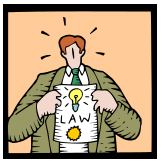
e-MANTSHI

A KZNJETCOM Newsletter

November 2018: Issue 148

Welcome to the hundredth and forty eight 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 Extension of Security of Tenure Amendment Act, 2018 Act 2 of 2018 has been promulgated in Government Gazette no 42046 dated 20 November 2018. The Act amends the Extension of Security of Tenure Act, 1997, so as to amend and insert certain definitions; to substitute the provision of subsidies with tenure grants; to further regulate the rights of occupiers; to provide for legal representation for occupiers; to further regulate the eviction of occupiers by enforcing alternative resolution mechanisms provided for in the Act; to provide for the establishment and operation of a Land Rights Management Board; to provide for the establishment and operation of Land Rights Management Committees to identify, monitor and settle land rights disputes; and to provide for matters connected therewith. The Act can be accessed here:
https://www.gov.za/sites/default/files/42046_gon1259_0.pdf

Recent Court Cases

1. Muller v S (A241/2018) [2018] ZAWCHC 155 (16 November 2018)

If a Magistrate does not consider a sentence agreed upon in a section 105A Act 51 of 1977 agreement (a plea and sentence agreement) to be just, the magistrate is duty bound to follow the peremptory provisions of s 105A(9).

Cloete J:

[1] The issues in this appeal against conviction and sentence, which is with leave of the trial court, are:

1.1 Whether a plea and sentence agreement concluded in terms of s 105A of the Criminal Procedure Act[1] may include an agreement that an accused's driver's licence is suspended for a particular period without it being incumbent upon the court to hold an enquiry in terms of s 35 of the National Road Traffic Act ("NRTA");[2]

1.2 If an agreed period of suspension cannot form part of a s105A agreement, whether a subsequent conviction under a different subsection of s 65 of the NRTA qualifies as a second offence for purposes of imposition of a mandatory period of suspension absent circumstances warranting a deviation; and

1.3 What circumstances should be taken into account in considering whether a deviation is warranted.

[2] The appellant was charged with contravening s 65(2)(a) read with ss 89(1) and (2) of the NRTA, it being alleged in the charge sheet that on 4 September 2016 and at Spine Road, Mitchells Plain, he wrongfully drove a motor vehicle while the concentration of alcohol in his blood exceeded 0.05g per 100ml, namely 0.13g per 100ml. The appellant has a previous conviction in 2010 for contravening s 65(1)(a) of the NRTA for driving a vehicle on a public road while under the influence of intoxicating liquor for which he was sentenced to a

---

1 Act 51 of 1977.
2 Act 93 of 1996.

fine of R2 500 or 60 days imprisonment, plus a further R5 000 or 4 months imprisonment suspended for a period of 4 years on condition that he was not again found guilty of a contravention of s 65(1)(a) of the NRTA during the period of suspension.

[3] In terms of paragraph 7 of the s 105A agreement concluded on 17 November 2017 the appellant *'admits guilt in respect of the charge, as mentioned above, and pleads guilty thereto on the basis set out below'.* The sentence portion of the agreement, from paragraph 19 onwards, recorded that *'the nature of the offence, the interests of the community and the personal circumstances of the accused have been duly considered and taken into account by both parties'.* One aggravating factor was stated, being that offences of this nature are regarded in a serious light. Ten mitigating factors were listed.

[4] These included that there was no accident or any injuries, that the appellant had shown *'incredible remorse'*, was 53 years old and the sole breadwinner of his family, having been in fixed employment as an administrative clerk at Groote Schuur Hospital for 36 years, had recently lost his wife to cancer, was under debt review, and *'has one previous conviction for a similar offence'.*

[5] The agreed sentence was a fine of R16 000 or 12 months direct imprisonment of which R12 000 was suspended for 5 years, and that the appellant would pay R4 000 on date of sentencing. He would also complete 60 hours of community service at SAPS in Strandfontein and his driver's licence would be suspended for 6 months.

[6] After convicting the appellant in terms of the s 105A agreement, the magistrate, without any prior warning, proceeded to hold an enquiry in terms of s 35 of the NRTA on the basis that *'his licence was automatically suspended and why the court should not uplift the suspension'*. After certain questions were put to the appellant the magistrate enquired, for purposes of finalising the enquiry, whether the appellant had a previous conviction for a similar offence. After this was disclosed, the magistrate imposed the following sentence:

> *'Your fine as agreed to then is the twenty thousand rand (R16 000.00) or sixteen (16) months imprisonment of which twelve thousand rand (R12 000.00) and twelve (12) months is suspended for five (5) years…*
> *As far as your licence is concerned, the section, the Act says it is automatically suspended for five (5) years.'*

[7] It appears that the reference to *'twenty thousand rand'* was a patent error. In his reasons for judgment handed down on 30 July 2018 the magistrate referred to the fine being one of R16 000. It is furthermore unclear why he

imposed a sentence of 16 months imprisonment but I will assume, for present purposes, that this too was an error. The magistrate also stated that:

> *'It was further a term of the sentence agreement between the State and the accused that the accused shall complete 60 hours of community service at the South African Police Services in Strandfontein. I did not confirm this part of the sentence agreement as I was of the view that the fine would serve as adequate punishment for the accused.*
> *A further term of the sentence agreement was that the accused's driver's licence shall be suspended for a period of six months. I changed that period to five years for the reasons that follow hereunder.*
>
> *Section 35 of the National Road Traffic Act, Act 93 of 1996 regulates the suspension of an accused person's driver's licence upon conviction for, amongst others, a contravention of Section 65(1), (2) and (5)… The Section 35 procedure is a post-sentence procedure… the court is required to hold an enquiry to determine whether circumstances relating to the offence exist which would justify the court to order that the* ex lege *suspension shall not take effect, or shall take effect for a shorter period than that prescribed by Section 35(1). The Section 35 enquiry is a function given to the court by the legislature. As such I am of the view that the State and the defence cannot agree to a shorter period of suspension of an accused's driver's licence in terms of an agreement under the provisions of Section 105A of the Criminal Procedure Act…'*

[8] One of the grounds of appeal is that the magistrate misdirected himself in unilaterally altering the terms of the plea and sentence agreement in relation to the period of suspension of the appellant's driver's licence without informing the parties prior to the commencement of the proceedings of his intention to do so.

[9] In *State v DJ*[3] it was held that where a presiding officer is of the view that the sentence proposed in a s105A agreement is unjust, he or she must, at the outset of the trial, inform the parties of this view and also of the sentence which is considered to be just. In that matter both the State and defence contended before the Supreme Court of Appeal, that the trial court had committed a fundamental irregularity by failing to comply with the peremptory provisions of s 105A(9)(a)-(d) of the Criminal Procedure Act which read as follows:

> *'(9)(a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just.*
> *(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may---*
> *(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument*

[3] 2016 (1) SACR 377 (SCA).

relevant to sentencing, the court may proceed with the imposition of sentence; or

(ii) withdraw from the agreement.

*(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (*b*)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just.*

*(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (*b*)(ii), the trial shall start de novo before another presiding officer: Provided that the accused may waive his or her right to be tried before another presiding officer.'*

[10] The Supreme Court of Appeal stated:

'[19] Under this provision the parties have an election. The court must first inform the prosecutor and the accused of the sentence that it considers just. Upon being informed of the sentence which the court considers just, both parties may decide to abide by the agreement subject to the right to lead evidence and to present argument relevant to sentencing, or withdraw from the agreement. If both parties decide to abide by the agreement after being advised by the trial court that it intends imposing a different sentence to the one agreed upon, the court will be at large to impose a sentence which it considers just. In that event the parties cannot then complain that they have been prejudiced, because they would have been given adequate notice. As soon as the trial judge formed the view that the sentences proposed in the plea agreements were unjust, he should have so informed the parties, and also of the sentence he considered just, at the outset of the trial. This would have afforded them an opportunity to consider their options. This is especially so because, after convicting them, there is nothing that they could do, save to appeal the decision. They were thus denied the option of making an informed choice.

[20] This approach is clearly contrary to the objectives of the Act. In S v Solomons *para 11 Moosa J held as follows:*

> *"The purpose of making such information known is to enable the parties to make an informed choice whether to abide by the plea bargaining process or to resile therefrom. The failure on the part of the presiding officer to do so, in my view, constituted non-compliance with the peremptory provisions of s 105A(9)(*a*)."*

For all the abovementioned reasons the appeal must be upheld and the answer to the question of law is that the High Court was wrong, as indicated above.'

[11] The State and defence agree that in the present case the magistrate did not comply with s 105A(9). The issue which nonetheless falls to be determined is whether he was obliged to do so in respect of the period of suspension of the appellant's drivers licence.

[12] In *S v Greeff*[4] Rogers J (Saldanha J concurring) stated *obiter* as follows:

> *'[4] The appellant applied in the court a quo for leave to appeal only against the suspension of his driving licence. The application for leave was refused by the magistrate, but on 11 March 2013 this court on petition granted leave to appeal on that aspect. In terms of s 309(4)(*b*) of the Criminal Procedure Act read with s 307 of that Act, the execution of a sentence imposed by a lower court is not suspended by the noting of an appeal. There is authority that this does not apply to ancillary orders such as the suspending of a driving licence, and that in relation to such ancillary orders the common law, that an appeal suspends execution, prevails (see* S v Abraham *1964 (2) SA 336 (T), and cases there cited;* S v Kelder *1967 (2) SA 644 (T) at 648H-649B; Hiemstra* Criminal Procedure *p 30-53; Du Toit et al* Commentary on the Criminal Procedure Act *p 30-48C). Strictly speaking, the suspension of a driving licence in terms of s 35(1) occurs ex lege unless a contrary order is made in terms of s 35(3) and the suspension is thus not pursuant to an order (see* S v Wilson *2001 (1) SACR 253 (T) at 259*h*). Since we were not addressed fully on the subject, I shall assume that the suspension of the appellant's licence was itself suspended, pending the outcome of this appeal, which is what the legal representatives on both sides seem to have believed. On this assumption the appeal has not been rendered academic by the passing of time. In any event, it is desirable that we should state our view on the substance of the appeal.'*

[13] However in *S v Lourens*[5] Savage J (with whom Henney J concurred) held that:

> *'[7] Section 276 of the CPA details the sentences that may be passed upon a person convicted of an offence. While the suspension or cancellation of a driving licence is not a sentence provided in s 276, in terms of s 35 of the Act it is clearly a punishment imposed consequent to an offence committed under s 65 (as is s 34 in relation to the offences cited in that provision). With sentences often combined by judicial officers in order to arrive at an appropriate punishment, a decision to cancel or suspend a driving licence is integral to such a determination. A suspension or cancellation order is therefore not a purely administrative adjunct to the sentence but constitutes a significant part of the punishment imposed.'*
>
> [emphasis supplied]

[14] Support for the view taken by Savage J in *Lourens* (*supra*) is to be found in *S v Jaftha*[6] where the Supreme Court of Appeal stated:

> *'[11] Third, no account was taken of the suspension of Jaftha's licence for five years on his second conviction. I do not consider this to be a misdirection. It was not merely a part of the punishment, but also an important and justifiable*

---

4 2014 (1) SACR 74 (WCC).
5 2016 (2) SACR 624 (WCC).
6 2010 (1) SACR 136 (SCA).

measure taken in order to ensure that Jaftha did not endanger himself and others again.'

[emphasis supplied]

[15] I agree with the above reasoning and finding of the Full Bench in *Lourens* (*supra*). It is accordingly my view that the s 35 enquiry indeed forms an integral part of the determination of an appropriate sentence. This being the case, it was open to the parties to include an agreed specific period of suspension of the accused's drivers licence in the s 105A agreement. It is therefore also my view that the magistrate erred in concluding that the s 35 enquiry was merely *'a post-sentence procedure'.* Because he did not consider the sentence agreed upon in the s 105A agreement to be just, the magistrate was duty bound to follow the peremptory provisions of s 105A(9). His failure to do so has the consequence that both the conviction and sentence must be set aside.

[16] In *S v DJ* (*supra*) the Supreme Court of Appeal held that the matter should be remitted to the trial court *de novo* before another presiding officer[7], and I will therefore follow this approach.

[17] This dispenses with the need to consider the remaining issues in this appeal, including what circumstances should be taken into account in considering whether a deviation from the prescribed periods of suspension is warranted.

[18] However, it needs to be brought to the attention of the Director of Public Prosecutions Western Cape (DPP) that there are two lines of conflicting decisions within this Division on this issue. On the one hand there are *S v Greeff* (*supra*) and *S v De Bruin*[8] in which the Full Bench held that the amendments made to s 35 of the NRTA with effect from 20 November 2010[9] have the consequence that, whereas previously there was no limit on the circumstances to be taken into account, they are now restricted to those relating to the offence itself, and unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account.

[19] On the other are *S v Lourens* (*supra*), *S v Brink*[10] and *S v Stockenstroom*,[11] in which the Full Bench held that the circumstances are not limited in this manner but include traditional sentencing factors, such as the personal circumstances of the accused.

---

7 At 384b-c.

8 Unreported decision of Rogers J (Saldanha J concurring) in Western Cape High Court automatic review reference no. 141270 of 29 January 2015.

9 Amended by the National Road Traffic Amendment Act No 64 of 2008.

10 2018 (2) SACR 6 (WCC) of Davis AJ (Allie J concurring).

11 Unreported decision of Thulare AJ (Bozalek J concurring) under case no. A24/2018 of 9 March 2018.

[20] Of course no appeal lies from one Full Bench to another. The two lines of conflicting decisions, without the DPP having approached the Supreme Court of Appeal to obtain clarity, has led to the most unsatisfactory result that lower courts are left in the dark as to which authority they are bound by. This is illustrated by the magistrate's finding that:

> *'Section 35(3) places an onus on the accused to prove circumstances relating to the offence, and not personal circumstances to enable a court to make a determination under that section. This view is supported by case law:* Greeff v S *2014 (1) SACR 74 (WCC) and* S v Enoch De Bruin*… This latter judgment clearly sets out the intention of the legislature. In arriving at my decision I was persuaded by these two judgments, as opposed to the judgment of the Honourable Judge Savage in* S v Werner Lourens*…*
>
> *I am of the view that* Greeff v S *and* S v Enoch De Bruin *correctly reflect the intention of the legislature. I am particularly persuaded by the views expressed by the Honourable Judge Rogers in paragraphs [6], [7] and [8] of his judgment in* S v Enoch De Bruin*…'*

[21] I thus intend directing that a copy of this judgment is forwarded to the DPP for attention. I accept, of course, that the present matter is not one in which this issue falls to be determined, but believe that it is in the interests of the proper administration of justice for the DPP, when the opportunity again arises, to approach the Supreme Court of Appeal in order for this issue to be clarified.

[22] **In the result I propose the following order:**

1. **The appeal is upheld.**
2. **The conviction and sentence are set aside.**
3. **The matter is remitted to the District Court Mitchells Plain for the trial to commence *de novo* before another magistrate.**
4. **The Registrar is directed to forward a copy of this judgment to the Director of Public Prosecutions, Western Cape.**

2. S v SHIBURI 2018 (2) SACR 485 (SCA)

If a legal representative withdraws on the day of a trial on grounds of ill health and an accused elects to proceed with the trial without representation when asked what he wished to do nothing more is expected of a court.

The appellant was charged in a regional magistrates' court with three counts of rape. Two of the rapes were allegedly committed on the same day and the third on a separate occasion. The appellant pleaded guilty to all counts, but the plea to the third

count was changed to one of not guilty. The magistrate then questioned the appellant in terms of s 112(1)*(b)* of the Criminal Procedure Act 51 of 1977 (the CPA) in respect of the counts to which he had pleaded guilty. From his answers he appeared to claim to have raped the complainants in the first two counts on the instructions of a companion who was armed with a knife. The magistrate's questioning also appeared to be directed at establishing the veracity of the defence of compulsion that the appellant was raising. The state ultimately accepted the plea of guilty and the magistrate convicted the appellant on those two counts. Evidence was led on the third count before he was convicted on that count also. The convictions were upheld on appeal to the High Court.

In a further appeal it was contended, inter alia, that the regional magistrate had failed, in the light of the seriousness of the charges he faced, to encourage the appellant to exercise his right to legal representation when his Legal Aid attorney withdrew on the trial day due to ill health. The magistrate had asked the appellant what he wished to do in the circumstances and he indicated that he wanted the trial to proceed. Further, that the explanation by the appellant during the s 112(1)*(b)* questioning had raised a defence of compulsion, and the court should therefore also have altered those pleas to not guilty.

Held, as to the trial proceeding with the appellant unrepresented, that the application of the rule regarding legal representation was context-sensitive. In any given situation the inquiry was always whether an accused's fair-trial rights had been infringed. Short of compelling the appellant to seek further legal representation in the present matter, it was difficult to see what else the regional court could have done. There was therefore no merit in the argument on legal representation. (See [13] – [14].)

Held, as to the questioning by the magistrate in terms of s 112(1)*(b)*, that it was not the court's function to evaluate the plausibility of the accused's answers or to determine their truthfulness at that stage of the proceedings. Instead, for the purposes of the section, the accused's explanations had to be accepted as true. On that premise, the court had to consider whether the explanation disclosed a possible defence in law to the charge that he had pleaded guilty to. The presence of doubt was a jurisdictional factor to trigger the application of the procedure laid down in s 113. (See [19].)

Held, further, that it was clear that the regional magistrate had been at pains to extract a concession from the appellant that he was under no compulsion from his colleague to rape the complainants, and that was beyond the ambit of s 112(1)*(b)*. Both the regional court and the High Court had erred in this regard and the convictions and sentences therefore had to be set aside. (See [20] – [21].) The court also upheld the appeal on the third count on the basis of the evidence as it appeared on the record.

Held (per Pillay AJA, dissenting), that the convictions and sentences on the first and second counts did not need to be set aside on account of non-compliance with s 113

of the CPA, and that the state had proved the guilt of the appellant beyond a reasonable doubt on the third count.

From The Legal Journals

Batchelor, B

"The reasonableness and effectiveness of the amendment to section 26 of the Maintenance Act 99 of 1998."

OBITER 2018 439

Abstract

Section 26 of the Maintenance Act as amended by the Maintenance Amendment Act 38 of 2005 (hereinafter "Amendment Act") is a key provision for enforcing maintenance orders in South Africa. Underpinning this provision is the need to ensure that children are protected from destitution and deprivation due to maintenance defaulters. Primarily, this section limits a maintenance defaulter's access to credit by negatively affecting his or her credit rating. The utility and legality of this provision as a measure of enforcing maintenance orders has yet to be judicially tested in South Africa. Therefore, this article evaluates the reasonableness of the limitation of a maintenance payer's fundamental rights in the light of foreign jurisdiction mechanisms for enforcing maintenance orders.

Nkosi, G

"A perspective on the dichotomy of acquisition of parental responsibilities and rights by fathers in terms of the Children's Act and Customary Law."

OBITER 2018 197

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

Contributions from the Law School

Rubbernecking

The act of 'rubbernecking' may be defined as looking about or staring with great curiosity, as by craning the neck or turning the head(https://www.dictionary.com, accessed 30/11/18). While curiosity is an enviable quality in the pursuit of knowledge, the old adage has it that it may 'kill the cat', and it certainly gives rise to harmful conduct in the context of the regulation of road traffic, particularly in the event of an accident or collision. While it is hardly an unusual reaction when happening upon the scene of a road traffic accident to attempt to establish more information about what has occurred, the conduct linked to rubbernecking, that is, slowing down or even stopping to gaze at the damage the accident has wrought, has very unwelcome consequences. This is particularly pertinent in the age of cell phones, where rubberneckers may take it upon themselves to try to film the accident scene as they pass. At the very least, this conduct may be seriously disruptive to the flow of traffic on the road in question, and it may have much more serious consequences where emergency vehicles such as ambulances are prevented from reaching the injured victims of the accident with all necessary swiftness.

The problem of rubbernecking in the context of road traffic incidents is currently eceiving attention in Germany (see https://www.theguardian.com/world/2018/nov/21/german-rubberneckers-could-face-bigger-fines, accessed 30/11/2018) , where a recent study has found that four out of five ambulance deployments were held up by an average of five minutes when trying to get through traffic, an alarming statistic, particularly in the context of serious accidents, which result in life-threatening injury, when treatment is a matter of extreme urgency. German traffic regulations provide that

'[a]s soon as vehicles on motorways and roads outside a built-up area with at least two lanes for one direction start to move at walking pace or come to a standstill, these vehicles must leave a gap for one direction between the lane on the far left and the lane immediately adjacent to it on the right to allow police and emergency vehicles to pass (reg11(2), German Traffic Regulations, https://www.bmvi.de/SharedDocs/EN/publications/german-road-traffic-regulations.pdf?_blob=publicationfile, accessed 30/11/18).

However, due to drivers looking at the accident scenes, and filming them on their cell phones, there has increasingly been a failure on the part of drivers to move aside and form the so-called 'rettungsgasse' or rescue lane in the middle of the road. Following an increase in the number of deaths on German motorways, attributed to rubbernecking and the failure to form rescue lanes, which resulted in a nationwide debate, penalties were increased a year ago from €20 to €320, concomitant with the risk of a driver losing his licence (the German road traffic scheme employs a system of administrative penalties, similar to those envisaged in the Administrative Adjudication of Road Traffic Offences Act 46 of 1998 (the implementation of which has been subject to extraordinary delay)). This steep interest in the ambit of the fine for such conduct has apparently not proved to be a sufficient deterrent, and it was reported that rescue workers attending a bus fire last year in Münchberg, which resulted in the loss of 18 lives, were impeded from getting to the scene by those filming the fire. Politicians are now discussing whether to raise the level of the fine even further, in the hope of forcing drivers to deter from rubbernecking and filming accident scenes.

The level of fatalities on South African roads is notorious. How might the problem of rubbernecking in the road traffic context be dealt with in South African law? On the one end of the spectrum, those hindering the passage of emergency vehicles could, at least in theory, be charged with the death of those who died as a consequence of their required emergency treatment being delayed. Would the NPA be amenable to bringing such a prosecution? In the light of the prosecutorial antipathy, on policy grounds, for resorting to murder charges for death on the road, it is extremely unlikely that a rubbernecker will be charged with homicide based on an omission to allow emergency vehicle access, whether intentional or negligent. The offences contained in section 63 of the National Road Traffic Act 93 of 1996 similarly focus on, in addition to infringing the rights of other road-users, showing disregard for the safety of other road users. Whether charges in terms of section 63 would be preferred is doubtful, once again, on policy grounds. These are serious charges, giving rise to potentially lengthy prison terms, and should be limited to factual scenarios where the conduct of the accused is egregious. On the other end of the legislative spectrum, a rubbernecker who slows the flow of traffic might be charged in terms of the Road Traffic Regulations, 2000, promulgated in terms of the Act. Hence, in terms of the Rules of the Road, set out in Part I of Chapter X of the Regulations, hindering or obstructing traffic on a public road is prohibited: 'No person shall wilfully or unnecessarily prevent, hinder or interrupt the free and proper passage of traffic on a public road' (reg 319(1)). Moreover, in terms of regulation 308A(1), no person shall drive a vehicle on a public road while holding a cellular or mobile telephone or any other communication device in one or both hands or with any other part of the body. While these prohibitions may offer scope for dealing with the problem of rubbernecking, their uneven application and enforcement may militate against their being used in this particular scenario.

It is submitted that the best solution for dealing with this particular conduct, whether the conduct merely has the consequence of seriously impeding the flow of traffic, or

whether emergency vehicles are delayed in their progress to the scene of the accident, is to make use of the offence of inconsiderate driving, set out in section 64 of the National Road Traffic Act. Section 64 provides that it is prohibited to 'drive a vehicle on a public road without reasonable consideration for any other person using the road'. As is evident from the definition of the offence, the key element to be considered is 'reasonable consideration'. (For a fuller discussion of what follows, see my note 'What does "reasonable consideration" mean in the offence of inconsiderate driving?' 2006 *Obiter* 146.) First, it is clear that the offence targets the act of driving as such, and that merely parking a vehicle illegally and by doing so interrupting the flow of traffic does not contravene the section (*S v De Villiers* 1974 (2) SA 602 (SWA) 604C-D, 605C-D; *S v Mongo* 1992 (1) SACR 387 (E) 390c-d). Second, the offence (unlike that of negligent driving) necessarily requires the presence of other road users for a conviction (*S v Van Rooyen* 1971 (1) SA 369 (N) 370A-D; *S v Ephraim* 1971 (4) SA 398 (RAD) 400D-F), although the driving concerned need not be negligent (*S v Van Rooyen* supra 370B). Nevertheless, the test for reasonable consideration is based on the reasonable person in the circumstances of the accused. As was stated in *S v Killian* 1973 (2) SA 696 (T) 698E-F:

'The offence is that of driving "without reasonable consideration" for any other person using the road and that can only mean "without that consideration which a reasonable man would have shown in the situation and circumstances prevailing at the time".'

Thus, the court will examine whether the accused acted with disregard for the rights and convenience of other road users (*S v Ephraim* supra 402A, 402E; *S v Hein* 1976 (2) SA 397 (O) 399G-H, 400D), and it involves the failure to fulfil the duty to drive with respect for other road users present (see *S v Van Rooyen* supra 370A-B).

With a maximum penalty of a fine or one year's imprisonment, the offence of inconsiderate driving seems to provide an offence of sufficient gravity to deal with the emerging problem of rubbernecking, and indeed, to respond to the numerous significant infringements of the rights of others on the road which do not found the offence of negligent driving. By making use of this offence, prosecutors can ensure that all drivers pay due care and attention to the rights of other road users, including rubberneckers and self-appointed recorders of the drama and pathos of road accidents.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

SENTENCING AFTER PERMALL

The judgement in S v Permall (171172) [2017] ZAWCHC 143; 2018 (2) SACR 206 (WCC) (8 December 2017) was published in e-Mantshi Issue 144 in July 2018. The question in brief is whether the ratio between the maximum fine and the maximum period of imprisonment permitted by the penalty clause in any specific law should be applied when determining the period of imprisonment to be imposed as the alternative to a fine in any given case. The Adjustment of Fines Act, 1991 (Act 101 of 1991) (hereinafter referred to as AOFA) arguably has some bearing on the matter.

AOFA deals with the ratio between the maximum fine and the maximum term of imprisonment that may be imposed in terms of certain laws. There is no suggestion in AOFA that the same ratio was ever intended to apply to the fine and the imprisonment to be imposed in any specific case. It is therefore necessary to look to the body of decided cases on this issue for guidance. It is useful to distinguish between those cases that were decided pre-AOFA and those decided post-AOFA.
The cases of S v Tsatsinyana 1986 (2) SA 504 (T) and S v Wana 1990 (2) SA 877 (TK) were decided pre-AOFA.
In Tsatsinyana it was held by Van Dijkhorst R that the magistrate had erred in his attitude that a judicial officer (when determining a sentence of a fine, alternatively imprisonment) could simply ignore the ratio between fine and imprisonment provided for in the Act, which he has to apply. He also mentioned that the Legislature has not endeavored, from time to time, to effect an adjustment in this ratio in various Acts in accordance with the declining value of money, and that this was a matter which required the attention of the Legislature.
However, the Judge in Wana was of a different view to Van Dijkhorst:
In Wana the accused was convicted of possession of a dangerous weapon in contravention of s2 of the Dangerous Weapons Act 71 of 1968 and was sentenced to six months imprisonment. The weapon in question was a ‘flick’ knife.
On review, Beck CJ stated at p879:
“Section 2 of the Dangerous Weapons Act 1968 provides for punishment by
‘(a) fine not exceeding R200 or to imprisonment for a period not exceeding 12 months or to both such fine and such imprisonment’.
These are three different ways in which the convicted person may be punished and it is not helpful, and is indeed misleading, to regard the first and second of these ways

as creating a ratio between the amount of a fine and the length of imprisonment to be undergone *if the fine is not paid.* A judicial officer's first task when coming to the matter of sentence is to decide which of these various ways is the appropriate way in which to punish the accused in the circumstances of the particular case. If he selects the way of punishing him by means of a fine, and determines the amount of the fine to be imposed, he must next decide on the nature of the sanction to be suffered if the fine is not paid. That sanction need not necessarily take the form of imprisonment, but if imprisonment is selected, as is usually done, then the only regard that the judicial officer need pay to the provisions of s 2 is that the length of that imprisonment may not exceed 12 months. He is not obliged to calculate the ratio between the maximum fine permitted (R200) and the maximum term of imprisonment permitted (12 months) and apply that ratio for the purpose of determining the length of imprisonment to be imposed as a sanction for not paying the fine that he has decided upon.
This has been repeatedly explained in this Court, and judicial officers are referred yet again to those passages in the undermentioned judgements where the point is made that the ratio between fine and imprisonment to be decided upon *for the purposes of selecting an alternative prison sentence* is not to be calculated by comparing the maximum fine with the maximum imprisonment that the statute in question allows. See S v Juta (case No 860283); S v Mayeza (Case No 850235); S v Msongelwa (case No 850689); S v Dlokolo (case No 850391).
Insofar as the decision in S v Tsatsinyana 1986 (2) SA 504 (T) suggests that a ratio between fine and imprisonment is to be gleaned from the maximum limits of each contained in a penalty clause and used for the purpose of determining the ratio between a fine imposed and the alternative period of imprisonment selected as a sanction for failing to pay that fine, it runs counter to the decisions of this Court."

Wana thus laid down the principle in no uncertain terms that the ratio between the maximum fine and the maximum period of imprisonment allowed by the Statute in question is not to be applied to the fine and the alternative imprisonment which is to be imposed in a particular case.

Wana was followed in S v Kapeng 1992(1) SACR 596 (O). I include Kapeng as a pre-AOFA case despite the fact that judgement was given after AOFA came into effect, as there is no reference in Kapeng to the provisions of the AOFA, and it appears not to have been considered. Wright R stated at p600:

"Dit is egter duidelik dat die verhouding tussen 'n boete en 'n periode van gevangenisstraf nooit op 'n wiskundige wyse bereken of toegepas behoort te word nie. Wat wel van B belang is, is die rol van inflasie en dat dit 'n faktor is wat hierdie verhouding beïnvloed en gedurig deur howe in aanmerking geneem moet word."

(It is however clear that the ratio between a fine and a term of imprisonment ought never to be mathematically calculated or applied. What is of importance is the role of

inflation and that is a factor which influences this ratio which has constantly to be taken into account by the courts.)

He went on to say:

“Dit is onmoontlik om ten aansien van hierdie verhouding te veralgemeen, maar moet die inkomste van hierdie bepaalde beskuldigde, dws R120 per week, as een van die kardinale faktore in aanmerking geneem word by die bepaling van die verhouding tussen die boete en die gevangenisstraf.”

(It is impossible to generalise about this ratio, but the income of the particular accused, namely R120 per week, must be considered as one of the cardinal factors in determining the ratio between the fine and the imprisonment.)

The Adjustment of Fines Act, 1991 (Act 101 of 1991) came into operation on 3 July 1991.

Section 1 reads as follows:

“1 Calculation of maximum fine

(1) *(a)* If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) *(b)* of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) *(a)* of the said Act, where the court is not a court of a regional division.

(b) For the purposes of paragraph *(a)* a fine as well as imprisonment may be imposed.

(2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) *(a)*: Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law

or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1) *(a)*."

The current ratio provided for in section 92 of the Magistrates' Court Act, 1944 (Act 32 of 1944) read with Government Notice 217 (GG 37477) of 27 March 2014 allows a Magistrate's Court to impose a fine of not more than R120 000 or imprisonment not exceeding 3 years. The ratio is thus R120 000 to 3 years. This further equates to R80 000 to 2 years, R40 000 to 1 year, R20 000 to 6 months, or R3 333,33 to 1 month! (Prior to March 2014 the maximum sentence in terms of section 92 of the MCA was R60 000 or 3 years.)

Thus, in any penalty provisions where s1(1) or (2) of AOFA apply, the maximum fine must be in the same ratio to the prescribed maximum term of imprisonment as the ratio described in section 92 of the MCA. What the introduction of AOFA meant was that the Legislature did not have to keep amending the penalty provision in every statute in order to keep up with inflation or "the declining value of money" (Tsatsinyana, supra). When the ratio in section 92 is amended it is usually only the fine which is increased. For example, in March 2014 the maximum sentence permitted in the Magistrates' Court was changed from R60 000 or 3 years to R120 000 or 3 years. Once that is done, AOFA ensures that the penalty provision in every Statute where s1(1) or(2) of AOFA applies is similarly adjusted ie. the maximum fine is increased relative to the maximum term of imprisonment. The Legislature merely has to amend the ratio in section 92 of the Magistrates' Court Act from time to time to keep up with inflation rather than amending every statute individually.

This is why I thought it appropriate to distinguish between the cases decided pre-AOFA and those decided post-AOFA. One could argue that pre-AOFA it didn't make sense to be bound by the ratio between fine and imprisonment as the Statutes were not amended frequently enough to keep up with inflation. Post-AOFA, however, inflation is taken out of the picture (as long as section 92 of the MCA is amended regularly) so the same argument does not apply. AOFA resolves the concern raised in Kapeng (supra) that inflation "is a factor which influences this ratio which has constantly to be taken into account by the courts".

However, that does not necessarily mean that the ratio must be applied when sentencing.

Wana (supra, a pre-AOFA case) was also followed in the post-AOFA case of S v Hayes and Another 2001 (1) SACR 545 (SE): The following extract is from the judgement of Leach J in Hayes:

"In response to this query the magistrate has asked this Court to confirm the sentence imposed. In doing so, he states that a district magistrate may now impose a sentence not exceeding three years or a fine not exceeding R60 000 and that, as a

result, the ratio between a period of imprisonment and a fine is such that 'one month is equivalent to R1 700'. He goes on to say that, accepting this as 'a true and correct analysis', a fine of R5 000 *vis-à-vis* imprisonment for five months is not unproportional and that 'strictly speaking five months imprisonment is equivalent to an amount of R8 400'.

This is, to put it simply, quite bizarre reasoning. The fact that limits have been laid down by the Legislature in respect of sentences of imprisonment and fines which can be imposed by a magistrate is no basis to calculate a ratio between a fine and an alternative sentence of imprisonment. Not only should the ratio between a fine and a term of imprisonment never be mathematically calculated or applied - see *S v Kapeng* 1992 (1) SACR 596 (O) - but it has been repeatedly stressed that the ratio between a fine and imprisonment is not to be calculated by comparing the maximum fine with the maximum imprisonment which is allowable - see *S v Wana* 1990 (2) SA 877 (Tk) and the cases there cited. If a judicial officer elects to punish an offender by way of a fine and determines the amount thereof, he must next decide on the nature of sanction to be suffered if the fine is not paid by having regard to the particular and material facts and circumstances of the case and not by reference to any mathematical formula."

The long line of decisions on this issue was not, however, followed in the Gauteng Division, Pretoria, in the review matter of S v Shongwe and others (2015 JDR 2446 (GP).

Bekker, AJ, stated, firstly, that AOFA was applicable and then, at paragraph 7 states:

"It is this court's finding that this ratio between the maximum fine and the maximum period of imprisonment, serves as a valuable guideline (taking into account of course also all the relevant facts pertaining to sentence) when considering an appropriate alternative period of imprisonment for a fine to be imposed in terms of the relevant Act."

He then explains (at paragraph 8) that the amount of the fine has to bear some relationship to the term of imprisonment and that "the argument that there should be no proportion between the extent of the fine and the length of the period of imprisonment cannot be supported."

To do otherwise, he states, would lead to injustices. He uses the following example to illustrate the point: "The accused who cannot pay a fine for theft of a bar of soap, is sentenced in terms of Section 112(1)(a) Act 51 of 1977 to a fine of R 2000 or in default of payment three years imprisonment. Surely the three years imprisonment is clearly excessive and disproportionate to the fine and an injustice will occur."

No one would disagree with his conclusion; in the example given, common sense tells us that the imprisonment and the fine are disproportionate. The question, however, is whether it is necessary to apply the ratio in order to prevent injustice? Should it not be left to the discretion of the presiding officer to determine what, in all the circumstances of a particular case, is a reasonable proportion between the fine and the imprisonment?

Finally, in S v Permall 2017 JDR 2001 (WCC) Thulare, AJ has taken a similar, yet more rigid, approach to Bekker AJ, without making any reference to Shongwe's case, or indeed any other precedent in point.
At paragraph 7 of his judgement, Thulare, AJ states:
"The ruling of the magistrate on AOFA is problematic. The magistrate's statement is that the sentence imposed is well within the court's sentence jurisdiction and that section 1 of AOFA does not prescribe a specific ratio between the fine and the alternative imprisonment imposed."

Thulare continues (at para 11):
"In my view, section 1(1)(a) of AOFA read with section 92(1)(a) and (b) of the MCA, provides a statutory rule which should guide magistrates, who are both appointed in the districts and the regional divisions, not only to calculate the maximum fine or the term of imprisonment as the case may be, but also in the computation of the fine or term of imprisonment in the sentences that the courts impose…… Considering both provisions of AOFA and the MCA referred to, the ratio between the amount of the fine and the term of imprisonment, in the magistrates' courts, is 3333.33, save as specially provided in any other law."
He concludes (at paragraph 12): "A sentence is in the discretion of the magistrate, however, that discretion does not enable courts to impose sentences which are more severe than the sentence which the magistrate was competent to impose, more so where the severity is founded on a drastic and unexplained departure from principles and rules, which includes statutory rules of calculations and computation."

The decisions in Shongwe and Permall thus deviated from the decisions in Wana, Hayes, and Kapeng (supra) although Shongwe still allows for "all the relevant facts pertaining to sentence" to be taken into account when determining the alternative period of imprisonment.

On the principle of *stare decisis* magistrates are bound to follow decisions of the High Court for the province in which the particular magistrate's court is situated. If no relevant decision exists as regards a specific issue, and a decision regarding such issue was made by a High Court in another province, the magistrate will then follow that decision. Where there is no decision in the High Court in the magistrate's province but conflicting decisions in other provinces, the magistrate is free to choose which decision to follow. The difficulty for Magistrates is that Bekker, AJ and Thulare, AJ appear to have had no recourse to precedent (or at least made no mention of it) before finding that the ratio should be applied. While judges are not bound by precedent from other divisions, one would have expected them to deal with the prior decisions and indicate why they were departing from them, or how they distinguished the facts in their cases. It is also difficult to reconcile Thulare's finding that a sentence is in the discretion of the magistrate while at the same time he requires the magistrate to apply the ratio when imposing the alternative period of imprisonment. Since it is

invariably the fine which is determined first, does this mean that the fine is within the discretion of the magistrate but not the term of imprisonment?

I would submit further that the approach in Permall's case does not take into account the differences in fines imposed for accused of differing financial means. The courts have frequently held that an accused's means should be taken into account when determining an appropriate fine. In the review case of S v Mohata 2015 JDR 0989 (FB) Kruger J stated at para [4]:

"There is no necessary or prescribed correlation between the fine and the alternative imprisonment. There is no fixed correlation between a fine imposed and alternative imprisonment. Both the fine and the term of imprisonment are determined having regard to the circumstances of the case and the accused. For example, for an accused with a low income, a fine of R200 could have the same effect as a fine of R2000 for a wealthy person. The punishment must fit the offender."

Fines are frequently adjusted downwards according to the accused's means, although the court also has to ensure that a serious crime is not made to look trivial by imposing too small a fine merely to suit the financial means of the accused (S v Lekgoale and Another 1983 (2) SA 175 (B)).

On the issue of financial means see also Frans 1924 (TPD) 419; Fredericks 1986 (4) SA 1048 (C); Ncobo 1988 (3) SA 954 (N); Juta 1988 (4) SA 926 (Tk); Khasembe 1991 (2) SACR 52 (C); Kapeng 1992 (1) SACR 596 (O); Hayes 2001 (1) SACR 545 (SE).

A fine is always imposed with imprisonment as the alternative in the event of non-payment of the fine, and never the other way round (S v Randwa 1961(3) SA 545(O) at 546). The alternative imprisonment will only become operative after it has been established that the fine was not paid. The relationship between a fine and imprisonment as an alternative was explained as follows by Kruger J in S v Jeffries 2011 (2) SACR 350 (FB) at 355h: "Alternative imprisonment is not a sentence of imprisonment…can never stand alone, separate from the fine and is not a substantive sentence. It may become the sentence in future if the fine is not paid."

The headnote of S v Bokbaard 1991 (2) SACR 622 (C) is instructive: "When a court wishes to keep an offender out of prison and for that reason decides on a fine, the alternative term of imprisonment is primarily a mechanism for enforcing payment of the fine. It then only has to be heavy enough to make non-payment of the fine problematical. Fines are, however, also imposed when the sentencing court is of the opinion that the accused really deserves imprisonment, but is still prepared to give him an opportunity of buying off the whole or a portion of his imprisonment….Where a fine is imposed on an accused which he will in all probability not be able to pay, the alternative term of imprisonment should be considered very carefully. In such a case the alternative imprisonment is not primarily an enforcement mechanism but a punishment measure. When it is for all practical purposes the only punishment to be imposed, the alternative term of imprisonment should be considered as if it were the only punishment that was being imposed."

While the body of case law on the topic of sentence is vast, I believe that these selected cases highlight the complexity of the sentencing process and the need to

individualise sentences, with regard to both fine and imprisonment. In the example given in Mohata (supra), for example, a low income person may be given a fine of R200 for a certain offence, whereas a wealthy person might be fined R2000 for the same offence. It is illogical to rigidly follow the formula in Permall and impose an alternative period of imprisonment of 1,8 days for the poor accused and 18 days for the wealthy one!

It is submitted that it is undesirable to unduly fetter the court's judicial discretion with regard to sentence. Once an appropriate fine has been determined, the court still has a discretion in determining what the term of imprisonment should be, taking into account all the usual factors. The court must decide on the term by "having regard to the particular and material facts and circumstances of the case and not by reference to any mathematical formula (Hayes, supra)".

K.Bruorton
Magistrate, Durban
28 November 2018

A Last Thought

"[8] *Vetustas* is not a subject that frequently engages the attention of our courts. Its origins are to be found in passages in the *Digest*. In *De Beer v Van der Merwe*, *1923 AD 378* at 383.Juta JA explained that the doctrine relates to a right that has been exercised against another person and has been in existence for so long – since time immemorial – that no one can tell when, and therefore how, it arose. It is then assumed that the right arose lawfully, subject to the other party being able to rebut that presumption by showing that it had an unlawful origin. He quoted Goudsmit as saying that:

'When any state of things has endured so long in time that its origin dated back to a period to which the memory of man did not extend there was a legal presumption that such origin had been legitimate and the parties were dispensed from furnishing proof that it was so.'

[9] *Vetustas* may appear similar to prescription, but the two operate in different ways. Prescription depends upon an act adverse to the interests of the owner and lacking legal authority. *Vetustas* presumes a lawful act, but that presumption can be rebutted by proof of unlawfulness. Prescription creates rights arising from conduct by the claimant and their predecessors in title adverse to and infringing upon the rights of the other party. It creates a right and not a rebuttable presumption. By contrast, *vetustas* does not create a right, but dispenses with the need to prove its origin. Once the party relying on it has proved the immemorial existence of the state of affairs that it is desired to maintain, it is presumed that such state of affairs was created in a lawful way. The onus then shifts to the other party to prove that it lacked a lawful origin."

Per Wallis, J A in *Community of Grootkraal v Botha NO and Others (1219/2017)* [2018] ZASCA 158 (28 November 2018)