e-MANTSHI

A KZNJETCOM Newsletter

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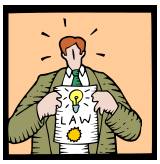
Welcome to the hundredth and thirty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. An Older Persons Amendment Bill 2017 which intends to amend the Older Persons Act 13 of 2006 has been published for general comments in Government Gazette no 40883 dated 2 June 2017. The purpose of the amendment bill is to amend the Older Persons Act, 2006, so as to insert new definitions; insert new provisions relating to the monitoring and evaluation of all services to older persons and for the removal of older persons to a temporary safe care without a court order; to tighten up the existing implementation and compliance measures; to effect some textual amendments for greater clarity and to provide for matters connected therewith.The Bill can be accessed here
http://www.gov.za/sites/www.gov.za/files/40883_gen426.pdf

Recent Court Cases

1. S v Thetha (CA&R165/2017) [2017] ZAECGHC 73 (9 June 2017)

It is irregular for a court to sentence an accused without allowing him/her to address the court in terms of section 274 of Act 51 of 1977 regarding an appropriate sentence.

Beshe J:
[1] This review first served before *Lowe J* who raised the following queries:
"Whilst technical was the accused, having led evidence on sentence, given the opportunity of addressing the court in argument?
At the commencement of sentencing should the accused's right to representation not have been explained afresh, he having been convicted? If so was this done?"

[2] In response to the query the Magistrate stated as follows:
"Having perused the court record (as I was of the view that I always allow accused persons to address me) I noticed that I ask them whether there is anything else they wish to tell me whilst still in the witness stand [see page 36 line 13] and not, after he/she has returned from the witness stand where he/she had testified in mitigation of sentence."

[3] The relevant part of the transcription records the following exchange between the Magistrate and the accused after the latter had testified in mitigation of sentence:
Court: Is there anything else that you want to tell me Mr Thetha that you would like me to take into consideration before you are sentenced?
Accused: No, Your Worship.

[4] *Section 274 of the Criminal Procedure Act* provides that:
"Evidence of sentence
(1) A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.
(2) The accused may address the court on any evidence received under *subsection (1)*, as well as on the matter of sentence, and thereafter the prosecution may likewise address court."

[5] As to when it is appropriate for the parties to address the court on sentence in *S v LM*, 2015 (1) SACR 422 ECG at [7]. *Tshiki J* pointed out that:
"… … where the state and / or the defence elects to do so they should be allowed to lead evidence in both mitigation and aggravation of sentence before any party is allowed to address the court on the appropriate sentence to be imposed."

[6] In *S v Mokela 2012 (1) SACR 431 SCA at [14].* the point was made that it is trite that both the accused and the state have a right to address the court regarding the appropriate sentence. Further that, even though the use of "may" in *Section 274* may suggest that the sentencing court has a discretion whether to allow the parties to address it on sentence "… … a salutary judicial practice has developed over many years, in terms thereof courts have accepted this to be a right which an accused can insists on and must be allowed to exercise". Later on the same paragraph the learned judge of appeal continues: "This in line with the principle of a fair trial. It is therefore irregular for a sentencing officer to continue to sentence an accused person, without having offered the accused an opportunity to address the court".

[7] Clearly the manner in which the accused was invited to address the court did not make it clear that he was required to address the court as to what type of sentence, in his view would be appropriate and why. The fact that the question was asked whether there was anything else that the accused wanted the court to take into account before sentence, at the stage when he was still in the witness stand could be construed to have meant any other factor apart from those already mentioned in his evidence. This is also indicated by the fact that the Magistrate thereafter called upon the prosecutor to cross-examine the accused. When there was no cross-examination, the Magistrate proceeded to ask the accused whether he had any other witnesses to call. Accused being unrepresented could not have insisted on his right to address the court on sentence.

[8] This brings me to the next query raised by *Lowe J*. Namely, whether accused's right to legal representation should not have been explained afresh, he having been convicted.

[9] *Section 35 (3) of the Constitution* provides that:
"Every accused person has a right to a fair trial, which includes the right-
(a) … …
(b) … …
(c) … …
(d) … …
(e) … …
(f) to choose, and be represented by a legal practitioner, and to be informed of his right promptly;

(g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and be informed of this right promptly."

[10] From the record of proceedings it transpires that accused's rights to legal representation were explained before the start of the trial. He elected to apply for legal aid. A representative was accordingly provided to him. Having been out on bail, accused at some stage skipped bail resulting in the legal aid attorney having to withdraw. Accused's bail was accordingly forfeited to the state. Upon his re-arrest and appearance accused insisted that he was going to conduct his own defence.

[11] In my view this was sufficient to satisfy the requirements of a fair trial as advocated for in *Section 35 (3) of the Constitution*.

[12] I have already alluded to the unsatisfactory manner in which the Magistrate went about regarding what is expected of her in terms of *Section 274 of the Criminal Procedure Act*. The accused, a male aged forty two (42) years was convicted of theft of four wheel nuts he unscrewed from complainant's trailer. This, after he had scaled a high perimeter wall into complainant's premises at about 22h00. As the Magistrate rightly pointed out, the four wheel nuts could not have been particularly expensive. What weighed heavily against the accused was the fact that he had a long list of previous convictions dating as far back as 1997. The latest being a conviction for theft in 2013. A total of eleven (11) previous convictions comprising two of housebreaking with intent to steal and theft, one of attempted housebreaking, seven of theft and one of unlawful possession of drugs (dagga).

[13] The sentence of thirty six (36) months imprisonment with twelve (12) months thereof suspended conditionally appears to be appropriate in the circumstances. Be that as it may, in light of the Magistrate's failure to comply with *Section 274*, it will be appropriate, in my view for the matter to be remitted back to the Magistrate to comply with the provisions of *Section 274*.

[14] In the result, the conviction is found to be in order, but the sentence ought to be set aside and the matter remitted back to the Magistrate to comply with *Section 274 of the Criminal Procedure Act*.

2. Baadjies v S (A141/2017) [2017] ZAWCHC 66 (9 June 2017)

The fact that a magistrate, after having established the age of a complainant, proceeded to enquire whether she understood the difference between truth and lies and then warned her to tell the truth is a clear indication that s/he considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath.

(I have only quoted the evidence on the issue of admissibility of the child's evidence in the following extract (the full judgment can be accessed here http://www.saflii.org/za/cases/ZAWCHC/2017/66.html –Editor.)

Gamble et Fortuin JJ
Admissible evidence?

[21] On appeal, Mr Theunissen argued on behalf of the appellant that the evidence of the child had been irregularly taken by the regional magistrate, that she had not been properly cautioned in terms of the relevant provisions of the CPA and that there was therefore no admissible evidence from KS on the record. We now deal with that argument.

[22] The record reflects that before KS gave evidence the court was asked to make a ruling in terms of s170A(1) of the CPA that her evidence could be adduced through the intercession of an intermediary. The defence did not object thereto and after considering the qualifications and experience of the proposed intermediary an order was duly granted. Thereafter, KS gave evidence *in camera.*

[23] She was asked in some detail by the regional magistrate, through the intermediary, what grade she was in at school and how old she was. Her replies that she was in Gr 3 and was then nine years old were factually correct. Then she was asked some questions aimed at establishing whether she could distinguish right from wrong. There were no difficulties with her replies in that regard either. The regional magistrate then remarked as follows:
"*HOF: Die Hof is tevrede dat die getuie die verskil verstaan tussen 'n waarheid en die leuen. Sy word dan verklaar 'n bevoegde getuie…. ("The court is satisfied that the witness understands the difference between a (sic) truth and the (sic) lie. She is thus declared to be a competent witness.")*
HOF: Ek waarsku nou vir jou, jy moet net die waarheid praat, niks anders nie net die waarheid, verstaan jy dit? ... ("I now warn you that you must speak only the truth and nothing but the truth, do you understand that?")
GETUIE: Ja."

[24] Mr Theunissen argued that this admonition from the court was not sufficient to render KS's testimony admissible as evidence. Relying on the Full Bench decision in

this Division in *Bessick* [2012] ZAWCHC 248 (29 May 2012), counsel submitted that the failure of the regional magistrate to specifically ask KS whether she understood what the concept of an "*oath"* embraced was fatal to the admissibility of her evidence. He suggested that such a direct enquiry was an obligatory first step to be undertaken by the court before establishing whether the witness could distinguish between right and wrong. Counsel argued that absent this enquiry, the witness could not be permitted to deliver unsworn evidence in terms of s164 of the CPA.

[25] The provisions of s164 (1) of the CPA are to the following effect:

"*When unsworn or unaffirmed evidence admissible*

164(1) Any person who, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."

[26] That section is to be considered in conjunction with s162 (1) which reads as follows:

"*Witness to be examined under oath*

162(1) Subject to the provisions of sections 163 and 164, no person shall be examined as a witness in criminal proceedings unless he is under oath, which shall be administered by the presiding judicial officer or, in the case of a superior court, by the presiding judge or the registrar of the court, and which shall be in the following form:-

'*I swear that the evidence that I shall give, shall be the truth, the whole truth and nothing but the truth, so help me God.'*

[27] S164 has been the subject of quite considerable judicial comment over the years, including judgments by the Supreme Court of Appeal (*S v B 2003(1) SACR 52 (SCA); Director of Public Prosecutions, KwaZulu-Natal v Mekka 2003(2) SACR 1 (SCA))*; and various Provincial Divisions *[S v Stefaans 1999(1) SACR 182 (C); S v Vumazonke 2000(1) SACR 619 (C); S v Malinga 2002(1) SACR 615 (N); S v Williams 2010 (1) SA 493 (ECG).9].* It bears mention that those cases deal with the import of the section in question before its amendment in 2007 when the words "*from ignorance arising from youth, defective education or other cause"* appeared after the word "*who*" and before the words "*is found"* in the first line thereof. *Hiemstra's Criminal Procedure at 22-48* points out that in its current form the section is accordingly of wider application than before and "*(t)he court can now make a finding that a witness does not understand the oath on any basis."*

[28] The preferred approach in relation to the procedure to be adopted by a trial court before applying s164 was summarised as follows by Streicher JA in *Mekka* :

[11] The fact that the magistrate, after having established the age of the complainant, proceeded to enquire whether she understood the difference between truth and lies

and then warned her to tell the truth is, in my view, a clear indication that she considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath. In her additional reasons the magistrate confirms that to have been the case. The magistrate did, therefore, make a finding that the complainant was a person who, from ignorance arising from the youthfulness, did not understand the nature and import of the oath. The magistrate saw and heard the complainant and this Court is in no position to question the correctness of her finding.
[12] The respondent submitted that the trial court also had to enquire whether the complainant understood the difference between truth and falsehood. Whether such an enquiry need be held is a question that was not decided in S v B and need not be decided in this case, as it is clear that the magistrate conducted such an enquiry. The complainant said that she understood the difference and that one got punished if one were to tell a lie, thereby indicating that she knew that it was wrong to tell a lie. It was the basis of these answers that the magistrate concluded, as she was in my view entitled to do, that the complainant understood the difference between truth and falsehood.
[13] It follows that the magistrate did not commit an irregularity by allowing the complainant to testify after having warned her to tell the truth."

[29] In *Williams*, Chetty J made the following observations in relation to the facts before that court:
"*[9] When the complainant was called upon to testify, the uncontroverted evidence of Ms Phillips (A social worker who had interviewed the complainant prior to the hearing with a view to recommending the use of an intermediary in adducing the child's evidence)., that the complainant had the intellectual capacity to differentiate between the truth and falsehood, had already been led and must obviously have weighed heavily with the judge. Consequently it is axiomatic that the judge's admonishment, that the complainant speak the truth, flowed directly from his conviction that, by reason of her youth, the complainant did not understand the nature and import of the oath. Experience shows that even in cases where witnesses are much older than the complainant the word 'oath' remains a nebulous concept, whereas the invocation to speak the truth is more readily appreciated and understood. The transcript demonstrates unequivocally that the judge was satisfied that the complainant comprehended the difference between truth and falsehood, and his admonishment that she speak the truth was in my view sufficient to render complainant's evidence admissible."*

[30] It will be observed that in both of these *dicta* there was no procedural requirement that the court should first enquire of the witness whether she understood what the '*oath'* was. It was left up to the court to assess whether this was probable or not. In *Bessick,* Henney J made the following observation (with reference to cases such as *S v B, Mekka* and *Williams)* as to the advisable approach:
"*[19] 'n Formele ondersoek hoewel wenslik, om vas te stel of 'n getuie oor die vermoee beskik om die eed of bevestiging te begryp, is nie nodig nie. Indien 'n hof 'n*

mening vorm uit omringende omstandighede dat 'n getuie nie die aard en betekenis van die eed begryp nie, kan die hof die getuie waarsku" . (*"While a formal enquiry is preferable to establish whether a witness has the capacity to understand the oath or affirmation, it is not strictly necessary. In the event that the court forms the opinion from the surrounding circumstances that a witness does not understand the nature and extent of the oath, it can warn the witness.")*

[31] In the circumstances, we are of the view that the approach advocated by counsel for the appellant places the bar too high. Having considered the approach of the regional magistrate in this case, we are of the view that she obviously satisfied herself as to the inability of KS to formally take the oath and correctly applied the provisions of s164; thereby ensuring that the evidence deposed to was inadmissible as such. Most importantly, as demonstrated in para 23 above, the trial court formally admonished the witness to speak the truth as required by that section of the CPA.

3. **S v Masemola (CM433/2016) [2017] ZAGPPHC 259 (6 June 2017)**

There are two methods in which a court can provide compensation to an injured person. The first is a compensatory order made in terms of section 300 of the Criminal Procedure Act 51 of 1977. A section 300 compensation order has the effect of a civil judgment. The second method is a condition of indemnification in a suspended sentence made in terms of section 297(1)(i)(aa) of the same Act.

De Vos J:
[1] This matter came before me as a special review at the request of the Senior Magistrate, Mamelodi. The accused appeared before the court on two counts. Count 1 related to the malicious injury to property, and count 2 was a charge of assault. The accused was found guilty on both counts.

[2] On count 1 the accused was sentenced to "*pay a fine of R2000 (two thousand rand) or in default to undergo a period of 2 (two) months imprisonment wholly suspended for a period of 3 (three) years on condition that the accused compensate complainant's loss of her property amounting to R3499,99 by paying instalments of R500 (five hundred rand) per month. 1st payment on or before 31 January 2017 and thereafter on or before 28th Feb, 31st March, 30th April, 31 May, 30th June and last one being R499,99 on or before 31 July 2017. (Section 300 of CPA 51 of 1977)*".
On count 2 the accused was sentenced to "*pay a fine of R2000 (two thousand rand) or in default to undergo a period of 2 (two) months imprisonment wholly suspended for a period of 3 (three) years on condition that the accused is not convicted of offence of assault to do grievous bodily harm or assault common which offences are committed within the suspension period*".

After these sentences were imposed the Presiding Magistrate further ordered that "*both counts are taken together as one for the purpose of sentence*".

[3] The Senior Magistrate is of the view that the following irregularities concerning sentence occurred:
3.1 In respect of count 1 the suspended condition pertaining to compensation was made in terms of section 300 of Act 51 of 1977. The inclusion thereof as a suspended condition was therefore irregular.
3.2 The Presiding Magistrate imposed a separate sentence in respect of each of the two counts, but nevertheless ordered that the two counts be taken together for purpose of sentence.
The Presiding Magistrate noted the concerns raised by the Senior Magistrate and indicated that he/she has no additional comments to submit on the issue.

[4] Collis AJ referred the matter to the Office of the Director of Public Prosecutions for its comment on the issues raised by the Senior Magistrate. The DPP supports the view of the Senior Magistrate. The DPP remarks as follows with regard to the first irregularity, pertaining to the sentence imposed on count 1:
"*7.1 There are two methods in which a court can provide compensation to an injured person. The first is a compensatory order made in terms of section 300 of the Criminal Procedure Act 51 of 1977. A section 300 compensation order has the effect of a civil judgment. The second method is a condition of indemnification in a suspended sentence made in terms of section 297(1)(i)(aa) of the same Act.*
7.2 The reference by the magistrate to section 300 of Act 51 of 1977 (inserted in brackets after the sentence in count 1) is rather unfortunate. The condition of suspension to compensate the complainant was clearly not made in terms of section 300 but in terms of section 297(1)(i)(aa). The complainant was called to testify solely in respect to the injury amount suffered (see p.18-20 of the transcribed record). This evidence was clearly received by the court in terms of section 274(1) of Act 51 of 1977.
7.3 Except for the reference to the wrong section i.e. section 300 instead of section 297(1)(i)(aa), the suspended condition to pay compensation is lawful. It is clear from the judgment that the magistrate's intention was that the accused compensate the victim for her injury rather than the accused paying a fine to the state coffers. Compensation in this form gives a complainant much greater satisfaction than would otherwise occur (see in this regard S v Charlie 1976 (2) SA 596 (A) and S v Benetti 1975 (3) SA 603 *(T)).*
7.4 In S v Tshondeni; S v Vilakazi 1971 (4) SA 79 (T) the applicable general principles were discussed regarding compensation as a condition of suspension. These are, as summarised in Hiemstra's Criminal Procedure *at p.28-74, as follows:*
"1. The first aim of a condition of suspension is to keep the convicted person out of prison. The court must guard against a sentence which is too light in the circumstances or which becomes too harsh because of the condition.
2. The second aim is to have the convicted person realise more clearly the

consequences of his or her irresponsible conduct.
3. The third aim is to compensate the victim for any injury suffered by him or her. The court must guard against the idea that the convicted person pays a fine to the complainant.
4. The court must ensure that the criminal trial does not degenerate into a dispute about quantum. Nevertheless the accused must be aware that the court is busy investigating the extent of the damage caused by his or her offence and must be given the opportunity to attempt to influence the court's determination thereof by means of questions or evidence.
5. The determination of damages takes place after conviction. In this enquiry medical costs and loss of income are in issue, as well as an amount for pain and suffering, which lies within the court's discretion. Other patrimonial loss which the victim suffered can also be taken into account.
6. The amount is not limited to the magistrate's jurisdiction regarding fines (*R v Fourie and Another 1947 (3) SA 468* (C)). There are indeed limitations in terms of section 300, but they are not applicable here.
7. The ability of the convicted person to pay must be kept in mind. For that reason payment in instalments can be ordered. It is in order to award an amount which is smaller than the true damage, simply because the accused cannot reasonably pay a larger amount and would consequently have to go to prison, with the result that the complainant would get nothing.
8. Although the amount for pain and suffering is discretionary, the record must indicate the basis on which it was calculated. If it appears that the accused and the complainant agreed on an amount, there is no problem, and the sentence can be suspended on condition that the accused honour his or her undertaking within a determined time.
9. It is in order for the court to make only an order, without imposing a fine or other sentence, that the accused pay the victim compensation under threat of a suspended sentence".
7.5 It is respectfully submitted that in imposing compensation as a condition of suspension the court a quo complied with the general principles set out in the matter referred to in paragraph 7.4 supra.
7.6 It is respectfully submitted that the sentence pertaining to count 1 be reviewed and that the reference to section 300 of the Act 51 of 1977 be deleted from the sentence in count 1".
[4] With regard to the second irregularity, which relates to the order that counts 1 and 2 be taken together for the purpose of sentence, the DPP remarks as follows:
"*8.1 The magistrate imposed separate sentences in respect to both counts. Although both sentences were wholly suspended the conditions of suspension differ.*
8.2 The counts were thus clearly not taken together for purpose of sentence and doing so would in any event be improper given the different suspended conditions imposed in respect to each count.
8.3 The order that the counts be taken together for purpose of sentence is nonsensical in light thereof that they were not taken together for that purpose.

8.4 In light thereof that the order has no purpose and was made after the individual sentences were imposed it is respectfully submitted that the order be reviewed and set aside".

[5] I agree with the submissions made by the DPP. Accordingly, the sentence on count 1 must be reviewed, as it is clear that the condition of suspension to compensate the complainant was not made in terms of section 300 of Act 51 of 1977, but in terms of section 297(1)(i)(aa) of the same Act. Furthermore, the order that the two convictions be taken together for purpose of sentence stands in direct conflict with the separate sentences imposed on each of the counts. Having regard to the fact that different conditions of suspension are imposed in respect of each sentence, the counts 1 and 2 cannot be taken together for purpose of sentence. Therefore the order cannot stand and must be set aside.
Accordingly, I make the following order:
a) The reference to section 300 of Act 51 of 1977 is deleted from the sentence imposed on count 1.
b) The remaining part of the sentence imposed on count 1 is confirmed.
c) The sentence imposed on count 2 is confirmed.
d) The order that "both counts are taken as one for the purpose of sentence" is set aside

From The Legal Journals

Naidoo, K

“Reconsidering motive's irrelevance and secondary role in criminal law”

2017 TSAR 337

Abstract
The consideration of a perpetrator's motive as an element of a crime is ostensibly a novel idea in criminal law since it contradicts the maxim in most Western systems of criminal law that in principle, motive is irrelevant to proving intention and criminal liability and plays, at most, a secondary role. In most Western systems of criminal law a perpetrator's criminal liability is partly based on his mental state at the time he committed the proscribed conduct. This mental state is referred to as mens rea, which is more commonly referred to as intention. Since the recognition of hate crime as a specific category of criminal conduct in the United States of America and the proliferation of hate-crime laws in that country an apparent exception to the maxim that motive is irrelevant and plays a secondary role seems to exist. The distinguishing feature of hate-crime laws is that the perpetrator's bias motive is regarded as an element of the offence itself. Commencing with the historical origins of mens rea and motive, this article considers the irrelevance or secondary role of motive in several Western systems of criminal law, closely examines the concept of motive, suggests possible reasons for its irrelevance or secondary role in criminal law and questions whether the irrelevance of motive is actually a fiction. The article concludes with a consideration of whether the apparent irrelevance of motive or its secondary role in South African criminal law would be an obstacle to the enactment of a hate-crime law in South Africa.

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

Contributions from the Law School

IS THE DEVELOPMENT OF THE COMMON LAW BY THE COURTS A POWER OF HISTORICAL AND ACADEMIC IMPORTANCE ONLY?

1. Introduction

The common law has always been seen as a living, breathing entity, which evolved and grew to meet the ever changing needs of society. Encapsulated as the doctrine of *stare decisis*, the common law is thus the uncodified law which developed through precedent via the interpretation of existing law by the courts. This fundamental characteristic of continual development of the common law has been acknowledged by specific constitutional inclusion and mention in s39(2) of the Constitution[1]:
'(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

Although the section makes mention that courts are empowered to develop the common law, the Constitution is silent on what development is and how it ought to be done. This leads into the bigger question regarding the doctrine of separation of powers: When is a court developing the common law, and when is it usurping the power of the legislature and creating new law?

This article considers the power of common law development afforded to the courts and further seeks to provide insight into what the power entails, how it is exercised and the implications of crossing the line by creating new law, in light of the decision taken in the *Stransham-Ford* case.

2. What is the power to develop the common law?

In 1948 Prof JC de Wet asked '(i)s the common law out of date?'[2] and posited that 'development was less about the creation of new legal principles as opposed to the application of existing principles to fresh contexts.'[3] Thus what development means essentially, is interpretation and application of long standing common law principles in and for a modern constitutional democracy essentially giving the common law immortality. But that being said, immortality or standing for 'all time' is not to be

[1] Act of108 of 1996
[2] DM Davis *Where is the Map to Guide Common-Law Development?* Stell LR 2014 1
[3] ibid

understood as stagnancy or paralysis, as the courts are required to develop the common law in terms of the constitutional imperative and directive of s39(2) of the Constitution. Where the common law principle in question is not able to withstand such scrutiny, it must then be changed – something vastly different from mere development. This it is submitted, is outside of the ambit of the courts powers, and the remedy would lie in the hands of the legislature. The court can only go as far as declaring it 'unconstitutional', and the matter must be resolved by the legislature. The legislature then must, not *may* or *should*, create new law[4].

And although Van der Walt correctly states that 'the development of the common law should start with an accurate determination of the common law position based on a proper historical analysis, followed by a decision[5] (which could be based on historical comparative, policy[6] and other reasons) that the outcome that is indicated by the common law as it stands is unacceptable,'[7] at which point do the courts cease to develop the common law and begin to create new law? We have to know when this is because of the doctrine of the separation of powers. Is there a difference between extending the common law and developing the common law?

Ramosa[8] argues that there is a difference, and that the difference is not just an argument in semantics, but rather one that goes to the very essence of the power bestowed on the court in terms of s39(2) of the Constitution, pointing out, correctly, that 'the courts do not possess the power to reformulate the constituent elements of the crime and, at the same time, to determine the criminal liability of an accused under the new crime.'[9]

Hoctor[10], it is submitted, correctly states '[I]t should be recognized that there is a crucial difference between the legitimate and vital role of the courts in striking down criminal law rules which are unconstitutional and the act of extending the bounds of

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[4]Snyman, CR *The scope of rape - A dangerous precedent* (2007) 124 SALJ 677

[5] If appropriate

[6] 'First, the essential function of policy in the common law is to bring into judicial consideration the broader social interest of the public at large. Secondly, the concept of policy is value laden: any given policy stands for certain values or a sense of morality with which we intend or expect most of society to abide. Thirdly, while policy may no longer be an unruly horse which judges should be reluctant to mount, it is nevertheless not a 'Pegasus that might soar beyond the momentary needs of the community'. Policy therefore reflects contemporary values: thus as society develops, its values may change and with them the expectations of the collective welfare that forms public policy. The public policy of today therefore need not necessarily be the same as that of yesterday. In this sense, reference to policy …may be seen as a tool or device by which the law may keep itself relevant to modern times. Fourthly, a court is naturally limited in relation to the type of public consideration that it is able to take into account: the adversarial process lacks the sources of information and means of inquiry available to, for example, a parliament. This is, however, no justification for failing to take external matters into account. Finally, evaluation of relevant policy considerations does not involve a court exercising an unfettered discretion. A judge is not a "knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness".' Butler, Desmond A. (2002) *An assessment of competing policy considerations in cases of psychiatric injury resulting from negligence*. Torts Law Journal, 10. pp. 13-40. http://eprints.qut.edu.au/18404/1/18404.pdf

[7] AJ van der Walt *Development of the Common Law of Servitude* (2013) 130 SALJ 722 at 738

[8] Ramosa, R *The limits of judicial law-making in the development of common law crimes: Revisiting the Masiya decisions* (2009) SACJ 353

[9] Supra note 13 at 370 – Ramosa writes in this context of the development of the common law and simultaneous application to the current factual scenario before the court, thereby violating the principle against retrospectivity particularly where it acts to the prejudice of the accused. His paper considers the principle of legality and the doctrine of the separation of powers in relation to the courts power to develop the common law.

[10] Hoctor article on *Masiya*

existing crimes, which founders on the principle of legality.... [I]t remains unacceptable that a court should disregard the principle of legality in usurping the function of the legislature.'

Snyman[11] too holds the same view stating that 'clear(ing) up existing points of doubt in the definition of crimes, . . . hold(s) that certain conduct is not punishable in terms of existing definitions of crimes, or perhaps even (to). . .fill an obvious lacuna in the definition of a crime'. And I agree with this contention.

'(C)ourts are enjoined to apply and, if necessary, to develop the common law in order to give effect to a protected right…' and in so doing are 'obliged to promote the spirit, purport and objects of the Bill of Rights.'[12] The decision in *Thebus*[13] thus tells us that the purpose of developing the common law is to meet the constitutional imperative and bring the common law in line with constitutional principles[14]. The Constitutional imperative simply affords the court the power to develop the common law, but does not say what the criteria for deciding when such development would be necessary. The court in Thebus[15] deduced that 'when a rule of the common law is inconsistent with a constitutional provision'[16] that is when the court is enjoined to develop the law to bring the common law in line with the spirit, purport and objects of the Bill of Rights. The court further stated that 'even when a rule of the common law is not inconsistent with a specific constitutional provision but *may*[17] fall short of its spirit, purport and objects'[18] then the common law must be 'adapted so that it grows in harmony with the "objective normative value system" found in the Constitution.' The writer refers to this section of the *Thebus*[19] judgement because of the interchangeable use of the words "develop" and "adapt". Did the court mean to use these words as synonyms? Or, is it an indication that 'development' of the common law is a legitimate court power, but 'adaptation' requires that the common law in question be dealt with by the legislature (once constitutional repugnancy has been identified)? The court in *Thebus*[20] then describes the power afforded to courts by s39(2) of the Constitution as being, not only to develop the common law, but also to 'refashion (it)…in order to reflect the changing social, moral and economic make-up of society.'

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[11] Snyman article on *Masiya* at 679

[12] *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) at para 25

[13] *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC)

[14] Supra at para 25 further quoting from *Pharmaceutical Manufacturers Association of SA and Another: In Re Ex Parte Application of the President of RSA and Others* 2000 (2) SA 674 (CC) '…the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes'.

[15] Supra at para 28

[16] ibid

[17] Emphasis added

[18] ibid

[19] supra

[20] At para 31

We thus find ourselves faced with another word that is either used as a synonym for "develop" or, again, is the court in *Thebus*[21] saying that not only is the court empowered to develop the common law, it can also adapt it? Clarity is definitely needed to ensure that the doctrine of separation of powers is not circumvented by the use of words that appear to be synonymous but in reality extend the powers of the court so as to now usurp the law making power reserved for the legislature. It is the submission of the writer that the power given to the court is to develop the common law and nothing more. It must not "adapt" or "refashion" the common law, at risk of violation of the doctrine of separation of powers.

Thus, it is submitted that "develop" means to interpret the common law in light of new and novel situations that present before a court; using the same principles and measuring the action/case in relation to it. It is not the disregarding of certain definitional elements of a crime, for if those elements were not part of the crime, the crime would not exist – in other words, the crime itself would cease to exist.

3. When is the common law being developed and when is new law being made?

The question of the power of the courts to develop the common law arose most recently in both the High Court and Supreme Court of Appeals decisions regarding the *Stransham-Ford*[22] case. Although the decision taken by the High Court was rendered moot due to the passing away of the Applicant[23], the SCA considered the power of the court to develop the crime of murder in relation to Physician Assisted Suicide. The question is an important one, for its answer will be integral towards determining what the way forward is for those advocating the legalization of physician assisted suicide. In the determination, the key question is: does continued criminalization of PAS (under the crime of murder) violate a patient's fundamental rights to dignity, privacy and bodily integrity? And if it does, can the common law crime of murder be developed by the courts so as to remove criminal liability in those circumstances? Or, is this tantamount to violation of the doctrine of separation of powers, and thus a matter that is outside of the s39(2) constitutional directive?

The SCA enunciated the legal question thusly: whether Stransham-Ford had a 'right to select a method of (committing suicide) that was acceptable to him.'[24] His application to the HC was for physician-assisted suicide – to be assisted by a physician in his committing suicide. Despite the initial decision regarding mootness of the entire action, the SCA felt it was pertinent to deal with the other related issues for the sake of clarity. One of these was the power of the court to develop the common law, particularly as it related to the crime of murder.

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[21] At para 31
[22] *Minister of Justice and Correctional Services v Estate Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016)
[23] Mr Stransham-ford
[24] At para 30 of the SCA decision

The High Court dealt with the power afforded in the s39(2) at para 22 of the judgement – but all that was said to this effect was that "a court must keep in mind that the primary responsibility from law reform rests with the legislature." He further states that "a court must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights." (I agree with this, because of use of the word 'develop'). Fabricus J then states that 'where there is such a deviation, courts are obliged to develop the common law by removing the deviation.' The problem with this is that to me the 'deviation' is so complex in that the ramifications of its removal are immeasurable. The deviation he considers goes to the definitional elements of the crime of murder. He correctly refers to the 2 stage test described in *Carmichel:*

1. To consider whether the existing common law (having regard to s 39(2) objectives) requires development in accordance with those objectives:

IF YES, THEN

2. How such development is to take place in order to meet the s39(2) objectives.

In order to make a determination on this first point, the court must have the benefit of a full record of the evidence. The HC decision was brought on an 'urgent' basis, and in its analysis, the SCA found that the court of first instance did not have such benefit. Thus, it found, that to make the decision it did (despite mootness) was ill informed. Given the nature of the question under scrutiny, nothing less than a full and thorough dissection of the law would suffice. The court, in this regard quoted the Honorable Hand J in *Spectator Motor Service Inc v Walsh*[25] thus: 'Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'

Despite the issues with the judgement itself (which became apparent in the SCA decision regarding the facts and evidence, as well as the mootness of the High Court decision due to Stransham-Ford's death prior to judgement being delivered) I do agree, from an analysis of the constitutional rights which Stransham-Ford claimed were infringed[26] by the blanket prohibition and criminalization of PAS that 'the absolute prohibition of assisted suicide in common law does not accord with the rights of the Applicant.' That is as far as I believe the court is empowered to go in as far as the issue is concerned – i.e. declare that the prohibition is unconstitutional. The rest has to lie in the hands of the legislature.

4. Conclusion

Are we to interpret the decision of the SCA as placing a blanket moratorium on the courts from developing the common law further? I think not. The reasons given in its

[25] At para 17 of the SCA decision
[26] Not discussed further in this article

decision for overturning the HC decision, and returning to the status quo are based on sound principles of interpretation and application of law. It is submitted that the courts do in fact have a continued role to play in the development of the common law, provided of course that that is what the courts stay within the bounds of said mandate.

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Matters of Interest to Magistrates

Van Breda v Media 24 Limited and Others; National Director of Public Prosecutions v Media 24 Limited and Others (425/2017, 426/2017) [2017] ZASCA 97 (21 June 2017)

(In the following extract from the above judgment (Paragraphs 42 to 75) all footnotes have been removed for ease of reading. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZASCA/2017/97.html . The case is important in view of the provisions of paragraph 13 of the Code of conduct for magistrates in Regulation 54A of the Magistrates Act, Act 90 of 1993 which reads as follows:

13. A magistrate may only permit the proceedings in his or her court to be televised, broadcast or taped for these purposes, or photographs to be taken or television cameras or similar apparatus to be used in his or her court during a court session,

during recess or immediately prior to or after the court session, on the conditions that he or she may deem fit-

(a) after hearing argument by the applicant and any other party involved in the proceedings who may wish to oppose the application;

(b) after due consideration of-

(i) the rights of all the parties, including their legal representatives, witnesses and court personnel involved in the proceedings; and

(ii) the interests of the administration of justice; and

(c) if he or she is satisfied that it is in the public interest to do so.)

Ponnan JA (Leach, Mbha, Zondi and Van Der Merwe JJA concurring)**:**

"[42] The question whether, and under what circumstances, cameras should be permitted in South African courtrooms provokes tension between the rights of the press, on the one hand and the fair trial rights of an accused person, on the other. The right to a fair trial has been interpreted as including the foundational values of dignity, freedom and equality which lie 'at the heart of a fair trial in the field of criminal justice'. When two constitutional rights (such as the right to freedom of expression and the right to a fair trial) butt heads it is not a matter of determining which right is more deserving so that courts may declare a victor and jettison the loser. Instead, as *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)* made plain 'where constitutional rights themselves have the potential to be mutually limiting – in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa – a court must necessarily reconcile them'. Accordingly, freedom of expression and the fair administration of justice, which are both essential to the proper functioning of any true democracy, should as far as possible be harmonised with one another.

[43] It is difficult to accept that a total bar on the broadcasting of judicial proceedings does not at least limit the s 16 right. As the Constitutional Court has explained, even where expression is regulated this limits the right concerned: 'Because freedom of expression, unlike some other rights, does not require regulation to give it effect, regulating the right amounts to limiting it. The upper limit of regulation may be set at an absolute ban, which extinguishes the right totally. Regulation to a lesser degree constitutes infringement to a smaller extent, but infringement nonetheless. . . .'

[44] Conventional media reporting will inevitably be limited and incomplete. And, despite their importance, newspapers (and even television) are yesterday's technology. Pencils and sketch pads are now considered anachronistic. There is no

restriction regarding filming outside the court. Nor is there any restriction regarding attending in court and taking notes, drawing pictures or upon accessing exhibits. The restriction relates to the means of gathering the information and the place where it may be gathered. There simply can be no logic in a court permitting journalists to utilise the reporting techniques of the print media but not permitting a television journalist to utilise his or her technology and method of communication, being the broadcasting and recording of proceedings, despite the fact that 'live camera footage will be more accurate than a reporter's after-the-fact summary'.

[45] The right to freedom of expression confers on the media the discretion to determine what means of communication would be most effective in relation to engaging the public and communicating and relaying information and events to it. As the European Court of Human Rights explains, albeit in a different context:
'The court recalls that it is not for the court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists. Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed.'
This is especially so when the restriction on the means of communication would undermine the quality or timeliness of the communication, because 'delayed information is as good as denied information'.

[46] It is thus important to emphasise that giving effect to the principle of open justice and its underlying aims now means more than merely keeping the courtroom doors open. It means that court proceedings must where possible be meaningfully accessible to any member of the public who wishes to be timeously and accurately apprised of such proceedings. Broadcasting of court proceedings enables this to occur. Television presents the complete picture instantaneously. Television cameras do so by creating a comprehensive and instantaneous feedback loop between the trial participants and the television audience. In contrast, the print media simply does not operate with the same kind of interactive speed or attract so wide and responsive an audience.

[47] The media plays a vital watchdog role in respect of the court process. One of the aspirational goals of the media is to make governmental conduct in all of its many facets (including courts) transparent. Cameras in the courtroom aid that process, so too microphones. Televised proceedings thus aid in the public oversight of the judiciary. According to Justice Potter Stewart 'the primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside Government as an additional check on the three official branches' This oversight role was recognised in *Sheppard v Maxwell*, where the court observed that: 'the press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and the judicial process to extensive public scrutiny and criticism.' At its core therefore, a bar on cameras and microphones means that one sector of the media is precluded from taking their

particular tools of trade into the courtroom. And, it has been pointed out that there has been a failure to articulate reasons for treating electronic media differently to print media in the courtroom context. In the light of the fact that members of the public acquire most of their news through the electronic media, it has to be somewhat counter-intuitive that they are not able to 'utilize the principle of open justice to their advantage to the same extent as the print media.' In that, the section 16(1) rights of both the media and the public are self-evidently limited.

[48] As this Court explained in *Primedia* regarding the right to an open Parliament:
'The Constitution thus affords all South Africans the right to see and hear what happens in Parliament. . . . Of course not all members of the public are able to attend sittings of Parliament. But the media is able to bring to their attention what happens in sittings by virtue of radio and television broadcasts, through newspapers and now also through social media such as Twitter. . . .'
Lewis JA there pointed out:
'The public has a right to witness [incidents in Parliament]. And the public has a right to know not only what the Speaker or the Chairperson says during moments of disorderly behaviour, but also to see how MPs are treated by security staff who forcibly evicts them from the Chamber. The public has a right to know how the legislative arm of government operates.'
That accords with the Constitution's general endorsement of openness and transparency in all public affairs. While *Primedia* concerned the right to an open Parliament, rather than the right to open justice, the same logic must apply in both contexts. After all, the judiciary as a branch of government should be accountable in the same way as the executive and legislative branches. Moreover, courts can hardly prescribe to other arms of government that they should be open, whilst endorsing a judicial system that is 'shrouded in mystique and protected at all times from the prying eye of the camera or the invasive ear of the microphone'.

[49] Television allows viewers to feel that they are present in the courtroom. And, there are many articulate arguments put forward to support cameras in the courtroom based on almost two decades of experience with cameras in some US States. Advocates in favour of coverage argue that it provides education about the workings of the court to those who themselves cannot be present in the courtroom. Proponents urge that cameras make lawyers and judges more accountable for their behaviour. Five decades ago, one of the principle reasons against unrestricted media coverage was that flashbulbs and microphones were inconsistent with the dignity and decorum of the courtroom. Today, the decorum argument has largely dissipated as modern technology has advanced significantly, with the result that cameras are now neither obtrusive, nor disruptive.

[50] A court is a place where citizens can take their disputes in the knowledge that the rule of law will be applied. It is governed by rules of evidence and procedures designed to seek out the truth, not in a general way, but in the context of specific

dispute resolution and administration of justice. These rules also endeavour to ensure the fairness of the trial process. Moreover, a criminal trial follows a well-established order, with the prosecutor in a criminal case trying to establish, through the presentation of evidence, the guilt of the accused beyond a reasonable doubt. With each witness, there is the opportunity for direct examination followed by cross-examination and re-examination. Objections are ruled on by the judge. The formality of the setting and the proceedings contributes to the dignity and decorum of the courtroom and serves as a constraint. A discreetly placed camera would capture the formality of the proceedings and enable people to observe from afar the dignity of the proceedings and imbibe the same lessons of respect for the judicial process as those who are physically present.

[51] Arguably, complete broadcast coverage of the trial is important to achieve the valuable ends served by increasing public access to judicial proceedings. In that regard, 'gavel to gavel' coverage, as it has sometimes been described, may be preferable to no (or limited) coverage. The way in which stories that have been told in court and re-told by the media, may make a difference as to how the law is appreciated and the functioning of the court understood. With gavel to gavel coverage the role of the media more closely approximates that of a conduit rather than a processor and interpreter of court proceedings. By keeping cameras out of the courtroom, court reporters continue to be relegated to conveying information about judicial proceedings from the steps of the courtroom (as has traditionally been the case), despite the fact that the 'aural and visual nature of broadcasting would give the public a more direct sense of what has transpired than a verbal report in a highly summarised form.'

[52] One of the most persuasive remaining objections is the possible effect that cameras, and the larger audience they represent, may have on the testimony of witnesses in criminal trials. In considering this objection, it must be accepted that the courtroom is already a public place with a physical public presence – proceedings are transcribed and members of the press and public are free to be present. Television broadcasts provide members of the public with a virtual presence in the courtroom. If the physical presence of members of the public cannot be said to inhibit or distract counsel, the judges and witnesses, it has to be open to debate that a virtual presence will have that effect. 'Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice.'

[53] Those in favour of cameras, point to the 50 US states that have allowed cameras in some courtrooms and report no discernible effect on participants. In fact, most studies conducted on the effect of cameras on witnesses have found that allowing cameras into courtrooms had no effect, positive or negative, on the legal

proceedings. It is worth noting however, that these studies have been criticised for their methodological limitations. However, the results from the US State studies were unanimous: the impact of electronic media coverage of courtroom proceedings, whether civil or criminal, show minimal side effects on witnesses and the few studies that did lacked rigorous design. Most importantly, all jurisdictions agreed that those effects could be addressed through appropriate policy design.

[54] There is as well the argument that notwithstanding a witness taking the oath or affirmation, he or she may be affected either consciously or subconsciously by the evidence of the other witnesses given during the course of the trial. By viewing other evidence during the televised proceedings, so the argument goes, the memory and recollection of a prospective witness would be impermissibly refreshed, which might serve to enhance the credibility of that witness' testimony and corrupt the truth-seeking function of a trial. In *Shabalala v Attorney-General of the Transvaal,* the Constitutional Court dealt with a similar contention in the context of docket privilege as follows:
'A recurrent theme which asserts itself in some of the cases is that the disclosure of witnesses' statements might enable an accused person to "tailor" evidence and to give perjured testimony because he or she becomes alive to the fact that the falseness of such evidence may not be detected by the prosecution on the information available to. This objection is conjectural and it must be balanced against other factors which have to be weighed in dealing with an accused's insistence that he or she has a right to a fair trial. An alert prosecutor and a competent court would be able to make adequate allowance for the fact . . .'
To be sure, the risk of witness exposure does present a problem that cannot lightly be wished away. One way to address this concern would be for the judge to direct witnesses to base their answers solely on their personal knowledge. This can be achieved for example by precisely and cautiously instructing trial witnesses to testify based solely on their personal knowledge. It goes without saying that the essential character of a court is that it is invested with the power to maintain its authority and to prevent its process being obstructed and abused.

[55] Following on *Shabalala*, witness statements are now generally made available to the defence in advance of the commencement of the trial. The defence, equipped with such evidence, should be able to point to specific instances of tainted testimony. The adversarial nature of criminal proceedings and the pivotal role that cross-examination plays in it should enable the judge to safely make findings as to whether or not a witness' testimony has been tainted by the exposure. In any event, the reality of court reporting today is that even without any form of audio or audio-visual reportage, the media provide live text-based communications through various social media platforms such as Twitter and Facebook from inside the courtroom. In truth therefore the risk of 'tailoring' already exists. Thus, whether that risk will be materially exacerbated by audio-visual coverage remains moot.

[56] It has also been contended that commercial imperatives will likely impel the media to focus on the high-profile or cases concerning the unusual or gruesome. By focussing on the sensational, particularly in a country like ours with deep patterns of racial and economic inequality, so the contention goes, public confidence in the judicial system may actually suffer, because citizens are likely to feel that only cases involving the privileged receive due and proper consideration. As long ago as 1921, CP Scott, the editor of the Manchester Guardian, wrote:
'A newspaper has two sides to it. It is a business, like any other, and has to pay in the material sense in order to live. But it is much more than a business; it is an institution; it reflects and it influences the life of the community . . . it has, therefore, a moral as well as a material existence, and its character and influence are in the main determined by the balance of these two forces.'
It needs to be underscored, however, that it cannot be for us to prescribe to the media which trials they should cover – that remains their call. Moreover, it may well be that in high profile cases, it is even more critical that the public receive the maximum amount of information about the process by which a particular result has been achieved. As it was put in *Richmond Newspapers*:
'When a shocking crime occurs, a community reaction of outrage and public protest often follows .... Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.... It is not enough to say that results alone will satiate the natural community desire for "satisfaction." *A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.* To work effectively, it is important that society's criminal process "satisfy the appearance of justice" ... and the appearance of justice can best be provided by allowing people to observe it.'(Italics for emphasis)

[57] Concerns of privacy and security may also justify limits on how the media go about gathering and transmitting information about judicial proceedings. However, in accordance with the public-centred perspective, when individuals appear in a courtroom, their privacy interests might have to give way because their disputes are being resolved in a public forum that must be open to public scrutiny. As held in *Cox Broadcasting Corp v Cohn*, a judicial proceeding is a public event and information on the public record may be broadcast despite its highly sensitive nature. However, the court did acknowledge that there may be interests in need of protection. Thus judges who have to balance the presence of cameras with privacy interests can do so by imposing appropriate restrictions. Deputy Chief Justice Moseneke pointed out that there are a myriad of measures available to protect witnesses:

‘These range from: anonymity orders to protect vulnerable witnesses identities and allowing witnesses to testify through intermediaries or with the help of a support person, to closing the courtroom so that only certain people are present, or even allowing witnesses to testify from a remote location via closed-circuit television. Other measures might include suppression orders such as that ordered in *Multichoice* when judge Mlambo prohibited the media from photographing or broadcasting the testimony of Mr Pistorius or his witnesses, or even, as the United States has started experimenting with, allowing witnesses to wear disguises in court.’

[58] It is important to emphasise that whilst greater access by the public to the court system by means of televised proceedings would result in: (i) demystification of the judicial process; (ii) greater informed deliberation and critical assessment of the judiciary based on the public’s ability to readily observe judicial proceedings; (iii) increased understanding of and respect for the judiciary based on the public’s increased ability to observe the daily working of the courts; (iv) improved journalistic standards relative to court reporting resulting from greater coverage of court proceedings and the development of court reporters specialising in judicial matters; and (v) heightened public awareness of deep seated societal problems, the right to a public hearing does not automatically mean that trials must necessarily be broadcast live in all circumstances.

[59] Where there is a debate about whether given court proceedings should be broadcast, a court is vested with the power to limit the nature and scope of the broadcast where necessary to ensure the fairness of the proceedings before it. The power of the court to do so is an inherent one flowing from s 173 of the Constitution and must be exercised in the interests of justice. As it was put by the Constitutional Court in *SABC Ltd v National Director of Public Prosecutions and others*:
‘This is an important provision which recognises both the power of courts to protect and regulate their own process as well as their power to develop the common law. . . . The power recognised in s 173 is a key tool for courts to ensure their own independence and impartiality. It recognises that courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that courts in exercising this power *must take into account* the interests of justice.’
Accordingly, a court has the inherent power to make any order in relation to the publicity of the proceedings. However, such order must be consistent with constitutional requirements.

[60] The NDPP impermissibly adopts a blanket one-size-fits-all approach. Not just for this matter, but, as I understood the argument, for all criminal proceedings. The NDPP claims that there should be no broadcast whatsoever – whether, visual or audio. Such an approach cannot amount to the proper exercise of the s 173 power to limit the nature and extent of the broadcast. This is made clear by the decision of this

Court in *Primedia*. There, in the context of restrictions on the right to broadcast Parliamentary proceedings, this Court held:
'The right to see and hear what happens in Parliament is not unlimited. . . . Any measure adopted by Parliament must be objectively reasonable. The test to be applied is not only whether the limitation is proportionate to the end sought to be achieved, but also whether other measures would better achieve the end, or would do so without limiting others' rights. This is the test in the limitations provision in the Constitution (less restrictive means to achieve the purpose – s 36(1)(*e*)). In *S v Manamela & another* (Director-General of Justice Intervening . . . O'Regan J and Cameron J said (para 66) in a dissenting judgment, but the particular passage was approved by the majority of the court):
"The approach to limitation is, therefore to determine the proportionality between the limitation of the right considering the nature and importance of the infringed right, on the one hand, and the purpose, importance and effect of the infringing provision, taking into account the availability of less restrictive means available to achieve that purpose."

[61] *Manamela,* I daresay, precludes a rigid one-size-fits-all approach. There will be cases, one imagines, that rest exclusively on circumstantial evidence. It may well be difficult in such a situation to justify excluding cameras from the courtroom. There may also be cases that rest on the evidence of a single eyewitness. In those cases the risk of witness exposure or tailoring of evidence would not arise. There too, it may well be difficult to justify excluding cameras. Moreover, the fact that witness X might be severely intimidated by having to testify on camera, does not justify prohibiting the broadcast of witness Y's testimony, who has not raised the same concern. Nor would it, without more, justify prohibiting the audio broadcasts of witness X's testimony. Such an approach, does afford appropriate appreciation for the different types of witnesses, who would testify in the course of criminal proceedings. What warrant, can there be, it must be asked, for treating expert witnesses, lay witnesses and professional witnesses (such as police officers) on the same footing? I venture that it may be fanciful to suggest that an audio broadcast can have the same distressing or embarrassing effects as an audio-visual broadcast.

[62] *MultiChoice* endorsed a regime whereby:
(a) the evidence of all expert witnesses was to be broadcast using visual and sound broadcasts; (b) any lay witness who objected to having their evidence televised would have these wishes respected and no video coverage of that witness would be allowed; (c) however, a full audio of the evidence would be broadcast, as well as audio-visuals of the legal practitioners and the judge and assessors, even where objecting witnesses give evidence; and (d) even then, the presiding judge would from time to time have the power to make rulings in respect of a specific witness as and when required. Such an approach adequately balances the rights of open justice and free speech, with legitimate objections from lay witnesses and the need for a fair trial. A blanket ban on all broadcasting or adopting a one-size-fits-all approach, does not.

[63] The NDPP seeks to make much of the decisions of this Court and the Constitutional Court in the *SABC* matter. But it is necessary to view that case in its proper context if the s 173 power is to be properly exercised. The *SABC* cases were decided over a decade ago. Then, the live broadcasting of court proceedings, including appeals, was (with rare exceptions) virtually unknown in this country. While the majority of the Constitutional Court dismissed the appeal – on the basis that there was no warrant for interference with the exercise of this Court's discretion – it held tellingly that 'the time has come for courts to embrace the principle of open justice and all it implies'. It went on to explain that changes would likely be required in relation to the approach towards broadcasting of court proceedings. The position has changed fundamentally since the *SABC* judgments. In 2009, three years after the *SABC* cases, this Court issued a practice directive allowing, as a default position, the full audio-visual broadcasting of all of its proceedings. Other courts, including the Constitutional Court and the Gauteng Division, Pretoria, follow the same approach.

[64] The *SABC* judgments must therefore yield to a new reality. For, even as we grapple with television in the courtroom, there are many (particularly younger viewers) who are increasingly turning to the internet to keep up to date with news and current affairs. Many people now use social media as their main source of information, resulting in a shift in how information is disseminated and received. As McLachlin CJ observed:
'The explosive growth of new media signals a shift in who reports on legal proceedings. Court decisions may no longer be the preserve of trained professional journalists. Anyone with a keyboard and access to a blog can now be a reporter. And who is to say they are not? Some bloggers will be professionals and academics providing thoughtful commentary and analysis. Others will fall short of basic journalistic standards. Will accuracy and fairness be casualties of the social media era? What will be the consequences for public understanding of the administration of justice and confidence in the judiciary? How can a medium such as Twitter inform the public accurately or adequately in 140 characters or less? If witness or juror contamination is a concern with television, is it not even more so with ubiquitous social media accessed or received automatically via a hand-held device?'

[65] There is a growing trend of openness and permitting of the broadcast of evidence in international and foreign criminal tribunals. Since the International Military Tribunal at Nuremberg broadcast its trial of Nazi leaders in connection with World War II atrocities in 1945, several regional human rights courts and international criminal courts have opened their proceedings to cameras not as the exception, but the rule.

[66] The Inter-American Court of Human Rights (IACHR) is required to keep its hearings and deliberations 'on audio recordings' under its rule of procedure, as approved by the court in November 2009. Some of the most extensively televised

international court proceedings are those at the International Criminal Tribunal for the former Yugoslavia (ICTY), a United Nations Court in The Hague, which adjudicates the war crimes that occurred during the conflicts in the Balkans in the 1990s. Since it first heard cases in 1994, the ICTY has routinely recorded its proceedings and distributed them to the world's media. The audio-visual recording of the ICTY proceedings was designed 'to make sure that justice would be seen to be done, to dispel any misunderstandings that might otherwise arise as to the role and the nature of the Tribunal proceedings and to fulfil the educational task of the Tribunal.' The ICTY proceedings, 'other than deliberations of the Chamber', are held in public, unless otherwise provided. Proceedings can be televised 'in a modified manner,' for example, with the witness's voice or image distorted if a witness is 'protected' under Rule 75 on 'Measures for the Protection of Victims and Witnesses' of the ICTY Rule of Procedure and Evidence. The ICTY thus has the discretion to close its proceedings to protect witnesses where necessary. The full proceedings of the International Criminal Tribunal are recorded and broadcast using court equipment. Footage is made available to carriers like the BBC and CNN.

[67] The approach to the recording of proceedings in the International Criminal Court (ICC) in The Hague is similar to the ICTY. Where necessary for the protection of a witness, the image or voice of the person is distorted and rendered unrecognizable in the audio-visual feed. In addition, the court retains the discretion to exclude certain testimony from broadcast. According to the Rome Statute for the International Criminal Tribunal, trials 'shall be held in public'. Like the ICTY, the ICC Trial Chamber may find special circumstances that require that certain proceedings be closed for the purposes of the protection of the victims and witnesses and to protect confidential or sensitive information to be given in evidence. The ICC Statute also provides for similar 'protective measures' for a victim, a witness, or another person at risk due to testimony given by a witness. In those instances, the trial chamber may hold an in camera hearing to decide whether to order preventive measures against releasing the information on the identity or the location of the victim, the witness, or the other person who is vulnerable to the consequences of the testimony provided. The ICC Regulations provide for the recording and broadcast of proceedings, including witness testimony. Videos of both ICTY and ICC trials are posted on the courts' websites and can be streamed in full, subject to a 30 minute delay.

[68] The European Court of Human Rights (ECHR) uses a written procedure that allows it to make rulings primarily on the basis of 'written observations' submitted by the parties, although it holds oral hearings occasionally. When the ECHR holds public hearings, they are required to be public unless the Chamber of seven judges or the Grand Chamber of seventeen judges otherwise decides. The ECHR states: 'All hearings are filmed and broadcast on the court's website on the day itself, from 14:30 (local time).'

[69] The law evolves gradually. Often, technology is far ahead of both the legislature and the courts. However, institutions, courts included, are not fixed in stone. As society becomes more attuned to cameras in the courtroom, the novelty will dissipate and cameras will fade into the background. Although the arguments put forward in favour of allowing cameras in the court room are compelling, it needs to be accepted that South Africa is very much at the experimental stage of examining the possibilities brought about by new and improved media technology. There are a number of interests at stake in a matter such as this. These include:
(a) the interests of the NDPP, the appellant and the public in holding a trial that is fair and is seen to be fair;
(b) the interests of the media and the public in maintaining freedom of the press and in ensuring open justice;
(d) the interests of participants in the trial process; and
(e) the interests of the court and the public in maintaining the dignity and decorum in the administration of justice.
The goal has to be to achieve a balance of these competing interests.

[70] In permitting the televising of court proceedings this Court is doing no more than recognising the appropriate starting point. It will always remain open to a trial court to direct that some or all of the proceedings before it may not be broadcast at all or may only be broadcast in (for example) audio form. It remains for that court, in the exercise of its discretion under s 173 of the Constitution to do so. It shall be for the media to request access from the presiding judge on a case-by-case basis. In that regard it is undesirable for this Court to lay down any rigid rules as to how such requests should be considered. It shall be for the trial court to exercise a proper discretion having regard to the circumstances of each case.

[71] It remains the duty of the trial court to examine with care each application. That court should exercise a proper discretion in such cases by balancing the degree of risk involved in allowing the cameras into the court room against the degree of risk that a fair trial might not ensue. In acceding to the request, the judge may issue such directions as may be necessary to:
(a) control the conduct of proceedings before the court;
(b) ensure the decorum of the court and prevent distractions; and
(c) ensure the fair administration of justice in the pending case.
In making that decision, the judge may consider whether there is a reasonable likelihood that such coverage would: (i) interfere with the rights of the parties to a fair trial; or (ii) unduly detract from the solemnity, decorum and dignity of the court. There shall be no coverage of: (a) communications between counsel and client or co-counsel; (b) bench discussions; and (c) in camera hearings. A judge may terminate coverage at any time upon a finding that the rules imposed by the judge have been violated or the substantial rights of individual participants or the rights to a fair trial will be prejudiced by such coverage if it is allowed to continue.

[72] The default position has to be that there can be no objection in principle to the media recording and broadcasting counsel's address and all rulings and judgments (in respect of both conviction and sentence) delivered in open court. When a witness objects to coverage of his or her testimony, such witness should be required to assert such objection before the trial judge, specifying the grounds therefor and the effects he or she asserts such coverage would have upon his or her testimony. This approach entails a witness-by-witness determination and recognises as well that a distinction may have to be drawn between expert, professional (such as police officers) and lay witnesses. Such an individualised enquiry is more finely attuned to reconciling the competing rights at play than is a blanket ban on the presence of cameras from the whole proceeding when only one participant objects. Under this approach cameras are permitted to film or televise all non-objecting witnesses. Spurious objections can also be dealt with. It is for the court concerned to ensure that in balancing the public's interest in coverage of criminal proceedings against those of objecting participants, the trial process, already time consuming and expensive, must not be allowed to become further unnecessarily protracted. Every objection should not represent an unneeded incursion into the trial court's discretion in managing a fair trial.

[73] If the judge determines that the witness has a valid objection to cameras, alternatives to regular photographic or television coverage could be explored that might assuage the witness' fears. For example, television journalists are often able to disguise the identity of a person being interviewed by means of special lighting techniques and electronic voice alteration, or merely by shielding the witness from the camera. In other instances, broadcast of testimony of an objecting witness could be delayed until after the trial is over. If such techniques were used in covering trials, the public would have more complete access to the testimony via television, and yet the witness could maintain some degree of privacy and security.

[74] Whenever an accused person in a criminal trial objects to the presence of cameras in the courtroom, the objection should be carefully considered. If the court determines that the accused's objection to cameras is valid, that may require that cameras be excluded. By framing the inquiry in these terms, courts will be better able to strike a constitutionally appropriate balance between policies favouring public access to legal proceedings and the accused's right to a fair trial. The court would accordingly have regard to all the relevant circumstances in identifying whether the right to a fair trial in a particular case is likely to be prejudiced.

[75] A decision on whether to restrict the broadcast of court proceedings raises the same set of rights as occupied the attention of this Court in *Midi Television*. It follows that the same approach should apply; namely that courts will not restrict the nature and scope of the broadcast unless the prejudice is demonstrable and there is a real risk that such prejudice will occur. Mere conjecture or speculation that prejudice might occur ought not to be enough."

A Last Thought

[46] It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further proceedings a nullity. The general principles are well-established. They are now enshrined in s 165(2) of the Constitution, which provides 'the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice'. Thus, a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, either he or she is either actually biased or there exists a reasonable apprehension that he or she might be biased, acts in a manner that is inconsistent with the Constitution.

[47] *S v Le Grange2009 (2) SA 434 (SCA)* put the position thus:
'[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is 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 . . . ." The right to a fair trial is now entrenched in our Constitution . . . . The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial . . . .
. . .
[21] It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to

mean ‘’a departure from the standard of even-handed justice which the law requires from those who occupy judicial office”. In common usage bias describes “a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.”

. . .

[27] Notwithstanding that a judge's own insights into human nature will play a role in credibility findings or factual determinations, judges must make those determinations only after being open to, and giving proper consideration to the views of all the parties before them. “The reasonable person, through whose eyes the apprehension of bias is assessed, expects judges to undertake an open-minded, carefully considered, and dispassionately deliberate investigation of the complicated reality of each case before them.” In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality.”

Per Ponnan, J A in *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* (95/2016) [2017] ZASCA 88 (6 June 2017)