e-MANTSHI

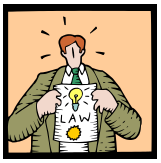
A KZNJETCOM Newsletter

June 2018: Issue 143

Welcome to the hundredth and forty third 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 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.

"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."

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 the 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 regulating the conduct of the proceedings of the Magistrates' Courts of South Africa. The amendment was published in Government Gazette no 41723 dated 22 June 2018. Rules 45, 46 and 49 have been substituted and rule 55 has been amended. Annexure 1 to the rules have also been amended. The amendments will come into operation on the 1st of August 2018. The amendments can be accessed here:

https://archive.opengazettes.org.za/archive/ZA/2018/government-gazette-ZA-vol-636-no-41723-regulation-gazette-dated-2018-06-22.pdf

Recent Court Cases

1. S v Moses (18509/2018) [2018] ZAWCHC 74 (14 June 2018)

If a magistrate has altered an accused's plea in terms of s 113 of Act 51 of 1977, he or she may properly recuse themselves and, provided that they do so before any evidence has been adduced, the trial may continue before a substitute magistrate in terms of s 118 of the Criminal Procedure Act., 51 of 1977.

Binns-Ward J (Bozalek J concurring):

[1] This matter was submitted by the magistrate at Riversdal (Mr C.M. Maseti) for special review in terms of s 304A of the Criminal Procedure Act 51 of 1977 ('the Act'). His reason for taking that course is best explained with reference to the history of the case.

[2] The accused, who was legally represented, pleaded guilty to the charges on which he was arraigned. He confirmed the content of a written statement in terms of s 112(2) of the Act that was read into the record by his attorney, and was thereafter appropriately convicted. The statement (exhibit A) had been signed by both the accused and his then attorney. The further hearing of the case was then postponed at the defence attorney's request for a probation officer's report to be obtained.

[3] Sadly, by the time the report became available and the matter was ready for the sentencing hearing to proceed, the trial magistrate had died. Another magistrate (Mr Oosthuizen) stepped into the breach in terms of s 275 of the Act for the purpose of discharging the outstanding duty of imposing sentence. At that stage the accused had become represented by a different legal representative.

[4] The new representative (Mr Stemmet) informed the magistrate that the content of exhibit A was not consistent with his instructions. The magistrate thereupon, without enquiring into the detail of the deviance between the instructions now given by the accused and the plea statement, summarily altered the pleas to not guilty. In so doing he purported to act in terms of s 113 of the Act. It was notionally within the magistrate's power to have altered the pleas in terms of s 113; see *S v Osborne, S v Nero* 1978 (3) SA 173 (C).

Whether he exercised the power competently in the circumstances is a question to which I shall return presently.

[5] After altering the pleas, and before the proceedings were taken further, the magistrate recused himself from the case because he had noted from the record that he had presided in the accused's bail application. He indicated that the matter might continue before another magistrate in terms of s 118 of the Act. The magistrate ordered that the clerk of the court should place the proceedings already on record (presumably the record concerning everything that had transpired prior to the alteration of the pleas) in a sealed envelope '[s]*odat dit nog altyd in die oorkonde bly maar nie deel van die sigbare oorkonde vorm nie*'.[1]

[6] The matter was thereafter allocated to Magistrate Maseti. It would seem that there had not been compliance with the order concerning the sealing of part of the record because upon perusing the file Mr Maseti came across the record of the accused's previous convictions. This made him feel uncomfortable about hearing the case. He could have chosen merely to recuse himself, and to ensure that the sealing order was complied with before the case was passed on to another judicial officer to try. He decided instead to send the matter on special review, however, because of his concern that the record shows that the charges were not put to the accused in strict compliance with s 105 of the Act at the commencement of the trial before the original trial magistrate. He suggests that the proper course in the given circumstances would be for the proceedings thus far to be set aside on review, with a direction that the trial commence *de novo* before another magistrate.

[7] The matter indeed raises a number of issues on which the prevailing position in law is in certain respects not altogether settled. Mr Maseti is to be commended for identifying that these should receive attention on special review before the hearing proceeds.

[8] In my judgment the following questions fall to be addressed on review:

a) Has the accused effectively pleaded to the charges?
b) If so, were his pleas competently altered to pleas of not guilty?
c) How should the matter proceed from here?

Has the accused effectively pleaded to the charges?

[9] The accused was charged on three counts; one of trespass and two of housebreaking with intent to steal and theft. The transcript of the proceedings reflects the following concerning the plea process:

HOF: Goed, op die 7de Augustus van 2017, die staat teen Elton Moses saaknommer SB295/2016. Die partye is genotuleer soos op die oorkonde. Ek aanvaar u het die klagtes verstaan. Daar is een van betreding en twee van huisbrake. Korrek so?

BESKULDIGDE: Reg so, meneer.

HOF: Hoe gaan u pleit op die klagte, meneer?

---

[1] '[S]o that it still remains part of the record, but does not form part of the visible record.' (My translation.)

BESKULDIGDE: Ek pleit skuldig.
HOF: Dankie, mevrou.
KLAGTE NIE FORMEEL AAN BESKULDIGDE GESTEL
BESKULDIGDE PLEIT SKULDIG
ME VAN DER HEEVER: Dankie Edelagbare. Bevestig my instruksie vir 'n pleit van skuldig. Ek hou die verklaring aan die hof voor. [2]
[The accused's legal representative thereupon read into the record a statement in which the accused confirmed that he had committed the offences with which he had been charged and that he done so with the required legal intention. The plea statement expressly recorded that the accused pleaded guilty to the count of trespass and one of the counts of housebreaking. Although an intention to plead guilty to the other charge was not expressly included in the statement, it was clear from the context that the accused was confessing to having committed the offence and that his plea statement was intended to be supportive of a plea of guilty to that charge too. The plea statement also gave amplified expression to the accused's reply in answer to the magistrate's question about how he was going to plead to the charges: '*I plead guilty*'.]
Geteken deur die beskuldigde en myself, edelagbare. Verlof om op te handig.
HOF: Mnr Moses, hierdie verklaring wat u regsverteenwoordiger aan my voorgelees het, het u dit verstaan?
BESKULDIGDE: Ja, edelagbare.
HOF: Is dit reg so?
BESKULDIGDE: Dit is reg so, edelagbare.[3]
PRESIDING OFFICER: Does the State accept?
PROSECUTOR: Accept the plea, Your Worship.
The magistrate then proceeded to find the accused guilty as charged in accordance with his pleas as recorded in the passage from the record that I have just quoted.

[10] Section 105 of the Act provides as follows:

Accused to plead to charge

---

[2] COURT: Very well, on the 7th of August 2017, the state versus Elton Moses case no. SB295/2016. The parties are as noted on the record. I assume that you understand the charges. There is one of trespassing and two of housebreaking. Not so?
ACCUSED: That is so, sir.
COURT: How do you intend pleading to the charges, sir?
ACCUSED: I plead guilty.
COURT: Thank you, madam.
CHARGES NOT FORMALLY PUT TO ACCUSED
ACCUSED PLEADS GUILTY
MS VAN DER HEEVER: Thank you, Your Worship. Confirm my instruction for a plea of guilty. I present the statement to the court.
(My translation.)

[3] Signed by the accused and myself, Your Worship. Leave to hand up.
COURT: Mr Moses, this statement which your legal representative has read out to me, did you understand it.
ACCUSED: Yes, Your Worship.
COURT: Is that so?
ACCUSED: That is so, Your Worship.
(My translation.)

The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106.

Sections 77, 85 and 105A had no application on the facts. It is clear, however, that s 105 was not complied with according to its letter. This begged the question that troubled Magistrate Maseti concerning the validity of the ensuing proceedings.

[11] The plea process in the current matter was remarkably similar to that reported in the judgment on appeal in *S v ZW* 2015 (2) SACR 483 (ECG) at para. 28. The only significant difference is that in the current case the magistrate's remarks implied that he assumed that the accused had had insight into the charge sheet, whereas in *ZW*, the prosecutor expressly informed the magistrate that '*the defence*' (the accused in that matter was also legally represented) had had insight into the charge sheet. Stretch J (with whom Negpen J concurred) noted (at para. 38) that the court had been informed during argument '*by both counsel for the appellant and counsel representing the state that this procedurally irregular conduct has become practice in the lower courts.*' The learned judge proceeded: '*If this is indeed so, presiding officers are invited not only to be vigilant in discouraging and reprimanding such sloppy prosecution, but also to resist becoming a part of what can only be described as a series of unfortunate irregularities*'.

[12] Despite the court's observation in *ZW* (at para. 41(c)) that

The provisions of s 105 are peremptory, not only with respect to the stating of the charges in open court, but also particularly with respect to the party seized with the duty to do so, being the prosecutor who after all is the official representative of the state, being the accused's accuser. See *S v Mamase and Others* 2010 (1) SACR 121 (SCA) para 7. Furthermore, an accused person is at the outset of criminal proceedings entitled to be advised of the case which he is called upon to answer to with sufficient particularity so as to instruct his legal representative properly and to plead to the charges in a meaningful way, should he so wish. The accused's right to be informed of the charge with sufficient detail to answer it is a fundamental non-derogable right which enjoys absolute protection in terms of s 35(3)*(a)* read with s 37(5)*(c)* of the Constitution.

the court did not hold that the non-compliance with the strict tenor of s 105 in the circumstances of that case had vitiated the proceedings. The only effect of the non-compliance with the letter of the provision in that particular case was that it resulted in the appellate court not being satisfied that the accused had been alerted to the application of the prescribed minimum sentences applicable to the offences with which he had been charged. In the result the court dismissed the appeal against the convictions, but substituted the sentences of life imprisonment that had been imposed in terms of the prescribed minimum sentence regime with determinate sentences of imprisonment.

[13] Whilst the court in *ZW* did not expressly reason its conclusions along these lines, I think the order made in the matter implicitly demonstrated the

application by the court of the recent trend in statutory construction which is to have regard in respect of the practical application of statutory provisions less to the characterisation of the language in which a provision has been couched (whether as 'peremptory' or 'directory'), and more to whether on the facts of the given case the evident substantive purpose of the provision has been achieved or not.[4]

[14] Para 7 of the judgment of the Supreme Court of Appeal in *S v Mamase and Others* 2010 (1) SACR 121 (SCA), to which reference was made in *ZW* in the passage quoted earlier,[5] does not hold that s 105 is peremptory in the sense that it is essential that it be complied with to the letter. The judgment holds that a plea process in criminal proceedings is peremptory in terms of s 105, which is something different. The appeal court made that observation in the context of determining when a trial commences. Its determination was that that the effect of s 105 (and s 106, which prescribes the nature of the various types of plea that an accused may plead) is that a criminal trial does not commence until the accused pleads to the charge(s). To use an analogy from civil procedure, *litis contestatio* is not obtained, and the case is not triable, until the accused has pleaded.

[15] The issue in *Mamase* was one of jurisdiction. The accused in that matter had applied to the court before which they had been indicted for a ruling that it did not have jurisdiction. The application was made before the criminal trial had commenced. The appeal court held that the court of first instance should not have entertained the application because, on a proper approach, the issue of its jurisdiction to entertain the matter would arise only in the context of plea in terms of s 106(1)(f) of the Act.[6] It explained that a challenge to the court's jurisdiction only becomes a justiciable issue when the court has become seized of the proceedings, which, in a criminal trial happens only when the accused enters a plea. It follows that it is therefore necessarily implicit in the judgment in *ZW* that the court accepted that the accused in that case had effectively entered a plea notwithstanding non-compliance with the letter of s 105.

[16] Another comparable case is *Motlhaping v S* [2015] ZANWHC 60 (17 September 2015). In that matter the full court of the North West division (Landman J, Gura and Chwaro JJ concurring) was seized of an appeal from

---

[4] Cf. *Weenen Transitional Local Council v Van Dyk* [2002] ZASCA 6, 2002 (4) SA 653 (SCA), [2002] 2 All SA 482, at para. 13, and *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* [2013] ZACC 51, 2014 (1) SA 604 (CC); 2014 (1) BCLR 1, at para. 30.

[5] At para. [12] above.

[6] Section 106(1)(f) provides:

Pleas
(1) When an accused pleads to a charge he may plead-
...
that the court has no jurisdiction to try the offence; ...

the judgment of a single judge in a criminal matter. The appellate court's judgment records that the plea process in the trial court went as follows:

… when the prosecutor requested that the indictment be read to the appellant, the trial Judge turned to appellant's counsel and asked her whether she represented the appellant and then said: "And the accused is familiar with the charges against him?" When counsel replied in the affirmative the trial Judge said "And he has instructed you to plead?" Counsel replied: "Not guilty." The trial judge then said:

"Just confirm with the accused that he pleads not guilty on all the charges. No, just ask him if he pleads not guilty on all the charges. You will interpret what I say and not what you want to interpret."

The appellant replied: "Not guilty."

The full court declined to uphold the contention by the appellant's counsel that the convictions and sentences should be quashed solely on the basis that plea process had not complied faithfully with the language of s 105 of the Act.

[17] It is evident from the judgment that Landman J was astute to the fact that s 105 is a provision in terms of which effect is given to an aspect of the fair trial rights entrenched in terms of s 35(3) of the Bill of Rights.[7] In weighing the argument advanced by the appellant's counsel he took the view the proper approach was to consider whether the non-compliance had materially compromised the appellant's fair trial rights. He concluded that it had not. In this regard the learned judge stated (at para. 9), '*I am satisfied from a reading of the record that the appellant knew he was indicted on two counts of murder and that he confirmed counsel's statement that he pleaded not guilty to those charges*'.

[18] The approach adopted in the aforementioned decisions put substance over form. In both matters the court overlooked the failures of punctilious compliance with s 105 in the trial courts because they were satisfied that the purpose of the provision had been substantively fulfilled, and also, and more importantly, that the accused's constitutional right to be informed of the charge with sufficient detail to answer it had not been compromised. In both matters the appellate courts were satisfied that the accused had been sufficiently informed of the charges they faced and that the nature of their intended pleas had been effectively placed on record.

[19] That the application of s 105 should be approached pragmatically, rather than formalistically, is also supported by the authors of Du Toit *et al*, *Commentary on the Criminal Procedure Act* (Juta) at 15-2 – 15-2B [looseleaf edition Service 58, 2017]. They offer an example of how formal compliance with the letter of s 105 might even be logistically impractical in a given case:

---

[7] Section 35(3)(a) of the Constitution provides:

Every accused person has a right to a fair trial, which includes the right –

(a) to be informed of the charge with sufficient detail to answer it; …

It is submitted that the prosecutor's duty to put the charge is based on the accused's right to know what the charge is. Is it then, strictly speaking, absolutely necessary for the charge(s) to be read out in circumstances where defence counsel, after proper consultation with the accused, takes the initiative by informing the court and the prosecutor that his client is aware of all the charges against him and in a position to plead? …

Consider the case where the accused, an accountant, is charged with four dozen charges of fraud and is defended by senior counsel who is assisted by two fairly experienced juniors. No court in South Africa would insist, or should require, that in this type of case 'the letter of the law' should be followed by requiring that the charges with all their detail should nevertheless be put to the accused by the prosecutor. The procedural objective should be to allow a situation where an informed plea in respect of each count can be received. The plea determines the ambit of the *lis* between the defence and prosecution; and this, it is submitted, can also be achieved in cases where defence counsel has indicated that his client is 'familiar' with the charges and ready to plead to each numbered count in the charge sheet or indictment.

[20] *S v Porrit* 2016 (2) SACR 700 (GJ) serves as a real life example of the considerations that Du Toit *et al* have in mind. In that matter the trial judge observed that reading the charges for purposes of pleading would take a full week or more. The trial judge (Spilg J) acceded to the adoption of the procedure agreed upon between the accused and the state in terms whereof the accused presented a document signed by them confirming that they understood the charges, agreed that the charges need not be put to them in open court, and that a plea of not guilty, as well as a plea of lack-of-jurisdiction, be entered. (See *Porrit* at paras. 67-69). The accused in that matter were not legally represented, but evidently not unsophisticated persons. It is clear from the judgment that in allowing the plea process to proceed as it did the trial judge paid careful attention to the imperative that the purpose of s 105 and the accused's fair trial rights should not be thwarted or compromised. I have little doubt that should the accused in *Porrit* later seek to challenge the validity of their trial on the basis that the letter of s 105 of the Act had not been complied with, they would be given short shrift.

[21] I would, however, respectfully agree with the enjoinder by Stretch J in *ZW* that s 105 of the Act should ordinarily be complied with according to its tenor. It is especially undesirable that a presiding officer should be seen to be assuming the functions of the prosecutor in respect of putting the charges to the accused. But in the circumstances of the current case, in which it is clear (i) that the accused was familiar with the charge sheet, (ii) that he had already signed a plea statement in terms of s 112(2) of the Act that had been prepared with the assistance of his legal representative, (iii) the accused expressly stated his plea of guilty to the charges in open court, and (iv) confirmed the content of his plea statement in open court and where (v) the prosecution recorded its acceptance of the plea in open court, I consider that the object of

s 105 was substantively fulfilled and that there was no prejudice to the accused's right to a fair trial. In the result I would address Magistrate Maseti's concern about the effectiveness of the accused's pleas by holding that the accused did effectively plead to the charges.

Were the accused's pleas competently altered to pleas of not guilty?

[22] The circumstances in which the accused's plea was purportedly altered in terms of s 113 of the Act to one of not guilty appear from the following passage of the transcript of proceedings before Magistrate Oosthuizen:

HOF: Landdros Delport is ongelukkig oorlede en nie beskikbaar om voort te gaan met hierdie verrigtinge nie. … En derhalwe gaan die hof Artikel 275 van die Strafproseswet toepas en voortgaan met die verrigtinge.

MNR STEMMET: Soos dit die agbare hof behaag. Edelagbare, my instruksies in hierdie aangeleentheid …(onhoorbaar) in hierdie aangeleentheid … (onhoorbaar) eintlik Artikel 113 toepas in hierdie aangeleentheid. Dit is my instruksie … (onhoorbaar) Edelagbare my instruksies is dat daar, beskuldigde voel hy was onskuldig in hierdie aangeleentheid edelagbare en hy wil graag sy dag in die hof hê.[8]

[23] [The accused's counsel, Mr Stemmet, then proceeded to refer to what appear to have been extracurial discussions concerning the irregularity of the plea process – an issue disposed of in relation to the first question discussed above – and indicated his understanding that the matter should have been sent on special review. The magistrate then intervened and the record goes on as set out below.

HOF: So Bewysstuk A [the plea statement read out before the first magistrate by the accused previous legal representative and confirmed by the accused], wat inderdaad deur u (sic) vorige regsverteenwoordige uitgelees het (sic), waarin u (sic) erkennings vervat is en wat die 112(2) Verklaring vervat het, is nie u (sic) instruksies nie?

MNR STEMMET: Nee, edelagbare dit is definitief nie my instruksie nie. In fact my instruksie het dit glad nie so gebeur nie, edelagbare (sic).

HOF: Enige sentiment van u kant af mnr Pretorius [the prosecutor]?

AANKLAER: … (Onhoorbaar) vonnis. Artikel 275 …(onhoorbaar)

HOF: Ek kan nog steeds, as ek Artikel 113 van die Strafproseswet reg verstaan, kan die hof daardie artikel op enige stadium voor vonnis toepas.

MNR STEMMET: Dit is inderdaad korrek, edelagbare.

HOF: En dit blyk dan nou inderdaad dat die verdediging nie meer, nou dat die instruksies verander het, dat dit nie meer vervat word in Bewysstuk A nie. So ek kan nie sien nie dat daar 'n nodigheid is om die aangeleentheid te verwys na die

---

[8] COURT: Magistrate Delport has unfortunately passed away and is not available to continue with these proceedings … And therefore the court is going to apply s 275 of the Criminal Procedure Act and continue the proceedings.

MR STEMMET: As the court pleases. Your Worship my instructions in this matter …(inaudible) in this matter … (inaudible) actually apply s 113 in this matter. It is my instruction … (inaudible) Your Worship my instructions are that there, the accused feels that he was not guilty in this matter Your Worship and he would like to have his day in court.

(My translation.)

Hooggeregshof toe nie. Die hof gaan bloot Artikel 113 toepas en ek gaan 'n pleit van onskuldig notuleer ten opsigte van al hierdie aanklagte.[9] [[10]]

….

[The magistrate then explained that he was unable to continue with the trial because of his prior involvement in the hearing of the accused's bail application, whereafter the continued as follows.]

HOF: Die hof pas dan nou Artikel 113 toe en ek notuleer pleite van onskuldig ten opsigte van al drie die aanklagtes. Ek gaan die aangeleentheid dan uitstel vir my ampsbroer om 'n verhoordatum te reël. Maar die pleit van onskuldig is nou reeds genotuleer. En my ampsbroer kan net Artikel 118 toepas en voortgaan met die verrigtinge, sonder dat daar (sic), want daar is geen pleitverduideliking aan my voorgehou nie.[11]

[24] It is convenient at this stage, having regard to the magistrate's references to them in the passages from the record that I have just quoted, to set out the provisions of ss 113 and s 118 of the Act. Section 113 provides:

113 Correction of plea of guilty

(1) If the court at any stage of the proceedings under section 112(1)(a) or (b) or 112(2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at

---

[9] COURT: So exhibit A [the statement in terms of s 112(2) of the Act] which was in fact read out by your previous legal representative, in which your admissions are set out and which comprises the statement in terms of s 112(2) is not your instructions?
MR STEMMET: No, Your Worship. It is definitely not my instruction. In fact my instruction is that it that it did not happen that way at all, Your Worship.
COURT: Anything from your side, Mr Pretorius [the prosecutor]?
PROSECUTOR: (Inaudible)… sentence. Section 275 (inaudible).
COURT: I can still, if I understand s 113 correctly, the court can still apply that provision at any stage before sentence.
MR STEMMET: That is indeed so, Your Worship.
COURT: And it now appears indeed that the defence no longer, now that the instructions have changed, that it is no longer reflected in exhibit A. So I cannot see that there is a necessity to refer the matter to the High Court. The court is merely going to apply s 113 and I am going to note a plea of not guilty in respect of all of these charges.

[10] It bears mention in passing that the magistrate's opinion that changing the recorded pleas from guilty to not guilty would, of itself, avert the necessity to send the matter on special review was misplaced. Section 113 could not have been invoked if the accused had not effectively pleaded guilty in the first place.
(My translation.)

[11] COURT: The court now applies s 113 and records pleas of not guilty in respect of all three charges. I am then going to postpone the matter for my Colleague to determine a trial date. But the plea of not guilty is already recorded. And my Colleague is in a position just to apply s 118 and continue with the proceedings, without there (sic), because no plea explanation has been presented to me.
(My translation.)

which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

(2) If the court records a plea of not guilty under subsection (1) before any evidence has been led, the prosecution shall proceed on the original charge laid against the accused, unless the prosecutor explicitly indicates otherwise.

Section 118 of the Act reads as follows:

118 Non-availability of judicial officer after plea of not guilty

If the judge, regional magistrate or magistrate before whom an accused at a summary trial has pleaded not guilty is for any reason not available to continue with the trial and no evidence has been adduced yet, the trial may be continued before any other judge, regional magistrate or magistrate of the same court.

[25] It is evident that s 113(1) may be triggered (i) if something occurs in the post-plea proceedings that makes the presiding officer *mero motu* doubt whether the accused is guilty of the offence to which he has pleaded guilty - this commonly happens when an accused says something in mitigation of sentence that calls into question whether he has properly admitted all the elements of the offence; (ii) if it is alleged that the accused does not admit an allegation in the charge or (iii) that the accused has incorrectly admitted any such allegation; (iv) where it appears to the court that the accused has a valid defence to the charge and (v) if the court is of the opinion for any other reason that the accused's plea of guilty should not stand. The circumstances of a given case might give rise to a situation in which there is an overlapping engagement of more than one of the aforementioned five triggering situations.[12] The proviso to s 113(1) can sensibly apply, however, only when the plea is altered in circumstances in which the third of the aforementioned triggers is applicable.

[26] Section 113 did not have a legal predecessor in the 1955 Criminal Procedure Act, and in the early years after its introduction in the current Act there was notable jurisprudential disharmony on its import. The position was settled by the judgment of the late Appellate Division in *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A). The appeal court held that s 113 should be construed consistently with the common law, which it stated had been correctly enunciated in *S v Britz* 1963 (1) SA 394 (T) at 398H-399B as follows:

The accused wishing to withdraw his plea of guilty must give a reasonable explanation as to why he had pleaded guilty and now wishes to change his plea. A reasonable explanation could be, for example, that the plea was induced by fear,

[12] The Appellate Division's identification in *Attorney-General, Transvaal v Botha* 1994 (1) SA 306 (A) of *four* situations in which s 113 is triggered happened before the provision was amended in terms of s 5 of Act 86 of 1996. The wording preceding the proviso to subsection (1) then read '*If the court at any stage of the proceedings under section 112 and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution:* '

fraud, duress, misunderstanding or mistake. If he fails to give an explanation the court would be entitled to hold him to his plea of guilty. If he does give an explanation there is no *onus* on him to convince the court of the truth of his explanation. Even though his explanation be improbable the court is not entitled to refuse the application, unless it is satisfied not only that the explanation is improbable, but that beyond reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he should be allowed to withdraw his plea of guilty.

The judgment in *Botha* emphasised that there is no onus on an accused to satisfy the court on a balance of probability that he should be permitted to change his plea. A reasonable explanation by the accused is all that is required to trigger the provision, and oblige the court to alter the plea (see *Botha* at 329G-H).

[27] As the passage from the record quoted in paragraph [22] above shows, the magistrate altered the plea to one of not guilty without any explanation by or on behalf of the accused having been given whatsoever. It is not an explanation for a new legal representative merely to state without elaboration that the accused's plea statement was inconsistent with his instructions. It was equally not explanatory to say that the accused wanted 'to have his day in court'. Certainly, without more, that would not amount to a reasonable explanation (cf. the remarks of Grosskopf J, Vivier J concurring, in a comparable context in *S v Du Plessis* 1978 (2) SA 496 (K), especially at 498G-H).

[28] The magistrate should have enquired into the matter before changing the plea. He should have ascertained which of the allegations that the accused had admitted in his plea statement were no longer admitted and ascertained why they were no longer admitted. It may well be that the magistrate upon such enquiry would have altered the plea, but without the enquiry he could have no basis to assess one way or the other whether there was a reasonable possibility of the explanation being true, or as to whether or not he should be in reasonable doubt about the tendered and accepted pleas of guilty. As the judgment in *Botha* confirms in a case like the present a reasonable explanation by the accused is the qualifying criterion for the court to change his pleas. It was absent.

[29] In addition, the magistrate's failure to elucidate the accused's position meant that no basis was provided for the operation of the proviso to s 113(1). It is not apparent on the record which of the allegations in the charge that the accused had admitted in his plea statement he now wished to place in issue. The plea statement admitted all the allegations in the charge sheet except for excluding some of the items of property allegedly stolen from the complainants in the counts of housebreaking and theft. Depending on the nature of the explanation given for the accused's change of stance, the magistrate should have ascertained which allegations the accused contended had been incorrectly admitted in order to clarify which of the accused's admissions could stand as proof in the manner contemplated by the proviso to s 113(1).

[30] The ruling made by the magistrate altering the accused's plea to one of not guilty on all three of the charges was not competently made, and therefore falls to be reviewed and set aside.

How should the matter proceed from here?

[31] Magistrate Maseti is concerned that he should not proceed with the trial because he has had sight of the record of the accused's previous convictions, which were proved before the case was postponed for the obtaining of a probation officer's report. There are conflicting judgments concerning the competence of a trial continuing before a judicial officer who alters a plea in terms of s 113 of the Act after conviction and before the imposition of sentence if the accused's previous convictions have been proved. In *S v Sass en Andere* 1986 (2) 146 (NKA) it was held (per Rees AJ, Jacobs JP concurring) that s 113 implicitly contemplated the continuation of the trial before the same presiding officer; whilst the opposite view was expressed (per Van Zyl J, Smit J concurring) in *S v Fourie* 1991 (1) SACR 21 (T). I read the obiter remarks of Lamprecht AJ (Phatudi J and De Vries AJ concurring) in *S v Dlamini* 2014 (1) SACR 530 (GP) at para. 21.4 and footnote 16, where it is suggested that the approach laid down in *Fourie* '*might be in need of reconsideration at an appropriate time …*' as preferring the judgment in *Sass*.

[32] I respectfully agree with the judgment in *Sass* and disagree with the relevant part of the judgment in *Fourie*.[13] In my judgment s 113 expressly provides for the continuation of the matter before the judge or magistrate before whom the accused pleaded guilty. This much follows from the words in s 113(1) that upon altering the plea the court shall '*require the prosecutor to proceed with the prosecution*'. The legislature must have appreciated when it provided that the alteration of the plea might be allowed at any time before sentence was imposed that that might be after the disclosure of the accused's previous convictions. If it had intended that in such circumstances the prosecutor should proceed with the prosecution before a different judicial officer, it would surely have said so; as, for example, it did in s 105A(6)(c) and 105A(9)(d). I also endorse the remarks made in *Sass*, with reliance on the dicta of Innes CJ in *R v Essa* 1922 AD 241 at 246-7,[14] subsequently endorsed

---

[13] The main part of the judgment in *Fourie* deals with the proper construction of s 113 consistently with the common law. In that regard the judgment was expressly approved by the Appellate Division in *Botha* supra.

[14] '*Now it must be borne in mind that the real disqualification for the due discharge of a juror's duty is not knowledge, but bias. And a Judge is specially trained to separate the two; to acquire the one without entertaining the other. He is continually confronted with the task. He listens to a hardened offender relating a plausible story; he must not allow the knowledge of a long list of previous convictions to influence him in the slightest degree in summing up the case to the jury. He has a record read to him, from which it is necessary in the result to excise certain portions; he must dismiss these portions from consideration. During the course of a trial important evidence is objected to. Its nature and effect transpire before he can give his decision, he must treat the case as if he had never heard the evidence. So that his intellect is trained to discriminate between various facts all within his knowledge, to apply some and to reject others as having no bearing upon the matter to be decided. These general considerations show that a Judge is not in the same position as an ordinary juryman as regards the propriety of acquainting himself with the earlier stages of a criminal investigation.*'

by Curlewis JA in *R v Mgwenya* 1931 AD 3 (in which the late Appellate Division dismissed an appeal based on a special entry that the trial judge, who sat without a jury, had perused the record of the accused's previous convictions put before him with the record of the preparatory examination), that it falls to be understood that a judicial officer, as distinct from a layman or a juror, is well qualified to exclude the knowledge obtained of the accused's criminal record in the assessment of the evidence upon which the verdict must be based. However, should a judicial officer for any reason nevertheless feel uncomfortable about proceeding with the matter with knowledge of the accused's previous convictions after altering the plea in terms of s 113, he or she may properly recuse themselves and, provided that they do so before any evidence has been adduced, the trial may continue before a substitute in terms of s 118 of the Act.

[33] By reason of the order that will be made reviewing and setting aside the alteration of the pleas, Magistrate Maseti will only get to stage of having to consider his position if, after appropriate enquiry into the issue raised by Mr Stemmet's cryptic indication that the accused might wish to change his plea, he properly decides that the accused's pleas should be altered. Unless Magistrate Maseti is persuaded by a reasonable explanation that the accused's plea must be altered in terms of s 113, he must proceed to impose sentence on the accused. In the event that he alters the plea and feels constrained to recuse himself, he should ensure that the references in the record to the accused's previous convictions are sealed before the matter is passed on to a different magistrate for completion in terms of s 118.

[34] The following order is made:

(a) The order made by Magistrate Oosthuizen altering the accused's pleas in terms of s 113 of the Criminal Procedure Act 51 of 1977 is reviewed and set aside.

(b) It is declared that pursuant to the order made in paragraph (a) above, Magistrate Maseti may continue with the trial in terms of s 275 of the Criminal Procedure Act, and in accordance with the guidance provided in this judgment.

From The Legal Journals

Louw, A S

"Considering the continued viability of adoption as a form of substitute parental care for children"

THRHR Volume (81) February 2018

Abstract
Given its many advantages, adoption should remain the most preferred form of care for adoptable children in suitable circumstances. An adoption grant should, however, be introduced without further delay to extend the advantage of adoption to as many other children as possible – especially and at least those in nonrelative foster care. The exclusive jurisdiction of the High Courts to grant guardianship orders should be removed to facilitate such orders. Although a guardianship order would not automatically confer succession rights on a child, it would certainly go a long way to ensure the protection of children not in the care of their parents by creating a legally-recognised parent-child relationship – at least until the child acquires the status of a major.

De Villiers, W P

"Notes about the application of the Administrative Adjudication of Road Traffic Offences Act 46 of 1998"

THRHR Volume (81) February 2018

Basdeo, V

"Criminal and procedural legal challenges of identity theft in the cyber and information age".

2017 SACJ 363

Abstract
Criminals have increasingly become involved in cyber activities but practitioners in the criminal justice arena do not seem to be keeping pace with crime in a cyber context. Being comfortable with the technology that underpins the information age is a non-negotiable skill for those who have to unravel and bring twenty-first century crimes to book. The birth of the cyber and the information era has created new criminal and procedural law challenges in the fight against identity theft. Identity theft imposes immense hardships upon its victims. There is often the false and misguided belief that it's only the careless, trusting and naive that fall victim to the trickeries of identity thieves. The evolution of technology and the resultant increase in individuals transacting electronically has presented new opportunities for identity thieves to get hold of personal information. The perpetrators of identity theft often use the stolen identities to commit fraud and to violate the law. This article examines the challenges of identity theft and the inadequacy of existing legislation to address this scourge. This article further examines the extent and efficacy of South African laws to deal with the challenges presented by identity theft. It also analyses the rudimentary powers that exist in South African criminal procedure with regards to identity theft, and it further examines legislative solutions introduced in South Africa, the United States of America and the United Kingdom. Finally, this article proposes possible recommendations to counteract identity theft.

Noncembu, V

"Sentencing the erstwhile child: Imprisonment and committal to a child and youth care centre."

2017 SACJ 299

Abstract
The Child Justice Act 75 of 2008 has brought new changes and much needed clarity in the prosecution of children, particularly on sentencing. It inter alia provides a framework of sentencing objectives and principles applicable to children. It specifically provides that imprisonment must be utilised only as a measure of last resort and for the shortest appropriate period of time. This article explores the sentencing of young offenders (erstwhile children) who attain majority status before the conclusion of their trials, with a special focus on imprisonment and committal to a child and youth care centre as sentencing options. Relevant legislative provisions are interrogated. The conclusion is that the Act does not provide sufficient guidance for sentencing the aforementioned offenders. The recommendation is that children who attain majority status before finalisation of their matters should be dealt with as children until the conclusion of their trials, including the sentencing stage. The author notes that this may have an impact on the turnaround time for finalisation of matters and thus submits that the concession should be limited to the age of 21 years. Review of legislation to give certainty and uniformity in dealing with these offenders is suggested.

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

Contributions from the Law School

Revising the rule of Spousal Privilege in cases of cohabitation

Abstract

Case law has demonstrated a trend that the rights of cohabiting couples are not adequately protected whether in terms of maintenance or the right to testify. The question remains as to how courts are to address this inequality in the future. It is suggested that a group of factors can be used to depart from the traditional approach to deciding cases.

Introduction

The continued existence of spousal privilege and whether it constitutes unfair discrimination on the basis of marital status, has become an important issue in light of the courts' duty to seek the truth-seeking process (Abdoll "Section 198 of the Criminal Procedure Act: Martial privilege or unfair discrimination on the ground of marital status?" September 2017 *De Rebus* http://www.derebus.org.za/section-198-criminal-procedure-act-marital-privilege-unfair- discrimination-ground-marital-status). Section 198 of the *Criminal Procedure Act 51 of 1977* is important in two respects. First, spouses are deemed the only category of witness that can refuse to disclose highly relevant evidence (Abdoll *supra*). It has been noted that "(1) A husband shall not at criminal proceedings be compelled to disclose any communication which his wife made to him during the marriage, and a wife shall not in course of criminal proceedings be compelled to disclose any communication which her husband made to her during the marriage" (Zefferet and Paizes South African Law of Evidence (2009) 706).

The spouse of an accused is a competent witness for the prosecution, and can only be compelled to testify in that capacity in limited circumstances. These circumstances specifically involve offences committed against the spouse or a child (Naude "Spousal Privilege and Compellability: A Reconsideration" (2004) *South African Journal of Criminal Justice* 325). From a procedural perspective, it is necessary to draw a distinction between spousal incompellability to testify and being able to claim

marital privilege when asked to reveal a communication made during the marriage. The reason for this is because only competent and compellable witnesses are entitled to claim the privilege (Naude supra 327). However, the reasons pertaining to both procedures are alike, since both are meant to safeguard the relationship from court processes, and therefore are indicative of important policy considerations (Naude *supra*). As a result, the rules are sometimes termed "adverse testimonial privilege" and the "confidential communications privilege" (Naude *supra*).

Second, since only married persons can rely on marital privilege, it is clear that s 198 of the CPA fails to accommodate individuals who cannot or will not enter into legally recognised marriage for whatever reason (Abdoll *supra*). Third, s 14(*d*) of the Constitution provides that every person has a right not to have their private communication infringed (Abdoll supra). When s 198 of the CPA is applied to the unfair discrimination test set out in *Harksen v Lane NO and Others*, 1998 (1) SA 300 (CC) the following points become salient: In respect of stage one of the enquiry, section 1 of the Constitution is not violated, because although stage one of the enquiry distinguishes between married and unmarried couples, the distinction is based on rational government objective (Abdoll *supra*). Because the differentiation is based on the ground of marital status, discrimination has been acknowledged. Furthermore, since in terms of s 9(3) marital status is viewed as a special ground, not only is unfairness presumed, but further ss 9(3) and 9(4) are deemed to be infringed. (Abdoll supra). In respect of stage three, if there is consensus that the discrimination created by s 198 is devoid of any rationale in respect of s 36 of the Constitution, then such a section should be pronounced unconstitutional (Abdoll *supra*). In *Ex Parte Chairperson of the Constitutional Assembly: In re Certificate of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) it was noted that neither the right to marry nor the right to family life are regarded as constitutionally protected rights in terms of the Bill of Rights (Abdoll *supra*). In light of a comparison between the right to equality and the right to spousal privilege, it becomes clear that spousal privilege is unconstitutional. Assuming that these findings are correct, not only is it arguable that s 198 of the CPA is inconsistent with the right to equality, but it would also appear that the existence of marital privilege becomes problematic. The purpose of these provisions is to promote the institution of marriage, but by excluding unmarried heterosexual cohabitants in permanent life partnerships, the legislation is in effect saying that such relationships do not constitute family life (*National Coalition of Gay and Lesbian Equality v Minister of Home Affairs v Minister of Justice* 1999 (1) SA (CC) par [51]).

This trend is further demonstrated in *Volks v Robinson* 2005 BCLR 466 (CC). Ms Robinson applied to the High Court for a court order declaring that she was entitled to lodge a claim for maintenance against the estate, and alternatively, declaring that that the Maintenance of Surviving Spouses Act 27 of 1990 was unconstitutional and invalid as it did not include a person in a permanent life partnership.(at par [10], in Jamneck "The Problematic application of s1(6) and 1(7) of the Intestate Succession Act under the new dispensation" (2014) *Potchefstroom Electronic Law Journal* 974). The Constitutional Court agreed that the exclusion of heterosexual life partners from

the protection of the Act amounted to discrimination on the basis of marital status, but found that the discrimination was not unfair (Jamneck *supra*). Instead of examining the nature of the privilege, the court simply concluded that due to the recognition of marriage as an institution, it imposes an obligation of support in such instances that are not applicable in other types of relationships: simply noted that impose an obligation of support in marriages that it did not impose in terms of other relationships: *"The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in case of unmarried cohabitants."* (*Volks v Robinson supra* par [56]).

The main problem was determining the main objectives that each party wanted to achieve in the relationship (Lind "Domestic Partnerships and Marital Discrimination" (2005) *Acta Juridica* 123). It was noted in Volks that: *"The entitlement to protection under the Act, therefore, depends on their decision whether to marry or not. The decision to enter into a marriage relationship and to sustain such a relationship signifies a willingness to accept the moral and legal obligations, in particular, the reciprocal duty of support placed upon spouses and other invariable consequences of a marriage relationship. This would include the acceptance that the duty to support survives the death of one of the spouses … There is choice at entry level. The law expects those heterosexual couples who desire the consequences ascribed to this type of relationship to signify their acceptance of those consequences by entering into a marriage relationship. Those who do not wish such consequences to flow from their relationship remain free to enter into some other form of relationship and to decide what consequences should flow from their relationships."* (par [90]-[91], in Jamneck *supra*).

How should a court handle a relationship where one spouse clearly does not want to get married – as in the case of Mr Shandling? Should the individual autonomy of Mr Shandling have been respected that he had clearly delineated prior to his death? In this sense then, because Mr Shandling had financially supported Ms Robinson prior to his death, she should be entitled to claim after his death as well. Should the focus be on support obligations that were undertaken by one party to the benefit of the other? (Lind *supra*). It is submitted that the focal point should be on whether the relationship had the same functional status of a marriage, and whether certain expectations were raised as a result of that relationship (Lind *supra* 124). This view is also reinforced by another factor in family law. Social practices and conventions of society form the basis of family obligations. Because such conventions are changing, legal responsibilities should also adapt to reflect such notions of justice – but also society's changing expectations (Lind *supra*). The courts have conducted a superficial investigation of autonomy, which clearly reflects that only a duty of support that has been purposefully undertaken will be accepted (Lind *supra* 122).

Another problem faced by the court was the uncertain nature that cohabitation creates in determining when such a relationship arises (Lind *supra* 126). This would

create uncertainty as to what criteria should be used to recognise and foster such relationships. Certainty is a key feature in civilised legal systems. If courts do not adhere to the principle of stare decises, and then the question arises – how will the courts will go about mitigating the effects of such a precedent? (Kruuse "'Here's to you, Mrs Robinson': Peculiarities and paragraph 29 in determining the treatment of domestic partnerships" (2009) *South African Journal on Human Rights* 387). Two reasons have been proposed for mitigating the effects of the doctrine. First, when undertaking constitutional interpretation, legal mistakes should not be entertained (Kruuse *supra*). Second, constitutional decisions are predominantly based on value judgments, which are prone to change (Kruuse *supra*). This approach is flexible, and in line with Roman Dutch convention (Kruuse *supra* 387-388). Such an approach will provide a list of factors that the court may heed when departing from precedent. These include consideration of the following questions:

1. Have principles of law developed in such a way, that there is no resemblance to previous doctrine?
2. Have facts altered in dramatic form so that previous rules are obsolete or no longer of meaningful application or rationalisation?
3. Has the determination been a direct impediment to achieving important goals in other laws? (Kruuse *supra* 388-389).

With reference to the factors mentioned, point two and three are salient. The substitution of circumstances has taken various forms. First, not only has the *Civil Union Act* 17 of 2006 come into operation but further, the drafting of the *Domestic Partnerships Bill* 2008 has acknowledged the need to protect cohabitation (Kruuse *supra* 389). The change in the status quo was highlighted with the finding in *Gory v Kolver NO (Starke & Others intervening)*2007 (4) SA 97 (CC) where the court failed to foresee that case law would develop in the manner that it did – whereby it granted more rights to same sex cohabiting couples than opposite sex cohabiting couples (Kruuse *supra*). With regard to the third element of whether a courts determination has been a direct impediment to achieving important goals in other laws, it could be correctly postulated that in *Volks* the court failed to protect different family types in terms of the Constitution (Kruuse *supra*). Likewise, the position post-*Civil Union Act* fits into the proposal that once a stable body of constitutional case law is developed, legal systems be free from precedent (Kruuse *supra*).This situation is, for example, where there is a change of circumstance that alters our understanding of the law (Kruuse 387). Does the passing of the Civil Union Act present a "change of circumstance? (Kruuse *supra*). From a practical viewpoint it does, and this means that the precedent set in *Volks* is questionable in cases where opposite sex cohabiting partners do not benefit (Kruuse *supra*). This same rationale can be applied to the continued existence of marital privelege and therefore South African courts have been wrong in refusing to extend such a privelege to cohabiting partners.

Conclusion

In light of the problems experienced with s 198 on the basis that it is inconsistent with the right to equality dictates that the continued existence of spousal privilege is also

questionable. By adopting an incous set of guidelines the courts can deviate from traditional precedent and provide equitable outcomes.

Samantha Goosen
School of Law
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

Implications of the increase in the prescribed income amount in terms of the Extension of Security of Tenure Act

An 'occupier' is defined in s 1 of the Extension of Security of Tenure Act 62 of 1997 (ESTA), as a 'person residing on [essentially rural] land which belongs to another person, and who has on or after 4 February 1997, or thereafter had consent or another right in law to do so'. In terms of para (*c*) of the definition of 'occupier', and in terms of the Regulations issued under ESTA, a person will not qualify as an occupier if the person earns an income in excess of the prescribed amount of R 5 000 per month.

On 6 February, the Minister of Rural Development and Land Reform amended the prescribed amount from R 5 000 per month to R 13 625 per month. This amendment of the Regulations under ESTA was subsequently published in the *Government Gazette* (GenN72 *GG*41447/16-2-2018). The effect of the amendment is that a person who earns a monthly income of between R 5 000 and R 13 625 will now also qualify as an occupier as defined in ESTA.

In terms of the Stellenbosch University Law Clinic (the Law Clinic) means test, used by Legal Aid South Africa to determine whether or not a person qualifies for legal aid at the Law Clinic, a single applicant should not earn an income of more than R 5 500 per month, while an applicant who has a spouse or partner should not earn a combined income of more than R 6 000 per month.

During December 2017, the public was invited to comment on a proposed amendment to the Regulations issued under the Legal Aid South Africa Act 39 of 2014 relating to the above means test. The proposed amendment entails increasing the income threshold of a single applicant to R 7 400 per month (from R 5 500 per

month), while increasing the income of an applicant with a spouse or partner to an amount of R 8 000 per month (from R 6 000 per month). The public was invited to comment on the proposed amendments before 19 January. The proposed amendments have to date not yet taken effect.

Regardless of whether the proposed amendment to the Regulations under the Legal Aid South Africa Act is effected, the negative implication of the amendment to the Regulations under ESTA is that certain farm occupiers – as defined in ESTA – will no longer qualify for free legal aid at institutions, such as the Law Clinic. This is particularly problematic as the Law Clinic is the only law clinic in South Africa, which assists in opposing ESTA eviction applications.

It is commendable that the reach of ESTA has been extended. However, the Law Clinic notes its concern that the extended reach of ESTA may result in large numbers of individuals who cannot enforce their rights under the legislation, because they do not qualify for legal aid and cannot otherwise afford to pay for the services of an attorney in private practice. Raising a legal defence to an ESTA application is a specialised and generally labour-intensive exercise, and it is doubtful that a person who earns, for example, R 9 000 per month, which is also used to maintain their extended family (as is typically the case), would still be able to afford private legal representation. This situation becomes worse when one considers that the ESTA occupier may eventually be evicted and would have to utilise their funds to seek new, alternative accommodation. ESTA matters also constitute a form of social justice litigation where courts are normally loath to grant cost orders against one of the parties, as is typically the case in ordinary civil litigation. One would have to question to what extent this practice will remain possible when defence attorneys have to be compensated for their work. The likely scenario is that these legal costs will simply reduce the compensation available to the occupier, further limiting the prospects of securing a roof over their heads.

The increase in the prescribed income ‘cap’ amount in terms of ESTA increases the need for legal services. The question remains, however, who will meet this requirement and at what cost?

Nikita Roode, attorney, Stellenbosch

(The above letter appears in the July 2018 edition of the *De Rebus* journal)

A Last Thought

[161] Under the present Constitution …… preliminary litigation in a criminal case was considered by Langa ACJ in *Thint (Pty) Ltd v National Director of Public Prosecutions and others*; *Zuma v National Director of Public Prosecutions and others* 2009 (1) SA 1 (CC) para 65.and he said the courts:
'… should discourage preliminary litigation that appears to have no purpose other than to circumvent the application of s 35(5). Allowing such litigation will often place the prosecutors between a rock and a hard place. They must, on the one hand, resist preliminary challenges to their investigations and to the institution of proceedings against accused persons; on the other hand, they are simultaneously obliged to ensure the prompt commencement of trials. Generally disallowing such litigation would ensure that the trial court decides the pertinent issues, which it is best placed to do, and would ensure that trials start sooner rather than later. There can be no absolute rule in this regard, however. The court's doors should never be completely closed to litigants . . . If the trial is only likely to commence far in the future, the victim should be able to engage in preliminary litigation to enforce his or her fundamental rights. But in the ordinary course of events, and where the purpose of the litigation appears merely to be the avoidance of the application of s 35(5) or the delay of criminal proceedings, all courts should not entertain it. The trial court would then step in and consider together the pertinent interests of all concerned.'

Per Wallis JA in *Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others (387/2017; 386/2017) [2018] ZASCA 100 (20 June 2018).*