e-MANTSHI

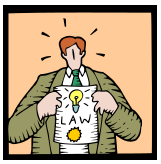
A KZNJETCOM Newsletter

November 2017: Issue 137

Welcome to the hundredth and thirty seventh 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.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

There is 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.
Any feedback in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Rules Board for Courts of Law has under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Correctional Services amended the rules of the Magistrates Court with effect from 22 December 2017. The notice in this regard was published in Government Gazette no 41257 dated 17 November 2017. The most important amendments are that Rule 43 (execution against immoveable property) and Rule 43A (execution against residential immoveable property) are substituted in their entirety. A new Rule 43B (enforcement of foreign civil judgment) is also introduced. The Government Gazette can be accessed here: https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-629-no-41257-dated-2017-11-17.pdf

2. Revised draft regulations relating to sexual offences courts and the Criminal law (sexual offences and related matters) amendment Act, 2007 (Act no. 32 of 2007) has been published in Government Gazette no 41272 dated 24 November 2017. The draft Regulations still focus on elements of efficiency and effectiveness of the sexual offences courts, aim to provide for protective measures for victims to be available at these courts and also focus on the needs of persons with disabilities. The draft Regulations still provide for basic requirements before a court may be established as a sexual offences court and advanced requirements, which must be realized progressively. The comments on the draft Regulations must be submitted to Ms A Van der Walt, **on or before 31 January 2018**.
The contact details are:
(a) Postal address: The Director-General: Justice and Constitutional Development, Private Bag X 81, Pretoria, 0001;
(b) e-mail address: alvanderwalt@justice.gov.za
(c) Fax nr: 086 6480 963

3. The Portfolio Committee on Trade and Industry published the Draft National Credit Amendment Bill, 2018 and the Memorandum on the Objects of the Bill for public comment. This notice was published in Government Gazette no 41274 dated 24 November 2017. Members of the public are invited to submit written comment on the Bill by 15 January 2018. Public hearings have been scheduled for 30 January 2018 and 6 and 7 February 2018. The purpose of the Draft Bill is to amend the National Credit Act, 2005, so as to provide for debt intervention; to include the evaluation and referral of debt intervention applications and the suspension of agreements considered to be reckless as part of the enforcement functions of the National Credit Regulator; to include the consideration of a referral as a function of the Tribunal; to require a credit provider and debt counsellor to determine whether an agreement is reckless; to provide for a court to refer a matter for debt intervention; to provide for an application for debt intervention and evaluation thereof; to provide for orders related to debt intervention and rehabilitation in respect of such an order; to enable the Minister to prescribe a debt intervention; to provide for mandatory credit life insurance; to provide for offences related to debt intervention, prohibited credit practices, reckless lending, selling or collecting prescribed debt and related to failure to register; to provide for measures when an offence is committed by a company; to provide for penalties in relation to the created offences; to provide for the Tribunal to change or rescind an order under certain circumstances; to require the Minister to prescribe a financial literacy and budgeting skills programme; and to provide for matters connected therewith. The Draft Bill can be accessed here:
www.gpwonline.co.za/Gazettes/Gazettes/41274_24-11_Parliament.pdf

4. Under section 43(2) of Judicial Matters Amendment Act, 2017 (Act No. 8 of 2017), the 1st of December 2017 has been fixed as the as the date on which section 24 of

the said Act shall come into operation. The notice to this effect was published in Government Gazette no 41280 dated 27 November 2017. The relevant part of Section 24 which is of interest to magistrates reads as follows:

"(1A) (a)A magistrate holding office as such may, before attaining the age of 65 years, in written notice to the Commission, indicate his or her intention to continue to serve in such office for such further period specified in the written notice: Provided that a magistrate must vacate his or her office on attaining the age of 70 years: Provided further that if he or she attains the said age after the first day of any month, he or she shall be deemed to attain that age on the first day of the next ensuing month. (b) A magistrate who intends to continue to serve in such office as contemplated in paragraph (a) must timeously give notice thereof in writing to the Commission before he or she attains the age of 65 years."

5. A notice to amend the Prevention and Combating of Corrupt Activities Act, 2004, has been published on the website of the Department of Justice. The purpose of the amendment bill is to deal with passive corruption in respect of foreign public officials; to extend the offence of unacceptable conduct relating to ordinary witnesses to include whistle-blowers and members of the accounting profession; to increase the monetary sanctions provided for in the Act; and to provide for matters connected therewith.
Deadline for comments is 15 January 2018 and **comments** on the draft Prevention and Combating of Corrupt Activities Amendment Bill must be marked for the attention of Mr H du Preez, and if they are submitted by email, be emailed to HduPreez@justice.gov.za and if they are faxed, be faxed to 086 649 6582

Recent Court Cases

1. KS and AM - A3032-2016 (South Gauteng High Court) 24 October 2017

The proper approach by a court in interpreting the powers under s 7 (2) of the Domestic Violence Act, Act 116 of 1998 is to look beyond the simple wording of the subsection and to consider the purpose of the Act in the light of the Constitution.

Molahleni, J

Introduction

[1] The issue in this appeal is whether the Germiston magistrate court (the court below) erred in refusing to grant the appellant who was a victim of domestic violence an order requiring the abuser to hand over all digital devices or materials used in committing the offence to the authorities, in terms of s 7 (2) of the Domestic Violence Act 116 of 1998 (the Act).

[2] On 17 December 2015, an interim protection order granted on 26 August 2015 came before the court below for confirmation. The interim order amongst others prohibited the respondent, AM […] from:

a. Physically, verbally or emotionally abusing, threating, harassing, following, stalking or intimidating KS […];
b. Enlisting the help of another person to do any of the above;
c. Entering KS […] the place of residence and the place of employment;
d. Directly or indirectly contacting KS […], whether in person, telephonically (including SMS), or via social media (including Facebook, Whatsapp and Linkedin);
e. Posting explicit material (including comments, videos or photographs) of KS […] on any platform, including any social media forum, or sending such material to any other third party.

[3] On the return date, the appellant sought an order in terms of s 7 (1)(a), (b), (e) and (f) and s 7 (2) of the Act. The order was granted in terms s 7(1) of the Act.

[4] Section 7 (1) of the Act provides:

(1) The court may, by means of a protective order referred to in section 5 or 6 prohibit the respondent from-

(a) committing an act of domestic violence;
(b) enlisting the help of another person to commit any such act;

(c) entering a residence shared by the complainant and the respondent: provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
(d) entering a specified part of such a shared residence;
(e) entering the complainants residence
(f) entering the complainants place of employment;
(g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
(h) committing any other act as specified in the protection order.

[5] Section 7 (2) of the Act provides:

"2 The court may impose any additional conditions which it deems reasonably necessary to protect and provide for the safety, health or well-being of the complainant, including an order-

(a) To seize any arm or dangerous weapon in the possession or under the control of the respondent, as contemplated in section 9; and
(b) That a peace officer must accompany the complainant to a specified place as assist with arrangements regarding the collection of personal property."

[6] The application for the confirmation of the interim interdict was opposed by the respondent. He denied having harassed the appellant and also stated that the relationship between the two of them terminated at end of July 2015 and not January 2015 as contended by the applicant. His version was rejected by the court below and accordingly the interim order made in terms of s 7 (1) of the Act was confirmed.

The background facts

[7] It is common cause that the appellant and the respondent had an intimate relationship which began after they met during May 2014. The appellant contended that the respondent presented himself as an unmarried man.

[8] The relationship between the two grew to a level where they agreed to marry. It was for this reason that they introduced each other to their respective family members. During December 2014, the respondent bought the appellant an engagement ring. It turned out later during their relationship that the respondent was in fact married.

[9] The appellant came to know that the respondent was married in January 2015 when his wife arrived at her home uninvited with two friends and confronted her about her relationship with the respondent.

[10] It is apparent that the appellant terminated her relationship with the respondent after the confrontation.

[11] The respondent refused to accept the termination of the relationship by the appellant. He then made threats to the appellant telling her that if he could

not be with her nobody would. He made the threats over the phone and through text messages.

[12] He also created a Facebook account during July 2015, wherein he befriended the appellant's friends and sent text messages of defamatory nature about the appellant.

[13] During August 2015, the respondent created a fraudulent Facebook account in the name of the appellant and posted therein certain explicit sexual video footage and photographs. The footage was seen by the appellant's family members including those in America. They phoned the appellant and alerted her to the footage.

[14] The appellant through her attorneys approached Facebook to have the footage removed and to delete the account.

[15] The appellant stated in her affidavit in support of the application that the respondent confirmed with her that he had created the Facebook account and posted the footage to prevent other men showing interest in her.

[16] During August 2015 the respondents made telephonic threats to the appellant and told her the following:

(a) He could not live without her.
(b) He would get another man to rape her, if she was to be involved with another man.
(c) He knows car hijackers and gangs he uses to get her family killed.

The grounds for appeal

[17] The appellant has raised several grounds of appeal the essence of which concern the criticism that the magistrate failed to properly interpret the provisions of s 7 (2) of the Act. It is contended in this respect that the magistrate erred in not directing the respondent to place in the temporary custody of the Sheriff all digital devices used in the commission of the offence. The purpose of the prayer in this respect was to have forensic search into the gadgets used in the commission of the offence and to permanently remove the pictures and video material from the respondent.

The decision of the court below

[18] As alluded to above the court below rejected the version of the respondent as being untrue and found that the appellant had made out a case for the protection order. It found that the respondent engaged in a pattern of conduct which was threatening, causing fear, emotional and psychological pain and suffering on the part of the appellant.

[19] In relation to the prayer to have the respondent to place in the custody of the Sheriff all digital devices used in committing the offence the court below held:

"The court agrees with the Applicant's attorney that any additional condition that may be imposed by this court, but it is also of the view that it is not reasonably necessary to take such drastic steps to the extent of seizing all the respondents' digital equipment and is convinced that that the conditions that are already in place are sufficient to protect and provide for the safety and the wellbeing of the Applicant."

The issue raised by the appellant.

[20] The appellant has formulated the issue for determination by this court to be:

"Whether section 7 (2) of the Domestic Violence Act 116 of 1998 (the Act) –

(a) empowers the courts to make an order allowing a victim of domestic violence to ensure that any private material concerning her (whether video, photo, audio or any other form) is permanently removed from the abuser's digital device; and

(b) obliged the court a quo to grant the appellant an order in this case."

[21] It was contended on behalf of the appellant that s 7 (2) of the Act must be interpreted purposively and generously to promote the rights to dignity, privacy, bodily and psychological integrity of women. It was further submitted that where the abuser is in control of private material concerning the victim, she suffers continuous violation of her rights for as long as the abuser retains such control.

[22] It was for the above reasons that the appellant contended that the appropriate remedy which the court below ought to have granted to protect her well-being was to grant the order as was prayed for in the application for the interdict.

[23] In opposition to the application the respondent contended that the appellant in the court below did not show that the continued possession of the material by the defendant posed a threat to her safety, health and wellbeing.

[24] It was further argued that the relief sought by the appellant if granted would intrude into the rights of the respondent's to privacy, the right not to have his home or property searched and his possession in relation to the laptop, computer, video seized.

[25] The approach to adopt when interpreting statutes is set out in section 39 (2) of the Constitution which provides:

"(2) When interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

[26] The Constitution further provides under s 233 that:

"When interpreting any legislation, every court must prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[27] It is clear that the provisions of section 39 (2) of the Constitution are peremptory. The courts, tribunals and other forums are required when interpreting legislation to review it through the perspective of the Bill of Rights. The guiding principle in this regard is the promotion of values and objects of the Bill of Rights.

[28] The guiding principle in the interpretation of s 7(2) of the Act, has to be based on the perspective of the norms and values enshrined in the Bill of Rights which are indeed broadly speaking expressed in the preamble to the Act being:

"To afford the victim of domestic violence the maximum protection from domestic abuse that the law can provide."

[29] The Act was enacted to promote and achieve the objectives of section 9 and 12 of the Constitution. Section 9 provides for the equality, full right to quality protection and benefit of the law. Section 12 provides everyone with the right to freedom and security of the person including being free from all forms of violence from either public or private.

[30] In contending that the interpretation given to the provisions of section 7 (2) made by the magistrate was improper Counsel for the appellant relied on the case of S v Baloyi [1]. The case was decided before the Act came into operation in November 1999. The Act at that stage had already been passed and came into effect on 15 December 1999.

[31] The Baloyi case had to do with the validity of section 3 (5) of the Prevention of Family Violence Act 153 of 1993. The issue of the validity of the section was considered in the context where the appellant an army officer had contravened an interdict restraining him from assaulting his wife and children. After pointing out the effects of the crime of family violence the court quoted with approval from a draft document of the US National Council of Juvenile and Family court where it was said:

"Domestic and family violence is a pervasive and frequently lethal problem that challenges society at every level. Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence."

[1] 2000 (2) SA 425

[32] The above was said in the context where it was supportive and propagating the effective legislation to deal with the problem of family violence in the society. The court further said:

“The imperative for such legislation, as noted by the Law Commission derives from section 12(1) of the Constitution, which reads:

‘Everyone has the right to freedom and security of the person, which includes the right—

(c) to be free from all forms of violence from either public or private sources;

The specific inclusion of private sources emphasises that serious threats to security of the person arise from private sources. Read with section 7(2), section 12(1) of the Constitution has to be understood as obliging the State directly to protect the right of everyone to be free from private or public domestic violence. Indeed, the State is under a series of constitutional mandates which include the obligation to deal with domestic violence: to protect both the rights of everyone to enjoy freedom and security of the person and to bodily and psychological integrity, and the right to have their dignity respected and protected, as well as the defensive rights of everyone not to be subjected to torture in any way and not to be treated or punished in a cruel, inhuman or degrading way.”

[33] Another aspect of the preamble to the Act is the recognition that:

(a) domestic violence as a serious social evil.

(b) that there are some high incidences of domestic violence in this country.

(c) the remedies currently available to the victims of domestic violence have proven to be ineffective

[34] In Omar v Government of the Republic of SA,[2] the court held that the high level of incidences of domestic violence in the country was unacceptable and that had resulted in severe psychological and social damage to the society. The need for an adequate legal system to address this problem was emphasised. The court further held that:

"18. . . . It is understandable for the legislature to enact measures that differ for the generally applicable to criminal arrest and prosecutions. It is clear the Act serves a very important social and legal purpose. “

[35] In F v Minister of Safety and Security,[3] the court held that the State through its enforcement and crime prevention agencies has a duty to protect women and children against the plague of violent crimes. The primary responsibility is with the police as the law enforcement agency. The responsibility extends to the courts in the performance of their function in ensuring that the rights entrenched in the Bill of Rights for both women and children are not trampled on by sexual abuse or threat thereof.

[36] It was further stated in the above case that:

---

[2] SA 2006 (2) SA 289 (CC)

[3](2011) ZACC 37 2012 (1) SA 536 (CC)

"56 The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women. It is deeply sad and unacceptable that few of our women or girls dare to venture into public spaces alone, especially when it is dark and deserted. If official crime statistics are anything to go by, incidents of sexual violence against women occur with alarming regularity. This is so despite the fact that our Constitution, national legislation, formations of civil society and communities across our country have all set their faces firmly against this horrendous invasion and indignity imposed on our women and girl-children.

57. It follows without more that the State, through its foremost agency against crime, the police service, bears the primary responsibility to protect women and children against this prevalent plague of violent crimes. Courts, too, are bound by the Bill of Rights. When they perform their functions, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. They must acknowledge the policy-drenched nature of the common law rules of vicarious liability, that it is the courts that have in the past fashioned and favoured them, and that now the rules must be applied through the prism of constitutional norms."[4]

[37] The obligation of the courts to protect women against sexual abuse through electronic gadgets and media was recognised in the Canadian case of R v BZ,[5] where similar to the present case the victim's explicit images of a sexual nature were distributed by electronic means by the offender without the consent of the victim. In dealing with the issue the court said:

"There is a disparate impact on vulnerable young female, precisely what Mr B.Z. did to the complainant in this case, which she poignantly described in her victim impact statement, such that the medic being characterized as a vulnerable class of victims requiring the Court's protection. [. . .]

Incidents of non-consensual distribution of intimate images and non-consensual sexting dove tail the increased use of technology for communication purposes in our society, and escalating risk-taking behaviour affect sexting leads to, which has been content created a class of vulnerable person requiring the Court's protection, and it is a crime that is more prevalent in our community than was previously the case."

[38] The court found that the nature of this offence was objectifying and violating the sexual dignity and privacy rights of the victim and demonstrating an intention to degrade and humiliate. The potential for psychological harm consequent the objectification and degradation increased significantly.

[39] The court below having granted the protection order, the prohibitive conditions under s 7(1) of the Act did not arise as an issue in this matter. The issue that however, is the subject in the present matter, is whether the

---

[4] See Carmichele v Minister of safety and Security 2001 (4) SA 938 (CC).

[5] 2016 ONCJ 547

continued possession of the offensive material by the respondent constitutes violation of the appellant's dignity, privacy, bodily and psychological integrity.

[40] In contending that the continuous possession of the offensive material by the respondent constitutes violation of the appellant's dignity, privacy and psychological integrity reliance was placed on the case of Prinsloo v RCP Media,[6] which involved possession by a newspaper of the explicit images depicting sexual intercourse between a couple who sought to retrieve the same from the newspaper. The court held that:

"Therefore I am of the view that possession of such images by someone who is not authorised by the original author or those depicted on them could in principle amount to an ongoing violation or at least a continuing threat of violation of one's privacy. Every instance when the images are viewed, even by a person who has already seen it, could constitute a renewed intrusion into one's privacy. The mere fact that one is at the mercy of another, who could take a look whenever he or she feels like it, renders one's privacy worthless or at least very vulnerable and could violate one's dignity. No one could be expected, in principle, to have to rely on the responsibility and decency of a possible repeated violation."

[41] Another case relied on by the appellant is that of NDPP v Mahomed[7], where the court in dealing with seizure of privilege information held that:

"The retention by the registrar of the material, or copies of the material, even if that material is not viewed, will in my view be a continuing violation of the respondent's privacy, which is protected against violation by section 14 of the Bill of Rights. I do not think privacy is violated only by private communication which are viewed by, or exposed to viewing, by another. I think it is violated just as much merely by dispossessing a person over material that he or she is entitled to hold in private, [. . .] In my view a violation occurs when, and for so long as, a person is dispossessed of control over private material."

[42] It was in the context of the above submission made on behalf of the appellant that this court at the hearing of this matter on 22 August 2017 directed that the parties file further heads of argument addressing the issue of whether the court below in refusing the relief sought by the appellant under s 7(2) of the Act was under the impression that the respondent had originally obtained the consent of the appellant in taking the pictures and recording the video materials and, if so, what the impact of that may have influenced the magistrate in the decision not to grant the prayer sought by the appellant.

[43] The respondent conceded in the further heads of argument that while there was no consent to have the photos and the video materials posted on the social media, there was never any question of lack of consent to developing the material by the appellant. It was submitted that the appellant did not make out a case in the court below that she did not consent to the making of the material.

---

[6] 2003 (4) SA 456 (T) 468G-H.

[7] (2008) 1 All SA 181 (SCA)

Evaluation/analysis

[44] It is apparent from the reading of the judgment of the court below that it accepted that the appellant did not consent to having anything to do with her after January 2015 when she terminated the relationship. The court further found that the posting the offensive material on the fake Facebook account constituted an act of domestic violence against the appellant. It was for this reason that the prohibitive order in terms of s 7(1) of the Act was granted.

[45] However, the court below refused to grant the order prayed for in terms of s 7(2) of the Act. In refusing to grant the order it held that it was not necessary to do so as that would be a drastic step of seizure of the digital equipment of the respondent.

[46] The record before this court does not reveal that there was any evidence before the court below that the appellant did not consent to the taking of the photos and the production of the video material.

[47] It is trite that the power to interfere with the exercise of the discretion by a lower court is limited to cases in which it has been shown that the lower court exercised its discretion capriciously or upon a wrong principle, or has not brought its unbiased judgment to bear on the question, or has not acted for substantial reasons.[8] In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others,[9] the court held that:

"[11] A court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles."

[48] In the General Council of the Bar of South Africa v Geach and others,[10] said that as a court of appeal it was not intended to interfere only because it might have seen things differently.

[49] In Trencom Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another,[11] the Constitutional Court said:

"[87] This Court has, on many occasions, accepted and applied the principles enunciated in *Knox* and *Media Workers Association*. An appellate court must heed

---

[8] . See Shepstone and Wylie and Others v Geyser NO 1998 (3) SA 1036 (A).

[9] 2000 (2) SA 1 (CC) at paragraph 11.

[10] 2013 (2) SA 52 (SCA) (at para 75).

[11] (2015) ZACC 22 at paragraph 87 – 88.

the standard of interference applicable to either of the discretions. In the instance of a discretion in the loose sense, an appellate court is equally capable of determining the matter in the same manner as the court of first instance and can therefore substitute its own exercise of the discretion without first having to find that the court of first instance did not act judicially. However, even where a discretion in the loose sense is conferred on a lower court, an appellate court's power to interfere may be curtailed by broader policy considerations. Therefore, whenever an appellate court interferes with a discretion in the loose sense, it must be guarded.

[88] When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised—

"judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles." An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court."

[50] The exercise of the discretion under s 7(2) of the Act in favour of the appellant would undoubtedly have entailed search a seizure process. This would have invariably intruded into the rights of the respondent. It would seem from a proper analysis this is what the court below considered to be a drastic step.

[51] It is evidently clear that the materials are of a private nature. They remain so even if the appellant had consented to their production. In this respect it seems to me on the facts and the circumstances of this case the existence and possession of the materials depended on the continued relationship between the parties. The reasonable inference to draw, assuming that the appellant consented to the production material in question, is that they remained private in that they were meant for the entertainment and enjoyment of both parties while the relationship lasted. It could never have been their intention that the other will retain them when the relationship was terminated and to use them as a weapon to attack, undermine the dignity and integrity of the other as was done by the respondent.

[52] In my view, the lower court in refusing to grant the relief sought by the appellant in terms of s 7 (2) of the Act the court exercised its discretion based on an incorrect principle. In fashioning the relief it was enjoined to have regard to the constitutional imperative of ensuring protection of the appellant as part of the member of the vulnerable group.

[53] The lower court in this matter was faced with a situation where there seem to be no precedent dealing with the provisions of s 7 (2) of the Act. The lower court therefore had a legal duty in fashioning the relief prayed for by the applicant to weigh and strike a balance firstly between the interest of the two parties – the right to dignity of the applicant and the right of ownership and possession of the respondent. A balance ought to also have been found in the interest of the community. This was in a sense a proportionality exercise

having regard to the conflicting rights of the parties. The exercise is to be carried out in accordance with the objects of the Bill of Rights and the weighing of the conflicting rights of the applicant and the respondent, done in the context of the positive duties of promoting dignity, equality and freedom in a constitutional state. These are the values to which the lower court ought to have applied its mind to.[12] The conduct of the respondent spreads the insubordination of women in society and if not stopped in its tracks, this will undoubtedly perpetuate the threat to the self determination of women in society.

[54] For these reasons the court below, in fashioning the relief sought by the applicant ought to have sent a clear message to the respondent and potential domestic abusers that their conduct is unacceptable and that they will not be allowed to get "away with murder" by allowing him and the "potential others" to keep the same material they would use not only to hurt others but also to denigrate their dignity.

[55] The possession of the materials by the respondent continues to be a threat to the constitutional rights of the appellant. The material in the hands of the respondent remains a weapon in his hands irrespective of whether they are observed by him or any other person. In this respect the interpretation by the court of the power given to it by s 7 (2) of the Act, amount to placing the appellant at the mercy of the respondent who may at any time view the material alone or with someone. In this context her privacy and dignity is worthless or vulnerable. This for me can be equated to placing a band on the forehead and placard at her back saying "she is worthless." It would also meet the very stated objective of the respondent that he would make sure that other men would not want to have a relationship with her.

[56] The principle that informs the power under s 7 (2) of the Act is that the legislature sought to provide an adequate legal system to address an unacceptable high level of incidences of domestic violence.

[57] The basic principle which the court below missed is that the appellant should not be expected in the circumstances of this case to rely on the responsibility and decency (which has already proven to be lacking) of the respondent not commit a repeat violation.

[58] In exercising the discretion under s 7(2) of the Act, the court below was enjoined to fashion a relief that would adequately address the problem that the Act sought to address. Thus allowing the respondent to keep the material amounted to perpetuating objectifying and violating the sexual dignity, privacy of the appellant and more importantly this increases her degradation.

[59] The threat and risk of repeat of further violation remains in the hands of the respondent.

[60] The proper approach which the court below failed to appreciate was that in interpreting the powers under s 7 (2) of the Act as a matter of principle

[12] Minister of Law & Order v Kardir 1995 (1) SA 303.

the magistrate was required to look beyond the simple wording of the subsection.

[61] The principle is that consideration ought to have been given to the constitutional imperatives which the Act seeks to address including its objective of protecting the constitutional rights of victims of domestic violence. The court in failing to exercise its discretion in favour of the orders prayed for by the appellant also failed to take into account the socio-historical basis for the enactment of the legislation.

[62] The respondent admitted having recorded and published private material (explicit photos and videos) depicting the appellant. The appellant cannot know what else the respondent has done or could do with the material, whether viewing it himself, showing it privately to others, or using it to blackmail the appellant once again, especially after the protection order expires after five years.

[63] The respondent's possession of the material constitutes a continuous violation of the appellant's rights to dignity, privacy and bodily and psychological integrity of the appellant. The special order sought by the appellant, which the court below declined, is the only remedy capable of effectively protecting and providing for the well-being of the appellant, and thus is reasonably necessary in terms of s 7(2) of the Act to order the respondent to hand over the material for forensic audit to be done on the equipment used and for the same to be removed and destroyed.

[64] In light of the above I find that the appellant has made out a case for this court to interfere with the decision of the court below.

Order

[65] In the premises the following order is made:

1. The appeal succeeds.
2. The decision of the court below under case number 993/2015 dated 17 December 2015 is set aside and replaced with the following order:

"1. The respondent is directed to handover and place in the temporary custody of the Sheriff of this Court all digital devices under his control in order for a forensic expert appointed by the Applicant's attorneys to identify and permanently remove from any such devices any photograph, video, audio and or records relating to the Applicant."

3. The respondent is to pay the costs of this suit.

2. Sayed v The State (530/2017) [2017] ZASCA 156 (24 November 2017)

The conduct of a judicial officer must be seen to be independent and impartial and s/he is to treat persons with civility and courtesy in court proceedings

(The following is an extract from the above judgment which has been edited for ease of reading. The full judgment can be read here: http://www.saflii.org/za/cases/ZASCA/2017/156.html)

Schippers AJA (Ponnan, Petse and Willis JJA and Lamont AJA concurring):

Facts

[2] The appellants were convicted in the regional court Benoni, of murder, attempted murder and two counts of kidnapping in 2006. Their case was referred to the North Gauteng High Court, Pretoria (the high court), for sentence in terms of the former s 52 of the Criminal Law Amendment Act 105 of 1997 (the Act). Section 52(1) provided that if a regional court, after it had convicted an accused of an offence referred to in Schedule 2 to the Act, was of the opinion that such offence merited punishment in excess of its jurisdiction under s 51, the court shall stop the proceedings and refer the accused to the high court for sentence.

[3] In July 2009 the case came before Louw J in the high court. The learned judge requested a statement from the regional magistrate setting out her reasons for the convictions, as contemplated in s 52(3)(b) of the Act. After considering the regional magistrate's statement, Louw J set aside the convictions on the basis that the proceedings in the regional court were irregular and not in accordance with notions of basic fairness and justice guaranteed by the Constitution.

[4] In November 2010 fresh charges were preferred against the appellants on the original complaint in the regional court, Benoni (the second trial). In that trial they raised a special plea of autrefois acquit and applied for a permanent stay of prosecution. The regional court dismissed the special plea on the grounds that the appellants were not acquitted on the merits of the case against them; and refused a stay of prosecution on the ground that they did not suffer irreparable prejudice. The appellants were granted leave to appeal to the high court.

[5] The court a quo (Pretorius J and Kganyago AJ) dismissed the appeal. It held that the magistrate had correctly rejected the plea of autrefois acquit because Louw J had set aside the appellants' convictions solely on account of the irregularities in their trial in 2006, not on the merits of the case; and that there were no extraordinary circumstances warranting a stay of prosecution.

[6] The appellants then applied to this Court for special leave to appeal, which

was granted on 9 September 2014. In terms of rule 7(1) of the rules of this Court, the appellants were required to lodge their notice of appeal within one month after they were granted leave to appeal. Under rule 8(1) they had to lodge the record within three months of delivery of the notice of appeal. They lodged the notice and the record of proceedings (which in this case consisted only of 250 pages) only on 31 May 2017, more than two years later. By then the appeal had lapsed.

The applications for condonation

[23] Although this is a case where condonation could justifiably be refused irrespective of the merits of the appeal, we nevertheless invited Ms Fisher-Klein to address us on the merits of the appeal so as to enable us to assess its prospects of success.

[24] As already stated, in the second trial the appellants raised the plea of autrefois acquit, namely that they had already been acquitted of the offences with which they were charged, as contemplated in s 106(1)(d) of the Criminal Procedure Act 51 of 1977. The rule against double jeopardy is enshrined in s 35(3)(m) of the Constitution, which states that every accused person has a right to a fair trial, which includes the right not to be tried for an offence for which that person has previously been either acquitted or convicted.

[25] More than 80 years ago, in Manasewitz, Stratford JA held that the requisites for a plea of autrefois acquit are that the accused must have been tried previously on the same charge by a court of competent jurisdiction and acquitted on the merits. This holding has been affirmed by the Constitutional Court as follows:
‘The requirement that the previous acquittal must have been on the merits, or to put it differently, that the accused must have been in jeopardy of conviction, means that, if the previous prosecution was vitiated by irregularity, then it cannot found a plea of autrefois acquit in a subsequent prosecution. That is because the accused was not acquitted on the merits and was never in jeopardy of conviction because the proceedings were vitiated by irregularity.’

[26] This is such a case. Louw J held that the proceedings were not in accordance with justice because of the conduct of the regional magistrate, Ms E Schutte, more particularly in the following respects. The regional magistrate required a trial within a trial to establish whether witness statements were read by, or read back to, the relevant deponent, before the defence could cross-examine on those statements. She had repeatedly interjected during the presentation of evidence, took over the questioning and made inappropriate comments on the value of the evidence whilst it was being adduced. In the course of the proceedings the regional magistrate indicated that she had already made up her mind as to the injuries sustained by the complainant.

[27] The regional magistrate almost immediately took over the questioning of Mr Sayed, the first appellant, during his evidence in chief. His cross-examination covered some 44 pages, in which there were 93 interruptions by the magistrate. When Mr Sayed, who is Muslim, testified, the regional magistrate questioned him and then sarcastically remarked: 'I think I should go to a mosque okay.' The regional magistrate also took over the examination of deceased's wife, to the point that the prosecutor remarked that he could not compete with the court.

[28] The regional magistrate appears to have prejudged the evidence of a police officer when, in the course of his evidence, she said:
'No, listen, listen you know what sir I hope to God that you do something else but investigate or attend scenes you are not being coerced, the point is I am telling you and Mr Botha [the defence attorney] will tell you that on the evidence it is common cause between the state and the defence you are wrong full stop.'

[29] Louw J held that a reasonable person 'would infer bias as the most likely reason for the regional court magistrate's unwarranted findings, utterances and her judicial impatience and intolerance'; and concluded that in the light of the extensive nature of the irregularities, the convictions had to be set aside. The following statement by Louw J, namely, 'I do not give judgment on the merits of the case', places it beyond question that the appellants' convictions were not set aside on the basis of any finding on the merits, but on account of the irregularities in the proceedings before the regional court which were so gross that they rendered the entire trial invalid. This Court has held that in such a case, the conviction is set aside without reference to the merits and the accused can be retried.

[30] For the above reasons the appellants' plea of autrefois acquit, in my opinion, has no prospect of success in the appeal.

[31] As to the stay of prosecution, the appellants contended that the court a quo erred in not finding that a cumulative time-lapse of nine years was so unreasonable as to warrant a stay of prosecution. That, however, does not paint the true picture and ignores the following facts. The proceedings in the regional court ran over three years, during which there was no unreasonable delay. Additional time was taken with obtaining the s 52 statement from the regional magistrate; and the appellants were subsequently acquitted because of gross irregularities which rendered their entire trial invalid. The appellants were released on bail and consequently suffered no prejudice.

[32] Indeed, it is the appellants' case that unreasonable delays were caused by postponements in the high court since their first appearance on 22 August 2007 until Louw J delivered judgment on 25 September 2009; and that this was 'the most expensive period' during which three advocates were engaged for five days. In this regard the appellants relied upon the right to a fair trial in terms of s 35(3) of the

Constitution, which includes the right to a speedy trial (s 35(3)(d)) and the right to a legal practitioner of their choice (s 35(3)(f), seemingly on the basis that the appellants may run out of funds and will have to be assisted by the Legal Aid Board.

[33] On the totality of the evidence, I do not consider that the delays in the high court justify a stay of prosecution. The case could not be heard on 22 August 2007 due to an overcrowded roll. It was postponed to 14 April 2008, 12 May 2008, 13 October 2008 and 14 April 2009 because the record was not in the court file. The judge who had to hear the case on 14 April 2009 recused himself because he knew the regional magistrate too well. Louw J heard the case on 27 July 2009 and requested the regional magistrate to furnish reasons for the conviction. The case was postponed to 21 August 2009 and judgment was delivered on 25 September 2009. The appellants were not prejudiced at all, on the contrary their convictions were set aside.

[34] The decision to retry the appellants was made in October 2009. There is no explanation as to why the second trial commenced a year later, on 1 November 2010. The appellants were given written notice to appear and released on warning. The trial was delayed because in March 2011 the appellants made representations to the DPP to withdraw the charges against them. On 31 May 2011 their attorney was informed that the representations were unsuccessful. Thereafter, the appellants sought an order in the high court 'requesting Judge Louw to amend, change or supplement his judgement [as to] whether the merits were indeed considered by him'. On 14 February 2012 the appellants withdrew that application and subsequently requested the trial court to postpone the case to 31 May 2012.

[35] On 31 May 2012 the pleas of autrefois acquit and the applications for a stay of prosecution were argued in the regional court. Judgment was delivered on 14 September 2012 and thereafter the appellants were granted leave to appeal to the high court, which dismissed the appeal on 8 November 2013. Subsequently, on 9 September 2014 this Court granted the appellants special leave to appeal.

[36] So, from the date of their first appearance in the second trial, the delays in the finalisation of that trial were caused solely by the appellants, as a result of their representations to the DPP, their application for the clarification of the order of Louw J and the appeals pursuant to the dismissal of the plea of autrefois acquit and their application for a stay of prosecution.

[37] In these circumstances, an application for a stay of prosecution is simply unjustified. The appellants have been charged with very serious crimes: murder, attempted murder and two counts of kidnapping. As the Constitutional Court has held, barring a prosecution before a trial begins, without any opportunity to ascertain the real effect of a delay on the outcome of the case is far-reaching as 'it prevents the prosecution from presenting society's complaint against an alleged transgressor

of society's rules of conduct.' Such radical relief will seldom be justified in the absence of significant prejudice to the accused.

[38] Although there was some delay in the high court between August 2007 and September 2009, the appellants were not prejudiced by the delay; and they suffered no prejudice as a result of the delays pursuant to the second trial. And the circumstances of their case are nowhere near extraordinary to justify a stay of their prosecution.

[39] In my view, the application for a stay of prosecution likewise has no prospects of success on appeal.

[40] It follows that the only appropriate order in the circumstances, is one dismissing the application for condonation of the late filing of the appeal record.

[41] What remains is the unjudicial conduct of the regional magistrate. I have referred above to the irregularities which Louw J found evinced bias on the part of the regional magistrate. This led to a miscarriage of justice where the appellants had been convicted of serious charges. What is more disturbing is that the appellants' case was not the first in which the regional magistrate has displayed such conduct: three appellate courts, including this Court, have found that she behaved in a manner unbecoming a judicial officer.

[42] In Ndlangamandla, the high court found that neither the prosecutor nor the defence were given an opportunity to present evidence in a manner they considered appropriate because the regional magistrate constantly descended into the arena. She behaved in an 'irritable, derogatory and outrageous manner'; she was discourteous to all officials, parties and witnesses, and hurled insults with impunity. The court noted that the regional magistrate had contemptuously ignored its admonishments in the past.

[43] This Court in Smith, found that the regional magistrate was rude to the prosecutor, the witnesses, the appellant in that case, and his attorney. She interfered with the presentation of the case. She did not treat the officers of the court, the witnesses or the appellant with dignity. Her interjections 'were often derogatory and insulting and sometimes nonsensical.'

[44] In Phiri the court observed:
'The trial is fraught with serious irregularities impacting the core of the proper administration of justice. The said irregularities are manifested by the manner of criticising the police, the prosecution, the defence and this court. Ms … has been called stupid, the public prosecutor is directed to watch TV and DSTV on channel 69, and she was also given lessons on how to conduct the prosecution during court proceedings. From the record nearly every arm of the court is labelled incompetent. I

must remark, as I hereby do, that such conduct is unbecoming and should be discouraged at all costs. Discourtesy to witnesses cannot be condoned as well as insults hurled with impunity in facie curiae.'

[45] The conduct of the regional magistrate erodes public confidence in the judicial system. Ngcobo CJ put it this way:
'In my view it is fundamental to our judicial system that judicial officers are not only independent and impartial, but that they are also seen to be independent and impartial. Civility and courtesy should always prevail in our courts. Litigants should leave our courts with a sense that they were given a fair opportunity to present their case. This is crucial if public confidence in the judicial system is to be maintained. And public confidence in the judicial system is essential to the preservation of the rule of law, which is so vital to our constitutional democracy. Therefore, legal representatives should not stand by as spectators over what may convey an impression of bias. They should raise any objection as soon as reasonably practicable. This will allow the judicial officer to explain his or her behaviour and, if necessary, correct that behaviour. Judicial officers, it must be remembered, are only human. This will make our courts vigilant of their behaviour and ensure that they prevent behaviour that may create an apprehension of bias.'

[46] In the circumstances, we have no alternative but to again refer the regional magistrate's conduct to the Magistrate's Commission and the President of the Regional Court, Benoni, in the hope that they will urgently take steps to avoid a recurrence of the unjudicial conduct displayed by the regional magistrate.

[47] The following order is made:
'1 The application for condonation is dismissed.
2 The Registrar is directed to forward a copy of this judgment to the Magistrate's Commission and to the President of the Regional Court for Benoni.'

From The Legal Journals

Okpaluba, C & Budeli-Nemakonde, M

"Quantification of damages for wrongful arrest, detention and malicious prosecution: A contextual analysis of contemporary appellate-court awards in South Africa (part 1)"

2017 TSAR 526

Okpaluba, C & Budeli-Nemakonde, M

"Quantification of damages for wrongful arrest, detention and malicious prosecution: A contextual analysis of contemporary appellate-court awards in South Africa (part 2)"

2017 TSAR 792

Rosenberg, W

"A disconnect between South African adoption laws and the plight of orphans"

2017 TSAR 812

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

Contributions from the Law School

Scandalising the court

The common-law crime of contempt of court has undergone, and survived, constitutional scrutiny in its manifestation of 'scandalising the court' in *S v Mamabolo (E TV and Others Intervening)* 2001 (1) SACR 686 (CC) (see Sachs J's semantic difficulties with this form of the crime at para [70]). The broader crime is discussed in some detail in Burchell *Principles of Criminal Law* 5ed (2016) 864ff and Snyman *Criminal Law* 6ed (2014) 315ff, and was also the subject of an examination by Pennefather & Hoctor in *e-Mantshi* 43 (August 2009) 7-14. For the purposes of this short note, I wish to return to the specific manifestation of the crime known as 'scandalising the court', which may be defined as

'the publication, either in writing or verbally, of allegations which, objectively speaking, are likely to bring judges, magistrates or the administration of justice through the courts generally into contempt, or unjustly to cast suspicion on the administration of justice' (Snyman 322).

The context for this inquiry is to examine the bounds of acceptable criticism of the judiciary, for the purposes of this crime.
In *Mamabolo*, Kriegler J, writing for the majority of the Constitutional Court, described the rationale for this crime as a 'public injury', in that the crime exists 'not to protect the dignity of the individual judicial officer, but to protect the integrity of the administration of justice' (para [25]). Although the court acknowledged the importance of the right to freedom of expression in *Mamabolo*, it was made clear that not all criticism of judges could be tolerated (at para [33]):

'[S]tatements of and concerning judicial officers in the performance of their judicial duties have, or can have, a much wider impact than merely hurting their feelings or impugning their reputations. An important distinction has in the past been drawn between reflecting on the integrity of the courts, as opposed to mere reflections on their competence or the correctness of their decisions. Because of the grave implications of a loss of public confidence in the integrity of its Judges, public comment calculated to bring that about has always been regarded with considerable disfavour. No one expects the courts to be infallible. They are after all human institutions. But what is expected is honesty. Therefore the crime of scandalising is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers.'

The type of egregious criticism which would fall foul of the crime of scandalising the court was demonstrated in two cases which followed shortly after the decision of the Constitutional Court in *Mamabolo*: *S v Bresler* 2002 (2) SACR 18 (C) and *S v Moila* 2005 (2) SACR 517 (T). In *Bresler* the white accused had made racist remarks impugning the competence of a particular magistrate of colour, in so doing impugning the integrity of judicial officers as a whole. As Satchwell J stated in her judgment, the accused had 'insulted every officer of every court, whatever our colour, whatever the pigmentation of our skin, whatever our ethnic origin or cultural background' (37a-b). Thus the accused had 'maligned the courts…and those who serve in them', and had 'attacked the very basis of the administration of justice and the right of all members of this society to trust therein and rely thereupon' (37b-c). The *Moila* case involved a black accused who had pilloried white judges with allegations of racism, bias and dishonesty, which were described as 'unbridled vituperative attacks on the Judges in question' (535b). In both the *Bresler* and *Moila* cases the racist attacks on the judiciary were held to constitute the crime of scandalising the court. Such attacks clearly seek to 'undermine one of the foundations of democracy in this country' (*Bresler* 37c-d) and cannot be defended as the exercise of the right to freedom of speech, as 'one cannot use the right of freedom of expression as an unlawful weapon of assault and, at the same time, claim lawfully to shield behind it' (*Moila* 536d).

Thus although the 'line between fair and impermissible criticism may be difficult to draw' (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 172), it seems evident that invoking racial rhetoric in criticizing judicial officers clearly goes beyond the pale, where such rhetoric is employed as a tactic to assail the dignity of the court, rather than as criticism based on the facts. Such criticism clearly goes beyond what is fair and temperate. However, it seems that the degree of criticism may not be as significant as its nature, since, in cases such as *Bresler* and *Moila* what is being placed in issue by the statements of the accused is the impartiality of the court. In the context of the crime of contempt of court, there is a long tradition in South African law of being very intolerant of allegations of judicial impartiality. Milton notes (172n89) that in relation to the landmark case of *S v Van Niekerk* 1970 (3) SA 655 (T), whilst the accused was acquitted on the basis of lack of *mens rea*, the general comments on judicial impartiality were so indiscriminately expressed as to not be able to qualify as fair comment.

The consistency of this approach in the pre-constitutional era, is now buttressed by the unanimous view of the Constitutional Court in *Mamabolo* that the crime of scandalising the court is constitutional, protecting the weakest of the three pillars of State, the judiciary, whose 'manifest independence and authority are essential' (*Mamabolo* para [16]). Simply put, the wrongful and reckless imputation of bias or partiality upon a judicial officer involves a significant attack on the integrity of the judiciary as a whole, and consequently attracts criminal liability in the form of the crime of scandalising the court.

This should give pause to those politicians and other frustrated litigants who rail against the courts, when the result of a case is not satisfactory to them. A recent

example of problematic statements of this nature came in the wake of the finding by the Pietermaritzburg High Court that the ANC provincial conference in KwaZulu-Natal was unlawful, when the provincial spokesperson made the following comment: 'Anyone who thinks that judges are impartial is living on their own planet.

Judges have opinions, they vote like everyone else and they have a preference on who should president.' (see report at https://www.news24.com/SouthAfrica/News/judges-are-not-impartial-kzn-anc-20171007, last accessed 24 November 2017). Based on the above discussion of the law it is evident that such a statement falls foul of the crime of scandalising the court, by alleging partiality on the part of judges, and consequently undermining the competence of the judiciary in the eyes of the general public. Judges ought to be criticized where they make mistakes in the course of their work. As noted earlier in the passage cited from the *Mamabolo* judgment (at para [33]) the competence of judges and the correctness of their decisions are certainly not immune from criticism. However, there is a very significant, qualitative, distinction to be drawn between such criticism and statements which impact on the integrity of the court. The latter statements, such as statements which unlawfully allege partiality or bias, are properly described, in the words of Sachs J (*Mamabolo* para [71]), as 'speech…used in a manner calculated to undermine the very institution designed to protect all fundamental rights, including the right to free expression'. Hence, such statements are regarded as 'scandalising the court', and attract criminal liability.

Shannon Hoctor
School of Law
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

Decolonisation and Teaching Law in Africa with Special Reference to Living Customary Law

C Himonga and F Diallo

(Below is a short edited extract from the article by Himonga C and Diallo F "Decolonisation and Teaching Law in Africa with Special Reference to Living

Customary Law" *PER / PELJ* 2017(20) – The extract deals with the legal education of Judges (including Magistrates). The full article can be accessed here: DOI http://dx.doi.org/10.17159/1727-3781/2017/v20i0a3267)

4.2 The legal theoretical framework

The predominant legal theoretical framework within which law is taught, at least in law schools under the historical influence of English and Roman-Dutch common law is legal centralism and positivism. This theory prepares future lawyers and judges to engage with western-type legal systems and legal cultures and not with non-western African legal systems, let alone oral legal traditions. For example, an important aspect of legal positivism is formalism. This strand of legal theory separates legal rules from "non legal normative considerations of morality or political philosophy" and requires judges to apply the rules to the facts of the case before them deductively, with the value of legal certainty as a goal, among other things. However, the rules of living customary law cannot be abstracted from their social contexts. They are embedded in the social realities within which people live their lives. In addition, the values of certainty, stability and predictability – which are core to western legal cultures – are not necessarily the primary goals of dispute resolution in living customary law.
It is therefore arguable that the legal education of judges and lawyers in Africa exclusively within the theoretical frameworks of legal positivism and centralism do not adequately prepare them to deal with the application of non-western legal orders, such as living customary law, in which law and its values are viewed differently. The result is that lawyers and judges view living customary law as non-existent, or regard living customary law as informal law that is irrelevant to state institutions.

South African judges, for example, have shown a remarkable willingness to step beyond the influence of the dominant mode of their legal education to embrace and recognise concepts of law, such as living customary law, that are located in non-western legal pluralistic theoretical frameworks. However, these judges sometimes seem to retreat into their predominantly western law and legal theoretical training and orientation when applying customary law. The result is that they bring ideas of legal centralism and positivism into the domain of customary law as well.

A classic example of this retreat is the decision of the majority in *Bhe v Magistrate Khayalitsha*. In that case the Constitutional Court recognised the concept of living customary law, including its flexibility. This flexibility means that the system of law is bound than the "positivist/centralist" system of law, in the sense that the application of the rules to disputes follows the repertoire of norms approach Bennett alludes to above. Inherently, this attribute of living customary law entails a case-by-case approach to the application of customary law in decision-making. It also entails some uncertainty in the outcomes of cases. In other words, ideally there is no precedent value in cases decided under customary law, as each case is decided entirely on its

own merits. Interestingly, however, the majority of judges in *Bhe* focused on the values of certainty and uniformity associated with legal centralism and positivism in deciding whether to develop customary law in accordance with constitutional provisions. The response of the Court to the argument on this issue is quoted at length in order to underscore this point.

It was argued by one of the parties that if the Court was not in a position to develop the rules of customary law in this case, it should allow for flexibility in order to facilitate the development of the law. The majority, rejecting this argument, reasoned as follows:

> The import of this [argument] was that since customary law is inherently flexible with the ability to permit compromise settlements, courts should introduce into the system those principles that the official system of succession violates. It was suggested that this could be done by using the exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid unfair discrimination and the violation of the dignity of the individuals affected by it. These exceptions would, according to this view, constitute the "living" customary law which should be implemented instead of official customary law. …. There is much to be said for the above approach. I consider, however, that it would be inappropriate to adopt it as the remedy in this case. What it amounts to is advocacy *for a case by case development* as the best option. … The problem with *development by the courts on a case by case basis* is that changes will be very slow; *uncertainties regarding the real rules of customary law will be prolonged* and *there will be different solutions for similar problems* …

Arguably, underpinning this reasoning is the Court's support for the values of certainty and uniformity associated with the concept of law within the legal theoretical framework of centralism and positivism, as well as its affinity to the doctrine of precedent. Thus, the ghost of the training of judges in legal centralism and positivism sometimes seems to follow them when they customary law in decision-making. The training of lawyers and future judges should therefore equip them to deal not only with the dominant common-law systems of African countries but with living customary law as well.

A Last Thought

"[43] What this view ignores completely, in my opinion, is that the rules physically deny access to domestic employees working in the estate save in accordance with the first respondent's system of ingress and egress and use of the public roads. Domestic employees are simply not free to traverse the public roads in the estate save in the limited manner provided by the Rules. From a constitutional point of view their rights in this regard are severely restricted. The first respondent appears to have categorized them into a class of people who pose a security risk to people living on the estate. Their position within the estate is reminiscent of the position that prevailed in the apartheid era: while they are good enough to perform domestic duties for their employers on the estate, which include the task of pushing perambulators on the roads, they are precluded from exercising any rights derived from public law and the Constitution. The restrictive nature of these rules also affect other basic rights of domestic employees such as their rights to human dignity, equality, freedom of association, freedom of movement, freedom of occupation and fair labour practices. It seems to me that the restrictions placed on domestic employees with regard to their movements on the roads in the estate, flow from a misconceived notion on the part of the first respondent that it is entitled to exercise usurped control over the public roads in the estate through its conduct rules. The first respondent's attempts to give a different, less restrictive meaning to the domestic rules by asserting that the rules actually benefit the employees in terms of their own safety and the fact that they are able to return to their homes timeously at the end of the working day, does not, in my view, detract from the unreasonableness of the rules. To the extent that these rules restrict the rights of domestic employees from freely being on and traversing public roads in the estate, I consider them to be unreasonable and unlawful."

Per Seegobin J in ***Singh and Another v Mount Edgecombe Country Club Estate Management Association Two (RF) (NPC) and Others (AR575/2016) [2017] ZAKZPHC 48 (17 November 2017)***