e-MANTSHI

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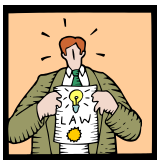
Welcome to the hundredth and twenty ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Justice and Correctional Services intends introducing the International Arbitration Bill, 2017, in the National Assembly shortly. The explanatory summary of the Bill was published in Government Gazette no 40687 dated 15 March 2017. The Bill is intended to incorporate the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) as the cornerstone of the international arbitration regime in South Africa. The UNCITRAL Model Law was developed to address the wide divergent approaches taken in international arbitration throughout the world and to provide a modern and easily adapted alternative to outdated national regimes. A copy of the Bill can be found on the websites of the Department and Parliamentary Monitoring Group at http://doj.gov.za and http://www.pmg.org.za.

Recent Court Cases

1. Mazina v S (494/2016) [2017] ZASCA 22 (24 March 2017)

A trial court must not wrongly regard an accused's statement in his section 115 plea explanation as an admission of fact under s 220 of Act 51 of 1977.

Zondi JA (Ponnan and Mathopo JJA concurring):

[1] The appellant appeared in the regional court, Kirkwood, on a charge of murder read with s 51(2) of the Criminal Law Amendment Act 105 of 1997. He was alleged to have killed one Jeremy Swartbooi (the deceased) on 14 April 2012 by stabbing him with a knife. The appellant pleaded not guilty to the charge. In support of his plea of not guilty, he made a statement in terms of s 115 of the Criminal Procedure Act 51 of 1977 (the Act) in which he stated that he had stabbed the deceased only once with a knife but contended that he had acted in self-defence. He was convicted and sentenced to 15 years' imprisonment.

[2] The appellant appealed against his conviction and sentence to the Eastern Cape Division, Grahamstown (Beshe and Majiki JJ). That court dismissed the appeal against conviction, but upheld the appeal against sentence. It set aside the sentence imposed by the trial court and replaced it with a term of 10 years' imprisonment. The appeal against conviction is with the special leave of this Court.

[3] The State case was based on the evidence of two witnesses, namely Mr Johnny Visagie (Visagie) and Mr Andile James Tyokela (Tyokela), both of whom did not witness the actual stabbing of the deceased. Moreover Tyokela was not even present when a verbal altercation between the deceased and the appellant occurred.

[4] According to Visagie, who was in the company of the appellant and the deceased shortly before the fatal incident occurred, the appellant and his friend Wayne were smoking an 'okka pipe' outside the tavern. The deceased arrived and asked them if he could smoke the pipe. The appellant told him to wait for his turn. The deceased, it would seem, did not take kindly to being told to wait. He taunted the appellant, calling him a 'gans'. This resulted in a verbal altercation between the deceased and the appellant. The deceased's friends restrained the deceased when he approached the appellant. Realising that a fight was about to occur, Visagie and his friend decided to go inside the tavern. Up to that point, Visagie did not see any weapon on either of the

two. The deceased appeared to be intoxicated. Visagie only learnt later that the deceased had been stabbed and had been removed to hospital.

[5] The evidence adduced by two State witnesses did not advance the State case. The appellant did not testify in his defence. What remained was his statement in terms of s 115 read together with the formal admissions under s 220 of the Act. To the extent relevant his s 115 statement provides:

'6. Ek erken dat ek die oorledene een (1) keer met 'n mes gesteek het, toe hy my wou aanval, omdat ons vroeër in 'n mondelingse stryery betrokke was.

7. Ek het op daardie stadium eerlikwaar geglo dat my lewe in gevaar was en/of dat ek ernstige liggaamlike leed sou opdoen.

8. Ek voer aan dat ek myself verdedig het.

9. Ek ontken dat my optrede wederregtelik was.

10. Na die steekwond toegedien is, het die oorledene omgedraai en die toneel verlaat.

11. Ek het later verneem, en ek aanvaar dit as korrek, dat die oorledene dood is as gevolg van die een (1) steekwond wat ek hom toegedien het.'

[6] The basis of the trial court's finding was the following:
'Die erkennings wat aan die hof gemaak is voor die tyd het dit alles erken wat daar gebeur het, dat daar onderskeidelik dan volgens die pleitverduideliking 'n rede was waarom hy die oorledene se dood veroorsaak het naamlik dat hy in selfbeskerming opgetree het deurdat hy geglo het volgens die pleitverduideliking dat sy lewe in gevaar was, dat hy ernstige liggaamlike leed sou opdoen. Dit is dus gemenesaak beskuldigde het op die tyd en plek gemeld in die klagstaat hy het die oorledene se dood veroorsaak deur hom een hou met die mes in die nek te steek wat gelei het tot sy dood as gevolg van die wond wat beskryf word in the bewysstuk "C" voor die hof, die geregtelikedoodsondersoek.'

[7] The trial court went on to state the following:
'Die natuurlike gevolg van 'n handeling is normaalweg dat dit wat intree was bedoel om in te tree. In hierdie geval is 'n meswond deur die beskuldigde toegedien aan die nek van die oorledene, dit het tot sy dood gelei. Ek kan nie 'n ander afleiding maak as dat hy die bedoeling gehad het en die gevolg wat ingetree het te bewerkstellig nie. Sonder om sy weergawe te oorweeg is daar nie 'n weergawe anderste as die natuurlike gevolg sal intree as 'n persoon 'n sekere handeling uitvoer nie. By gevolg het hy die opset gehad om die oorledene se dood te veroorsaak, en vind ek hom SKULDIG op die aanklag van moord soos aangekla.'

[8] On appeal the court below endorsed the findings of the trial court and confirmed the conviction. It held that it was common cause during the trial that the appellant admitted in terms of s 220 that he had stabbed the deceased and that the deceased died as a result of the stab wound. The court below reasoned that given that it is unlawful to kill a person, the appellant's admissions amounted to prima facie proof of the fact that the appellant murdered the deceased and that required him to place some evidence to support the existence of his defence.

[9] In my view, the court below misdirected itself. After the s 115 statement had been received into evidence, Mr Diedrich, who was representing the appellant, intimated that the latter was willing to make certain formal admissions. In that regard the record reads:
'Edelagbare daar is verder ook die normale 220 erkennings wat deur die beskuldigde gemaak is. Aangeheg is ook die lykskouingsverslag. Wil die hof dat ek dit ook inlees in die rekord?
Hof: Asseblief ja.
Mnr Diedrich: Erkennings in terme van art. 220 van Wet 51 van 1977. Die beskuldigde maak hiermee die volgende erkennings, dat die oorledene tydens sy leeftyd Jeremy Swartbooi was, dat hy korrek geidentifiseer is as die person genoem in die klagstaat. Dat die oorledene op 14 April 2012 as gevolg van 'n steekwond aan die nek oorlede is. Dat die oorledene geen verdere beserings opgedoen het vanaf die verwydering van die toneel totdat Dr. Jan Antonie de Beer op 17 April 2012 'n nadoodseondersoek op sy liggaam uitgevoer het nie. Dat die inhoud van die post mortem verslag asook die korrektheid en bevindings daarvan erken word as bewysstuk. Dit is dan geteken ook deur die beskuldigde op vandag se datum sowel as ekself. Ek wens ook dit in te handig by die Agbare Hof as verdere bewysstuk.
Hof aan beskuldigde: Mnr Mazina bevestig u dan die inhoud van die verklaring uitgelees wat waarskynlik u handtekening het wat u ook geparafeer het dat dit korrek is? . . . – Ja
Ek merk dit dan as bewysstuk "A" in die verrigtinge. Die formele erkennings wat u daarin maak sê u, u is bereid dat die hof dit so erken. Soos wat die ander erken word, word dit dan in terme van art. 220 genotuleer as erkennings wat u gemaak het, met ander woorde die staat hoef dit nie te bewys nie u erken dit. Dan word die ander dokument ook ontvang, bewysstuk "B" en in dit word verwys na bewysstuk "C", die verslag, die nadoodseondersoek, met die erkennings vooraf gemaak. U bevestig dit ook as korrek. - - - Ja.
U kan dan maar sit meneer die saak gaan op daardie basis voort.'

[10] It is immediately apparent that the formal admission 'die oorledene op 14 April 2012 as gevolg van 'n steekwond aan die nek oorlede is', differs markedly from the statement made by the appellant during the s 115 proceedings. The material portion of his s 115 statement provides: 'Ek erken dat ek die oorledene een (1) keer met 'n mes gesteek het, toe hy my wou aanval, omdat ons vroeër in 'n mondelingse stryery

betrokke was'. The s 220 admission is in the passive voice. There is thus no formal admission by the appellant to the effect that he did anything, much less that he had stabbed the deceased. Given the quality of the evidence adduced by the State and absent a formal admission by the appellant, there was simply no basis for a conviction. In fact the State appreciated as much when he informed the trial court that the appellant must be found not guilty.

[11] I have read the judgment prepared by Coppin AJA. My colleague states (para 19): 'But for erroneously describing the admissions as formal admissions before noting them as such, the Magistrate, otherwise, acted correctly in terms of s 115(2)(*b*) of the Act'. With respect to my learned colleague that erroneous description goes to the heart of the matter. For, it is upon that erroneous description and the conceptual confusion it causes that the conviction is founded. An admission in terms of s 220 constitutes sufficient proof of the fact to which it has reference. Where it has such cogency the State is relieved of the burden of adducing evidence concerning that particular fact. An accused is not obliged to consent to a formal admission being recorded as such. Where he does not so consent, the onus remains on the State to prove by admissible evidence all the facts which were put in issue by a plea of not guilty. In this case both the trial court and the court below wrongly regarded the appellant's statement in his s 115 plea explanation as an admission of fact under s 220 of the Act. It was not. The onus thus remained on the State to adduce admissible evidence concerning the stabbing of the deceased. That, the State failed to do. A conviction could accordingly not follow.

[12] In the result the appeal succeeds. The appellant's conviction and sentence imposed pursuant thereto are set aside.

Coppin AJA (Nicholls AJA concurring):

[13] I have had the benefit of reading the judgment prepared by my colleague Zondi JA. For the reasons set out herein I am not able to agree with the reasoning and conclusion reached in that judgment. A fundamental point on which I differ with my colleague is whether the trial court incorrectly regarded the admissions made by the appellant, in his s 115 of the Criminal Procedure Act 51 of 1977 (the Act) plea explanation, as formal admissions of fact as contemplated in s 220. I am of the view that the trial court did not err in that regard for the reasons I shall briefly traverse. Consequently, the appeal stands to be dismissed.

[14] At the outset of the trial the appellant, who was legally represented, made a written statement in terms of s 115 of the Act in which he indicated that he was pleading not guilty to the charge of murder. In the statement he admits that he was in the presence of the deceased on the date the incident occurred, i.e. 14 April 2012. He further admits that he stabbed the deceased once with a knife and accepted that the deceased died as a result of a stab wound inflicted by him.

[15] In the statement he raises self-defence as a justification for the stabbing. He states that he and the deceased earlier had an argument and that the deceased wanted to attack him. He further states that he genuinely believed that his life was in serious danger and that he was going to suffer serious bodily harm. He specifically denied that in stabbing the deceased and causing his death he acted unlawfully.

[16] Of significance is that in the s 115 statement, he goes on to state the following concerning the admissions which he made:
'Ek stem toe dat die erkennings hierbo gemaak deur die Abgare Hof aangeteken mag word as formele erkennings. Maar behalwe vir sodanige erkennings plaas ek die Staat ten bewys van die ander elemente van die misdrywe my ten laste gelê.'
The appellant confirmed his s 115 statement and it was admitted as 'Exhibit A'.

[17] The State also produced a written document of other admissions made by the appellant in terms of s 220 of the Act, relating to the identity of the deceased, the cause of death and the chain from the time of the deceased's fatal injury to the post-mortem examination conducted on his body and also relating to the post mortem report itself. This written document was admitted as 'Exhibit B' and the post- mortem report as 'Exhibit C'.

[18] The record reflects that the Magistrate then engaged the appellant as follows regarding his s 115 statement ('Exhibit A'):
'Ek merk dit dan as Bewysstuk "A" in die verrigtinge. Die formele erkennings wat u daarin maak sê u, u is bereid dat die hof dit so erken. Soos wat die ander erken word, word dit dan in terme van art. 220 genotuleer as erkennings wat u gemaak het, met ander woorde die Staat hoef dit nie te bewys nie u erken dit.'

[19] The appellant agreed to this, and further agreed to the correctness of 'Exhibit B' and 'Exhibit C'. But for erroneously describing the admissions as formal admissions before noting them as such, the Magistrate, otherwise, acted correctly in terms of s 115(2)(*b*) of the Act. There is no indication on the record that the appellant, who was legally represented, did not understand what admissions the Magistrate was referring to, but clear indication to the contrary.

[20] There can, therefore, be no doubt as to what the appellant formally admitted. The only element of the crime of murder that the appellant put in issue was that of unlawfulness. The effect of the formal admissions made by the appellant was that the State did not have to adduce evidence to prove the facts formally admitted.

[21] The State then proceeded to adduce the evidence of two witnesses, Mr Johnny Visagie (Visagie) and Mr Andile James Tyokela (Tyokela), who were present at the tavern where the fatal stabbing of the deceased took place on 14 April 2012. The two witnesses testified concerning the peripheral circumstances of the stabbing, but did

not witness the actual stabbing and the events that immediately preceded it. Their evidence was very brief.

[22] Visagie admitted that he had not been sober at the time of the incident and that he was at Porsha tavern (the tavern) in Aquapark, Kirkwood, on 14 April 2012, just before 22h00. He and his friend, Frederick, were smoking an 'okka pipe' when they were approached by the appellant and his friend, Wayne, and they requested to also smoke the pipe. Visagie knew the appellant through friends. The appellant and his friend smoked the pipe, after Visagie and his friend had finished. The deceased arrived and asked the appellant whether he could also smoke the pipe. The appellant told him to wait a 'minute'.

[23] According to Visagie, the deceased was drunk and had tattoos on his arm. Apparently offended by the appellant's response to his request, the deceased then started taunting the appellant, calling him 'gans'. Visagie testified that the deceased was restrained by his friends, and that it is at that stage that he realised that 'trouble' was imminent, and on his recommendation, he and his friend, Frederick, left the scene and went into the tavern. When Visagie was pointedly asked in cross-examination whether the appellant's plea of self-defence was true, Visagie pleaded ignorance. He answered as follows:
'. . . Ek sal nou nie weet nie, ek het nie gesien dat hy steek hom nie so ek kan nie 'n ding in die hof gaan praat wat ek nie van weet nie. Dan lieg ek vir myself en ek lieg vir die hof mos nou.'

[24] Tyokela's evidence was no better. He prefaced his evidence by stating, in effect, that he did not know who stabbed the deceased. He testified that he saw the deceased standing at the gate where a large group were smoking an 'okka' pipe. He then saw the deceased running towards the tavern and that blood was coming from the deceased's neck. The deceased ran to a tap and then onto the road, where he subsequently collapsed next to a 'danger box'. Tyokela readily conceded that he did not witness the stabbing incident.

[25] After Tyokela's evidence, the State closed its case. The appellant's case was closed his case without him testifying, or calling any witnesses. The appellant's representative was apparently content with the State's closing argument, that due to the lack of evidence and in light of the appellant's plea explanation that he had acted in self-defence, the appellant ought to be given the benefit of the doubt and acquitted.

[26] Notwithstanding those submissions, the Magistrate found that the evidence before him was sufficient and convicted the appellant of the murder of the deceased. The basis of the appellant's appeal in the court below was that the evidence of the State was circumstantial, and that the magistrate erred in concluding that the only reasonable inference to be drawn from the proven facts is that the killing of the

deceased was unlawful. Particularly, because the appeal was based on the fact that the appellant had raised self-defence as justification in his plea explanation, and because the State bears the onus to prove the guilt of the appellant beyond a reasonable doubt, while the appellant bore no onus to prove his innocence.

[27] The court below found that the appellant had a case to answer and that his failure to give evidence sealed his fate. As to whether the State had, notwithstanding the shortcoming of the evidence of the State witnesses, discharged its onus, the court below (Beshe J) stated:
'It became common cause during the trial that [the] deceased died as a result of having been stabbed by the appellant. The appellant made an admission in this regard in terms of Section 220 of the Act, thereby placing this fact beyond issue. Given that it is unlawful to kill another; in my view this amounted to prima facie proof that he murdered the deceased. Although there was no obligation on the appellant to prove the defence he had raised in his plea explanation, the fact that there was a prima facie case against him required that he places some evidence to support the existence of the defence he relies upon before court. By failing to do so he ran the risk of the court concluding on the available evidence, that the prosecution had discharged its burden of proof beyond reasonable doubt…'

[28] Having correctly found that the appellant's plea explanation, and what had been put to the State witnesses, could not be taken into consideration as evidence on oath, the court below concluded that there was no evidence under oath supporting the appellant's plea of self-defence and that he had been correctly convicted by the trial court. In my view, the reasoning and conclusion of the court below, including that which relates to the formal admissions made by the appellant, cannot be faulted.

[29] It is trite that where there is prima facie evidence implicating an accused in the commission of a crime, there is an evidentiary burden imposed on him and evidence, sufficient to give rise to a reasonable doubt, is required to prevent a conviction. If the accused does not adduce such evidence he runs the risk of being convicted.

[30] At the close of the State case the trial court had before it the evidence of the two witnesses, albeit peripheral to the stabbing. It also had before it the formal admissions made by the appellant, inter alia, that he had stabbed the deceased intentionally and that the deceased had died as a result. In circumstances where there was no evidence given under oath indicating that the appellant acted in self-defence, this constituted prima facie evidence implicating the accused in the commission of the offence and the appellant had an evidentiary burden to adduce evidence which was sufficient to create a reasonable doubt about whether he had indeed acted in self-defence. This did not imply that he had an onus to prove his innocence. The State still bore the onus to prove his guilt beyond a reasonable doubt.

[31] The failure of the appellant to adduce the necessary evidence under oath strengthened the State case and, what was only prima facie proof, became proof beyond a reasonable doubt.

[32] In this court the appellant's legal representative submitted in his heads of argument, essentially, that everything that the appellant stated in his s115 statement, *both* unfavourable and favourable (i. e., including his explanation that he acted in self-defence), was part of the formal admissions he made. Furthermore, that the effect thereof, so it was argued, was to create reasonable doubt as to whether the appellant had acted in self-defence; and that the appellant ought to have been given the benefit of the doubt and acquitted. Those submissions are without merit. A formal admission can only be made in respect of unfavourable facts and must be an admission, properly so called. The appellant's statement that he acted in self-defence, squarely put in issue the unlawfulness of his conduct and cannot possibly be regarded as an admission of what the State was required to prove.

[33] The appellant also relied on what was held in *S v Cloete1994 (1) SACR 420 (A).*, namely, that the exculpatory parts of a plea explanation, made in terms of s115 of the Act, was evidential material that should not to be ignored. Even though the exculpatory part of a plea explanation may not be ignored in determining, at the end whether, in light of all the evidence, the State had discharged its onus, it did not have to be given any weight as it was not repeated under oath and the State had had no opportunity to test it in cross-examination. Accordingly, the court below cannot be faulted in its approach to the appellant's plea explanation and its ultimate conclusions concerning it.

[34] In the result I would dismiss the appeal.

(As can be seen the majority of three judges decided to allow the appeal whilst the minority of two judges would have dismissed the appeal. The footnotes to the judgments have not been included in the text-Ed.)

2. Mudau and Another v S (1148/2016) [2017] ZASCA 34 (29 March 2017)

A magistrate should ensure that any confession conforms to the prescripts set out in the Constitution.

Mbha JA (Tshiqi, Petse JJA and Fourie and Mbatha AJJA concurring):

[1] The appellants were charged in the Limpopo Local Division of the High Court, Thohoyandou (Makgoba AJ), hereinafter referred to as the high court, with murder, attempted murder and robbery committed with aggravating circumstances. On the first count it was alleged that the appellants, acting in common purpose, unlawfully

and intentionally killed Mr Robert Mandiwana. On the second count it was alleged that they attempted to kill Mr Raymond Lishivha, and on the third count it was alleged that they assaulted Mr Lishivha and robbed him of R55.

[2] On 14 July 2003 the appellants were convicted of murder, assault with intent to cause grievous bodily harm and robbery committed with aggravating circumstances. They were sentenced to life imprisonment on the count of murder and 15 years' imprisonment on the counts of assault with intent to commit grievous bodily harm and robbery with aggravating circumstances, which were taken together for the purpose of sentencing. The appellants appeal against both conviction and sentence. Leave to appeal was granted by the high court on 6 December 2012. It is pertinent at this juncture to note that the appellants were initially charged with a third accused whose conviction and sentence were subsequently set aside by this court on 1 April 2009.

[3] Two witnesses testified on behalf of the State, namely Mr Raymond Lishivha and Ms Portia Budeli. They stated that they were inside a shack, which was used as a workshop for Mr Lishivha's carpentry work, together with the deceased. Two unknown males, one of them being tall and the other one short, entered the shack. The shorter of the two males who was carrying a firearm fired two gunshots, one of which hit and killed the deceased. The taller male person, who was carrying a knife at the time, searched Mr Lishivha and took R55 from his pocket. He thereafter stabbed Mr Lishivha three times in his back and shoulders. Thereafter the two assailants ran away from the scene.

[4] It is common cause that neither witness could identify the assailants. The State then sought to hand in as evidence confessions of both appellants and a written statement made by the third accused. The defence objected to the admissibility of the confessions on the basis that they did not comply with the provisions of s 217 of the Criminal Procedure Act 51 of 1977 (the CPA) in that the appellants were threatened, assaulted and forced to make the statements, that these statements were not made freely and voluntarily and, importantly, that the preamble forms of the confessions were not completed in full. This then necessitated the holding of a trial within a trial in order to determine the admissibility of the two confessions and the statement made by the appellants and the third accused respectively.

[5] Both appellants and their co-accused were required to testify first in the trial within a trial. Thereafter the State called as witnesses, Mr Nditsheni Baldwing Matamela, the magistrate who recorded the appellants' confessions on 2 December 2002 and 9 December 2002 respectively, the investigating officer Inspector Munyai and another police officer, Inspector Musina. At the conclusion of the trial within a trial, the court found that the appellants (and their co-accused) were not impressive witnesses and rejected their evidence regarding the alleged incidents of assault. It concluded that the accuseds' version that they were induced to make the statements could not be accepted. It is common cause that both the appellants were convicted purely on the

basis of their confessions.

[6] The gist of the appeal against conviction, in respect of the first appellant, is briefly that his statement in terms of s 217 of the CPA does not amount to a confession because although he admits to having been at the scene at all relevant times, he never implicated himself in any way and in fact exonerated himself from any guilt. Furthermore, the trial court impermissibly convicted him on the basis of the confession of the second appellant.

[7] In so far as the second appellant is concerned, his conviction is challenged on the basis that his confession should not have been admitted because, it was not freely and voluntarily made and he was unduly influenced into making the confession in that he was told that a confession would 'allow the matter to proceed quickly'.

[8] The basis of the appeal against sentence is briefly that the trial court over-emphasised the seriousness of the offence and the interests of society over the personal circumstances of the appellants. Furthermore, the trial court ought to have found that there were substantial and compelling circumstances that warranted a deviation from the prescribed minimum sentence of life imprisonment.

[9] As the appellants contend that their confessions were wrongly admitted into evidence, I deem it prudent to traverse, briefly, some of the relevant salient principles governing confessions. The admissibility of evidence contained in a confession is governed by s 217(1) of the CPA, which provides that such a confession shall be admissible into evidence if it is proved to have been freely and voluntarily made by a person in his sound and sober senses and without having been unduly influenced thereto.

[10] It is trite that a confession must conform to the rigidly defined requirements specified in s 217. Failure to satisfy any of the requirements will render it impermissible to tender the statement as a confession. In *R v Becker 1929 AD 167 at 171* it was said that a confession can only mean an unequivocal acknowledgment of guilt, the equivalent of a plea of guilty before a court of law. It is therefore an extra-curial admission of all the elements of the offence charged. Similarly in *R v Hans Veren & others, 1918 TPD 218 at 221* it was said that the accused must in effect have said 'I am the man who committed the crime'. Thus a statement will not be regarded as a confession where it is made with an exculpatory intent. The decisive factor is whether the accused has admitted all the essential elements of the offence.

[11] A related provision is s 219 of the CPA which provides that '[N]o confession made by any person shall be admissible as evidence against another person'. A confession made by one accused should be excluded when determining the guilt or otherwise of his or her co-accused.

[12] Whilst the admissibility of a confession is governed, in large measure, by the provisions of s 217, it has become increasingly apparent that the question of admissibility has significant constitutional implications. Section 35(5) of the Constitution provides that:
'[E]vidence 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.'
Examples that immediately come to mind are the duty to inform the accused of various important constitutional rights, such as the right not to be compelled into making any confession or admission that could be used against a person, the right to remain silent, as well as to be informed promptly of that right, the consequences of not remaining silent, the right to choose and to consult with a legal practitioner in a language that he or she understands.

[13] There are accordingly two separate but related inquires that have to be made in determining the admissibility of a confession namely, whether the statutory requirements referred to above have been satisfied, and whether in all the circumstances the accused has had a fair trial. As can be seen, the Constitution has significantly widened the grounds upon which the admissibility of a confession or admission may be challenged in criminal proceedings.

[14] A confession made to and reduced to writing by a magistrate is, upon its mere production, admissible in evidence provided that the requirements of s 217 are satisfied. This means that a magistrate should ensure that the confession conforms to the prescripts set out in the Constitution. Even before the advent of the Constitution, cases are legion that emphasised the importance of informing the accused of his constitutional rights to legal representation and the right to silence at every important stage during the recording of a confession. Thus in *S v Mpetha & others 1982 (2) SA 405(C)* the court said at 408 E-H:
'Before the presumption comes into operation it must appear "from the document in which the confession is contained" that such confession was made freely and voluntarily, etc. Normally no confession of itself would refer to questions of voluntariness or undue influence. A person making a confession is most unlikely to volunteer the fact that he is confessing freely and voluntarily, that he is in his sound and sober senses and that he has not been unduly influenced to make such confession. It is manifest therefore that implicit in the whole procedure envisaged by the section is a questioning by the magistrate of the person confessing. These questions as well as the answers must be recorded for it to be able to appear from the document that the confession was made under the required conditions of voluntariness, etc. This, of course, is also in accordance with long-standing practice. It is well known that over a period of many years departmental instructions and the decisions of the Courts have built up a series of guidelines designed to ensure that confessions are in fact freely and voluntarily made without the exercise of undue influence ….'

These rights have since the advent of the Constitution been entrenched in s 35.

[15] Contrary to what was stated in *Mpetha*, the recording of the confessions of both appellants are replete with omissions, incoherent and contradictory recording of answers by the appellants to questions, and serious non-adherence to some of the fundamental principles governing confessions referred to above. I start with the confession of the first appellant Mr Nndwambi Mudau.

[16] Paragraph two of the form, setting out the accused's constitutional right to remain silent and the right to legal representation was left blank and not completed. Similarly, paragraph three of the form which questions whether the deponent was in his sound and sober senses and paragraph four which enquires whether the accused wished to make a statement notwithstanding what had been explained to him, were also left blank. Although the magistrate testified that he could still remember that the first appellant answered in the affirmative to these questions, the correctness of his evidence in this regard is seriously put in doubt as, when he was asked about the answer given in relation to paragraph six which was also not completed, and how it came about that the first appellant was brought to make a confession, he stated that he could not remember the answer that was given. This must be viewed against the backdrop of the magistrate's testimony that on the day in question he was extremely busy as he was manning two courts on his own.

[17] Paragraph nine of the form was also left blank. The magistrate's viva voce evidence when questioned on this was so convoluted and contradictory, that on this ground alone this confession ought to have been excluded. I quote the magistrate's testimony as it appears from the record:
'Makgoba M (J): He said he does not want to make a statement? Just repeat that one, the question again and the answer? … The *reply was no* here.
Ja, just repeat the question for me again … Do you nevertheless wish to make a statement? And the answer? … *No***.**
So he said he does not want to make a statement? Is that what I understand? … Yes, *I cannot* remember well there.' (My emphasis.)

[18] As can be seen from the exchange between the trial judge and the witness, it should have been pertinently clear to the trial court that the first appellant undoubtedly answered in the negative to the question whether or not he wished to make a statement. Interestingly, the first appellant also repeated in paragraph 16 of the form that he did not wish or prefer to make a statement.

[19] In my view the fact that the magistrate still proceeded to record the confession and the fact that the trial court ruled that the confession was admissible resulted in a serious miscarriage of justice and rendered unfair the first appellant's trial. The trial court also ignored or overlooked, inexplicably, Inspector Munyai's testimony when he conceded that he duly advised the first appellant of the advantages of making a

confession namely, that such confession was going to allow the matter to proceed quickly. This in my view, amounted to unduly influencing the first appellant to make the confession.

[20] The first appellant's so-called confession ought also to have been excluded on another basis. The statement is not, in my view, an unequivocal admission of guilt as, although he placed himself at the scene during the commission of the offences, he nonetheless exculpated himself from any wrongdoing by averring that he was coerced by his co-accused, the second appellant, to act in the manner in which he did. I quote from the relevant parts of his statement:
'He then told me to enter inside. When I entered he ordered me to search two male persons who live there. I searched that man and took R55.00 (Fifty five rand) from his pocket …
He again called me and I was still frightened. There was a knife on the table. I took a knife and stabbed another person at his back.'
As not all of the elements of the offences were admitted, the first appellant's statement did not amount to a confession and ought to have been excluded.

[21] This unfortunate trend about the poor completion of the pro-forma form continued even with regard to the second appellant. The magistrate omitted for example, to record the answer given to the question of whether the second appellant had wished to make a statement and whether or not he had been assaulted or coerced into making a statement. Although the magistrate later testified that he could recall that the answer given was 'yes', the correctness of his version to the questions posed is doubtful as he later stated that on the day concerned he was extremely busy and that he was manning two courts by himself.

[22] The magistrate also omitted to record his observation whether the second appellant was in his sound and sober senses with specific reference to anxiety, nervousness, joviality and demeanour. This has to be considered against the backdrop of the second appellant's evidence that when he was brought to the magistrate to make the confession, he was dizzy because he felt he was being forced to admit an offence which he did not commit. Even more disturbing is the fact that in reply to the question of how it came about that the second appellant was brought to make a confession, the magistrate simply recorded the answer given, namely, that he was advised by Inspector Munyai, the investigating officer to report there. In my view, this was a red flag and is something that should have alerted the magistrate and prompted him to make a follow up to ensure that this accused was not influenced in any way into making any confession.

[23] With regard to the conduct of the trial, specifically in relation to the trial within a trial, the trial judge committed a number of serious irregularities and misdirections. Firstly, he erroneously ruled at the commencement of the trial within a trial, that the appellants had to first adduce evidence to prove that the confessions were not freely

and voluntarily made and without any undue influence. This, in my view, is a gross misdirection because the onus to prove the admissibility of a confession rests, always, on the State. The erroneous shifting of the onus to the appellants rendered their trial unfair.

[24] The trial judge also ignored the fact that the same magistrate recorded both appellants' confessions albeit on different dates ie 2 September and 9 September 2002 respectively. There is nothing in the record that indicates that the trial judge made any attempt to check whether or not another magistrate was available to take down the second appellant's confession later on. Whether or not magistrate Matamela was aware that the second confession related to the same incident as that of the first appellant and if so, whether he sufficiently warned and cautioned himself not to be in any way influenced by what he already knew as emanating from the first appellant's earlier confession, is doubtful.

[25] After the second appellant had given his evidence-in-chief in the trial within a trial and before the prosecutor could cross-examine him, the trial judge remarked and asked the prosecutor: 'Mr Nekhambela, I do not know if you would like to cross-examine this witness. He made a very bad impression. I do not know, as a witness really. I do not know whether would it be worth for you to cross-examine him, but you can have that time. But he made a bad impression, really, I do not know. Do you have any questions for the witness'? Other than the fact that this unfortunate remark shows that the trial judge had already decided that he was not going to accept the second appellant's evidence, a perception of bias on the part of the trial judge by any reasonable person was, in my view, in the light of the circumstances of this matter, inevitable.

[26] Our courts have persistently warned against the threat to the legitimacy of our criminal justice system, created by perceptions of bias during hearings, given its adversarial nature. *In S v Basson, 2007(3) SA 582 (CC)* the Constitutional Court expressed itself in this regard as follows:

'[27] The impartiality of a judicial officer is crucial to the administration of justice. So too is the perception of his or her impartiality. These principles are recognised in many foreign democracies. Thus in *Van Rooyen & others v The State & others (General Council* of the *Bar of South Africa Intervening)2002(5) SA246 (CC)* this court cited with approval the following reasoning of Le Dain J in the Canadian Supreme Court in the case of *Valente v The Queen*:[1985] 2 SCR 673
Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence, the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'

[27] This court has also expressed similar concerns. In *S v Le Grange & others, 2009(1) SACR 125 (SCA) para 16* Ponnan JA affirmed that the cornerstone of our legal system is the impartial adjudication of disputes and that the law required 'not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be "manifest to all those who are concerned in the trial and its outcome especially the accused"'. In my view, therefore, the conduct of the trial judge in this case sustains the conclusion that he was not open-minded, impartial and fair during the second appellant's trial within a trial.

[28] The final misdirection that was committed by the trial court which, in my view, is totally decisive of the fate of this appeal, occurred when the trial judge decided in his reasoning to apply the confessions and admissions by all three accused against one another, in clear violation of s 219 of the CPA. I consider it appropriate to quote an excerpt from the trial judge's judgment in this regard. He said the following:
'Whatever version they gave before the court, if one looks at the confession and the admissions made, then the court is inclined to accept the version of the state. On count 1, that of murder, the court makes a finding that it is indeed so, accused 3 wanted to get rid of the deceased because he believed that the deceased would be a state [witness] against him. Then he wanted to get rid of him. He solicited the assistance of accused 2, who in turn solicited the assistance of accused 1. In the circumstances then, the court finds that there was a conspiracy to murder, between accused 2 and 3. Accused 1 joined in, realising and even knowing fully well that there was a conspiracy to get rid of the deceased. In the circumstances I make a finding that there was common purpose between the three accused and all three are accordingly found guilty.' The trial court erred by not delineating and treating each confession separately as against its specific maker, and instead treated all of them in blanket fashion against all the accused.

[29] I am satisfied that the taking down of the appellants' confessions and the conduct of their trial, especially the trial within a trial, were characterised by serious misdirections, gross procedural irregularities and material non-observance of the statutory requirements contained in ss 217 and 219 of the CPA, and other principles governing confessions. Furthermore, there was a serious violation of the appellants' constitutional right to a fair trial as required by s 35(5) of the Constitution. The State accordingly failed to discharge its onus of proving that the appellants' confessions were made freely and voluntarily and without any undue influence. The confessions ought to have been excluded but were wrongly admitted into evidence. Without the confessions, there was no evidence to sustain the convictions. In the result this appeal must succeed and both appellants' convictions must be set aside. In light of this finding, I do not deem it necessary to consider the appeal against sentence.

[30] I accordingly make the following order:
1 The appeal against the convictions is upheld.

2 The convictions of both appellants on charges of murder, assault with intent to commit grievous bodily harm and robbery with aggravating circumstances are set aside.
3 The order of the trial court is set aside in its entirety and replaced with the following:
‘Both accused are found not guilty and discharged on all the charges.’

From The Legal Journals

Gravett, W H

“The myth of rationality: Cognitive biases and heuristics in judicial decision-making”

2017 SALJ 53

Abstract
From Plato until the early 1970s, humankind operated under two broad assumptions: (1) people are generally rational; and (2) when people depart from rationality, emotions are likely to blame. However, in 1974 experimental psychologists started documenting systematic errors in the thinking of 'normal' people that they traced to the basic design of the machinery of cognition, rather than to the corruption of thought by emotion. They found that human beings rely on cognitive shortcuts to generate judgements without having to consider all the relevant information, relying instead on a limited set of cues. A range of empirical studies in the United States and Europe show that judicial decision-makers are susceptible to some of these cognitive biases. Even if judges have no conscious prejudice against either litigant, understand the law, and know the facts, they might still make systematically erroneous decisions because of how they — like all human beings — think. The purpose of this article is to start to acquaint the South African judiciary with these traps of the mind. There seems to be no empirical research on the effects of these cognitive biases on judicial decision-making in South Africa. This is a perilous deficiency in scholarship that must be addressed.

Monyakane, M M M & Monye, S M

"The legal implications of S v Ndhlovu and Litako v S on the South African law of hearsay evidence: A critical overview"

2016 SACJ 308

Abstract
The change in course on the admission of extra-curial statements in S v Ndhlovu in 2000 caused concern about the correct way admissions of co-accused are to be admitted by the courts. Whilst many writers believed that s 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 accommodated admissions of co-accused against another, the case of Litako v S pointed out the anomalies that mitigated against that position. This article supports the view in Litako v S that corrected the earlier position of the court. It is the argument in this article that courts should not make out cases for the state and that it is the duty of the prosecution to establish a case to answer for each accused person, whether co-accused or not. It is further argued that the Law of Evidence Amendment Act never repealed the common-law principles regarding admissions, and that, if that were the case, the legislature should have expressly done so. Furthermore, it is argued that the approach in S v Ndhlovu opened too wide s 3 of the Law of Evidence Amendment Act.

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

Contributions from the Law School

Some perspectives on the defence of voluntary intoxication

The idea that a person can voluntarily get drunk on alcohol (or 'high' on some other chemical substance), and then, having engaged in criminal conduct while intoxicated, can be entitled to a defence which can completely exclude criminal liability, is controversial. The potential implications are obvious: that there will be a proliferation of accused persons pleading not guilty, and being acquitted, on the basis of bringing upon themselves a condition which is entirely avoidable. Until 1981, South African law reflected these policy concerns. Following the approach in the Roman-Dutch writers, our law held that voluntary intoxication could at best be a factor which

mitigated sentence, rather than negated liability (De Wet *Strafreg* 4ed (1985) 124). The English law 'specific intent' rule, which allowed a crime of specific intent (such as murder) to be reduced to a crime not requiring specific intent, or any intent at all (i.e culpable homicide), was also influential (see *Fowlie v R* 1906 TS 505), achieving essentially the same result: voluntary intoxication could mitigate, but not exculpate. The high point of this approach in South African law was the Appellate Division case of *S v Johnson* (1969 (1) SA 201 (A)).

Then, in the light of the commitment to the psychological approach to liability, flowing from cases such as *S v De Blom* (1977 (3) SA 513 (A)), came the leading case of *S v Chretien* (1981 (1) SA 1097 (A)). Criticising the decision in *Johnson* as juridically impure ('juridies onsuiwer' (1103D)) for its policy-driven conviction of the accused despite the finding of the court *a quo* in *Johnson* that the accused was acting mechanically at the time the fatal harm was inflicted, the court further rejected the notion of specific intent as contrary to South African law (1104A). The court in *Chretien*, per Rumpff CJ, then applied a principled approach to the question, holding that voluntary intoxication, by negating various elements of criminal liability, could function as a complete defence. Thus it was decided in *Chretien* that the following requirements could all be excluded on the basis of voluntary intoxication, depending on the facts of the case: that the act must be voluntary (1104E-F; 1106E-F); that the accused must have criminal capacity at the time of acting (1104H; 1106F-G); as well as the requirement of fault in the form of intention (as flowing from the court's holding that an accused on an attempted murder charge could not be convicted of common assault where the requisite intention for attempted murder was influenced by voluntary intoxication).

The legislative response was swift, but flawed: the Criminal Law Amendment Act 1 of 1988, which sought to provide an alternative route to criminalizing conduct which would result in a conviction were it not for the accused's intoxication. Academic criticism was also not in short supply: Snyman describes the *Chretien* judgment as 'completely wrong', as being contrary to the common law, the law in other jurisdictions, and 'sound legal policy' (*Criminal Law* 6ed (2014) 221-222). It is however clear that the decision in *Chretien* was entirely consistent with the basic principle that an accused ought never to be convicted where there is reasonable doubt – for any reason – that he is unable to act voluntarily, unable to distinguish between right and wrong, unable (as opposed to unwilling) to exercise self-control or that he has formed the necessary intention to act unlawfully. Moreover, Rumpff CJ stressed that it is only in highly exceptional cases that it will be found that the effect of the intoxication was such as to exclude the accused's capacity to know that what he is doing is unlawful, or such as to result in a fundamental disintegration of the accused's inhibitions, and consequently that the accused lacked capacity (1106C-E). To the credit of the courts, despite the furore around the *Chretien* decision, the exceptional nature of this defence has been understood, and the spectre of hordes of accused being acquitted on the basis of voluntary intoxication has simply not materialized. However, given the controversy surrounding this defence, whenever there is a case where this defence is successfully pleaded, it can be expected that

cries of alarm should arise in the media and the general public. So it is with the recent case of *S v Ramdass* (2017 (1) SACR 30 (KZD)), where the accused was acquitted on charges of murder of his girlfriend, as well as robbery, based on his defence of lack of criminal capacity, flowing from voluntary intoxication as a result of use of crack cocaine and alcohol.

It was held in *Ramdass* that, despite the policy-based decision relating to the defence of provocation in the notorious case of *Eadie*, it was clear that the judgment in *Chretien* reflects the current state of the law (para [6]). Crucially, the court in *Ramdass* held that the accused had established an evidential foundation for his defence of non-pathological incapacity based on intoxication, and that the state had failed to establish its case beyond reasonable doubt (para [28]-[30]). Notably, the psychiatric evidence led by the state supported the accused's claim that it was reasonably possible that he was incapacitated by the intoxication (para [13]), the other state witnesses bolstered the accused's account that he was intoxicated and disorientated (para [16]), and the court found the accused to be a truthful witness, despite gaps in his memory (para [17]). The accused was therefore acquitted on both counts (para [35]).

It is noteworthy that in making this finding, the court's approach was extremely thorough, indicating that mere amnesia does not constitute the defence of non-pathological incapacity (para [7]); that any evidence seeking to lay a foundation for such a defence will be carefully scrutinised (para [7], citing *Eadie*); that any finding of guilt requires cogent expert evidence to establish such a finding (para [28]; [34]); and that too ready a finding of incapacity may bring the administration of justice into disrepute (para [29], citing *Chretien*).

The distaste for the *Chretien* decision, which founded the possibility of a complete defence based on voluntary intoxication, is evident in Zimbabwe. Thus, in the recently promulgated Zimbabwean penal code – the Criminal Law (Codification and Reform) Act [Cap 9:23] – Part IV of Chapter XIV deals with the question of intoxication as follows. Although involuntary intoxication can be a complete defence (s 220), voluntary intoxication which does not negate intention is at most a mitigating factor in sentence (s 221), and is not even mitigatory when negligence-based crimes are in issue (s 221). The Code provides for a strict liability offence, which may be punished to the extent of the original crime, where voluntary intoxication does affect the accused's 'intention, knowledge or realisation' such that the original crime has not been committed (s 222), and moreover provides for antecedent liability where the accused who knows or foresees the possibility of engaging in criminal conduct whilst intoxicated, is essentially treated 'as if he or she had not been intoxicated when he or she did or omitted to do the thing concerned' (s 223). Thus, whereas the Zimbabwean law prior to the Code provided for the possibility of the crime of murder being reduced to that of culpable homicide, which would ordinarily entail a lesser sentence, this is no longer the case, as the alternative charge set out in s 222 provides for the same punishment as the crime originally charged. The defence of voluntary intoxication thus occupies an even narrower ambit since the coming into force of the Code, and can at best amount to mitigation (see *S v Masina* (2010) HH

245-10 (ZH)). Prior to the inception of the Code, the *Chretien* approach attracted criticism in the Zimbabwean courts. In *S v Dube* (1997 (1) ZLR 229 (HC) 248) the court stated that

'The specific intent rule…has, despite its imperfections, managed to last well and for all its logical impurities has generally been applied without insuperable difficulty and without causing injustice – something the *Chretien* approach might be hard put to match.'

In *S v Hurle and Others* (1998 (2) ZLR 42 (HC) 62) Gillespie J is even more outspoken in this regard:

'To my mind, there is something absurd in a court, or jurists, discovering that, on legal principle, conduct long recognized as criminal is not in fact criminally accountable and then feeling obliged to look to the legislature to reverse the anti-social effects of that discovery. A jurisprudential syllogism that satisfies the scholar but fails to convince the ordinary man of its justice is not the law. It is Bumble's ass[1].'

Interestingly, in the recent decision of the Namibian Supreme Court of *Hangue v S* [2015] NASC 33, the court dismisses the approach taken in *Johnson* as militating 'against the common law fundamentals of criminal liability' (para [29]), and adopts an approach to the question of voluntary intoxication which is entirely consistent with that adopted in *Chretien*. Whilst noting judicial comment unfavourable to *Chretien* (at para [15], notably the remarks of O'Linn J in *S v Davids* 1991 NR 255 (HC) 259E-H that permitting such an approach to voluntary intoxication would amount to a 'travesty of justice'), as well as the narrow approach to the non-pathological incapacity defence adopted in *Eadie* (which the court attributes to the need to address 'inconsistencies in the approach of different courts' (para [36])), and the fact that Namibian courts are no longer bound to follow South African precedent (para [25]), the court very clearly analyses the evidence on the basis that a defence or automatism, or non-pathological incapacity, or lack of intention, could flow from voluntary intoxication. On the facts however, the court held that the appellant had failed to establish an evidential foundation for the defence.

Whilst voluntary intoxication will always be a controversial and highly contested defence given the significant policy concerns that it raises, and will always be a defence which requires very careful scrutiny (as was indeed recognized in *Chretien*), it is submitted that only persons whose acts are truly responsible and worthy of blame can be regarded as falling within the scope of criminal liability, and punishment. Any other approach violates the recognition of the principle of autonomy embodied in the right to dignity, which underpins our constitutional values.

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[1] Referring to the oft-quoted statement of the character Mr Bumble in Dickens' *Oliver Twist,* who likens the law to a donkey: 'If the law supposes that, the law is an ass…'.

Matters of Interest to Magistrates

The doctrine of precedent and the value of s 39(2) of the Constitution

By Bayethe Maswazi

The principle of *stare decisis* is a juridical command to the courts to respect decision already made in a given area of the law. The practical application of the principle of *stare decisis* is that courts are bound by their previous judicial decisions, as well as decisions of the courts superior to them. In other words a court must follow the decisions of the courts superior to it even if such decisions are clearly wrong. The importance of this principle is best illustrated by the words of Brand AJ, as he then was, in the case of *Camps Bay Ratepayers' and Resident Association and Another v Harrison and Another* 2011 (4) SA 42 (CC), when he said: '*Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.' Clearly the above dictum does give the doctrine of precedent a constitutional flavour, but whether the doctrine ought always to be subject to the Constitution or *vice versa*, Brand AJ did not deal with that, opining as he did that the issue was not relevant in the instant matter since he was dealing with post constitutional precedent. That observation illustrates the complexity of the issue, at least when a pre-constitutional precedent is relevant and binding. The issue though does not only pertain to pre-constitutional precedents, even post constitutional precedent may sometimes present problems.

In this article I examine whether a court in a given scenario is bound by the principle of *stare decisis* in circumstances where it deals with the decision or precedent set by a court superior to it, particularly, if the latter has interpreted a particular legislative provision in a manner which plainly does not accord with the command or the constitutional directive contained in s 39(2) of the Constitution. I further examine the relationship between s 39(2) of the Constitution and the doctrine of precedent with a view to determine the extent to which courts have solved the possible conflict between the two. The question then is, in the event of the conflict between the doctrine and s 39(2) of the Constitution, which of the two principles must reign? The obvious answer is that s 39(2) by virtue of the supremacy of our Constitution must reign. An excavation of various court decisions suggests that the issue is not that simple and courts have not given a clear answer or where direction has been given by the Constitutional Court (CC), lower courts have not readily followed. Is there a real conflict between the two principles? If so, can reconciliation between them be

achieved? Confronted by a binding precedent on the one hand and s 39(2) on the other in a given legal issue, where does a court go? These questions are not intended to suggest that there is an automatic conflict that arises at every given interface between the doctrine and s 39(1) of the Constitution. On the other hand, they arise because there has been a trend where the significance of s 39(2) have somehow been diminished. The survey of these cases in this article will reveal this tendency.

The meaning of s 39(2) of the Constitution

Section 39(2) directs every court or tribunal – when interpreting legislation or developing common law or customary law – to promote the object, purport and spirit of the Bill of Rights. The development of common law and customary law are beyond the scope of this article, which is concerned only with the interpretation of legislation, though s 39(2) affects the common law and customary law as well as the section suggests. There are various pertinent factors that arise out of the reading of s 39(2). Firstly, the section confronts directly and singularly every court as it interprets legislation. Secondly, it imposes a duty on courts to view all legislation through the lens of the spirit, object and purport of the Bill of Rights, by making sure that its spirit, purport and object percolate through the interpretive process. In other words, the final product of each interpretive process must exhibit proof of the promotion of the purport, spirit and object of the Bill of Rights. Section 39(2) does not necessarily imply the elevation of a particular right in the Bill of Rights, nor a transfiguration of same into spirit, purport and object of the Bill of Rights. The meaning then, I submit, of the purport, spirit and object of the Bill of Rights is not the raw collections of the rights in the Bill, it is the profound and collective message found in the values of the Constitution as encapsulated in s 1 of the Constitution. What s 39(2), therefore, asks for is that, these values must shine through in the interpretive process. I do not propose this as the best meaning of s 39(2), rather I suggest it as the most preferable approach towards the interpretation of s 39(2). No occasion has arisen, so far, for the CC to consider itself confronted by the issue as to what is the true or best meaning of s 39(2), at least not to my knowledge, nor has the CC ever been asked how courts ought to approach the interface between s 39(2) and the doctrine of precedent, an issue which makes this article all the more significant.

In *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC), Langa DP had an occasion to consider the meaning of s 39(2) and he opined as follows: ‘The purport and objects of the Constitution finds expression is s 1, which lays out the fundamental values which the Constitution is designed to achieve.’

The *Hyundai* case is not, in my view, the best example to illustrate the importance of s 39(2) because the case implicated directly various rights in the Bill of Rights, yet the provisions of s 39(2) do not demand judicial attention only when there is a constitutional issue to be considered, they seek attention of the court whenever it

interprets legislation. Nonetheless, the *Hyundai* matter was an important foundation in this regard.

The pertinent precedent on s 39(2) and *stare decisis*

In *S v Walters and Another* 2001 (10) BCLR 1088 (TK) Jafta AJP was confronted with a question of whether s 49 of the Criminal Procedure Act 51 of 1977 (CPA) in sanctioning a peace officer to kill a fleeing suspect who is suspected of committing a schedule 1 offence, was constitutional. Having examined the applicable precedent including the decision of the Supreme Court of Appeal (SCA) in *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA), he came to the conclusion that the section was unconstitutional. Of interest in the case is that even though the court in the *Walters* matter had a wide opportunity to consider whether to avoid the applicable judicial precedent, which was binding on it through s 39(2) of the Constitution, the court chose not to refer to the section at all. In the result Jafta AJP lost an opportunity to define the relationship between s 39(2) and the doctrine of precedent, even though he grappled with the question whether he was bound by the SCA decision in the *Govender* matter.

In *Minister of Safety and Security v Sekhoto and Another* 2011 (5) SA 367 (SCA), Harms DP in a unanimous decision, took the opportunity to consider whether a peace officer – when considering the arrest of a suspect under s 40 of the CPA – must also additionally consider whether there are other less restrictive means of securing the attendance of the suspect at court. This was in the context of the decisions of the various High Courts, which had held that arrest must be a last resort, in other words, a peace officer must consider alternative to arrest before actually effecting the arrest. Harms DP issued a stern rebuke of the High Courts and held that this was not necessary since the jurisdictional requisites of an arrest are contained is s 40 of the CPA, no more is needed by the peace officer other than the factors set out in s 40. Of s 39(2) he merely held that it was not suggested in what way s 40 of the CPA may be interpreted to promote the purport, spirit and objects of the Bill of Rights. In other words he was not convinced that as he was interpreting s 40 of the CPA, he had to consider s 39(2) of the Constitution in interpreting s 40 of the CPA.

In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC), the CC had to consider the provisions of the Prescription Act 68 of 1969. Jafta J recognised the significance of s 39(2) when dealing with pre-constitutional precedent. However, this recognition was somehow dampened by the observation Jafta J made when he said at para 90: ‘The Constitution in plain terms mandates courts to invoke the section [s 39(2)] when discharging their judicial function of interpreting legislation. The duty is triggered as soon as the provision under interpretation affects the rights in the Bill of Rights.’

Section 39(2) on its plain wording seems applicable every time a court interprets legislation not only when that legislation affects the Bill of Rights. Therefore, with respect, the last sentence of the above passage is not necessarily the correct interpretation of s 39(2). The interpretation attached to the section by Jafta J in the above dictum illustrates the complexity surrounding this section. But, the *Makate*

case was not dealing with the interface between s 39(2) and doctrine of precedent, accordingly, while it is important for the definition of the section, it bears less relevance to the theme of this discussion.

In *Turnbull-Jackson v Hibiscus Coast Municipality and Others* 2014 (6) 592 (CC) the CC was confronted with the argument that the decision of the CC in *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) was more in accordance with the provisions of s 39(2) than the SCA decision in *True Motives 84 (Pty) Ltd v Mahdi and Another* 2009 (4) 153 (SCA) concerning the meaning of s 7(1)(*b*) of the National Building Regulations and Building Standards Act 103 of 1977. The pity though is that s 39(2) did not play as significant a role as expected in the overall decision in the *Turnbull-Jackson* case.

Overall these cases illustrate the complex role that s 39(2) of the Constitution has played so far in our jurisprudence, particularly with the inconsistent recognition that the section has been accorded by our courts. The fact that no case has considered pertinently, which direction our jurisprudence must take in the relationship between s 39(2) and the doctrine of precedent, is an illustration of the fact that this section has not been given as much recognition in our jurisprudence as one would expect.

Conclusion

Section 39(2) has had a difficult journey within the South African jurisprudence, from its inception its interface with judicial precedent has made the journey all the more complex. The voice of the CC as the guide to the SCA and the various High Courts is needed. Regardless of this situation, it is unlikely that the section will be subordinated to judicial precedent given the supremacy of the Constitution. It is the doctrine that should be subordinated to the Constitution and not the Constitution to the doctrine. The common law must develop in consonant to the Constitution. Section 39(2) is equally an important mechanism of building a solid human rights jurisprudence demanded by s 1 of the Constitution, the sooner our courts realise this, the better. There is a need to give meaning to the relationship between s 39(2) and the judicial precedent, our courts must be urged to define this relationship, it is important for the survival of the nascent human rights culture that we have built since 1994.

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A Last Thought

"Judges have traditionally held a special place in the public's mind as arbiters of our disputes and protectors of our liberties. Because the institutional legitimacy of the judiciary depends to a significant extent on the quality of its judgments, when judges don their robes, they wrap themselves in a mythos of cognitive rationality. Indeed, the entire edifice of legal education and practice in South Africa is premised on the assumption that judges resolve legal disputes strictly through logic and inductive reasoning: they weigh the facts of the case, evidence, and legal precedent in a methodical and objective manner, and keep an open mind and defer judgment, to reach a reasoned solution and therefore optimal judgment.

However, there is a range of empirical studies conducted in the United States and Europe (especially Germany) that strongly support the notion that judicial decision-makers are susceptible to intuitive, *unconscious* thought processes, and specifically to some of the cognitive biases and heuristics that decision science have identified over the course of the last forty years. In this sense, judges engage in decision-making in ways comparable to other groups of well-educated adults, relying on intuition to make snap judgments. These results should not be all that surprising. First, under the press of heavy caseloads, judges generally make decisions in uncertain, time-pressured conditions that encourage reliance on heuristics, which, in turn, produce cognitive biases. Secondly, as Judge Jerome Frank put it: 'When all is said and done, we must face the fact that judges are human.' Law is a human product, made and administered by judges with the same cognitive machinery as everyone else, and thus subject to the same human frailties as everyone else."

The myth of rationality: Cognitive biases and heuristics in judicial decision-making by Willem H Gravett 2017 SALJ 53 59-60