR 298 (E):

> 'The reason for the statutory insistence on the expeditious despatch of records on review is generally to provide the speedy and efficient administration of justice, but in particular *to ensure that an accused is not detained unnecessarily* in cases where the court of review sets aside the conviction or reduces the sentence. (My emphasis.)'

2 The section gives every accused person the "*right to a fair trial, which includes the right to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language."*

3 [2014] ZAKZPHC 60 (9 December 2014).

4 In *S v VC supra*.

September 2014. The Sub-committee is on record[5] as having reported on 19 September 2014 as follows:

"That Executive Committee of the Chief Magistrates Forum must seek the guidance of the Chief Justice on the Language Policy as regards the Magistrates Courts.

That the Executive Committee of the Chief Magistrates Forum must establish, through the Office of the Chief Justice, as to whether the Department of Justice and Constitutional Development has ensured that there are proper structures to adequately and timeously transcribe and translate proceedings recorded in any of the nine indigenous languages into English.

That the Chief Magistrates Forum in the meantime to do an audit of indigenous languages predominantly in use within Administrative Regions, in order to assist the National Department responsible for language policy in determining the most used languages within specific clusters and/or subcommittee, for purposes of service level agreements with service providers of translation services.

That the Chief Magistrates Forum must support the use *of* indigenous languages in any courtroom for any proceedings, as long as it is practical to do so.

That the Chief Magistrates Forum must inform Mr Dawood that the Forum would not, for reasons specified in the report, support the idea of '*indigenous language courts'*, but that it would take practical steps and positive measures to elevate the status and advance the use of languages with historically diminished use and status in all the courts of the Republic of South Africa."

[9] It is quite plain that the government is still engaged in coordinating the process of elevating indigenous languages for use in courts. The process has not reached the stage where it could be said indigenous languages should be used in Courts even when the exigencies of a matter did not demand such use. The explanation for the delay given by the Magistrate is far from convincing. Nothing is said, for instance, that an interpreter, who could have interpreted from isiXhosa to English, and vice versa, was not available during the proceedings under review.[6] The way in which the proceedings were conducted has resulted in an inexplicable, inordinate delay, rendering justice a mockery.

[10] As to the sentence imposed by the Magistrate the record reads:

"Wena ke awusengomntu ufanel'uba phakathi koluntu, ufanel'uba usiwe phaya entolongweni. Yilonto nale Nkundla ke iza wuthi ikuthi uye phaya IMINYAK'EMIBINI ENTOLONGWENI (TO UNDERGO 2 YEARS IMPRISONMENT)."

[11] The transcribed record clearly does not lend support to the Magistrate's reference to "*three years imprisonment on each count*" as having been the sentence he imposed. Therefore, the matter falls to be dealt with on the basis that the accused was sentenced to undergo 2 years imprisonment. There having been

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5 *Id* at para [19].

6 This course was held to be justified in such circumstances in *S v Matomela* 1998 (3) BCLR 339 (Ck).

nothing pointing to the contrary, the imprisonment sentence related to both counts which were treated as one for purposes of sentence.

[12] But for what is stated above and having considered the merits of the instant review, the proceedings are hereby certified as having been in accordance with justice.

[13] The Registrar of this Court is directed to forward a copy of this judgment to the-

13.1 Office of the Chief Justice; and

13.2 Office of the Director of Public Prosecutions, Bhisho.

From The Legal Journals

Basdeo, V

"A critique of search and seizure in terms of a search warrant in South African criminal procedure"

Southern African Public Law 2015 153

Abstract

The requirements and safeguards for a valid search warrant in South African criminal procedure are critically analyzed in this article. The existence of safeguards to regulate the way in which law enforcement officials may enter the private sphere of ordinary citizens is one of the features that distinguish a constitutional democracy from a police state. South African experience has been notoriously varied in this regard. Many generations of systemized and egregious violations of personal privacy established norms for citizens that seeped generally into the public administration and promoted amongst a great many officials habits and practices inconsistent with the standard of conduct now required by the Bill of Rights. Today, law enforcement officials must be highly skilled in the use of investigative tools and extremely

knowledgeable about the intricacies of the law. One error in judgment during initial contact with a suspect can, and often does, impede the investigation and could affect the fairness of the trial. For example, an illegal search may so contaminate evidence obtained that it will not be admitted as evidence in court. In addition to losing evidence for prosecution purposes, failing to comply with constitutional mandates often leads to liability on the part of the law enforcement official.

Du Plessis, W J

"Can estoppel be raised against an eviction in terms of PIE?"

Southern African Public Law 2015 434

Abstract

Estoppel is a well-known defence against (or limitation on) the rei vindicatio. This would be the case for example where the owner by some representation creates the impression that a third party is the owner of a thing and that the third party has the capacity to alienate the property. The bona fide third party can, when the owner then institutes the rei vindicatio to recover his property, raise estoppel and preclude the real owner from claiming his property. Before 2002, if one wanted to evict an unlawful occupier from certain residential premises, one would institute the rei vindicatio. In Ndlovu v Ngcobo; Bekker v Jika [2002] 4 All SA 384 (SCA) the court, however, ruled that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) must be used in all instances of evicting people from urban residential premises. The question is: does estoppel serve as a defence/limit in the application of PIE? Surprisingly few cases deal with this issue. The court in Joe Slovo made a few remarks about the possibility of using estoppel as a defence against the rei vindicatio by looking at the interpretation of 'tacit consent' required by PIE. This article will interpret provisions of PIE and look at case law that deals with the use of estoppel in lease cases. It will conclude by remarking on the feasibility of using estoppel as a defence in PIE eviction cases.

Hoctor, S

"Negligence "in the air" or on the road? *Ndlela v S* 2013 (unreported, KZP) Case no AR 630/2012"

Obiter 2016 392

Abstract

In certain circumstances, certain drivers are authorised to drive with a blue light and siren flashing on a public road. Thus, in terms of regulation 308(1)(h) of the

Regulations issued under the National Road Traffic Act 93 of 1996 (hereinafter "the Act") any person driving or having a vehicle on a public road is required to "give an immediate and absolute right of way to a vehicle sounding a device or bell or displaying an identification lamp in terms of section 58(3) or 60 or regulation 176". Section 58(3) permits the driver of emergency vehicles, a traffic officer, and duly authorised drivers, as well as, particularly pertinent to the discussion which follows, a "person appointed in terms of the South African Police Service Act ... who drives a vehicle in the carrying out of his or her duties" to disregard the directions of a road traffic sign displayed in the prescribed manner. There are two provisos: that such driver must drive the vehicle concerned "with due regard to the safety of other traffic"; and that such vehicle is fitted with a device capable of prescribed sound and a prescribed identification lamp, both of which must be in operation during such driving. Section 60 mirrors the provision in section 58(3), allowing for certain drivers to exceed the speed limit, subject to the same provisos. Regulation 176 authorises a member of the South African Police Service (along with a member of a municipal police service, a traffic officer, and a member of the South African Defence Force performing police functions) to utilise a lamp emitting a blue light in the exercise of his or her duties.

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

Contributions from the Law School

Arrest and Detention of Minors – Acting in the best interests of the Child
Raduvha v Minister of Safety and Security and Another [2016] ZACC 24

Arrest is often described as being the most drastic method for securing the attendance at court of an accused. Understandably so. A person's constitutionally guaranteed rights to freedom[7] and freedom of movement[8] are infringed when they are arrested. But there are circumstances which necessitate resort to this measure. The Criminal Procedure Act[9] states that an arrest should preferably be done only on the strength of a warrant of arrest, but also accepts and creates procedures for an

[7] S12(1)(a) of the Constitution of the Republic of South Africa, 1996
[8] S21(1) supra
[9] 51 of 1977

arrest without a warrant. Until fairly recently, the pre-trial rights of juvenile offenders were regulated by the Criminal Procedure Act[10]. The advent of The Child Justice Act[11] brought about a change in strategy when dealing with child offenders and how they are dealt with within the criminal justice system. Not only does it seek to regulate the general treatment of detained minors, but also aims to proved processes and procedures for securing the attendance of said minors at court. The CJA, together with the Constitution[12] consider and protect the rights of child offenders in a situation where a minor may be arrested or incarcerated. The case of *Raduvha v Minister of Safety and Security and Another*[13] caused the judiciary to consider these rights in the face of an alleged wrongful arrest and detention of a minor without a warrant.

Facts:
The applicant, who was 15 at the time, was arrested without a warrant. On the day in question[14], the police had responded to a complaint of assault and breach of a protection lodged against the mother of the applicant. The police attempted to arrest the applicant's mother, whereupon the applicant physically intervened in an attempt to prevent the officers from arresting her mother. Relying on s40(1)(j) of the CPA, the police officers arrested the applicant for unlawfully obstructing them in the execution of their duties. Both the applicant and her mother were then arrested, and taken to the police station where they were detained for approximately 19 hours and released, on warning, the next day. The Public Prosecutor declined to prosecute them.[15]

As a result, both the applicant and her mother launched civil claims for damages in the High Court against the Minister of Safety and Security (respondent). The High court found that the arrest and detention of both the applicant and her mother were lawful reasoning that:
"Having traversed the evidence, I am unable to find that [the two police officers] exercised their powers in terms of section 40(1)(b) and (j) beyond the powers of the section. The jurisdictional facts set out in the section are present in this case and the Plaintiffs have not alleged that such powers were exercised for any purpose other than to bring the Plaintiffs before a court of law. Had they alleged that these powers were exercised for an ulterior purpose or that the police officers were inspired by mala fides or malicious intent, the onus would have shifted and rested upon them to prove such motive."[16]

The applicant was dissatisfied with the judgement, and appealed to a full sitting of the High Court, which agreed with the court a quo finding that 'there was no evidence

[10] supra
[11] 75 of 2008
[12] supra
[13] [2016] ZACC 24
[14] 6th April 2008
[15] Ad para 7 of the judgement
[16] Ad para 12 of the judgement

to suggest that the arresting officers arrested them (the applicant and her mother) "for ulterior purposes, mala fide or arbitrarily".'[17] The court based its findings on the case of *Minister of Safety and Security v Sekhoto and Another*[18] in that a police officer 'is entitled to act as empowered by section 40(1)(b) without any further consideration.'[19]

The applicant then applied for special leave to appeal to the Supreme Court of Appeal, which was dismissed. She then applied to the Constitutional Court for leave to appeal against the judgement of the Supreme Court of Appeal.

In the Constitutional Court, the applicant argued that her arrest and detention was irrational and unjustified, and given the fact that she could have been released into the custody and care of her father (who was present when the arrest was affected), it was not the only avenue available to them. She based this contention on a reading of s40(1) of the CPA, and a permissive reading of use of the word 'may' in the subsection. The police had thus failed to exercise discretion. She further based her arguments on section 28(2) of the Constitution[20] - which states that in all matters dealing with children, the best interests of the child are paramount – which the police failed to consider when effecting her arrest. Further, section 28(1(g) of the Constitution[21] states that arrest should be used as a last resort, when there are no alternatives – in this case, the presence and availability of her father was an alternative.

The Centre for Child Law was admitted as amicus curiae and presented an overview of various local and international instruments on juvenile justice. It submitted that section 28(2)[22] 'seeks to align itself with these instruments in according the best interests of the child paramount importance'[23] and thus the arrest and detention of the applicant was unlawful.

Insight and submissions:

It appears that the best interests of the child are at logger-heads with the administration of justice as far as arrest and detention of minors are concerned. The Constitution, read in conjunction with the CPA and the CJA, is unequivocal that where there are alternatives to arrest and detention, these should be resorted to.

The CJA[24] creates duties for the police when they encounter a juvenile offender:

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[17] Ad para 13 of the Judgement
[18] [2010] ZASC 141
[19] Ad para 12 of the Judgement.
[20] supra
[21] supra
[22] Of the Constitution
[23] Ad para 20 of the judgement
[24] supra

- Contact the parents or guardians of juvenile offenders[25];
- Ascertain the child's age[26];
- Exercise discretion before arresting a child[27].

Considering the facts in *Raduvha*[28], it is clear that the police in this instance failed in their duties, and the applicant's arrest and detention 'were in flagrant violation of her constitutional rights in section 28(2) and 28(a)(g) and thus unlawful.'[29]

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Matters of Interest to Magistrates

Informal mediation and the fall in conviction rate

National Prosecuting Authority says there are more resolutions via the alternative dispute resolution mechanism.

By Jean Redpath ● Redpath is a Civil Society Prison Reform Initiative researcher at the Dullah Omar Institute at the University of the Western Cape.

Much has been made of National Prosecuting Authority (NPA) head Shaun Abrahams exercising his prosecutorial discretion inappropriately. But what if the abuse of discretion is mirrored lower down the ranks? The evidence suggests an increasing tendency to decline to prosecute in favour of "informally mediating" ordinary cases.

Decisions not to prosecute are not routinely reviewed and no policy guides informal mediation. The result is fewer convictions in cases that matter despite increased resources.

NPA policy says prosecution should occur when there is "a reasonable prospect of success" and no public interest reason for not prosecuting. Figures reported in NPA annual reports show that "a reasonable prospect" seems to mean a near-certainty: in

[25] S20(3)(d) of the CJA
[26] S4(2) of the CJA
[27] S20 of the CJA
[28] supra
[29] Ad para 71 of the judgement

2015-16 the NPA achieved a 93% conviction rate. The rate has gone up steadily from 82% in 2002-03. Unfortunately, the increase has been associated with a drop in the number of convictions — 13% fewer since 2002-03. Why have convictions dropped if the conviction rate is so high?

The NPA has stopped reporting on new enrolments. So it is not immediately clear whether the drop in convictions is due to fewer referrals of cases from the police. The annual reports of the South African Police Service (SAPS), however, show that the number of priority crime arrests has almost doubled since 2002-03. And since 2010-11, the SAPS has reported on the number of “detections” and the number of “trial-ready dockets”. These have gone up rather than down — the latter have more than doubled. This suggests lack of SAPS throughput cannot be the reason for the reduction in convictions.

Could the drop in convictions be the result of the NPA prioritising more serious cases for prosecution? The SAPS (not the NPA) records convictions per crime type. The SAPS-recorded convictions for the 20 most serious crimes have dropped sharply — there were a third fewer in 2015-16 than there were in 2008-09. The SAPS-recorded convictions usually exceed NPA case convictions, because each NPA case conviction may involve more than one crime conviction. But in 2015-16, there were fewer SAPS recorded serious crime convictions than NPA case convictions. This must mean more NPA case convictions relate to crimes that are not among the SAPS 20 most serious crimes.

Furthermore, convictions for “crimes dependent on police action” are increasing. These crimes — 90% of which are drug crimes, 6% “driving under the influence” and 4% firearms offences — are easier to prosecute because the accused is often caught in the act, and there is usually no “victim”. In the past two years, more than half of serious crime convictions recorded by SAPS related to this category. Serious crime convictions other than these three crimes have halved since 2009-10. This suggests the reduction in convictions is not due to a focus on other serious crime.

Is the reduction in convictions due to lack of court time as a result of more time consuming cases like that of Oscar Pistorius? The NPA reports that average court hours per day dropped from four hours and nine minutes in 2002-03 to only three hours and 16 minutes in 2015-16. Courts are empty most of the day.

Is the reduction in convictions due to dwindling human resources and funding? The inflation-adjusted budget for general prosecutions has almost doubled since 2002-03, while the NPA as a whole enjoys an inflation-adjusted budget that is 185% of what it was in 2002-03. The NPA employed 38% more prosecutors in 2011-12 than in 2005-06.

The NPA has argued that the reduction in convictions is accounted for by the increase in resolutions via “alternative dispute-resolution mechanism” (ADRM) cases, which have indeed increased 900%. Adding ADRM to cases finalised in court shows some increase after 2007-08, but not as large as the increase in funding or prosecutors.

There are many reasons to prefer a fair ADRM to prosecution. But most ADRM (as much as 75%) is “informal mediation”. This appears to be the ultimate in the

exercise of prosecutorial discretion, where the prosecutor mediates between the complainant and accused — eventually leading to withdrawal of the case.

Anecdotal evidence suggests informal mediation sometimes involves payment of compensation to the complainant. This scenario holds potential for abuse. ADRM should occur only when there is an answerable case.

If there is no case to answer, the prosecution should simply withdraw, and not subject an accused to ADRM. Yet the SAPS includes among its “trial-ready dockets” those cases “where the public prosecutor decided to finalise the case by means of alternative dispute-resolution programme while investigations are still outstanding”.

A further concern is that if a case is resolved by ADRM, the accused has no criminal record. The sheer volume of ADRM (180,000 in one year) means that the absence of a previous conviction is no longer a reliable indicator.

There are no policies guiding informal mediation and it is unclear whether prosecutors are trained in mediation. In his 2016 budget vote speech, Justice Minister Michael Masutha said in relation to ADRM: “We are currently working with the NPA to refine the system to ensure that it is fair and just, not only to the accused but equally to the victim as well.” This suggests that in its current “unrefined” form, it may not be fair and just.

The reason for the reduction in convictions is clearly an increasing tendency not to prosecute. Is this resulting in some people getting away with crimes, some of which may be serious? Is it resulting in some who have no case to answer being pressured into settling informally, or victims being pressured to withdraw? Are serial offenders getting off with no criminal record?

Combining this general tendency not to prosecute with what has been occurring at the highest levels of the NPA raises serious concerns. Abrahams may be the least of our worries. It is not enough for the NPA to say “trust us”. Independent oversight mechanisms are needed. The conversation about what future oversight might involve is just starting.

(The above article appeared in the Business Day of 21 November 2016)

A Last Thought

"[12] The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy-related issues, it behoves our courts to embrace that judgement call as dispassionately as the judicial affirmation or oath of office enjoins them to and unflinchingly bring an impartial mind to bear on those issues, as in all other cases.

[13] Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a Judicial Officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office.

[14] Bekker CJ, Mohamed CJ and Zondo JP observed in essence that racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred and the lowest form of contempt for African people or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack."

Per Mogoeng CJ in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others [2016] ZACC 38*