e-MANTSHI

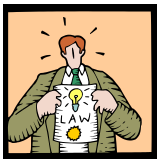
A KZNJETCOM Newsletter

October 2018: Issue 147

Welcome to the hundredth and forty 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. 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 and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The explanatory summary of the Child Justice Amendment Bill 2018 was published in accordance with Rule 276(1) (c) of the Rules of the National Assembly in Government Gazette no 41952 dated 2 October 2018. The purpose of the Bill is to amend the Child Justice Act, 2008 (Act No. 75 of 2008) so as to amend a definition; to further regulate the minimum age of criminal capacity; to further regulate the provisions relating to the decision to prosecute a child who is 12 years or older but under the age of 14 years; to further regulate the proof of criminal capacity; to further regulate the assessment report by the probation officer; to further regulate the factors to be considered by a prosecutor when diverting a matter before a preliminary inquiry; to further regulate the factors to be considered by an inquiry magistrate when diverting a matter at a preliminary inquiry; to further regulate the orders that may be made at the preliminary inquiry; to amend wording in order to facilitate the interpretation of a phrase; and to further regulate the factors to be considered by a

judicial officer when diverting a matter in a child justice court; and to provide for matters connected therewith. The Bill can be accessed here:

http://www.justice.gov.za/legislation/bills/201809-ChildJustice-AmendmentBill-OCSLA.pdf

2. The Rules Board for Courts of Law ("Rules Board") has, pursuant to section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), read with section 52 of the Children's Act, 2005 (Act No. 38 of 2005), resolved to develop the rules for the Children's Courts of the country. In order to carry out such task, a Task Team was established to investigate, research, review and recommend the draft rules for consideration and approval by the Rules Board. Comments are invited, for submission by no later than 07 December 2018.
Submissions can be sent via email to Makubela Mokulubete (MMokulubete@justice.gov.za). Further enquiries may be directed to (012) 406 4755.
The memorandum and proposed rules can be accessed here:

http://www.justice.gov.za/rules_board/comment.html

Recent Court Cases

1. S v Mtyhole (R255/2018) [2018] ZAFSHC 156 (18 October 2018)

An accused who pleads guilty to a charge has to provide a factual basis for his plea of guilty before he can be convicted if all the elements of the offence are admitted.

Daffue, J

I INTRODUCTION

[1] This is an automatic review in accordance with the provisions of s 302 of the Criminal Procedure Act, 51 of 1977 ("the CPA").

[2] On 5 July 2018 the accused, unrepresented at the trial, pleaded guilty to a charge of speeding on the N1 near Bloemfontein on 22 May 2018. He drove a friend's Volvo motor vehicle at a speed in excess of the 120 km/h speed limit, to wit 171 km/h. After questioning by the trial magistrate in terms of s 112(1)(b) of the CPA, he was convicted and sentenced as follows: payment of a fine of R2 500.00, failing

which he should serve 12 months' imprisonment. Section 35 of the National Road Traffic Act, 93 of 1996 was not invoked.

II QUESTIONING BY THE TRIAL MAGISTRATE IN TERMS OF SECTION 112(1)(b) OF ACT 51 OF 1977 (THE CPA).

[3] The accused, a 30 year old pharmacist of Mthatha with a B Com degree (according to the record which is doubtful bearing in mind accused's occupation), earning R35 000.00 per month, was informed upon his guilty plea that he would be questioned and should the court not be satisfied that all the elements of the offence are admitted a plea of not guilty would be entered in terms of s 113 of the CPA.

[4] The following questions and answers appear from the record:

"Okay N1 between Glen and Witfontein are within the district of Bloemfontein?... Yes your Worship.

You were driving a Volvo is that so?... Yes your Worship.

Registration number? ... I can't remember what the registration is it was my friend's car.

Is it the same vehicle you were caught driving?.....Yes

Are you aware of the speed limit in the area where you were caught for exceeding speed limit?..... Yes your worship.

What is it? ... It's 120.

At what speed were you driving? … I was driving at 171 your Worship.

Were you the driver of your friend's car? … Yes your Worship.

Were you aware that you exceeded the general speed limit? … Yes your Worship.

Were you aware that such a contravention is not allowed? … Yes your Worship.

Were you also aware that such excessive speed that you were driving at is punishable by law? … Yes your Worship."

[5] The prosecutor confirmed that the information tendered corresponded with the contents of the docket whereupon the accused was convicted.

[6] The accused tendered information from the bar and even suggested that he would be prepared to pay a fine of R2 500.00. Surprisingly, the trial magistrate imposed a lenient sentence, to wit a fine of R2 500.00, alternatively 12 months' imprisonment. The fine is much less than often imposed for similar offences. The following crucial information was obtained during the sentencing process and upon the very last question put to the accused by the trial magistrate as to whether there was anything that he wished to bring to the court's attention: "No there is nothing your Worship I just want to apologise because that night I was driving from North West because I attended an exam on that day my wife was in labour because she gave birth on the 24th so I had to rush to Umtata to rescue her to the nearest doctor there. So am sorry about that." (*verbatim* quote). Instead of following up questions, the trial court left it there. This is an important aspect that will be dealt with in detail *infra.*

[7] Although the transcribed record does not indicate that an inquiry in terms of s 35 of the National Road Traffic Act was held, the trial magistrate confirmed that it was done. The section, requiring suspension of the accused's driver's licence for six months, was not invoked.

III THE REFERRAL FOR REVIEW

[8] On 28 September 2018 the acting senior magistrate of Bloemfontein sent the record of proceedings and the trial magistrate's accompanying letter to the High Court which documents were received on 10 October 2018. When the letter which is quoted *infra* is read, it will immediately become clear to the reader that the particular magistrates did not consider the crucial answer given by the accused when he proffered information in mitigation.

[9] The High Court received the referral more than three months after the finalisation of the proceedings in the lower court. As we have become used to by now, there was again a delay in transcribing the record. Section 303 of the CPA is peremptory, but systemic delay causes transgression of the section in almost all review matters. Sher AJ, with whom Henney J concurred, referred to this as a "perennial problem" in *S v Jacobs and six similar matters* 2017 (2) SACR 546 (WCC) at para [39]. Sensible proposals were made which included the introduction of an outstanding automatic review list. See paras [45] – [48]. Hopefully that judgment was brought to the attention of relevant decision-makers who are seriously considering systemic delays of this nature which are not in the interest of justice.

[10] The transcribed record – not even a full seven pages - would have been meaningless, was it not for the hand-written corrections made by the trial magistrate.

[11] The relevant part of the trial magistrate's letter reads as follows:

> "1…
> 2…
> 3…
> 4. I received the transcribed record on the 24th September 2018.
> 5. The conviction followed accused's guilty plea on the 5th July 2018.
> 6. It is my respectful submission that the conviction be set aside as the questioning on (sic) the accused by the trial magistrate fell short of the criteria used in S v Mohlolo Khambule (FS), Review number: R177/2018.
> 7. It is my respectful submission that accused did not admit that the operator/the traffic officer concerned was duly authorized to / competent to operate the speed capture device.
> 8. It is my respectful submission that the accused did not admit that he was aware, before he was pulled over by the traffic officer, that he was travelling at an excessive speed.

9. It is my respectful submission that the transcribed record does not show that after the conviction a S35 inquiry was conducted, however, the handwritten notes of the trial magistrate indicate that an inquiry was conducted."

IV THE PURPOSE OF REVIEWS

[12] Review procedure in terms of s 302 of the CPA is aimed at ensuring the validity and fairness of the convictions and sentences in certain categories of our lower courts, for example *in casu,* the sentence imposed by the trial magistrate who has held the rank of magistrate for a few months only, and thus less than seven years, brought the proceedings within the ambit of automatic review in terms of s 302(1)(a)(i).

[13] The review court "has only to certify that the proceedings were in accordance with justice, and not necessarily in accordance with law." See Du Toit *et al, Commentary on the Criminal Procedure Act,* service 60 at 30-9 with reference to *S v Cedars* 2010 (1) SACR 75 (GNP) at 77 and authorities relied upon. The question to be answered in each case is whether there was real and substantial justice, not necessarily in accordance with strict law and even if a rule of criminal procedure may not have been observed. See also: *S v Nteleki* 2009 (2) SACR 323 (OPD) at para [7].

V QUESTIONING IN TERMS OF SECTION 112(1)(b) OF ACT 51/1977

[14] Section 112(1)(b) of the CPA reads as follows:

"(T)he presiding... magistrate shall... question the accused with reference to the alleged facts of the case in order to ascertain whether he admits the allegations in the charge to which he has pleaded guilty, and may, *if satisfied that the accused is guilty of the offence to which he has pleaded guilty*, convict the accused on his plea of guilty of that offence and impose any competent sentence...." (emphasis added)

[15] In *S v Naidoo* 1989 (2) SA 114 (AD) at 121F the correct approach to questioning in terms of s 112(1)(b) was recorded as follows:

"I would merely observe that it is well settled that the section was designed to protect an accused from the consequences of an unjustified plea of guilty, and that in conformity with the object of the Legislature our courts have correctly applied the section with care and circumspection, and on the basis that where an accused's responses to the questioning suggest a possible defence or leave room for a reasonable explanation **other than** the accused's guilt, a plea of not guilty should be entered and the matter clarified by evidence." (emphasis added)

[16] Du Toit *et al, Commentary on the Criminal Procedure Act,* service 60 at 17-9 also confirm that the subsection was designed to protect accused persons - uneducated and undefended accused in particular – "from the consequences of an ill-considered plea of guilty." Therefore, as the authors state at 17-15, the "ambit of the questioning is at all times determined by the fact that s 112(1)(b) provides the necessary machinery to test a plea of guilty." The court's questioning has as its aim to obtain a factual basis by the accused supporting the plea of guilty, *i.e.* to show that all the elements of the offence have been admitted. Kruger A, *Hiemstra's Criminal Procedure*, issue 9 at 17-3 puts it as follows: "The purpose of the questioning is twofold: first, to determine whether the accused admits the allegations in the charge sheet upon which there was a guilty plea (and one may add as the author states further on, the admissions must be made freely, consciously and reliably): and, secondly, to enable the court to conclude for itself whether the accused is, in fact, guilty." A mere regurgitation of the allegations in the charge is insufficient.

[17] It is not the court's function to eliminate all possible conceivable defences or as the full bench in *S v Phundula* 1978 (4) SA855 (TPD) put it: "Dit word stellig nie van die landdros verwag om alle denkbare verwere te ondersoek en uit te skakel nie." (It is not expected of the magistrate to investigate and exclude all conceivable defences. (my translation)) In one of the three appeals before it, the court found that the magistrate should have asked further questions in terms of s 112(1)(b) to establish whether the appellant had the necessary intent to steal. It appeared from the summary provided by the prosecutor that the accused made a collision with a vehicle allegedly stolen by him, that the vehicle overturned causing the accused to be hospitalised and that he informed the police after handing him over that he did not want to live any longer. The full bench held that further questioning might have resulted in the appellant not admitting intent to steal. His aim appeared to be to commit suicide. In *S v Tshumi* and others 1978 (1) SA 128 (NPD) the accused, who was convicted upon his guilty plea to a charge of culpable homicide, responded to a question by the trial court that the deceased had been the original aggressor. Although this raised the question whether he acted in self-defence, the matter was not taken any further by the trial court. It is not surprising that the review court set aside the conviction and sentence. In *S v W* 1994 (2) SACR 777 (N) the accused pleaded guilty on a charge of theft of a motor vehicle. According to their answers during questioning they took the complainant's vehicle, but abandoned it next to a highway. In the absence of further questioning to establish their intent to deprive the owner permanently of the benefits of his vehicle, the review court found that they had not admitted all the elements of theft. I provided the three examples in order to show that if responses by an accused during questioning suggest a possible defence or a reasonable explanation other than his/her guilt, a plea of not guilty in terms of s 113 must be entered.

[18] It is important to emphasise that the court must be satisfied that the allegations in the charge are admitted, *in casu* that on 22 May 2018 the accused unlawfully and intentionally drove the particular motor vehicle on a public road at a speed of 171

km/h which is in excess of the speed limit of 120 km/h applicable to the particular road. In acting as such the trial magistrate should have obtained the factual basis on which the accused pleaded guilty to test the correctness thereof. It is not for the trial court to extract information or to search for possible defences indicating that the accused mistakenly pleaded guilty, for example that the driver fled for his life as he was chased by robbers or that he is a German citizen who thought that no speed limit applied to our national roads as is the case on the German Autobahn. However, if it appears from the questioning that the accused may have a valid defence, no conviction should follow and a not guilty plea should be entered. This would be the case where the accused indicates during questioning, to give just two examples, that he exceeded the speed limit whilst fleeing from robbers, or he, being a medical doctor, was transporting a patient who suffered from a life-threatening injury to the nearest hospital for emergency treatment in order to save his/her life.

VI *S v MOHLOLO KHAMBULE* – THE JUDGMENT RELIED UPON

[19] On 16 August 2018, after finalisation of the proceedings in the lower court in this matter, the Free State High Court judgment, *S v Mohlolo Khambule*, review number R177/2018, was delivered. It is as yet unreported, and not even published on the Saflii website. I shall deal fully with the judgment as it has particular consequences for trial magistrates. In that case a medical doctor pleaded guilty for speeding. According to the charge sheet he was travelling at a speed of 153 km/h in a 100 km/h zone on the N8 near Bloemfontein.

[20] The accused was represented by a legal representative who prepared a written statement for the accused in terms of s 112(2) of the CPA. The statement was signed by the accused and read into the record.

[21] Dr Khambule stated *inter alia* the following:

"I accept that I drove fast and exceeded the prescribed speed limit in a 100kmph zone, and plead guilty thereto. I admit that I was travelling at a speed of approximately 153 km ph, after being shown the reading as was displayed on the speed measuring equipment operated by the traffic official. I have perused all the documentation in relation to the aforementioned equipment and confirm that it was in working order. I am remorseful of my actions, and I humbly ask the honourable Court to take into consideration that I am remorseful, when passing down a sentence."

[22] Clearly, Dr Khambule is familiar with the specific road. It is a road that he had been travelling every day of his working life whilst resident in Mandela View, situated next to the N8 to the east of Bloemfontein, a fact of which judicial cognisance can be taken. He works at the Universitas hospital in Bloemfontein and the specific day he was on his way to Pelonomi hospital. It is uncertain who his legal representative was, but it appears *ex facie* the statement that Dr Khambule must have been represented by an experienced criminal law lawyer conversant in English. The detailed statement

is proof that the doctor wanted to plead guilty, that he indeed pleaded guilty and that he admitted all the elements of the offence put to him. There cannot be any doubt that he knew it was against the laws of this country to drive a motor vehicle at a speed in excess of the speed limit on a particular public road. Although he stated that he had to attend a meeting of doctors to discuss the improvement of health care at the Pelenomi hospital to avoid future deaths, there was no intention to rely on the defence of necessity and thus absence of unlawfulness. The position would have been different if the information was tendered by an unrepresented accused during questioning in terms of s 112(1)(b). In such a case the trial magistrate would be under a duty to make further enquiries before deciding upon the guilt of the accused.

[23] The acting senior magistrate of Bloemfontein sent the matter to the High Court as a special review in terms of s 304(4) of the CPA. The review court set aside the conviction and sentence and remitted the matter to be heard by the same magistrate. In so doing a professional person who obviously wanted to get rid of pending proceedings against him, employed another professional, a qualified lawyer, to represent him, certainly at some cost, in the hope of quickly finalising the case, failed in his attempt to obtain finality. Now, the case is back at square one. I would be surprised if the doctor pleads not guilty this time around. Whatever he does, it will cost him time and money.

[24] The review court in *Khambule* relied on three reasons why the conviction should be set aside. Firstly, Dr Khambule's use of the word "approximately" as if the speed capturing device would show a reading of "approximately 153 km/h". The doctor stated that he drove fast and admitted that he exceeded the 100 km/h speed limit, before referring to "approximately". I do not believe that this word could be regarded as any indication of a lack of *mens rea,* especially bearing in mind the statement as a whole and the circumstances under which it was prepared. Fact of the matter is that Dr Khambule was driving one and a half times the prevailing speed limit and it could never be submitted that he was unaware of speeding.

[25] The second and third problems detected by the review court were about facts not alleged and thus not admitted in the statement, whilst according to the review court should have been part of the statement. The second alleged defect was the failure to admit "that the operator, the traffic officer concerned, was duly authorised or competent to operate the speed capture device." In my view this is not one of the essential elements of the offence of speeding. Sometimes speeding offenders try their luck in our courts by eliciting evidence in cross-examination that the traffic officer did not have the required knowledge to operate the particular device and/or that there are other deficiencies in the state's case. Clearly, the doctor did not want to embark on such a process and merely wanted to accept responsibility for his offence.

[26] Finally, the review court found that the doctor failed to admit "that he knew that it was unlawful for him to travel at the alleged excessive speed or that he knew that

travelling at such a speed was a traffic transgression punishable by law." If the doctor did not know this, he should never have qualified for a motor vehicle licence in the first place. Surely, an educated person would never convince a court in this country that he is or was unaware of the meaning and intent of traffic signs and the consequences of speeding and/or exceeding prevailing speed limits. It must also be emphasised that the doctor, whilst legally represented, did not rely on the defence of necessity and the facts presented by him do not support such a contention. It might have been a totally different situation if the accused was an uneducated, illiterate and unlicensed foreigner who had never before driven a motor vehicle on a South African road.

[27] In *Khambule* the review court incorrectly found at para [11] that the doctor did not state that he knew what speed limit (100 km/h) applied where he was caught and "that he knew that by exceeding the speed limit he was committing a traffic offence punishable by law." The doctor expressly accepted that he "exceeded the prescribed speed limit in a 100 km ph zone." He did not say that he was unaware of the speed limit at the time; to the contrary he stated that he exceeded the speed limit of 100 km/h. The only necessary and logical conclusion to arrive at is that the doctor as licensed motor vehicle driver also knew that it was unlawful to exceed the speed limit. The review court's conclusion that "criminal intent and unlawfulness were amiss to sustain a conviction" is clearly wrong and we are at liberty to refrain from following it. *Khambule* is clearly distinguishable from *S v Samuels* 2016 (2) SACR 298 (WCC) for two reasons. Firstly, Dr Khambule was represented by a legal representative and secondly, the indigent accused in *Samuels,* a single mother with four children, pleaded guilty to a charge of contempt of court in that she transgressed a court order by not evacuating certain premises, but made it clear that "…ek het nêrens gehad om heen te gaan nie. Daarom het ek nie gegaan nie." (I had nowhere to go and therefore I did not go. (my translation)) Ms Samuels' non-compliance with the court order was not wilful and *mala fide* or unreasonable and a plea of not guilty should have been entered. The review court found as such and the conviction and sentence were set aside.

[28] It follows from the comments made *supra* that I respectfully do not agree with the reasoning of the court in *Khambule* and the conclusion arrived at. Such a formalistic approach should not be countenanced. It would place an unnecessary extra burden on our lower courts to request accused persons to place more evidence before the court than necessary in order to convict. Accused persons, admitting that they travelled too fast and pleading guilty as a result, accept that traffic officers are duly authorised to act as such, properly trained to execute their duties and that the speed capturing devices were functioning properly. That is why they are prepared to plead guilty. However, it is highly likely that upon questioning by the trial court in respect of matters beyond their knowledge, accused persons may not be prepared to make formal admissions in this regard, causing pleas of not guilty to be recorded in terms of s 113 and an unnecessary wasting of court time and resources.

VII EVALUATION OF THE MATTER *IN CASU*

[29] The accused is not uneducated. He is a pharmacist with the required degree. He is an intelligent person. He is earning a salary of R35 000.00 per month. He was not represented by a legal representative and therefore the matter was sent to the High Court as an automatic review in terms of s 302. The trial magistrate was appointed to the rank of magistrate on 1 February 2018 only.

[30] I quoted the questioning by the trial magistrate *supra* and it will not be repeated. The accused was aware of the 120 km/h speed limit on the N1. He admitted that he had exceeded the speed limit by travelling at 171 km/h, that his contravention "is not allowed" and that his driving at such an excessive speed is punishable by law. He drove at nearly one and a half times the prevailing speed limit and of necessity must have known that he exceeded the general speed limit. He went further than Dr Khambule by admitting that he committed a punishable offence.
[31] The trial magistrate, supported by the acting senior magistrate, submitted in paragraph 6 of the letter quoted *supra* that, based on *Khambule,* this court should set aside the conviction and sentence for the reasons mentioned in paragraphs 7 and 8 of the letter. I indicated *supra* that it is not expected of a presiding officer to seek admissions from an accused to the effect that the traffic officer was duly authorised to act and/or competent to operate the speed capturing device. Obviously it would have been a totally different matter if the accused mentioned that the person who had pulled him off the road was in private clothes, and/or intoxicated, and/or the speed capturing device indicated a speed of 171km/h, but he was travelling at a mere 130 km/h.

[32] I do not agree that the accused did not admit that he was aware, prior to being pulled off, that he was travelling at an excessive speed as mentioned in paragraph 9 of the letter. He indicated at page 2, line 15 of the record that he was aware that he exceeded the general speed limit. He did not say that he became aware of the transgression only after being pulled off, or that he believed that he was driving within the speed limit at the time.

[33] The accused intended to plead guilty, did in fact do so and admitted all the allegations in the charge. There can be no doubt about this. However, the trial court failed to request the accused to provide a factual basis for his plea of guilty, for example under what circumstances did he travel the particular day and why did he travel at an excessive speed. If a factual basis was requested, the accused would probably have given the answer he gave in mitigation of sentence, *i.e.* that he was on his way to Mthatha, having been informed that his wife was in labour and that he needed to get her to a doctor urgently. It is not disputed that the wife gave birth just over a day after accused was caught speeding. In any event, when the trial court was informed accordingly, she either should have asked further questions to

establish whether there was really an absence of unlawfulness, or entered a plea of not guilty in terms of s 113. The conclusions arrived at in *S v W, S v Tshumi, S v Samuels* and *S v Phundula supra,* based on the facts of those cases, are appropriate *in casu* as well.

[34] The review court must ensure that justice is done, both to the accused and the state and it is in the interests of justice that litigation should come to finality. See again para [7] of *Nteleki supra.* In para [8] of this judgment by Van Zyl J, with whom Van der Merwe J (as he then was) concurred, the learned judge stated "… it is clear that considerable time, effort, inconvenience and expense to both the State and the accused would be involved in bringing the accused before court again." In the circumstances of that case the review court decided to confirm the conviction and sentence although an incompetent sentence was imposed. Notwithstanding the aforesaid considerations the matter should be remitted to the Magistrate's Court for a *de novo* hearing. The accused will have to be served with a summons in Mthatha and he will have to travel all the way to Bloemfontein to appear in court again.

VIII CONCLUSIONS

[35] Notwithstanding the accused's intention to plead guilty and his plea of guilty, probably in order to get finality, the proceedings were not in accordance with justice and the conviction and sentence cannot stand. I come to this conclusion based on the facts of this matter although it should be made clear that the finding is not based on the reasoning and conclusion in *Khambule* which I already found to be incorrect.

[36] The trial magistrate's assurance that she conducted an inquiry in terms of s 35(3) of the National Road Traffic Act is worrisome in the absence of any record to that effect. I indicated *supra* that the record is poorly transcribed. It also appears as if something was said by the trial magistrate before the court adjourned which was not recorded. Fact of the matter is that an automatic suspension of the accused's licence for a period of six months had to take effect, unless evidence under oath was presented by the accused to the satisfaction of the court why the suspension shall not take effect. There is no proof of such an inquiry although we were assured that the magistrate's handwritten notes, which do not form part of the record as should have been the case, serve as proof that an inquiry was held. The legislature intended presiding officers to be strict on offenders travelling at excessive speeds as in this case. Therefore an automatic suspension follows upon a conviction, unless a case has been made out for not invoking the suspension. The trial magistrate must ensure in future that proper records are kept and if the transcribed record is incomplete, she has to ensure that it is supplemented and/or edited in order to present a fair reflection of the proceedings.

IX ORDERS

[37] 1) The conviction and sentence are set aside.

2) The matter is remitted to the Magistrate's Court for a *de novo* hearing before the trial magistrate or any other available magistrate.

2. S v RAMATAR 2018 (2) SACR 414 (WCC)

It is a material irregularity for a magistrate to elicit information on an accused's previous convictions before taking a plea in terms of s 112(1) *(b)* of the Criminal Procedure Act 51 of 1977.

The accused came before a regional magistrate on a charge of theft of razor blades to the value of R850. It appeared from the record of the plea proceedings that at the inception of the proceedings, immediately after the accused had indicated that he wished to plead guilty, the magistrate asked the prosecutor whether the accused had previous convictions. The prosecutor informed her that there was one previous conviction. Apparently not satisfied with this response, the magistrate then asked the accused whether he had only one previous conviction, to which he replied that he had more, whereupon the magistrate proceeded to take his guilty plea and convict him.

When the matter came on review the court requested the magistrate to provide reasons for her conduct and to comment on whether the proceedings should not be set aside on the grounds of a failure of justice due to a material irregularity, in that she had sought to elicit information on the accused's criminal record prior to conviction. The magistrate responded that, given the accused's insistence on pleading guilty to the charge of theft of goods which had a relatively minor value, the court had actually wanted to know if the matter could be diverted. She should have asked if the accused qualified for diversion, but the prosecutor had inadvertently divulged one of the accused's previous convictions.

The court held that the magistrate's questions were irregular as they were not directed at satisfying the requirements of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977, and had nothing to do with either the facts relevant to the underlying allegations in the charge-sheet or the accused's state of mind and knowledge of unlawfulness in relation to the charge. The magistrate's explanation for what occurred was disingenuous. If she had thought that this was potentially a matter for diversion then she could, and should, simply have enquired whether this was so from the prosecutor, but had instead directed questions to the prosecutor and the accused in which she had sought directly to elicit his criminal record, even before taking his plea. It was highly disconcerting that, when faced with the transcript of what actually occurred, instead of owning up to her improper conduct, the magistrate had sought not only to provide an explanation which was untenable and not borne out by the transcript, but sought to place the blame on the prosecutor. (See [14].) The conviction and sentence were set aside, and a copy of the judgment forwarded to the

Magistrates' Commission, the regional court president, and the Director of Public Prosecutions.

From The Legal Journals

Watney, M

"Mistakes upstairs may cause death downstairs: on warrants of arrest and *stare decisis.*
S v Lerumo 2018 (1) SACR 202 (NWM) and *Sulani v Mashiyi* 2018 (2) SACR 157 (ECP)"

2018 TSAR 927

Abstract
A potentially harsh legislative provision may sometimes be interpreted by courts in such a way as to avoid a grave injustice never intended by the legislature. Over time such an approach may become so entrenched in the daily functioning of the courts that scarcely a word is said or written about its origins or continued validity. An example of this relates to the interpretation of section 67(1) of the Criminal Procedure Act 51 of 1977 (the act), which provides for the procedure after an accused released on bail failed to appear in court. The South African courts have for decades interpreted section 67(1) of the act to imply that the court has a discretion to stay the execution of a warrant of arrest authorised for an accused person who failed to appear in court after his release on bail. This practice was turned on its head when the North West division of the high court (Mafikeng) in S v Lerumo found in August 2017 that on a proper reading of section 67(1) no such discretion exists. Hard on the heels of this the Eastern Cape division of the high court (Port Elizabeth) in Sulani v Mashiyi rejected the approach followed in the Lerumo case and found in February 2018 that such a discretion does indeed exist.
This contribution aims to investigate the approaches adopted by the respective high courts and to shed some light on the interpretation of section 67(1) in an endeavour to address the confusion that now exists in especially the lower courts pertaining to the practical approach to adopt when a warrant of arrest is issued pursuant to the failure of an accused person released on bail to appear in court.

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

Contributions from the Law School

PROTEST ACTION AND THE LAW: EMERGING DEVELOPMENTS

In categorising the different forms of protest action, recent literature distinguishes between peaceful, disruptive and violent protests (see N Bohler-Muller et al 'Minding the protest: attitudes towards different forms of protest action in contemporary South Africa' (2018) *SA Crime Quarterly* 81 at 83, citing C Runciman et al 'Counting police recorded protests: based on South African Police Service data' (2016) 25-26 available at *http://www.uj.ac.za/faculties/humanities/csc/Pages/Historical.aspx* accessed on 01 August 2018). These forms of protest action do not have formal definitions, but their essence is captured by the following descriptions: peaceful/orderly protests 'consist mostly of pickets, marches and public meetings…these are tolerated by the authorities and are often negotiated in advance' (Runciman op cit 26). Disruptive protests 'are identified through the use of tactics such as blocking a road, commonly achieved by placement of rocks and/or burning of tyres. Such action stops the free flow of traffic and might prevent people from going to work. It is never authorised, breaches established order and may be regarded as illegal' (Runciman op cit 26). These protests are more forceful but still non-violent (Bohler-Muller op cit 84). Violent protests can be regarded as 'those involving injury to persons or damage to property' (Runciman op cit 25).

The contentious position is in respect of disruptive but non-violent protests. What makes disruptive protests controversial is their unsettled legal status and the speculation that this has given rise to. Clarity on the legal status of disruptive protests is necessary because it has a bearing on whether or not disruptive protests are compatible with peace and are therefore lawful, thus falling within the protective ambit of the right of assembly in section 17 of the Constitution of the Republic of South Africa, 1996.

The courts have had an opportunity to pronounce on the legal status of disruptive protests on two recent occasions, but did not utilise that opportunity. In *Hotz v University of Cape Town* 2017 (2) SA 485 (SCA) (which judgment has since been confirmed by the Constitutional Court in *Hotz v University of Cape Town* 2018 (1) SA 369 (CC) at paras 18-20), a prohibitory interdict was sought against the conduct of protesting students which can be classified as having been both disruptive and violent. In this case, conduct which was violent included the damaging of property,

assault on staff members, and the incitement of violence. Disruptive conduct included the erecting of a structure (a shack) that blocked a university road and disrupted traffic. In granting the interdict, the court acknowledged the importance of civil disobedience (at para 72), but nonetheless did not consider the lawfulness or otherwise of protests of a disruptive nature. Thus, the court interdicted conduct that is both violent and disruptive, ultimately treating both as unlawful (at para 82)

In *Rhodes University v Student Representative Council of Rhodes University and Others* [2017] 1 All SA 617 (ECG), a prohibitory interdict was also sought against disruptive and violent conduct. This time, the violent conduct took the form of damage to property, the incitement of violence, and assault on people generally. Disruptive conduct took the form of the obstruction of entry into the university as well as the disruption of the academic programme, which includes lectures and tutorials. In granting the interdict against behaviour that is deemed to be disruptive, the court assumed or readily accepted, without more, that the disruption of lectures and tutorials went beyond conduct that is peaceful and thus protected under the right of assembly in section 17 of the Constitution (para 150). It is on this basis, among other things, that the matter was taken on appeal before the Constitutional Court. The court acknowledged that the matter raised a novel constitutional issue but dismissed the appeal on the basis that it did not 'justify a ventilation of such issues' (*Ferguson v Rhodes University* 2018 (1) BCLR 1 (CC) at para 17).

Therefore, both the *Hotz* and *Rhodes* cases have not satisfactorily addressed the question of the legal status of disruptive protests. Fortunately, the authors of a note on the High Court decision in the *Rhodes* case have expressed some enlightening views in this regard (see S Abdool Karim & C Kruyer 'The constitutionality of interdicting non-violent disruptive protests: Rhodes University v Student Representative Council of Rhodes University' (2017) *SA Crime Quarterly* (2017) 93-102). They argue that the broad and generous interpretation of the right of assembly mandated by the Constitutional Court judgment in *SATAWU v Garvas* 2013 (1) SA 83 (CC) is wide enough to cover disruptive protests, thus bringing disruptive behaviour within the protective ambit of the right of assembly (Abdool Karim & Kruyer op cit 94 & 99-100). They also point to the exclusion of disruptive behaviour from the prohibitions listed in the Regulation of Gatherings Act 205 of 1993 as indicative of the treatment of disruptive protests as peaceful and therefore lawful (Abdool Karim & Kruyer op cit 94 & 99-100).

The learned authors further oppose the High Court's assumption of unlawfulness and the subsequent interdicting of disruptive behaviour without taking into account the constitutional protection afforded to disruptive behaviour of the kind seen in the *Rhodes* case (Abdool Karim & Kruyer op cit 100-101). Their view is that such an assumption infringes the right of assembly, and they suggest that what would have been acceptable is a narrow interdict which curtails the level of disruption without restricting all disruption. This presupposes that the university ought to have been ordered to tolerate some disruption. To this end, they endorse the drawing of a distinction between permanent disruption (which incapacitates the entire lecture or

tutorial) and temporary disruption (which provides a platform at least for the expression of a grievance).

De Vos echoes the above sentiments and even provides detail as to when an interdict against disruptive protests would be justified (P De Vos 'The constitutional limits of disruptive protest: the case of student protest in South Africa' (2018) *Journal for Human Rights/Zeitschrift für Menschenrechte* 64 at 84). In this regard, he argues that:

'Protest action which on one occasion led to the cancellation of a lecture, for example, or which temporarily made it difficult for some staff to get to their offices might not constitute a "substantial interference" with the property rights of the university and in such a case the property right could not be said to trump the right of individuals to take part in protest action. The size of the protest, its duration, and the extent of the disruptions should be taken into account in such cases to decide whether the right to protest must yield to the property rights of the university. It must be clear that I propose a context and situation sensitive approach which require the court to assume that peaceful and unarmed protest should not be limited (by an interdict or in other ways) unless the disruption cause by the protest is prolonged and substantial. These criteria are by necessity general in nature and must be applied with reference to the larger context. For example, where protest has continued for several weeks and has made it difficult for the university to continue with its academic programme and even to write examinations, might require a court to intervene, even if the protest is not violent and the disruption sporadic.' (De Vos op cit 84-85)

In light of the above considerations for interdicting disruptive protests, De Vos submits that, although disruptive protests do not, in principle, warrant an 'intrusion on the right to assemble', what drove the court in the *Hotz* case to grant an interdict was the protesting students' 'threatening behaviour and limited acts of violence accompanying the enforcement of the exclusion zone around the shack' (being a structure used to cause the disruption) and that 'the disruption was not intended to be temporary.' By seemingly advocating the general assumption of lawfulness on the part of peaceful and unarmed protests (which presumably includes disruptive protests at least in their beginning stages) and indicating the circumstances which could turn disruptive protests from being presumed lawful to being unlawful and therefore subject to an interdict, De Vos can be understood to be making the point that the legal status of disruptive protests is that they are generally peaceful and lawful unless the disruption is prolonged and substantial, in which case they would be unlawful and subject to be interdicted. What remains to be decided, however, is whether the disruption which is prolonged and substantial will at some point be deemed to be unlawful to the point that it attracts civil and/or criminal sanctions

Khulekani Khumalo
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

Consequences of the failure to disclose Common Purpose in a charge Sheet

Background

Section 35(3)(a) of the Constitution of the Republic of South Africa, 1996 provides that every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient details to answer it.

The Constitutional Court enunciated the right to a fair trial as referred to in the Interim Constitution (Act 200 of 1993) as follows in the case of *S v Zuma & others* 1995 (1) SACR 568 (CC) at para 16:

"That caveat is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.....s 25(3) has required criminal trials to be conducted in accordance with just those "notions of basic fairness and justice". It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

Whilst the Constitutional Court in the Zuma case was dealing s 25(3) of the Interim Constitution which has now been replaced by s 35(3) of the Constitution, this dictum is still relevant to s 35(3) (See *Msimango v The State (*698/2017) [2017] ZASCA 181 at para 18).

Section 84(1) & (2) of the Criminal Procedure Act 51 of 1977 (CPA) which deals with the essentials of a charge provides as follows:

"(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of

which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2)Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge."

Section 86(1) of the CPA which deals with amending a charge sheet provides:

"where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted there from, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend."

In *S v Coetzer en 'n Ander 1976 (2) SA 769 (A)* at 773G – 774B the court held that what is intended by prejudice is that the accused should have been prejudiced in the conduct of his defence by the amendment being granted.

In *S v Maqubela and Another 2014 (1) SACR 378 (WCC)* the court held at para 26 that,
"where a court acts of its own motion to amend a defective or incomplete charge, the incidence of the burden of proof does not rest on the prosecution to prove the absence of prejudice. The court is merely required to notify the accused of its intention and to afford the defence an opportunity to show prejudice. Failure by the accused to use that opportunity and to place appropriate information before the court, or to spell out the reasons he or she may be prejudiced, may result in a finding of no prejudice. But, even in the absence of such information, the court should decide for itself whether or not the amendment would prejudice the accused, on the basis of common sense and judicial knowledge."

Section 86(4) of the CPA provides:

"The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder."

The Constitutional Court explained the import of s 86(4) in *Moloi v Minister of Justice and Constitutional Development 2010 (2) SACR 78 (CC)* by stating at para 19 that:

'*Section 86(4) on the other hand provides that even if the charge is not amended, the proceedings based on the defective charge may nevertheless remain valid. However, the question is whether s 86(4) may be invoked if the accused may be prejudiced by an amendment not having been made. Pre-constitutional judicial authority suggests not. Whether the accused may be so prejudiced is dependent upon the facts of each case. What is cardinal, however, is that prejudice, actual or potential, will always exist unless it can be established that the defence or response of the accused person would have remained exactly the same had the State amended the charge.'*

Failure to disclose Common Purpose in a Charge Sheet

In *S v Alexander 1964 (1) SA 249 (C)* the court held at 249F-G:

"It is not essential for the State to allege in an indictment in so many words that the accused acted in concert or with a common purpose or in a criminal course of conduct. It will be sufficient if the State alleges in its indictment sufficient particulars to show that the accused in doing what they are alleged to have done became associated with one another in an unlawful purpose or scheme and that the series of acts done by them was done in connection with and in the furtherance of that unlawful purpose."

In *S v National High Command 1963 (3) SA 462 (T)* at p. 464 the court held,

"Now it is clear that where a common purpose is alleged, the State has to supply particulars of the facts on which it will rely in order to ask the Court to draw the inference that each and every one of the accused was a participant in the conspiracy, or party to the alleged common purpose."

In *S v Mphetha and Others (1) 1981 (3) SA 803 (C)*, the court ordered the State to furnish further particulars to the accused in accordance with the set of guidelines it ordered. It went on to quote with approval from *R v Adams and Others 1959 (1) SA 646 (SCC) at 656F:*

"It is a well-known principle in our law that an accused person is entitled to such particulars as he properly requires for the purpose of preparing his case before he is called upon to plead and enter upon his defence, and he is entitled to such particulars even if it entails a disclosure of Crown evidence."

In *S v Ndaba 2003 (1) SACR 364 (W)* at para 102, Labe J stated,

"I am satisfied that the allegation of common purpose has to be made by the State in the indictment, or at least in the summary of substantial facts furnished in terms of s 144 (3) (a) of the Act."

The court granted the State's application to amend the charge sheet in terms of s86(1) of the CPA to reflect common purpose after all the evidence had been led in respect of counts 2 and 5 as there was no prejudice to the accused. The court held at para 118,

"the amendments granted were covered by the evidence which had been led without objection by the accused."

Recent Cases

In *Siphoro v S (A399/2012) [2014] ZAGPJHC 168* the charge sheet made no mention of the State's intention to rely on the doctrine of common purpose on the charge of attempted murder (count two). The first time that common purpose was ever mentioned in relation to the charge of attempted murder was when judgment was being delivered.

Ratshibvumo AJ held at para 14:

"Whereas the appellant conducted his defence to the end under the impression that the allegation was that he pulled the trigger and attempted to kill Mr. Skenjana, the finding to the effect that he was guilty based on the doctrine of common purpose must have come as a surprise to him. I am of the view that failure to inform the appellant of the charge he faced adequately and the possibility of conviction on the doctrine of common purpose prejudiced him and resulted in an unfair trial in respect of that charge and the resultant conviction."

The court accordingly upheld the Appeal in respect of the conviction on count 2 and acquitted the appellant on this charge.

In *Msimango v The State (698/2017) [2017] ZASCA 181* it was common cause that in convicting the appellant on count 3, the regional magistrate relied on the doctrine of common purpose notwithstanding that it was never averred either in the charge sheet or proved in evidence.

At paras 15 and 16 Bosielo JA noted,

"*Undoubtedly, the approach adopted by the regional magistrate of relying on common purpose which was mentioned at the end of the trial is inimical to the spirit and purport of s 35(3)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) under the heading "Arrested, detained and accused persons". In fact it is subversive of the notion of the right to a fair trial which is contained in s 35(3)(a) of the Constitution.*

Section 35(3) falls under Chapter 2 of the Constitution under the heading, the Bill of Rights. Section 7 of the Constitution commands the State to respect, protect, promote and fulfil the Rights in the Bill of Rights. However, this is subject to legitimate limits in terms of s 36 of the Constitution. The requirement embodied in s 35(3) is not merely formal but substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish every accused with sufficient details to put him or her in a position where he or she understands what the actual charge is which he or she is facing. In the language of s 35(3)(a), this is intended to enable such an accused person to answer and defend himself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice is both adversarial and accusatory."

Bosielo J agreed at para 18 with both counsels submission that as the charge sheet was silent on any possible reliance on the doctrine of common purpose, and as there was no application for amendment of the charge sheet in terms of s 86 of the CPA, the conviction on count 3 could not stand. The SCA accordingly upheld the appeal against the conviction and sentence in respect of count 3.

In *Ntuli v S 2018 1 ALL SA 780 (GJ)* the charge sheet did not state that the prosecution would rely on the doctrine of common purpose, nor did it appear that the prosecution mentioned it by the time the appellants were asked to plead.

Splig J held at para 47 that the convictions of the appellants were correct as it was evident from the charge sheet that the State was relying on common purpose. The evidence led was to that effect and the appellants, who were represented by counsel, never argued that the attempted murder charges were based exclusively on individual culpability. Counsel certainly understood that the case his clients had to meet was one based on common purpose.

Splig J noted at para 51 the judgment of *S v Maqubela and Another 2014 (1) SACR 378 (WCC)* were Murphy J *mero motu* amended an indictment and held

"the basis for doing so supports the proposition that an indictment is not fatally defective if there is a failure to allege common purpose. It is obviously a good practice to do so as it obviates the risk of prejudice in cases which are more akin to conspiracies where not all the accused may have participated in each stage of the criminal acts relied upon."

Conclusion

Omission in a charge sheet relating to the common purpose of an accused has various implications depending on the facts and circumstances of each case. In some cases the omission will not be *per se* fatal and in other cases the omission may have

the effect that the conviction and sentence relating to common purpose may be set aside.

Where it appears that there was an omission prior to judgment the charge sheet will not necessarily be defective and the Judicial Officer may have to deal with an application in terms of s86(1) of the CPA from the state to amend the charge sheet provided that this can be done without prejudice to the accused's defence (See *S v Coetzer; S v Ndaba; Ntuli v S* above).

A mere failure to mention the exact words common purpose will not necessarily mean that an accused was unable to properly defend himself where common purpose is implied in the charge sheet or comes out in evidence during the course of the trial (See *S v Alexander; Ntuli v S; S v Ndaba* above*).*

Were a defence counsel is well aware that the case which his client has to meet is one of common purpose failure to mention same in the charge sheet will not in any way have a detrimental effect on conviction and sentence (See *Ntuli v S; S v Ndaba* above).

A Judicial Officer can *mero motu* amend a charge sheet to reflect the common purpose before handing down judgment in terms of s86(1) of the CPA. This again is only possible if the defence will not suffer prejudice and is given an opportunity to make any necessary representations (See *Maquebela & another v S* above).

Omission in a charge sheet with regards to an accused's accomplice liability for common purpose could be problematic if it only comes to an accused's knowledge when judgment is being delivered. This could have serious constitutional implications and is a clear violation of the right to a fair trial as envisaged by Section 35(3) (a) of the Constitution. The result could be that the accused was a victim of an unfair trial. An accused convicted in these circumstances should have no difficulty in successfully appealing his conviction and resultant sentence. (See *Siphoro v S ; Masimango v S* above).

Yashin Bridgemohan
Attorney Pietermaritzburg

A Last Thought

"Our judicial processes should not allow further victimisation to occur in the courtroom. Victims of sexual and gender-based violence are often faced with multiple levels of stigma and prejudice at a family and community level. These are further entrenched in police processes and courtroom battles. Those victims who are brave enough to overcome all the doubt and fear to report their cases, face further victimisation by the police. Police officers are generally perceived as being indifferent to the plight of women who are victims of sexual and gender-based violence. These men (and women) are usually the first figures victims encounter in the judicial system, yet many victims relate how unsavoury these encounters were for them."

Nonsikelelo Ncube
Business Day