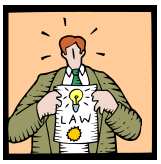
# e-MANTSHI

A KZNJETCOM Newsletter

**October 2017: Issue 136**

Welcome to the hundredth and thirty sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.




## New Legislation

1. The Rules regulating the conduct of the proceedings of the Magistrates Court has been amended with effect from the 1st of November 2017. The notice to this effect was published in Government Gazette no 41142 dated 29 September 2017. The amendment affects the following rules: Rule 2, 9, 12, 17, 58, and the costs and tariffs. The notice can be accessed here:
https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41142-dated-2017-09-29.pdf

## Recent Court Cases

### 1. YG and The State - Case A 263/2016 (South Gauteng High Court) 19 October 2017

**The common law defence of reasonable chastisement is unconstitutional and no longer applies in our law.**

(Below is an edited version of the judgment in which most of the footnotes and references have been removed for ease of reading. The full judgment can be accessed here:
http://centreforchildlaw.co.za/images/YG_v_S_-_High_Court_Judgment.pdf )

Keightley, J (Francis, J Concurring)

**Introduction**

[1] The appellant in this matter was tried in the Regional Court, Johannesburg, on two charges of assault with intent to do grievous bodily harm. The first charge related to his alleged assault of his 13-year old son, M, and the second charge related to his alleged assault of his wife. The two assaults were alleged to have occurred at the family home on the same day, although they occurred at different times.

[2] The trial court found the appellant guilty on both charges on the competent verdict of common assault. The court invoked section 297(1)(a)(ii) of the Criminal Procedure Act 51 of 1977, and postponed the passing of sentence against the appellant for a period of five years. The magistrate granted the appellant leave to appeal against his convictions.

[3] As far as the facts relating to the first charge are concerned, it is common cause that on the day of the incident M was sitting on his parents' bed in their bedroom using one of the family's iPads. The appellant entered the room and accused M of watching pornographic material on the iPad. M denied this, but the appellant persisted with the accusation. There was a verbal exchange between them, with the appellant insisting that M should tell him the truth. When M repeated his denial the appellant hit him. He told M that he was lying, and he said that he was giving him another opportunity to tell the truth. When M refused to admit he was lying, the appellant hit him again. This pattern repeated itself a number of times.

[4] The appellant's defence at the trial was that he had done nothing more than to exercise his right as a parent to chastise M by meting out reasonable corporal punishment for M's indiscipline. He told the court that they are a Muslim family and that M knew that pornography is strictly forbidden.

[5] Certain important details of the incident are disputed. M testified that the appellant punched him with his fists on M's thighs. He also punched him on the chest. At this point M lost his balance and fell off the bed onto the floor and hit his back against the security gate, but his back was not really injured by the fall. While he was on the floor, the appellant kicked him three or four times with his bare foot. M was very sore. He was crying and he was emotional. He also testified that the appellant was very angry during the incident.

[6] The appellant's version was that he had only slapped M with an open hand on his buttocks. He did not dispute that this happened a number of times after M repeatedly denied that he was lying. He testified that on one occasion he might have hit M on the back of the thighs but this happened when M tried to twist away from the appellant's blows to his buttocks. As the appellant described his conduct, he had given M a spanking on the buttocks. He had done this because he was disappointed in M's conduct in watching pornographic material, which is forbidden in their religion, and for lying to the appellant about this. The appellant claimed that he did not intend to assault M. He said that: "I just intended(ed) to discipline him (M) out of concern to show him in the future what is right and what is wrong."

[7] M was examined by a medical doctor 4 days after the incident took place. Dr van der Poel's clinical findings were recorded on the J88 form, and confirmed by him at the trial. He found a tender, slight swelling on the left side of the chest, and a tender left scapular. There were two blue bruises on the upper lateral part of the right leg, and several blue bruises on the upper lateral part of the left leg. The J88 form indicates that the leg bruises were in the thigh region. Dr van der Poel testified that the injuries were consistent with an assault. However, he did not hesitate under cross-examination to confirm that the tenderness and swelling on the chest area could have been caused by something else, such as a soccer ball. He described the amount of force required to cause the injuries as medium, rather than severe or slight. He was asked under cross-examination whether the injuries could have been caused by a hiding with an open hand. To this Dr van der Poel responded as follows: "Your worship, no. I do not think ... not the legs, not the bruises .... Because then we would have bigger areas of bruises and it would be bigger areas and it was not that big areas. It was more (round) areas."

[8] According to Dr van der Poel, swellings usually take between 5-7 days to go down, but discolouration usually takes longer.

[9] The trial court found that the probabilities favoured the appellant's version on the question of whether or not his son, M, had been viewing pornographic material on the iPad. However, the court went on to find that M's untruthfulness on this aspect of his evidence should not be overemphasised, (Record, pg 112, lines 10-14) and that it did not taint the remainder of M's evidence. The trial court went on to accept M's version of the assault on M, and to reject that of the appellant.

[10] As regards the assault on his wife, Ms G, the trial court also rejected the appellant's version. I will deal with the merits of the appeal against the appellant's convictions in respect of both counts in due course. First, however, it is necessary to deal with an issue raised by this court when it considered the appeal. That issue concerns the question of whether the defence of moderate chastisement to a charge of assault, which is based on the common-law right of a parent to inflict corporal punishment on his or her children, is compatible with the Constitution. As I have already indicated, this was the defence raised by the appellant against the charge of assault in respect of M.

[11] This court requested counsel for both the appellant and the State to make submissions on the issue. In addition, we issued directions inviting any interested parties to be joined as *amici* of the court and to make submissions. In particular, we invited submissions from the Minister of Justice and Correctional Services, and the Minister of Social Development. The former Minister did not respond to the invitation, but we received written submissions on behalf of the Minister of Social Development, for which we are grateful.

[12] Apart from the Minister of Social Development, we admitted four *amici curiae* to the proceedings. They made both written and oral submissions. The first three *amici* were represented by the Centre for Child Law, and made joint submissions. They were the Children's Institute, the Quaker Peace Centre, and Sonke Gender Justice. For simplicity's sake, I refer to them collectively as "the CCL *amici".* The fourth *amicus* was Freedom of Religion South Africa ("FORSA").

**Is the reasonable chastisement defence Constitutionally compatible?**

[61] The authorities discussed earlier provide the necessary roadmap to guide the process of considering whether the reasonable chastisement defence is compatible with our Constitution. It seems to me to be clear that the starting point is the recognition by the Constitutional Court in *S v M* that our Constitution imagines children as their own constitutional beings. They hold constitutional rights in their own respect, not through their parents. Children are entitled under the Constitution and legislation like the Children's Act to require their parents to protect their rights. If their parents fail in this regard, the state bears the overarching obligation to ensure that children's rights are respected, protected and enforced.

[62] As the Court stressed in *S v M,* what our Constitution requires is a mind-set change, towards a child-focused and child-sensitive model of child justice. The origins of the reasonable chastisement defence lie in our Roman and Roman-Dutch law. They are based on the notion of the parental power and the view that children owe a duty of obedience to their parents. This has been described as follows: "(the parental power) gives the parents the right of demanding from their children due reverence and obedience to their orders, and also, in cases of improper behaviour, to inflict such moderate chastisement as may tend to improvement."

[63] Over the years our courts have reiterated the parent-centered nature of the defence. For example, in *Germani v Hetf,* the Appellant Division held that: "it is well-recognised that a parent of a child, ... is entitled to use reasonable and moderate force to procure the child's obedience to his legitimate directions and requests". (my emphasis) The existing case law and authorities are littered with reference to the parental right to use reasonable and moderate chastisement on their children. Following from this, if a parent raises the defence to a charge of assault, the onus lies on the State to prove that he or she exceeded the bounds of the defence and thus did not have the authority to carry out what would otherwise be an unlawful assault.

[64] The parental power, or rights based origins of the defence are clearly at odds with the child-focused model of rights envisaged under our Constitution. However, it would be too simplistic to consider this on its own to be sufficient to condemn the defence to the constitutional litterbin. It is important to bear in mind that there are aspects of the defence that implicitly at least give some recognition to the protection and wellbeing of the child.

[65] FORSA point out in their submissions that parental discipline is an important part of the parent's duty to ensure that the child is brought up in a socially acceptable manner. This forms part and parcel of what the Constitution recognises to be the parental care which parents are obliged to provide. It is also an important element of the duty on parents under the Children's Act to guide and direct the child's upbringing. Thus, parental discipline is something that is aimed at ultimately inuring to the benefit of the child and contributing to his or her best interests. FORSA submits that to place restrictions on the parental power of discipline by removing the reasonable chastisement defence would not be in the best interests of the child.

[66] In addition, it is also important to bear in mind that the defence of reasonable chastisement does not permit untrammeled levels of physical punishment to be meted out to children. As FORSA points out, the defence limits a parent to reasonable or moderate levels of physical discipline. FORSA submits that this should not be equated with violence or physical abuse. Implicit in FORSA's submissions is the notion that the defence of reasonable chastisement permits, at worst for the child,

only minimal levels of physical punishment. Developing this notion further, the submission is that, when balanced with the disciplinary benefits achieved, the defence cannot be regarded to constitute an unjustifiable breach of the child's rights.

[67] In my view, there are a number of difficulties with this submission. In the first place, as both counsel for the appellant and the State acknowledged in their submissions, the common law does not lay down strict guidelines as to what constitutes reasonable chastisement. Snyman, suggests that it is constituted by an occasional slap on the thigh or the buttocks. However, in the old case of *R v Janke & Janke,* the court noted that while a highly sensitive child may be seriously affected by a whipping, the same punishment may be harmless (and hence entirely justified) for a more robust child.

[68] The most the common law does is to identify factors that should be taken into consideration in each case in order to determine what is reasonable. This is deeply problematic as it introduces a level of arbitrariness to the infliction of physical punishment on children. In both *Williams* and *Christian Education a*bove, the Constitutional Court identified the arbitrary nature of the infliction of corporal punishment as being factors contributing to the constitutionality inquiry. In my view, the same applies to physical chastisement administered in the home environment. Under the common law, it is for the parent to decide in the first instance on the level of physical force his or her child deserves, and can withstand, as punishment. Many parents may behave, or believe they are behaving, "reasonably" in this regard. However, given the levels of child abuse and domestic violence in our country, as noted in numerous decisions, it is likely that many a child is subjected to levels of physical punishment that, regardless of their parent's belief, they are unable to withstand without harm to their physical and/or emotional states. This element of arbitrariness, which is inherent in the common law defence of reasonable chastisement is out of line with the child-centered model of rights demanded by our Constitution.

[69] There are further fundamental difficulties with the submissions made by FORSA in support of the retention of the common-law defence. The Constitution is very explicit in its exposition of rights. It gives protection from "all forms of violence", whether from public "or private sources" (my emphasis) in section 12(1)(c). It also protects the right to bodily and psychological integrity in section 12(2). This is a clear indication that the same level of protection is to be afforded to those who are victims of violence in the home as to those who are the victims of violence from public sources. In other words, if a child experiences any form of violence in the home from a parental source, that child is entitled to the same protection from the State as she would be entitled to if the violence came from a non-parental source. Similarly, it should make no difference whether a child's bodily integrity or psychological integrity is interfered with through conduct on the part of a parent that, but for the defence, would be an assault.

[70] One of the obvious difficulties with the reasonable chastisement defence in this regard is that it permits a parent to inflict some level of violence on a child, and to breach their right to bodily and psychological integrity for disciplinary purposes. Even if the level of chastisement is adjudged to be "reasonable" under the defence, physical chastisement inevitably involves a measure of violence. It undoubtedly also breaches the physical integrity of the child. The offence of assault under the common law is aimed at protecting bodily integrity. Yet the reasonable chastisement defence decrees that it is lawful for a parent to breach that integrity. This is clearly a violation of the rights guaranteed under section

[71] The same holds true for a child's right to dignity. Under the Constitution a child enjoys the general right to dignity under section 10. In addition, children enjoy special protection under section 28(1)(d) to be protected from, among other things, degradation. Human dignity lies at the heart of this latter protection. In turn, the right to dignity is foundational to our constitutional dispensation. It is one of the factors expressly identified in the Constitution to be taken into account in the process of determining whether a limitation of a right is justified under section 36.

[72] The child's right to dignity is implicated in the present inquiry in two related respects. In the first place, it seems to me that where conduct breaches a child's right to physical integrity, it must inevitably involve a measure of degradation or loss of dignity for the child. At the very least it has the potential to do so. So, where a child is subjected to conduct that would otherwise be an assault, but for the reasonable chastisement defence , there is an inherent breach of that child's dignity. This brings into play the second respect in which the child's right to dignity is impaired. If an adult is subjected to an assault, the law will take its course to protect his or her rights. However, in the case of a child, the defence of reasonable chastisement permits (and obliges) the State to treat him or her with a lesser level of concern and gives the State less power to protect her or his rights. This is inherently degrading for children who are effectively treated as second-class citizens by the law in this regard.

[73] The effect of the defence is fundamentally to undermine the critical concept of children having their own dignity, as noted in *S v M.* Contrary to this constitutional principle, it subsumes the child's right to dignity under that of their parents. It assumes that in meting out reasonable chastisement the parent is acting in the child's best interests, and that the parent knows what is best for the child. However, this assumption is made without any regard to the child's own, self-standing right to dignity, or to the child's right to require the State to protect it.

[74] My analysis of the reasonable chastisement defence in relation to the child's right to dignity points to a further constitutional deficiency in the defence. The defence treats child victims of assault by their parents differently to adult victims of assault. I earlier referred to the definition of assault under the common law. In

general, the offence does not require unreasonable levels of violence to be perpetrated against the victim. All it requires is the unlawful and intentional application of force to the person of another. Pushing, or slaps on the buttocks would fall within the definition, as would striking someone with a slipper or other object, regardless of how benign the instrument might appear to be. However, where a parent carries out such conduct for disciplinary purposes, our law accepts that the parent may claim to have been acting lawfully. In that case, the State bears the onus of proving that the parent exceeded his or her lawful bounds of authority to discipline his or her child.

[75] Children are entitled under section 9(1) of the Constitution to equal protection of the law. They also have the right under section 9(3) not to be discriminated against because of their age. The reasonable chastisement defence does not give children equal protection under the law in that it does not protect children from assault in circumstances where adults who are subjected to the same level of force are protected.

[76] Moreover, this is not a rational differentiation that would fall within the bounds of different treatment permissible under section 9 of the Constitution. The defence legitimises the infliction of some level of violence, and breaches of bodily integrity, by parents against their children. This is antithetical to the constitutional right prioritising the best interests of the child. It is also undermines the special duty owned by the State to protect children from all forms of violence and degradation, and to protect their best interests. The existence of the defence obstructs the state in its duty to prosecute parents who assault their children. Its effect is to render more vulnerable a group of rights-holders that has been singled out by the Constitution to be deserving of special protection, and whose best interests are expressed to be of paramount importance. For these reasons, I agree with the submissions made by the CCL *amici* to the effect that the reasonable chastisement defence breaches the rights of children under section 9(1) and 9(3) of the Constitution.

[77] Is there any basis upon which it can be found that these infringements of children's rights are justifiable under section 36 of the Constitution? That section provides that:
"The rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose".

[78] As the Court held in *Williams,* limitations can only pass constitutional muster if a court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in its limitation, taking into account the availability of less restrictive means to achieve this purpose.

[79] I have already outlined why, in my view, the rights in question are very important. In short, they involve the rights of children to be protected, equally with adults, from assaults that constitute an affront to their dignity and bodily integrity. They are particularly important rights in the context of the high levels of child abuse and violence that pervade our society. It is important that the State is empowered, rather than shackled, by the arsenal at its disposal to investigate, prevent and protect children from harmful and potentially harmful situations. The defence creates an "off-limits" zone for State involvement, which is not conducive to facilitating a child-focused justice and protection system for children. The existence of the defence, which legitimises assault only in relation to children, is fundamentally at odds with the best interests of the child.

[80] The limitation has its origins in a pre-constitutional era, when children were not viewed as being the holders of their own set of rights. Discipline remains an important part of the responsibilities of parents. No-one is suggesting that parents should not be permitted to discipline their children. However, it is worth repeating a point I have made before: even reasonable chastisement may fall within the bounds of what our law defines to be an assault. Thus, the question is whether the severe limitations imposed by the defence on the rights of children can be justified by the need to continue to permit parents to assault their children for disciplinary purposes.

[81] I can find no justifiable reason to permit this. In saying so I take into account the fears expressed by FORSA, viz. that in doing away with the defence many well-meaning parents who genuinely believe they are doing their best for their children may become criminalised, as they will now be vulnerable to criminal convictions for assault. FORSA also fear that these parents may end up losing their children. However, these are fears that are out of step with the underlying objectives of the Children's Act, which is to promote positive parenting and positive discipline, rather than to criminalise errant parental behaviour. I detailed earlier how the Act makes provision for the diversion of cases to the children's court, which has broad powers to make orders to facilitate positive parenting in families. In the draft policy discussed on behalf of the Minister in the Department of Social Development's submissions to this court, the same point is made: the Department does not envisage that doing away with the reasonable chastisement defence will lead to the over-criminalisation of parenting behaviours. Instead, the draft policy states that:
" as far as possible, parents should not be criminalised and, if reported for inappropriate punishment (including corporal punishment), should be referred to prevention and early intervention services." As I have already indicated, these

intervention and prevention services are already in place under the Act. In line with these legislative objectives, it seems clear that criminal sanctions are not intended to be imposed willy-nilly in respect of any parent who chastises their child.

[82] FORSA relies on the right to freedom of religion and belief under section 15, and on the rights of religious communities under section 31 to advocate for the retention of the defence of reasonable chastisement. FORSA submits that it would be unconscionable and unconstitutional to undermine these rights by doing away with the defence. They submit that this would place many believers who believe that they are acting in the best interests of the children with the choice of obeying the law or obeying the reasonable tenets of their faith and facing criminal sanction.

[83] Unlike the applicants in *Christian Education,* FORSA does not submit that the common law defence ought to be retained specifically to provide for a religious exemption. Had they done so, this might have provided a stronger basis to argue against the wholesale doing away with the defence. As things stand, it is necessary to balance any limitations on the right to religious freedom involved in doing away with the defence against the limitations on the rights of the child in retaining it.

[84] I will assume, as the court did in *Christian Education,* that doing away with the defence may involve some limitation of rights under section 15, and perhaps section 31 (although I make no decision in either regard). Even if this were the case, it seems to me that these limitations are not such as to warrant retaining a defence that fundamentally undermines the rights of children. As I indicated earlier, it is accepted in our jurisprudence that children's rights are not subordinated to the religious views of their parents. The removal of the defence will not prevent religious believers from disciplining their children. It is so that they may have to consider changing their mode of discipline, but in view of the importance of the principle of the best interests of the child, this is a justifiable limitation on the rights of parents. In addition, to reiterate a point I made earlier, the removal of the defence will not open up religious parents to a greater threat of criminalisation and removal of their children. This is a case where I am satisfied that it is permissible to require religious parents who believe in corporal punishment to be expected to obey the secular laws, rather than permitting them to place their religious beliefs above the best interests of their children.

[85] For all of these reasons, I find that the limitations imposed by the reasonable chastisement defence are not constitutionally justifiable under section 36. It is time for our country to march in step with its international obligations under the CRC by recognising that the reasonable chastisement defence is no longer legally acceptable under our constitutional dispensation. In doing so we will hardly be at the forefront of legal developments in the international community. Alrnost half of African states have either committed to abolishing corporal punishment in full (i.e. including in the home) or have expressed a clear commitment to doing so. South Africa is one of those that has made the commitment although, as I indicated earlier, the process of doing so

through legislation is not well advanced. The courts have a duty to take the necessary steps to develop the common law where it infringes constitutional rights. In my view, that duty will be served in this case by an order declaring, with prospective effect, that the common-law defence of reasonable chastisement is no longer applicable in our law.

**From The Legal Journals**

**Karels, M**

"Financial liability and child offenders in South Africa"

**Obiter 2017 74**

**Abstract**

*This submission is a theoretical examination of pecuniary liability in the case of child offenders in terms of the Child Justice Act 75 of 2008. It considers the financial position of child offenders in the ordinary course of criminal action viz. the obligation to pay bail, fine(s) or compensation orders, etc. Thereafter the potential latent financial liability of parents arising from the criminal actions of their offspring will be considered. The financial and legal accountability of parents will be considered and compared with the position of South African parents as opposed to that of parents in England and Wales. Finally, the submission queries, the practical operation and implementation of contribution orders in terms of the Children's Act 38 of 2005. A comparison of the use of such orders with the practice in the United States of America follows. The submission postulates that contribution orders are merely one example of potential financial liability for criminal conduct within the Child Justice Act 75 of 2008, which may materially affect the parent(s), guardian, or appropriate adult responsible for the care of a child offender.*

**Klatzow, D**

"The unhappy relationship between Forensic Science and the Law: Serious Marriage Guidance is Long Overdue."

**Advocate August 2017 35**

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

## Contributions from the Law School

### Swearing in a child witness

There have been two recent cases dealing with the swearing in of a child witness. The first deals with establishing the competence of the child witness and admonishing her, while the second deals with the nature of the enquiry prior to admonishing the child witness.

**Competence/Admonishment**

In the case of *S v Mbokazi* 2017 (1) SACR 317 (KZP) the appellant appealed against his conviction on a count of rape and also against the imposition of a sentence of life imprisonment. This note is only concerned with the former. The court broadly stated the three grounds of his appeal on the merits as follows:

a) 'that the complainant was not properly admonished by the trial court in that the enquiry held by the learned magistrate in that regard was a superficial enquiry. In that case it cannot be said whether she established whether the witness knew the difference between the truth and a lie.
b) that her evidence as a single witness was not clear and satisfactory in every material respect, in that there were inconsistencies and a clear contradiction in her evidence as to how the appellant raped her; and
c) that the complainant's evidence as a child complainant was unreliable due to the suggestibility and susceptibility of minor children (at para [2]).'

At the time the complainant gave evidence in court she was thirteen years old; an intermediary was appointed (at para [6]).

The appellant's submission was that the child could not distinguish between truth and lies due to insufficient admonition by the magistrate (at para [9]).

The relevant sections of the Criminal Procedure Act were sections 162, 164 and 192. Section 162 provides that all evidence must be given under oath. Section 164 provides that if the witness does not understand the nature and import of the oath or affirmation, s/he may be admonished to speak the truth. Section 192 states that if the witness does not understand the difference between truth and untruth, the witness is not competent.

The magistrate had asked the child whether she understood the meaning of the oath to which the child had replied 'no.' She then asked the child whether she knew what it means to tell the truth, to which the child replied 'yes'. The child went on to state that '[t]elling the truth is saying something that is straight and something that is understandable' and that telling lies is 'speaking something that is not understandable. Someone … would not even know what you are saying (at para [9]).' The child was also asked whether it was a good or bad thing to tell lies and she replied that it was a bad thing (at para [10]).

The high court had regard to the dictionary definition of the word 'straight' which includes the following example of the proper use of the word 'straight' – 'not evasive, honest, a straight answer (at para [11]). The high court interpreted her words in relation to the meaning of 'telling lies' as meaning that 'if you lie it's something that you manufactured, a figment of your imagination and something that people will not understand, as it is not in existence or an untruth (at para [12]).'

The high court concluded that the exchange was sufficient for the magistrate to form the opinion that the child was competent and that she was properly admonished. The court held that this finding was reinforced by the manner in which the child gave evidence which was clear and that her answers to questions during cross examination reflected her maturity and competency (at para [16]). Accordingly, the court found that the magistrate had not been superficial in the manner in which she conducted her duties and that she had committed no misdirection in relation to swearing in the child witness. The other grounds of appeal on the merits also failed, as did the appeal against sentence. Accordingly the appeal was dismissed.

**Enquiry prior to admonishment**

In the case of *AB v S* (A141/2017) [ZAWCHC] (9 June 2017), there was an appeal against the conviction of the appellant on various counts including rape. One of the grounds of the appeal was that the evidence of the child complainant, who was seven and a half years old at the time of the incident in 2014, had been irregularly taken by the regional magistrate, that she had not been properly cautioned in terms of the Criminal Procedure Act and that there was accordingly no admissible evidence to support the conviction on the record (at para [21]).

The complainant gave evidence in camera via an intermediary (at paras [5], [22]).

The regional magistrate had asked the child complainant questions regarding her age and what grade she was in, which she answered in a factually correct manner. The magistrate then proceeded to establish that the child understood the different between truth and lies and having done so, declared her a competent witness. He then admonished her to tell the truth (at para [24]).

The appellant's argument on appeal was that it had not been established that the child did not understand the nature and import of the oath and that this was fatal to the admissibility of her evidence. He relied on the case of *S v Bessick* [2012] ZAWCHC 248 (29 May 2012) (ibid). The appeal court referred, inter alia, to the cases of *S v B* 2003 (1) SACR 52 (SCA); *Director Public Prosecutions, KwaZulu- Natal v Mekka* 2003 (2) SACR 1 (SCA). The appeal court pointed out that in the *Bessick* case the judge had said that although a formal enquiry into whether the witness understood the nature and import of the oath may be desirable, it was not necessary and a court could simply form that opinion from surrounding circumstances (at para [30]). The appeal court made the point that since the amendment to section 164 of the Criminal Procedure Act in 2007 which deleted the words 'from ignorance arising from youth, defective education or other cause' a court could become satisfied that the witness did not understand the nature and import of the oath for any reason (at para [27]). *In casu*, the appeal court was satisfied that the regional magistrate had properly satisfied herself that the child witness did not understand the oath and that she had correctly proceeded to admonish her (at para [31]). The child's evidence was thus confirmed to have been admissible and the appeal on the merits did not succeed on this or any other ground.

**Nicci Whitearnel**
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## Matters of Interest to Magistrates

### JUDICIAL ETHICS*

By Judge AEB Dhlodhlo

### 1. INTRODUCTION

Section 165 (1) of the Constitution of RSA[1] provides that the judicial authority of the Republic is vested in the Courts.

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* This paper was read at a meeting of Magistrates of Empangeni on 29 September 2017.

1 108 of 1996.

Subsection (2) provides that the courts are independent and subject only to the Constitution and, the law, which they must apply impartially and without fear, favour or prejudice.
Section 174 (1) of the Constitution deals with the appointment of judicial officers. It provides that any appropriately qualified woman or man who is a fit and proper person may be appointed as a judicial officer.
A fit and proper person, in my view, is a person of acceptable behaviour or conduct or of acceptable moral standard.

**2. Ethics**

2.1 Definition of ethics

One dictionary defines ethics as a set of moral principles. [2] [2]According to the Canadian Law Dictionary "Ethics of a Profession" means the general body of rules, written or unwritten relative to the conduct of the members of the profession intended to guide them in maintaining certain basic standards of behaviour. "[3]

2.2 The Code of Conduct for Magistrates contains, among others, the following:

2.2.1 "A Magistrate acts at all times (also in his/her private capacity) in a manner which upholds and promotes the good name dignity and esteem of the office of Magistrate and the administration of justice."

According to this provision, during or after office hours a Magistrate is to refrain from conduct which does not uphold and promote the good name, dignity or esteem of the office of the Magistrate and the administration of justice. Examples of such unacceptable conduct are being drunk in public, being improperly or indecently dressed in public and being in the company and being part of people who are committing crime. It is no excuse that it is after hours.

I am reminded of the words of Judge Eksteen who said, among others, that he admired his father who was a Magistrate and who always sought to uphold the highest ideals of the civil service and of the magistracy.[4] A judicial officer is one during and after working hours. If he or she commits a disgraceful act on a Saturday afternoon, and presides in court on a Monday morning, he or she will be associated with the disgraceful act even when he/she pronounces a judgement.

2.2.2 "A Magistrate does not accept any gift, favour or benefit of whatsoever nature which may possibly unduly influence him/her in the execution of his/her official duties or create the impression that this is the case."

It is sometimes said that a judicial officer must appreciate that, by accepting the appointment as such, he/she understands that his/her social life will be restricted. This is so because, by being a regular attendant at social gatherings, he/she would

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2 The Pocket Oxford Dictionary (1996).

3 Professor A. Wayne MacKay: "Exploring misconduct and accountability for judges" unpublished paper of June 1995 at 8.

4 In his paper "From the address by the Honourable Mr Justice JP Eksteen to the East London Attorneys' Association" (1971) 88 SALI 517 at 520.

be exposed to bribes, gifts and favours. A gift by a member of the public to a judicial officer is likely to be an "application" for a favour if and when the member is involved in a court case. The acceptance of the gift or the favour could be construed as meaning the granting of the "application."

2.2.3 “A Magistrate maintains good order in his/her court and requires dignified conduct from litigants, witnesses, court staff, legal practitioners and the public."
Maintaining good order in court means, among others, that a Magistrate or a judicial officer, be he/she a Magistrate or a Judge, should conduct himself or herself in an acceptable manner. He/she should not adopt an attitude which might create the impression in the mind of a right-minded layman that there is a real likelihood that the judicial officer is unfavourably disposed towards a party. [5] The presiding officer's plain duty is to maintain his or her cool-headedness even in the face of irritation.[6] In this case it was said that the more 'unschooled' the type of mind one is dealing with, the more careful one has to avoid giving the impression of being bullying or hostile. [7] Words which constitute degrading treatment and the violation of the dignity of a litigant, a court staff member, a legal practitioner or a member or members of the public or of a certain class of people should not be uttered by the presiding officer. [8]

**3. Forwarding reviewable cases to the High courts and responding to queries**
The Clerk of the Magistrate's court concerned must, within seven days after the determination of a criminal case, forward the record of the proceedings or a certified copy to the Registrar of the High Court which has jurisdiction.[9]
In S v Manyongo[10] Erasmus J said:
"The reason for the statutory insistence on the expeditious dispatch of records on review is generally to promote the speedy and efficient administration of justice, but in particular to ensure that an accused is not detained unnecessarily in cases where the court of review sets aside a conviction or reduces the sentence."
Delays in responding to queries raised by reviewing Judges are matters of great concern.[11] In S v Hlungwane[12] the reviewing Judges directed that copies of their judgment concerning unacceptable delays be referred to the Department of Justice and the Magistrates Commission.
Reviewing Judges in our court have had to deal with these delays. Reference will be made to two of such cases:

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5 S v Herbst 1980 (3) SA 1026 (E).
6 See for example S v Tyebela 1989 (2) SA 22 (A).
7 At 32H.
8 See example (1986) 3 SALI 550 at 554, P J Schwikkard et al Principles of Evidence (1997) 334 and cases cited therein (1996) 113 SALI 169.
9 S303 of the Criminal Procedure Act 51 of 1977
10 1997 (1) SACR 298 (E) 300e
11 S v Raphatle 1995 (2) SACR 452 (T). See also S v Maia and Others 1998 (2) SACR 673 (T). also S v Maluleke 200 4 (2) SACR 577 (T).
12 2000 (2) SACR 422 (T)

In S v Gobizembe[13] the accused was convicted and sentenced in October 1999. The Registrar of the court received the record of the proceedings in January 2000. It took the Magistrate eleven months to respond to the reviewing Judge's query. The reason furnished by the Magistrate for the long delay in responding to the query was that, for about six months, he was indisposed. There was no explanation about why he did not respond to the query during the five months when he was not indisposed.
The Reviewing Judge criticized the Magistrate for the unacceptable delay and also for irregularities he committed. The sentence was interfered with. The record of the proceedings was forwarded to the Department of Justice.

In another case[14] which was reviewed the accused was convicted and sentenced on 23 November 2000. The record of the proceedings was received by the Registrar only on 31 January 2001. No reasons were given for the delay. The reviewing Judge addressed a query to the Magistrate to give reasons for the delay. The Magistrate responded as follows:
"I have investigated circumstances leading to the late submission of the above case for review. My findings are: There is only one typist dealing with matters for the Legal Section. I also discovered that preference is not given to reviewable cases or urgent court matters by the typist."
The reviewing Judge remarked as follows:
"The delay in submitting a case for review will prejudice the accused if the conviction or sentence or both are set aside on review and the accused has served a term of imprisonment or has raised a loan to pay the fine."
Fortunately in the present case the conviction and sentence were confirmed. A copy of the review judgment was forwarded to the Department of Justice.
There have been several cases in which the delay in forwarding the records of the proceedings is blamed on the shortage of typists.
In S v Letsin[15] it was emphasized that when the Court, on review, requests a Magistrate to furnish his reasons for sentence, the Magistrate should regard such request as one of an extremely urgent nature. When a query or queries are directed to a Magistrate by a reviewing Judge, it is expected of the Magistrate to respond in a responsible, complete and courteous manner.[16]
Courtesy demands of a magistrate whose case is submitted late for review to enclose a letter in which she/he furnishes reasons for the delay and apologises for such delay.

## 4. Conclusion

The new democracy ensured that Magistrates attained their independence from the public service so as to be seen as impartial. One of the objectives of the Code of Ethics is to promote impartiality. It is trusted that Magistrates and other judicial

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13 CA & R 09/2001 (unreported)
14 S v Gogwana CA & R 11/2001 (unreported) Bhisho High Court
15 1963 (1) SA 60 (0).
16 S v Mogetwane 2000 (2) SACR 407 (0)

officers will always maintain standards of ethical behaviour inside and outside court. If they do this, consumers of justice will have confidence in them and the image of the judiciary will not be tarnished.

**The Ten Commandments by Judge Edward J Devitt**

Judge Edward J Devitt was a Chief Judge of the United States District of Minnesota. His ten commandments were first published in the December 1961 American Bar Association Journal as a guide to 73 persons who were about to be appointed as federal judges.[17]

The commandments are:

1. Be kind:

Under this commandment it is stated that if judges could possess one tribute, it should be an understanding heart. It is also stated that the bench is no place for cruel or callous people regardless of their other qualities and abilities.[18]

2. Be patient:

The author states that 'patience is one of the cardinal virtues, and it should be one of the most important commandments for the judge'.[19]

In the words of the author: 'The judge should be particularly patient with young lawyers who come to court for the first time. The reception we accord them will make a lasting impression, good or bad. We want it to be good. '[20]

3. Be dignified:

The author said:

'I only mean that you must possess an appreciation of the great prestige of the judicial office and of the respect accorded it and its occupant by the American public.'[21]

4. Do not take yourself too seriously:

The author concludes his remarks by saying that the greatest deterrent to taking oneself too seriously in any respect is a wise and observing spouse who periodically remarks: "Don't get so judgey".[22]

5. A lazy Judge is a poor judge:

The judge said that the road to success on the bench is the same as in any other field of human endeavor. It must be characterized by hard work.[23]

It should be added that there is no place for a lazy person in the legal profession.

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17 (1980) DR 245
18 ibid
19 ibid
20 ibid
21 ibid
22 ibid
23 ibid

6. Do not fear reversal:

A judge should accept that his/her judgments may be overturned by a higher court. The judge continued and said: 'Reversal by a superior court now and then keeps us on our toes. It teaches us to be careful and industrious; it curbs our impetuosity (acting or doing rashly or with sudden energy and nurtures) judicial-mindedness.[24]

7. There are no unimportant cases:

A judge must give the same conscientious attention to every case that comes before her/him.[25]

8. Be prompt:

The judge said:

"Perfection is a laudable aspiration, but for a trial judge is not necessarily a virtue if it causes procrastination and undue delay."[26] This means that judgments should not be reserved for long periods.

9. Common sense:

The author states:

'You might be able to get by as a judge if you don't know much law, but you just can't make it without common sense. '[27]

10. Pray for divine guidance:

If a judicial officer believes in a Supreme Being she/he should pray to Him for guidance. The author said: 'Judges need that help more than anybody else.'[28]

It seems to me that the Ten Commandments apply to all judicial officers, assessors and inquiry officers.

To the Commandments may be added the following:

11. A judicial officer should maintain his/her coolheadness even if irritated by a party, a witness or a legal representative.

12. Irritation is likely to cause a judicial officer to fail to control her/his anger and burst in court; thus lowering the dignity of the court.

A judge in such circumstances should rather adjourn the proceedings to enable herself or himself to regain coolheadness.

There are many other rules of conduct which affect judicial officers. Experience and common sense will guide judicial officers in deciding whether or not some conduct is acceptable.

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24 ibid
25 ibid
26 at 247
27 ibid
28 ibid

**A Last Thought**

[35] The operation of the doctrine of common purpose does not require each participant to know or foresee in detail the exact manner in which the unlawful act and consequence will occur. The doctrine of common purpose in our law is clear.
[36] In *Mgedezi*, the Supreme Court of Appeal stated:
"In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates. Thirdly, he must have intended to have common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the requisite *mens rea*."
[37] In *Thebus*, this Court reiterated the principle of common purpose and explained what the "requisite *mens rea*" entails if the prosecution relies on this doctrine. The Court stated:
"If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue."
[38] Finally, in *Dewnath* it was held:
"The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime."

Per Mhlantla J in *Makhubela v The State; Matjeke v The State* [2017] ZACC 36