e-MANTSHI

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Welcome to the hundredth and thirty first 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.
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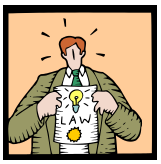

New Legislation

1. The South African Law Reform Commission has released a report on Sexual Offences: Adult Prostitution on 26 May 2017. The aim of the report is to review the fragmented legislative framework that currently regulates adult prostitution within the larger framework of all statutory and common law sexual offences. The statutory provisions under review are contained in the Sexual Offences Act 23 of 1957 (the Sexual Offences Act). The secondary aim is to consider the need for law reform in relation to adult prostitution and to identify alternative policy and legislative responses that might regulate, prevent, deter or reduce prostitution. The report may be accessed at http://www.justice.gov.za/salrc/reports/r-pr107-SXO-AdultProstitution-2017.pdf

Recent Court Cases

1. VN v MD AND ANOTHER 2017 (2) SA 328 (ECG)

Where a parenting plan had been made an order of court the variation of such a plan needed the input of a family advocate, social worker or psychologist in preparing a revised plan.

VN and MD were the biological parents of a minor child, in respect of whom they shared parental rights and responsibilities. A parenting plan had been entered into between the parents, and that, as well as a subsequent revised version, had been made an order of court. Being dissatisfied with his rights of access in terms of the parenting plan and seeking a review thereof, MD approached the children's court. The presiding magistrate ordered that a revised plan presented by MD should be made an order of court. VN appealed to the High Court against that decision. The High Court upheld the appeal on various grounds and set aside the order granted. The court found to be completely inadequate the record of the proceedings of the magistrate placed before it, in particular as to the reasoning behind the conclusion reached. The evidence apparent from the record did not support the magistrate's finding that it would be in the interests of justice to increase access to MD in the manner sought. (Paragraphs [6] – [8] and [13] – [15] at 330I – 331G and 333C – 334A.)

Another important aspect prompting the High Court's decision was the absence of the input of a family advocate, social worker or psychologist in the preparation of the revised parenting plan made an order of court. On this point the High Court acknowledged that s 33(5) of the Children's Act 28 of 2005 did not pertinently require those persons' input in respect of the variation of a parenting plan. However, the court added that, when regard was had to the structure of part 3 of ch 3 of the Act, it was clear that, in pursuing any agreement in respect of the exercise of parental rights and responsibilities, the parties were required, before approaching a court, to consult the family advocate, social worker or a psychologist, who was qualified to provide guidance as to the best interests of the minor child. By parity of reasoning, where the parenting plan was to be varied by virtue of the parties experiencing difficulty in exercising their rights and responsibilities, the parties were again required to engage the services of such a qualified person before seeking the intervention of a court. This was particularly so where a significant period had elapsed since the previous

parenting plan had been endorsed and where the parties had failed to reach agreement. (Paragraph [19] at 334H – 335B.)

2. NEDBANK LTD v JONES AND OTHERS 2017 (2) SA 473 (WCC)

A magistrates' court may not vary a contractually agreed interest rate in a debt review application and a rearrangement order containing such a proviso is invalid.

The Joneses (the first and second respondents) were unable to pay their creditors (the sixth to fifteenth respondents) and approached a debt counsellor (the third respondent), who applied for debt review under s 86(7)*(c)* of the National Credit Act 34 of 2005 (the NCA). The magistrate hearing the application (the fourth respondent) on 8 June 2010 made an order (proposed by the debt counsellor) restructuring the Joneses' debt in terms of a home-loan agreement with Nedbank Ltd (the applicant). The proposal was made under s 86(7)*(e)*(ii) and the order under s 87(1). The order dropped the monthly instalment from R10 500 to R4000 and capped the initially variable interest rate of 10,9 % at 8,9 %. The repayment period (initially 336 months) was left open-ended 'till debt settled'.

Displeased, Nedbank applied for the rescission of the magistrate's order and declaratory relief. It argued that the order was void ab initio because the magistrate was not empowered to vary the agreed interest rate nor order that it be fixed indefinitely. Nedbank contended this sort of order was threatening the liquidity of the banking system and its effect in this case was that the Joneses' debt would never be repaid. Besides the validity of the magistrate's order the principal issue confronting the court was the appropriate order to make in the light of Nedbank's five-year delay in bringing the present application.

Held The reasoning in *Nedbank Ltd v Norris and Others 2016 (3) SA 568 (ECP)* was on point and would be adopted (see [17] – [18], [31]). The magistrate had, by fixing the interest rate at a level which rendered the debt incapable of ever being settled, exceeded his powers under s 37. The order was ultra vires the NCA and invalid (see [18]). A review at this stage would create a commercial nightmare for both parties — particularly the Joneses — and should not be granted (see [20] – [23]).

But the persistent misinterpretation of ss 86 and 87 by debt counsellors and magistrates warranted a declaratory pronouncement on the correct position (see [28] – [32]). An appropriate order would declare —

• that a magistrates' court hearing a matter in terms of s 87(1) did not enjoy I jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and that any order containing such a provision is null and void; and

• that a rearrangement proposal in terms of s 86(7)*(c)* contemplating a monthly instalment lower than the monthly interest accruing on the outstanding balance was ultra vires the NCA.

3. HOHNE v SUPER STONE MINING (PTY) LTD 2017 (3) SA 45 (SCA)

A confession made by a person may be inadmissible in a criminal trial but may be admissible in a civil trial so that that person may be held liable for damages.

Super Stone's directors saw CCTV footage that convinced them that an employee, Hohne, was stealing diamonds from the business. They confronted Hohne I with the evidence and left him with the choice of full confession or criminal prosecution. Hohne chose to cooperate, agreeing to a recorded interview. After some prevarication followed by a stern warning that lies or evasion would result in exposure and criminal prosecution, Hohne confessed. He pointed out hidden diamonds and later made a signed confession to the police. He also signed an acknowledgement of debt in which he admitted being liable to Super Stone in an amount of R5 million in respect of the losses incurred as a result of the theft. The recording of the interview, the police confession and the acknowledgment of debt together constituted the evidence in dispute in the present case, which according to Hohne was obtained by duress and inadmissible against him.
Hohne was prosecuted in a criminal trial, but the court ruled his confession inadmissible because it was not freely and voluntarily made, and acquitted him.
Super Stone then instituted a damages action in delict against Hohne. The trial was divided into two parts: the first dealt with the question of the admissibility of the contested evidence and the second with the merits. The court admitted the evidence and awarded Super Stone R6 million in damages. In an appeal to the Supreme Court of Appeal the parties confined themselves to the issue of duress.

Held per Leach JA (Shongwe JA, Petse JA and Nicholls AJA concurring)

The mere fact that a suspected criminal was faced with an election whether to make a statement relating to allegations of criminality did not make any resulting statement offensive to the right to a fair trial if it were introduced into the evidence (see [47]). There was nothing unlawful or *contra bonos mores* — in the sense of an unconscionable threat of some considerable harm — in the directors' warning regarding the consequences of lying (see [48]). Nor would evidence of anything he said or did as a result render the subsequent trial unfair (see [48]). There was in any event no evidence that Hohne did in fact act under duress: there had been no threat of unlawful evil that would be inflicted on him if he did not cooperate (see [49]). Hohne failed to discharge his onus to establish duress or coercion that would render the incriminating evidence against him inadmissible or breach his right to a fair trial if admitted (see [50]). Appeal dismissed.

4. S v Nkala (20170040) [2017] ZAECGHC 51 (9 May 2017)

A misrepresentation in a fraud case may take a variety of forms and may include a misrepresentation made by implication.

Bloem J.

[1] The accused was charged in the magistrate's court with fraud. He pleaded guilty but the magistrate was not satisfied that he admitted all the elements of the offence of fraud. The magistrate accordingly recorded a plea of not guilty in terms of section 113 of the Criminal Procedure Act.[1] The prosecutor then led the evidence of Rudi Strydom, the investigating officer, whereafter the state closed its case. The accused did not testify. He also did not call witnesses to testify on his behalf. The magistrate then convicted the accused of fraud and sentenced him to pay a fine of R1 000.00 or to undergo one year's imprisonment, half of which was suspended for three years on condition that he not be convicted of fraud committed during the period of suspension.

[2] In terms of section 303 of the Criminal Procedure Act this matter was placed for consideration before Pickering J who requested the magistrate for his reasons for convicting the accused of fraud instead of theft and why warrant officer Strydom's opinion evidence was admitted and relied upon. The magistrate submitted his response to the above enquiry. On receipt thereof Lowe J requested the Director of Public Prosecutions to comment on whether the conviction was justified and, if a conviction was justified, whether the accused should have been convicted of theft or fraud. Mr Turner from that office promptly provided submissions with which I shall deal hereunder. I thank Mr Turner for his submissions.

[3] In the handwritten charge sheet it was alleged that between October 2016 and 31 January 2017 the accused had "*been fraudulently defrauding the complainant, Ms Zanele Matshikiza, by borrowing her cellphone pretending that he wanted to use it for Facebook purposes. In the process the accused fiddled with the complainant's phone until he managed to transfer monies from the FNB account of the complainant to his phone making an e-wallet for himself, as a result of his actions the complainant suffered prejudice to the amount of R8 000.00, as the accused has unlawfully and intentionally misrepresented himself to FNB to be Ms Zanele Matshikiza*."

[4] The admissions that the accused made when the magistrate asked him questions in terms of section 112(1)(b) of the Criminal Procedure Act are that during 2016 he managed to get the complainant's PIN number of her banking account which could be accessed through her cellphone, that during the above period he would visit the complainant, his friend, at home

[1] Criminal Procedure Act, 1977 (Act No. 51 of 1977).

when he would have access to her cellphone and that, without her knowledge or consent, he would transfer money from her bank account. He furthermore admitted that "*I was aware that it was against the law but I wasn't aware that it was actually fraud that I was committing*", that "*I thought of it as theft*" and "*I was aware that theft is a criminal offence*". The magistrate then asked him whether he "*had the intention of committing such an offence and achieve your target goals*" to which he replied "*it was not intentionally, Your Worship, it was never my intention to commit it. It was never planned*" and "*it was not my intention to actually steal from the complainant or defraud her of her assets. She was my friend after all.*"

[5] The magistrate recorded a plea of not guilty because he was of the view that the accused did not admit the element of intent to defraud. The state called warrant officer Strydom. The public prosecutor asked him one question which question and the accused's answer are quoted hereunder:

"*Sir, now as the police with such years of experience, can you please assist this court in telling us whether when a person, a person is stealing something from any other person, can that person make a mistake? --- No, Your Worship, stealing there was an intention to steal*."

[6] The accused did not have a question for warrant officer Strydom. The magistrate asked him the following question to which warrant officer Strydom responded:

"*Now when a person says then after telling the Court that he stole something from a person, but said he had no intentions to do it, is he telling lies? ---Yes, Your Worship*".

[7] In his response to the second issue raised by Pickering J the magistrate acknowledged that warrant officer Strydom's opinion regarding the accused's intention was irrelevant and inadmissible. Mr Turner also submitted that warrant officer Strydom's evidence was of no relevance as to whether the accused had the intention to commit theft or fraud.

[8] Fraud consists in unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.[2] The essential elements of fraud are (a) unlawfully; (b) making a misrepresentation; (c) which causes; (d) prejudice to another; (e) with the intent to defraud.[3] It is a basic principle of our criminal law that, for it to secure a conviction, the state is required to prove all the elements of the offence beyond reasonable doubt.[4]

[9] From the above admissions, in my view, there can be no doubt that the accused's conduct was unlawful and that his conduct caused prejudice to the complainant. He admitted that he was aware that his conduct "*was against the law*". The conduct was the withdrawal of money from the

[2] JRL Milton *South African Law and Procedure – Common Law Crimes* 3rd ed, vol 2 at 702.
[3] JRL Milton at 707. See also CR Snyman *Criminal Law* 5th ed at 531.
[4] *S v Smit* 2007 (2) SACR 335 (T) at 374i.

complainant's bank account without her knowledge or consent. Furthermore, the complainant suffered prejudice when sums of money were withdrawn from her bank account. The accused's unlawful conduct accordingly caused the complainant and the bank prejudice. What remains to be determined is whether, based on the admissions, it can be said that the accused made a misrepresentation and that he intended to defraud the complainant.

[10] Mr Turner correctly submitted that the accused knew that what he was doing was wrong and constituted theft. He does not agree with the accused that, although he knew that his conduct constituted theft, he did not realise that it also constituted fraud. Mr Turner submitted that "*the accused defrauded the complainant and the bank by unlawfully transferring moneys to his own account through the unauthorised use of another person's PIN number. He clearly acted fraudulently and did so to the prejudice of both the complainant and the bank*."

[11] The elements of misrepresentation and intent to defraud were dealt with in *S v Mbokazi*.[5] The accused in that case was the manager at the Madadeni branch of the Ithala Bank where, through an error in the computerised accounting system, the savings account of one Msibi was credited in the sum of R62 500.00. The accused became aware of the error and took advantage of it. Except for other sums that he withdrew from Msibi's account, he also withdrew the sum of R1 000.00. The evidence made no mention that the accused made an express representation which made it possible for him to withdraw the R1 000.00. Thirion J said the following at 77i – 78a about representation:

"Misrepresentation may however take a variety of forms. They may be made by entries in books or records (*R v Heyne and others* 1956 (3) SA 604 (A)) or by conduct or even by silence when there is a duty to speak. It would seem to me that the remarks of Lord Halsbury in *Aaron's Reefs Ltd v Twiss* [1896] AC 273 (HL) which are quoted with approval in *S v Ressel* 1968 (4) SA 224 (AD) are also apposite in the present case:

'It is said there is no specific allegation of fact which is proved to be false. Again I protest, as I have said, against that being the true test. I should say, taking the whole thing together, was there a false representation? I do not care by what means it is conveyed – by what trick or device or ambiguous language; all those are expedients by which fraudulent people seem to think they can escape from the real substance of the transaction. If by a number of statements you intentionally give a false impression and induce a person to act upon it, it is not the less false, although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue.'"

[12] The learned Judge then dealt with the submission that when the accused withdrew the R1 000.00 from the savings account of Msibi, he made no

[5] *S v Mbokazi* [1998] 2 All SA 72 (N).

representation to the bank at all, other than that he was taking the money. It was submitted that the accused did not make a representation, orally or otherwise, to the effect that he was entitled to withdraw the money.

[13] Thirion J did not sustain those submissions and dealt with them as follows at 78c-d:

"I do not agree. I think that counsel's submission ignores the realities of the situation. The accused was an employee of the bank. It was part of his duties to perform the functions of a teller. I think that as such an employee, the accused impliedly represented to the bank, whenever he affected a withdrawal of money from a customer's account, that the customer had duly authorised the transaction; that the necessary steps had been taken for the due withdrawal of the money standing to the credit of the account. Furthermore the accused, in order to effect the transaction, made certain entries on the computer. Those entries carried with them the implied representation that it was the customer who had withdrawn the money or at least that the customer had authorised him to operate the computer in order to effect the withdrawal of the money."

[14] Although *S v Mbokazi* has not specifically been approved by the Supreme Court of Appeal, it has been referred to by that court on various occasions, recently in *S v Prinsloo and others*.[6] In none of the cases in which reference was made to it did the Supreme Court of Appeal criticise the reasoning in *S v Mbokazi*. I have no doubt that the Supreme Court of Appeal would have criticised *S v Mbokazi* by now if such criticism was warranted.

[15] To the extent that the accused in this case was not employed by First National Bank where the complainant's account was held with the result that he could not make entries on her account, it was distinguishable from *S v Mbokazi* where the accused was employed as branch manager of Ithala Bank where Msibi's savings account was held. The accused in

[16] that case also made certain entries on the computer to effect the withdrawal of money. Like in *S v Mbokazi,* when the accused in this case made the transfer from the complainant's bank account, he impliedly represented to the First National Bank that it was the complainant who had withdrawn the money. The accused knew that that representation was false because it was made without the complainant's knowledge or consent. He accordingly misrepresented the situation to First National Bank with the intention to induce the bank to release the money from the complainant's account. The withdrawal of money caused prejudice to the complainant and the bank. In the circumstances, I am satisfied that on the admissions made by him, the accused was correctly convicted of fraud.

[17] The conviction of fraud and the sentence referred to in paragraph 1 above are accordingly confirmed.

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[6] *S v Prinsloo and others* 2016 (2) SACR 25 (SCA) at 65i.

From The Legal Journals

Nicci Whitear

"The admissibility of extra-curial admissions by a co-accused: A discussion in the light of the Ndhlovu, Litako and Mhlongo/Nkosi cases, and international law"

2017 SALJ 244

Abstract
The common-law rule against the use of extra-curial statements made by one co-accused against the other was 'deeply ingrained in our legal psyche' until the case of S v Ndhlovu & others2001 (1) SACR 85 (W) ('Ndhlovu's case'). In this case, the court invoked s 3 of the Law of Evidence Amendment Act 45 of 1988 to admit such evidence as hearsay evidence. The Supreme Court of Appeal ('SCA') in Litako & others v S2014 (2) SACR 431 (SCA) para 64 ('Litako's case') rejected the approach adopted in Ndhlovu's case, and reiterated the rule excluding the use of extra-curial statements made by one co-accused against another. This position has now been confirmed by the Constitutional Court ('CC') in the case of Mhlongo v S; Nkosi v S2015 (2) SACR 323 (CC) (Mhlongo/Nkosi's case).This note provides a critical analysis of these developments.

De Villiers, W P

"Section 271A of the Criminal Procedure Act 51 of 1977 (Prescription of certain previous convictions) and minimum sentencing legislation- S *v Jacobs* 2015 2 SACR 370 (WCC)"

2017 (80) THRHR 340

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

Contributions from the Law School

Spousal privilege

Facts of the case

This case involved an appeal from conviction and sentences in magistrate's court for the theft of a police docket done in an attempt to obstruct the course of justice. [7]The appellant was employed at the magistrate's court as a clerk and a stenographer where the police docket went missing.[8] Prior to the prosecution of the *Mrubata* matter, the docket went missing after the appellant gained access to the state prosecutor's office who was handling the case, where he gained access to the docket. The appellant's wife was called as a state witness. She testified that she was not living with the appellant at the time due to marital problems,[9] But he had slept in her home on the weekend after the appellant had gained access to the docket, which he left behind in his bag.[10] The appellant tried to recover the bag but she was unwilling to hand it over.[11] The appellant's wife eventually called the police and handed over the bag which contained the docket.[12] After testifying under examination in chief she stated under cross examination that she was still married to the accused.[13] Crucially, it had not been explained to her before she came to testify that she was not compelled to give evidence against her husband, because of spousal privilege. This was only explained at court. She said she would not have testified had she known she did not have to but decided that, since she was already there, she would testify anyway.[14]

Findings of Appellate Court

The issue on appeal centered on the magistrate's serious misdirection in failing to properly investigate the circumstances under which the appellant's wife testified.[15] At the very least by permitting her to continue giving evidence after she indicated that she would not have testified had she been aware that she was not obliged to do so, counsel for the accused argued that the appellant was not afforded a fair trial.[16] In

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[7] *S v Mrubata* and *Others* CAS 523/07/2017, discussed in *S v Mgcwabe* 2015 (2) SACR 517 (ECG).
[8] *S v Mgcwabe* supra (n 1) par [4].
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*
[12] *S v Mgcwabe* supra (n 1) at par [6]
[13] *Ibid.*
[14] *Ibid.*
[15] *S v Mgcwabe supra* (n 1) at par [9].
[16] *Ibid.*

other words, the process was fatally defective because she had not been afforded an opportunity to exercise her rights in terms of s 195 of the *Criminal Procedure Act of 1977.*[17] Section 196(1) of the Criminal Procedure Act 51 of 1977 provides that the spouse of an accused shall be competent but not compellable to give evidence for the prosecution in criminal proceedings.[18] It is clear that the rationale behind the provisions of s 195 (1) of the *Criminal Procedure Act* [19]is the preservation of the sanctity of marriage. In the case at hand it appears as if the marriage relationship was already irreparably broken.[20] The issue was whether s 195 (1) of the CPA provides that a spouse shall not be compellable to give evidence only if it is necessary to preserve the marriage relationship.[21] The literal wording of the section affords a spouse an absolute right to make an election not to testify, irrespective of the actual status of the relationship. Further, the accused was clearly prejudiced by his wife's testimony.[22]
The court held that once the witness had indicated that she would not have come to court had she been aware of her rights, the magistrate should have adjourned the matter to enable her to make a considered decision.[23]

Criticism

It is submitted that application of spousal privilege, based on a literal not purposive reading of s 195 (1) of the CPA was incorrect. The manner in which the rule was applied did not take cognizance of the fact that there was no marital relationship to preserve, and that the wife had been made aware of her rights (albeit only when she was at court) but nevertheless elected to testify against her husband anyway. She had after all called the police and handed the bag containing the docket over to them, instead of giving in to her husband's pressure for her to give it to him. To disallow the wife's testimony had the effect of depriving the court of directly relevant, vital information.[24] In *Rumping v DPP* [25] Lord Reid noted that:[26]

"It is a mystery to me why it was decided to give this privilege to the spouse who is a witness: it means that if that spouse wishes to protect the other he or she will disclose what helps the other spouse but use this privilege to conceal communications if they would be injurious but on the other hand a spouse who has become unfriendly to the other spouse will use this privilege to disclose

[17] *S v Mgcwabe supra* (n 1) at par [10].
[18] *Ibid*. However, a spouse can be deemed competent and compellable to give evidence for the prosecution where the accused is charged with certain offences which are listed in subsection.
[19] *Act 51 of 1977*.
[20] *S v Mgcwabe supra* (n 1) at par [10].
[21] S v Mgcwabe *supra* (n 1) at par [12].
[22] *S v Mgcwabe supra* (n 1) at par [17].
[23] *Ibid*.
[24] Fourie "Recognition of a parent-child testimonial privilege in South African Criminal Procedure: Lessons from the United States of America" (2008*) South African Journal of Criminal Justice* 259.
[25] [1962] 3 All ER 256.
[26] Naude (n 22) 331 fn 39.

communications if they are injurious to the other spouse but conceal if they are helpful." [27]

It is submitted that the legislation is irrational and unjustifiable and merely perpetuates and reinforces a number of harmful stereotypes.[28] It is submitted that while effective enforcement of the criminal law is essential, policy considerations necessarily dictate that the courts should abolish spousal privilege and adopt a discretionary approach: render spouses subject to normal obligations to give evidence. However, this would be subject to the proviso that the court has the power to excuse witnesses when public interest does not require that the evidence be given.[29]

Another point worth noting – but which was not considered by the court, is whether spousal privilege is simply limited to information that has been directly and intentionally conveyed by words (written or spoken) or whether it also extends to information derived by one spouse from observing the actions of the other spouse, or retaining his possessions which he inadvertently left at her home (where, *in casu*, he was staying without her permission). It could be argued that because of the rationale for the privilege, it should be limited to confidential information that is intentionally conveyed by one spouse.[30] So for example where the husband places money in a wardrobe, without being aware that his wife is observing him, such information would not constitute a marital communication. In *Owen v State* [31] the wife of the accused testified that her husband was out late on the night that the burglary occurred. Furthermore, when he returned he had brought nothing home with him. However afterwards she had seen him with money which she had counted for him and which he then used to purchase merchandise. In this case the court noted that [32]

"any transaction or communication between husband and wife, not appearing on its face to have been intended to be public, was shielded by the sacredness of the relation, but noted decisions that when the conduct or transaction was not traceable to the relation of husband and wife and the confidence inspired by that relationship, but in its nature was as likely to have occurred before the public as in private, the parties might testify for or against each other, at least after the dissolution of the marriage." [33]

What is clear is that the better approach seems to be not the manner in which the information is conveyed but rather whether it was conveyed in reliance upon marital

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[27] *Rumping v DPP supra* (n 24) 256.
[28] Naude "Spousal Competence and Compellability to Testify: A Reconsideration" (2004) 17 *SACJ* 325 at 342. For instance gay relationships do not qualify as family due to the inability to procreate (*National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA CCC at par [50].
[29] Naude *supra* (n 22) 343-344.
[30] *Ibid*.
[31] (1885) 78 ALA 425, 56 AM Rep 40.
[32] Barton "Marital communications and the law" (1979) *CILSA* 1 at 35.
[33] Annot 10 ALR 2d 1389 at 1405.

confidence. In *Mgcwabe* [34] it is clear that the accused could not have been acting in reliance upon such a confidence given the strained circumstances of their relationship. This is further demonstrated by the means that the accused took to try and retrieve the bag.

Recommendations and Conclusion

It is submitted that the courts should abolish spousal privilege and adopt a discretionary approach: render spouses subject to normal obligations to give evidence. However, this would be subject to the proviso that the court has the power to excuse witnesses when public interest does not require that the evidence be given.[35] This would result in competing policy considerations being weighed in light of the facts of each particular case.[36] This would provide much needed flexibility and is already recognized in s 189 of the *Criminal Procedure Act* [37] which notes that there are circumstances in which court recognizes that it is undesirable to compel a witness to testify. The public interest in receiving relevant testimony must be weighed against the disadvantages a witness would suffer if they testified.[38] These include:

- Probative value of evidence
- Seriousness of the offence
- Disruption of any continuing relationship
- Harshness of compelling person to testify
- Availability of other evidence on the same matters and reliability of such evidence
- Likelihood that harm would be caused to testifying spouse.[39]

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[34] *S v Mgcwabe supra* (n 1).
[35] Naude *supra* (n 22) 343-344.
[36] Naude *supra* (n 22) 344.
[37] Act 51 of 1977.
[38] Naude *supra* (n 19) 345.
[39] *Ibid*.

Matters of Interest to Magistrates

The Myth of Objectivity: Conclusion from Gravett WH "The Myth of Objectivity: Implicit Racial Bias and the Law (Part 2)" *PER / PELJ* 2017(20)

Most of us would like to be free of biases and stereotypes that lead us to judge individuals based upon the social categories to which they belong, such as race. But wishing things do not make them so. The best scientific evidence suggests that most of us - regardless of how hard we try to be fair and objective and regardless of how deeply we believe in our own objectivity - harbour implicit mental biases that might very well alter our behaviour. The accumulated hard data, collected from scientific experiments conducted with mathematical precision, objective measurements and statistical dissection, forces us - as Justice van der Westhuizen urged - to see through the facile assumptions of our own "colour-blindness".

Confronted with robust research suggesting the pervasiveness of implicit bias on decision-making, should we, as lawyers and judges and legal scholars, strive to be behaviourally realistic, recognise our all-too-human frailties, and design systems and procedures to attempt to decrease the impact of implicit bias in the courtroom? I submit that our duty as faithful stewards of the judicial system demands no less. A judicial system that embraces a mission of social justice, while simultaneously being hamstrung by decision-making processes that might be implicitly racially biased, is simply indefensible.

What then, can we do about implicit biases in the courtroom? The public should ideally view the court system as the single institution that is most unbiased, impartial, fair and just. Yet the typical trial courtroom mixes together many people, often strangers, from different social backgrounds, in an intense, stressful, emotional and often hostile social environment. In such an environment a complex jumble of implicit and explicit biases will inevitably be active. It is the primary responsibility of the judge to manage this complex and bias-rich environment to the end that fairness and justice be done - and be seen to be done.

The good news is that implicit biases are malleable, *ie* they are not impervious to change. On the personal level, one potentially effective strategy to alter implicit bias about race is to expose ourselves to counter-typical exemplars. For example, in a longitudinal study, Dasgupta and Asgari tracked the implicit gender stereotypes held by female subjects both before and after attending a year of college. One group of women attended a co-educational college, while the other attended a single-sex college. At the commencement of their college careers both groups had comparable

levels of implicit stereotypes against women. However, after one year, those who attended the women-only institution on average expressed no implicit gender bias, whereas the average gender bias of those who attended the co-educational college actually increased. After carefully accounting for the other environmental variables of the two universities (e.g. coursework and extra-curricular activities), the researchers concluded that it was exposure to an environment in which women frequently occupied counter-stereotypic leadership roles (professors and administrators) that altered the implicit gender stereotypes of female college students.

Although the longitudinal field study explored implicit gender bias, Kang expresses the opinion that we should not be surprised to see similar results in the near future with regard to implicit racial bias. Both groups viewed women stereotypically as more "supportive" than "agentic".

Research has also shown that when a person forms a new personal connection with a member of a previously devalued out-group, implicit attitudes and stereotypes towards that group may change rapidly and dramatically. Such evidence gives further impetus to efforts to increase the diversity of the Bench and courtroom.

On the legal institutional level, the implicit social cognition research bears out that the conditions under which implicit biases translate most readily into discriminatory behaviour are when people have wide discretion in making quick decisions with little accountability. Judges function in just such an institutional environment. Courtrooms can be busy places, often requiring judges to make almost instantaneous decisions on motions, trial objections, witness credibility and the like in high-pressure situations. The research makes clear that unwanted prejudicial responses are most likely to occur under conditions of distraction or cognitive overload that do not afford judges the time necessary to actively engage in the corrective cognitive processes to control the "bigot in the brain".

The evidence also suggests that believing ourselves to be objective puts us at particular risk for susceptibility to implicit biases and behaving in ways that belie our self-conception. This is precisely what Justice van der Westhuizen cautioned us about. Judges should therefore remind themselves that they are human and fallible, notwithstanding their status, their education and the robe.

Most judges view themselves as objective and especially talented at fair decision-making. For example in one survey Rachlinski *et al* found that 97% of judges (35 out of 36) believed that they were in the top quartile "in avoid[ing] racial prejudice in decision-making" relative to other judges who attended the same conference. That is obviously statistically impossible. In another survey more than 97% of the administrative judges surveyed ranked themselves in the top 50% in terms of avoiding bias – again, this is mathematically impossible.

Closely connected to doubting one's objectivity is the strategy of consciously increasing one's motivation to be fair. Social psychologists generally agree that motivation is an important determinant in checking biased behaviour. It may be difficult to correct biases even when we do know about them. However, if we trust our own explicit self-reports about our biases - namely, that we have none - we will have no motivation to self-correct. Unfortunately, as far as biases are concerned, we

often readily see the splinter in our neighbour's eye while ignoring the mote in our own.

A powerful way to increase judicial motivation would be for judges to gain scientific knowledge about implicit social cognition. This would require that judges become internally persuaded that a genuine problem exists. Judges in the United States are already studying what might be done. For example, the National Center for State Courts has a dedicated working group on implicit biases and it has produced a primer on the subject for judges.

The authors recognise that adopting such a measure would entail major structural changes. Also, having three judges decide cases that one might be able to decide could well be too inefficient and costly to be viable. One study found that adding a female judge to an appellate panel more than doubled the probability that a male judge would rule in favour of the plaintiff in sexual harassment cases and more than tripled this probability in sex discrimination cases. As part of judicial education, judges should be encouraged to take the IAT (Implicit Association Test). It might assist newly appointed judges to understand the extent to which they have implicit racial biases and alert them to the need to correct for these biases when they take the Bench. It would also serve to counter the phenomenon that when a sense of power is bestowed on people, they tend to show greater bias than they did before. To be clear, the suggestion is not that testing should be mandatory for judicial candidates or that their results should be disclosed. To be effective, judges should be "confronted" with their IAT results in a thoughtful and controlled manner that fosters introspection and avoids defensive responses.

In addition to providing training, the judicial system could also alter actual practices in the courtroom to minimize the untoward impact of implicit biases. In this regard, Rachlinski *et al* suggests the use of three-judge trial courts in all instances, improving the diversity of appellate court panels, and increasing the depth of appellate scrutiny by employing *de novo* review in cases in which particular trial court findings of fact might be tainted by implicit bias.

I am mindful of the potential costs of these interventions. However, if there are cost-effective interventions I believe that they should be adopted, at least on an experimental basis. I recognise that these suggestions are starting points and that they may not all be effective. However, to render justice blind - as it is supposed to be - these reforms are worth considering.

The general goal of this contribution is not to take a position on how the discoveries in implicit social cognition research should inform the law. Rather it is to reveal to South African legal practitioners and scholars who are unfamiliar with implicit racial bias and its potential consequences (i) the robustness of the empirical evidence that much of human cognition can and does occur without introspective access; (ii) that such implicit mental processes nevertheless guide and influence decision-making; and (iii) that the costs incurred by individuals and social groups come at the hands not only of the malign, but also from the unaware and uncontrolled mental acts of well-intentioned people.

In short, this contribution suggests that the research findings surrounding implicit racial bias provide a more behaviourally accurate understanding of the continued perpetuation of racial disparities in the judicial system. It seeks be useful to lawyers and judges of good faith who conclude that implicit racial bias in the courtroom is a problem worth worrying about, but do not know quite what to do about it. I also hope to provoke those who are more skeptical about the legal relevance of implicit racial bias to engage in substantive debate about implicit biases, "colour-blindness" and the law past caricatures.

(I have edited the above extract which is from the conclusion of the article and removed all references to footnotes. The full article can be read here http://journals.assaf.org.za/per/article/view/1313/2101 (Ed).

A Last Thought

[143] “The injustice of our history cannot be avoided. At the immediate level of this case it requires that we afford the same dignity, and rectification of indignity, to those living on farms, as that which motivated the solution to the “poor white problem” in the first half of the previous century. It means that we must recognise that the common law protection of property and its attendant economic privileges did not, in our historical context, support personal autonomy and economic freedom, but effectively worked against it. The argument that the protection of existing property is a necessary condition for personal and economic freedom is not self-explanatory in the South African context. It will only start to become convincing when property held in tenuous form by previously disadvantaged people is protected in stronger form under the Constitution”.
Per Froneman J in *Daniels v Scribante and Another* 2017 ZACC 13