e-MANTSHI

A KZNJETCOM Newsletter

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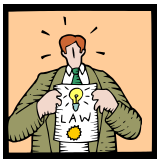
Welcome to the hundredth and forty ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985),and with the approval of the Minister of Justice and Correctional Services, amended the rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa. The notice to this effect was published in Government Gazette no 42064 dated 30 November 2018. The rules came into operation on 10 January 2019. The amended rules are rule 9, 32, 52, 52A, 68 and Part IV of Table A of Annexure 2 and Part II of Table C of Annexure 2. The Government Gazette can be downloaded here:

http://www.google.co.za/url?url=http://www.gpwonline.co.za/Gazettes/Gazettes/42064_30-11_NationalRegulation.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwiHg8vG8pTgAhWzTBUIHaHCBWUQFggmMAM&usg=AOvVaw0wlX2qyivJHSznpeTNWL6D

2. The prescribed rate of interest in terms of section 1(2)(b) of the Prescribed Rate of Interest Act, Act 55 of 1975 has been amended to 10,25% per annum with effect from 1 January 2019. The notice to this effect was published in Government Gazette no 42179 dated 22 January 2019.The notice can be accessed here:

http://www.justice.gov.za/legislation/notices/2018/20180420-gg-41581-gon435-RateOfInterst.pdf

Recent Court Cases

1. S v FREDERICK AND ANOTHER 2018 (2) SACR 686 (WCC)

Long-term imprisonment is not the answer to crimes of substance abuse. Mechanisms provided for by the Prevention and Treatment for Substance Abuse Act 70 of 2008 and the Probation Services Act 116 of 1991 are rather to be employed.

The accused were convicted of possessing minimal amounts of undesirable dependence-producing substances in contravention of s 4*(b)* of the Drugs and Drug Trafficking Act 140 of 1992 in two separate cases that came before the court on review. Both offenders had a number of previous convictions for the same offence — respectively five and 11 such convictions. For the present offences one accused was sentenced to a fully suspended sentence of three years' imprisonment, and the other to 36 months' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977.

The court noted on review that, generally, drugs were abused by the emotionally afflicted. Substance abuse was a manifestation of a response to uncertain future developments inducing fear. Primarily, it was a crime against one's own self. Both accused presented one clear message, namely that long-term imprisonment, or the fear thereof, was not generally an answer to crimes primarily against oneself, and, in particular, substance abuse as a lifestyle choice. (See [8] – [10].)

In dealing with such substance abuse, magistrates' courts ought to bear in mind that there was a comprehensive national response that provided for mechanisms aimed at the demand and harm reduction through prevention, early intervention, treatment and reintegration programmes under the Prevention and Treatment for Substance Abuse Act 70 of 2008 (PATSAA). Where a case against the accused was prima facie

that he was a person suspected of sustained or sporadic excessive use of substances, the National Prosecuting Authority (the NPA) should call for a probation officer to investigate the circumstances of said accused and the provision of a pre-trial report recommending the desirability or otherwise of a prosecution. Where the NPA failed to do this, a court convicting such a person should consider inquiring into whether they were a person as defined in s 33 of PATSAA. If they were not such a person then it was preferable that a probation officer's report be obtained and, depending on the diagnosis, it be decided whether they should be placed in appropriate programmes in terms of the Probation Services Act 116 of 1991. (See [11] – [13].)

The sentences imposed by the trial court were set aside and the matters were referred back for the court to consider holding an inquiry in terms of s 37 of PATSAA, with a view to acting in terms of s 36(1) in lieu of sentence, or order that the accused be placed under probation services in terms of the I Probation Services Act.

2. S v KRUSE 2018 (2) SACR 644 (WCC)

Where an accused is deaf and mute the interpretation of the proceedings cannot take place by means of written communication. Such an accused is hampered by such procedure and it amounts to the violation of his/her fair-trial rights.

The appellant, who was deaf and mute, was convicted in a magistrates' court on a charge of murder and was sentenced to 15 years' imprisonment.

It appeared that the appellant did not understand sign language and had requested the services of a particular interpreter who could interpret for him. This was not accommodated, however, and the proceedings took place by means of written communication. The interpreter wrote down in Afrikaans the questions put to and answers given by the state witnesses, who testified in English. As each state witness finished testifying in chief, the interpreter's notes were shown to the accused and his counsel to verify that the proceedings had been correctly recorded, and to prepare for cross-examination.

The court noted on appeal that there were a number of difficulties with the procedure adopted, the most obvious being that the interpretation was substandard since it was not continuous, precise, competent and contemporaneous: the interpreter was required to simultaneously translate and record what was being said, which was irregular; because the accused was only afforded the opportunity to read the interpreter's notes at the end of each witness' testimony he was deprived of the benefit of contemporaneous interpretation; and the record showed that the accused was not always afforded a proper and timeous opportunity to consider what had been said.

Held, that the record gave rise to grave doubts about the efficacy of the accused's understanding and communication. His ability to adduce and challenge evidence was

undoubtedly hampered by his disability and he would have benefited greatly from the assistance of the special interpreter he requested. (See [17].)
Held, further, that the procedure adopted by the magistrate was not sufficient to ensure that the accused was able to participate effectively in his trial. It was clear that the accused struggled to hear and to follow the proceedings. The violation of his right to a fair trial could and should have been avoided by the simple expedient of referring him for an audiological examination to ascertain the extent of his impairment, and obtain expert guidance on how best to facilitate effective communication with and by the accused. (See [19] and [21].) The appeal was upheld, and the conviction and sentence set aside.

From The Legal Journals

Kruger, H

“The Protection of Children's Right to Self-Determination in South African Law with Specific Reference to Medical Treatment and Operations"

***PER* / *PELJ* 2018(21)**

Abstract

The Children's Act 38 of 2005 provides that children over the age of 12 years can consent to their own medical treatment or that of their children, provided they are of sufficient maturity and have the mental capacity to understand the benefits, risks, social and other implications of the treatment (section 129(2)). The predecessor of the Children's Act set the age at which children could consent to medical treatment at 14 years, and no maturity assessment was required (Child Care Act 74 of 1983 section 39(4)). Children over the age of 12 years can consent to the performance of surgical operations on themselves or their children, provided that they have the level of maturity described above and they are duly assisted by their parents or guardians (Children's Act section 129(3)). Before the Children's Act came into operation, the Child Care Act allowed children over the age of 18 to consent to their own operations (section 39(4)). Neither a maturity assessment nor parental assistance was required. (Note that when the Child Care Act was in operation the majority age was still 21 years.) In

this article the question is considered if the relaxation of the limitations on children's capacity to consent to medical treatment and surgical operations in the Children's Act recognises the right of children to make independent decisions without the assistance of their parents or guardians or other substitute decision-makers. Firstly the article investigates the theoretical foundations of the protection of children's rights, particularly their autonomy rights. Secondly the meaning of the concept "competence" in medical decision- making and the related concept of "informed consent" are discussed. Thirdly some developmental and neuroscientific research on children's decision-making capacities and how they influence children's competence to give consent valid in law are highlighted. Fourthly possible legal foundations for the protection of children's right to self-determination in medical decision-making are sought in the Constitution and international and regional human rights treaties. Finally the relevant provisions of the Children's Act are examined in order to ascertain whether children's right to self-determination is sufficiently protected in South African law.

This article can be accessed here:
https://journals.assaf.org.za/index.php/per/article/view/4609/7218

Cloete, C & Zsa-Zsa Temmers Boggenpoel

“Re-evaluating the court system in PIE eviction cases.”

2018 SALJ 432

Gravett, W

“Subconscious advocacy — Part 2: Verbal communication in the courtroom and ethical considerations.”

2018 Stell LR 175

Abstract
Social science has been used with increasing success in a wide variety of human endeavours. For example, marketing, human relations and the delivery of health services are among the widely expanding applications of the classic disciplines of psychology, sociology, anthropology and social psychology. More recently, trial lawyers have also shown increased interest in applying the research findings and theoretical insights of social science to litigation. After all, every law and legal institution is based upon assumptions about human nature and the manner in which

human behaviour is determined. Although trial lawyers have been using subconscious nonverbal and verbal persuasion techniques for centuries, social science has recently provided empirical support for trial practice theories that heretofore have been based solely on folklore, intuition and experience. I aim to show that principles of human behaviour derived from social psychological laboratory and field research illuminate the behaviour of actors in the courtroom, equip trial lawyers to better represent their clients, and even suggest ways in which the trial system could be improved. Some scholars claim that the increasing body of psychological literature on the effects of subconscious verbal and nonverbal persuasion has enabled trial lawyers to improve their courtroom effectiveness to the point where they can "covertly" control how fact-finders decide cases. It is true that social scientists have discovered a myriad of factors that affect judicial decision-making, but that have nothing to do with the merits of the case. However, by communicating this information to trial lawyers, the social scientists have actually decreased the likelihood that these extraneous influences will affect judicial decisions. They have identified existing barriers to rational decision-making, and have devised strategies to reduce their impact, and thereby improve the chances that fact-finders will render better, more informed, and more rational judgments.

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

Contributions from the Law School

Video conference testimony in the civil courts: South African courts lag behind.

INTRODUCTION

Generally, when witnesses give evidence their identities are known to all, and they are physically present in the hearing venue. They give oral evidence which may be challenged in cross examination, and their demeanour can be scrutinised by the presiding officer to assist in gauging the witnesses credibility.
There are some exceptions to these general rules though, some of which apply only in the criminal context but which are included here for completeness.

For example, witnesses may be allowed to give in camera evidence, where their identities are protected because they fear for their safety should they testify in open court. And in certain circumstances, evidence may be tendered by way of affidavit or written statement.
Other exceptions to requiring the witness to give testimony from within the courtroom include the following:

The intermediary
Section 170A of the Criminal Procedure Act 51 of 1977 makes provision for the appointment of an intermediary in criminal proceedings where a child under the age of 18 is testifying and it appears to the court that they will be exposed to 'undue mental stress or suffering' while testifying in open court without the assistance of an intermediary.
When an intermediary is appointed, section 170A(3)(*c*) requires the court to direct that the evidence must be given in a place 'which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his or her testimony.' In practice, the child witness is placed in a room separate from the court, with the intermediary. The courtroom and the child and intermediary are linked by electronic media whereby the court and those in court can see and hear the child and intermediary but they cannot see into the courtroom and are thus shielded from the harsh environment of the court room. Questions are posed to the intermediary who relays them in a child friendly manner to the child whose answers are received by the court. The court may question the child directly and may order that the intermediary relay questions to the child verbatim.

Section 170A of the Criminal Procedure Act 51 of 1977 has survived constitutional challenge.

Closed-circuit television and other electronic media

Section 158(2)(*a*) of the Criminal Procedure Act, 1977 allows a court, either on its own initiative or on application to order that a witness or an accused may give evidence by means of closed-circuit television or other such electronic media. This can only be done if the witness or accused consents to such an order. Testimony by way of videoconference link technology has been allowed in terms of this section.

A court may only make an order in terms of section 158(2)(*a*) if the facilities are readily available or obtainable, and if it appears to the court that to do so would prevent unreasonable delay, save costs, be convenient, be in the interest of the security of the State, public safety or in the interests of justice or the public or prevent the likelihood that prejudice or harm might result to any person if he or she testifies or is present at such proceedings.

Not all the factors set out in section 158(3) have to be met to bring section 158(2) into operation.

The process has been applied in several cases.

Evidence on commission

If there are difficulties in obtaining the presence of a witness which could result in an undue delay, increased costs or inconvenience either party may make an application to court for evidence to be led on commission in terms of section 171(1)(*a*) of the Criminal Procedure Act, 1977; and in terms of High Court Rule 38(3) and section 53 of the Magistrates' Courts Act 32 of 1944. The Civil Proceedings Act 25 of 1965 provides in s 24 for Depositions of Witnesses to be taken on a commission.

Rule 38 of the Uniform Rules of Court provides for various procedures to produce evidence for trial. It also provides for the manner in which evidence will be adduced at trial. Rule 38(3) provides for taking of evidence of a witness before or during the trial before a commissioner of the court. The court will issue a commission to a magistrate in the district where the witness resides. Rule 38(5) provides that unless the court directs such examination to be by interrogatories and cross interrogatories, evidence given under commission shall be adduced upon oral examination. The witness will be summonsed to court and examined, on oath, before the appointed magistrate in the presence of the parties, their legal representatives, and the witness shall be subject to cross examination and re-examination.
The examination is recorded and confirmed with the witness, who must then sign it, as must the magistrate and it is then returned to court which requested the evidence.

The court is unable to observe the demeanour of the witness when evidence is given on commission. This is the major reason why this procedure is used very rarely.

Interrogatories

Evidence given by way of an interrogatory and cross interrogatory is similar to evidence given on commission. An interrogatory is a list of specific questions, compiled by the parties and the court. The list of questions is then sent to a court in the witness's jurisdiction, which will summons the witness, put the questions to them and will record their responses.
The record is then returned to the court that issued the interrogatory and incorporated into the evidence of the relevant proceedings.

High Court Rule 38(5) and sections 39 and 40 of the Superior Courts Act 10 of 2013 provide for the issue of interrogatories for civil proceedings in the High Court if it is in the interests of justice to do so.

Similarly, section 52 of the Magistrates' Courts Act, 1944 makes provision for interrogatories in Magistrates' Courts.

Hague (Evidence) Convention

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters—more commonly referred to as the Hague (Evidence) Convention—is a multilateral treaty which was drafted under the auspices of the Hague Conference on Private International Law (HCPIL). The treaty was negotiated in 1967 and 1968 and signed in The Hague on 18 March 1970. It entered into force on 1 July 1972, with an implementation date of 1 January 1972. It allows transmission of letters of request (letters rogatory) from one signatory state (where the evidence is sought) to another signatory state (where the evidence is located) without recourse to consular and diplomatic channels.

As of 4 September 2017, there are 61 states which are parties to the Hague Evidence Convention. Fifty-four of the HCPIL member states are party to the Hague Evidence Convention - South Africa became a signatory on 8 July 1997.

The Evidence Convention establishes methods of co-operation for the taking of evidence abroad in civil or commercial matters for signatories to the convention. It provides for the taking of evidence (i) by means of letters of request, and (ii) by diplomatic or consular agents and commissioners. The Convention provides effective means of overcoming the differences between civil law and common law systems with respect to the taking of evidence. The convention is generally regarded as being compatible with videoconference testimony. In other words, a state may receive evidence from a witness in another signatory state by videoconference provided the appropriate protocols are followed. A concern about the procedure is its slowness, but there are efforts to reduce the waiting time to four months or less. There is a great deal of information on the Hague (Evidence) Convention website which is aimed at facilitating and encouraging its use.

Evidence by videoconference

The terms video link, video link conference, and video conference may be used interchangeably to refer to technology that allows a witness to testify from a remote destination (or remotely), while being audible and visible in extremely close to real time to those in the courtroom. (Even where the technology used is appropriate, there may be a milliseconds' delay in the transmission of sound and picture).

Video conferencing in South Africa's High Court civil courts has been allowed, although neither the Civil Proceedings Evidence Act, nor the Uniform Rules of Court allow for such a procedure.

Videoconferencing via specialised software and hardware is considered more reliable than Skyping (or using another free software application). However, the free technology is fast catching up, and has the advantage of being much cheaper than the specialised videoconferencing technology. It is in fact free to use, other than internet costs.

In the case of *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* the court allowed a witness to testify via video conference, and appeared to take the stance that such rules were not necessary, holding that:
'Neither the Uniform Rules of Court nor the Civil Proceedings Evidence Act expressly stated that more modern technology than pen and paper or living, breathing persons are permitted in the High Court. The legislature has not needed to do so. The Constitution and the Rules enjoin us to make the necessary developments on a case by case and era by era basis.'
In *Krivokapic v Transnet Ltd t/a Portnet* the court, exercising its admiralty jurisdiction, explained more carefully why it was empowered to allow video conferencing, even though it was not catered for by the rules. It took the view that it was entitled to allow this procedure by virtue of its inherent jurisdiction. However, it found that compared to other foreign jurisdictions, South Africa lagged behind and required a legal framework for video link conferences in the civil courts.
The court added that it 'can see no reason why specific rules have not been developed for civil proceedings to cater for exceptional circumstances like … [in the case before us]. We are still left with the antiquated commission rules.'
South Africa needs, as a matter of urgency, to develop rules and codes of good practice on the use of video technology in civil proceedings – for both the High Courts and the Magistrates' courts. The justice system needs rules to confirm that video conferencing is an accepted part of operations, and to provide the technology with an air of legitimacy. South Africa also needs to set clear guidelines for the technologies' use – so that challenges and issues that may arise can be anticipated and dealt with more efficiently and effectively than on an ad hoc, case-by-case basis. In addition, even though at present the High Court is taking the view that its inherent jurisdiction allows it to take evidence via videoconference – this option does not exist for the magistrates' courts who do not have inherent jurisdiction.
Some guidance as to what such rules might look like can be gleaned from comparative jurisdictions, in which the position regarding videoconference testimony is provided below.

COMPARITIVE PERSPECTIVE

Canada, Ontario

Rule 1.08 (1) of the Rules of Civil Procedure permits trial evidence by telephone or video conference, where the facilities are available in court or are provided by a party to the proceedings. Where the parties do not consent to a witness giving evidence by telephone or video conference, the matter is governed by rule 1.08 (3), which provides that the court may, on motion or on its own initiative, make an order directing a telephone or video conference on such terms as are just.
Rule 1.08(5) sets out the factors to be considered when exercising this discretion. It reads:

'In deciding whether to permit or direct a telephone or video conference, the court shall consider,

(a) The general principle that evidence and argument should be presented orally in open court;

(b) The importance of the evidence to the determination of the issues in the case;

(c) The effect of the telephone or video conference on the court's ability to make findings, including determinations about the credibility of witnesses;

(d) The importance in the circumstances of the case of observing the demeanour of a witness;

(e) Whether a party, witness or lawyer for a party is unable to attend because of infirmity, illness or any other reason;

(f) The balance of convenience between the party wishing the telephone or video conference and the party or parties opposing; and

(g) Any other relevant matter.'

Also relevant is Rule 1.04, the pertinent portions of which provide that:
'[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits … .In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amounts involved, in the proceeding.'

The court in the *Transnet* declared itself 'impressed with the open mindedness shown by the Canadian legislature' in terms of enacting rule 1.04. The Supreme Court of Canada has noted that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be readjusted. This is a shift in culture which maintains the goal of a fair process that results in a just adjudication of disputes – but does so in a way that is proportionate, timely, and affordable.

In *Chandra v CBC* the court held that:
'[t]he use of video or similar technologies does not now represent a significant deviation from the general principle favouring oral evidence in Court. Such evidence is given orally, under oath or affirmation and is observable "live" as it would be with all witnesses present in the courtroom. Questions are asked and answers are given in the usual way. The witness can be closely observed and most if not all of the visual and verbal cues that could be seen if the individual was physically present can be observed on the screen. The evidence is received by the court and heard and understood by Counsel and any members of the public who may be present in the courtroom at the time.'

The court also noted that the available technologies included 'not only the ability to examine a witness but, also, to put to that witness in a contemporaneous way documents and other exhibits.'
Australia - Federal Rules, and statutory provisions

Testimony in civil cases via video conferencing link is allowed in terms of ss 47A to 47F of the Federal Court of Australia Act 1976 (There are special provisions to facilitate the taking of evidence remotely between Australia and New Zealand in ss 47 to 54 of the Trans-Tasman Proceedings Act 2010.)

Leave or a direction or order of the court for testimony to be given by video link or for appearances or submissions to be made by video link, must be obtained either on application or mero motu.

Convenience alone is not sufficient to justify a party's request for leave. In each case where it is proposed to use a video link, the court must consider whether this will provide a just, timely, economic and efficient use of the resources of the court and the parties and aid the progress or resolution of the litigation. The court may also not order that video conferencing facilities be used, unless it is satisfied that all the parties in the courtroom can see and hear the remote witness, and that the technical and design requirements specified by the rules of court are complied with.

Factors that may need consideration include:

- 'the availability of equipment and facilities at the relevant locations;
- the quality of picture and sound depending on the available equipment and transmission speed or bandwidth;
- the nature of the facilities at each site;
- the inherent limitations of the videoconference arrangements overall for any particular purpose of the hearing (e.g. cross-examination of a critical and controversial witness and judicial assessment of the credit of such a witness);
- the extent of documentation which might need to be viewed;
- time differences between the different locations;
- if the videoconference is to involve an interpreter, consideration may also need to be given to :
    - the qualifications, training and experience of the interpreter in the context of the added difficulties and complexity of the use of a video link;
    - the impact of any interpreting on the operation of a videoconference; and
    - the best location at which the interpreting can be provided.'

In the Federal Court of Australia Act 1976, the question of the oath and affirmation in remote proceedings is expressly dealt with. Section 47A (2) provides that the testimony must be given on oath or affirmation, unless:

'(a) the person giving the testimony is in a foreign country; and

(b) either:

(i) the law in force in that country does not permit the person to give testimony on oath or affirmation for the purposes of the proceeding; or

(ii) the law in force in that country would make it inconvenient for the person to give testimony on oath or affirmation for the purposes of the proceeding; and (c) the Court or the Judge is satisfied that it is appropriate for the testimony to be given otherwise than on oath or affirmation.

(3) If the testimony is given:

(a) otherwise than on oath or affirmation; and

(b) in proceedings where there is not a jury;(in proceedings where there is a jury, the judge may warn the jury about the testimony in terms of s 165 of the Evidence Act, 1995) the Court or the Judge is to give the testimony such weight as the Court or the Judge thinks fit in the circumstances.'

The oath or affirmation must be administered in terms of s 47 E of the Act, which provides that it may be administered:

'(a) by means of the video link, audio link or other appropriate means in a way that, as nearly as practicable, corresponds to the way in which the oath or affirmation would be administered if the remote person were to give testimony in the courtroom or other place where the Court or the Judge is sitting; or

(b) if the Court or the Judge allows another person who is present at the place where the remote person is located to administer the oath or affirmation—by that other person.'

The Act also deals with documents and how they may be put/conveyed to the remote witness. (see s47 D of the Federal Evidence Act 1976).

UK

The guidance for the use of video conferencing facilities in civil proceedings in the United Kingdom is based largely on the protocol of the Federal Court of Australia, discussed above.

Item 2 of Annexure 3 to the Practice Direction on videoconferencing in civil proceedings provides as follows:

'VCF [Video Conferencing Facilities] may be a convenient way of dealing with any part of proceedings: it can involve considerable savings in time and cost. Its use for the taking of evidence from overseas witnesses will, in particular, be likely to achieve a material saving of costs, and such savings may also be achieved by its use for taking domestic evidence. It is, however, inevitably not as ideal as having the witness physically present in court. Its convenience should not therefore be allowed to dictate its use. A judgment must be made in every case in which the use of VCF is being considered not only as to whether it will achieve an overall cost saving but as to whether its use will be likely to be beneficial to the efficient, fair and economic disposal of the litigation. In particular, it needs to be recognised that the degree of control a court can exercise over a witness in a remote site is or may be

more limited than it can exercise over a witness physically before it.'

United States of America – Federal Rule of Civil Procedure 43 (a)
Federal Rule of Civil Procedure 43 (a) provides as follows:

(a) 'At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.'

This has been interpreted as allowing evidence to be taken from witnesses located abroad by videoconference technology.

Singapore
Section 62A of the Evidence Act (Chapter 97)
Section 62A (1) Notwithstanding any other provision of this Act, a person may, with leave of the court, give evidence through a live video or live television link in any proceedings, other than proceedings in a criminal matter, if — (a) the witness is below the age of 16 years; (b) it is expressly agreed between the parties to the proceedings that evidence may be so given; (c) the witness is outside Singapore; or (d) the court is satisfied that it is expedient in the interests of justice to do so.
Section 62A(2) In considering whether to grant leave for a witness outside Singapore to give evidence by live video or live television link under this section, the court shall have regard to all the circumstances of the case including the following: (a) the reasons for the witness being unable to give evidence in Singapore; (b) the administrative and technical facilities and arrangements made at the place where the witness is to give his evidence; and (c) whether any party to the proceedings would be unfairly prejudiced.

CONCLUSION
In conclusion, it is necessary for South Africa to develop rules and codes of best practice regulating the taking of evidence by video link. This is especially crucial for the magistrates' courts who lack the power to do so in the absence of such rules. At present South Africa lags behind many jurisdictions in the rest of the world in this regard.

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Matters of Interest to Magistrates

WHEN IS SPEECH PROHIBITED HATE SPEECH? THE CONSTITUTION VERSUS SECTION 10(1) OF THE EQUALITY ACT

Introduction

The recent Supreme Court of Appeal (SCA) decision in *Masuku v South African Human Rights Commission obo the South African Jewish Board of Deputies* [2018] ZASCA 180 (*Masuku*) demonstrates the often-misconstrued relationship between the prohibition of hate speech in section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act) and section 16(2)(c) of the Constitution, which excludes hate speech from constitutional protection. With reference to the factual matrix in *Masuku*, this note explains how the constitutional framework underlying the right to freedom of expression (including the internal hate speech limitation and the general limitation clause in section 36) inter-connects with the hate speech prohibition in section 10(1) of the Equality Act. In particular, the note aims to address the circumstances in which courts are bound to apply section 10(1) of the Act as opposed to relying directly on the constitutional hate speech provision.

Relevant legislative sections

Section 16 of the Constitution protects freedom of expression. Section 16(2)(c) provides that the right does not extend to the "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm."

Section 10(1) of the Equality Act prohibits hate speech in broader terms and provides that: "Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds,

against any person, that could reasonably be construed to demonstrate a clear intention to –

a) be hurtful;
b) be harmful or incite harm;
c) promote or propagate hatred."

The proviso in section 12 excludes the "*bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution" from section 10(1)'s ambit. This type of speech will not be prohibited hate speech. The prohibited grounds in the Equality Act are identical to those listed in section 9 of the Constitution (the equality clause) and are therefore much broader than the four grounds in section 16(2)(c). Additionally, a complaint in terms of the Equality Act may be brought on an analogous ground (such as HIV status or poverty, for example).

Facts in *Masuku*

In 2009 the South African Jewish Board of Deputies (SAJBOD) lodged a hate speech complaint against Bongani Masuku, then International Relations Secretary of COSATU, with the SAHRC in respect of certain statements made by Masuku which were they believed were directed at Jewish people. The statements were uttered at a time when there was intense conflict between Israel and Palestine after a military operation against Hamas in the Gaza Strip, causing the death of hundreds of people. This resulted in an international outcry, with the SAJBOD supporting the Israeli cause. COSATU openly opposed the Israeli operation and the SAJBOD's support thereof.

The consequence was an online diatribe, which commenced with very offensive comments from unknown users about members of COSATU (referring to them as "monkeys" with AIDS, who rape babies) on a blog. Masuku responded as follows:

"… as we struggle to liberate Palestine from the racists, fascists and Zionists who belong to the era of their Friend Hitler! We must not apologise, every Zionist must be made to drink the bitter medicine they are feeding our brothers and sisters in Palestine. We must target them, expose them and do all that is needed to subject them to perpetual suffering until they withdraw from the land of others and stop their savage attacks on human dignity…"

Thereafter, a rally was held at Wits University where Masuku made the following contentious statements (whilst facing constant heckling from the audience):

"Cosatu has got members here even on this campus; we can make sure that for that side it will be hell …"

"The following things are going to apply: any South African family … who sends its son or daughter to be part of the Israel Defence Force must not blame us when something happens to them with immediate effect …"

"Cosatu is with you, we will do everything to make sure that whether its at Wits, whether its at Orange Grove, anyone who does not support equality and dignity, who does not support rights of other people must face the consequences even if it means that we will do something that may necessarily cause what is regarded as harm …"

The SAHRC believed that these statements constituted hate speech as prohibited by section 10(1) of the Equality Act. In the SAHRC's view the Wits' statements were directed specifically at Jewish people. Masuku admitted making the statements, but contended that they were not directed at Jewish people. He explained that he was targeting defenders of the State of Israel. The use of the term "Zionists" indicated that his statements were aimed at people adhering to that political ideology, as opposed to people linked to a particular religious or ethnic group. Nonetheless, the SAHRC referred the complaint to the Equality Court for adjudication.

The Gauteng Division of the Equality Court, per Moshidi J, held that the statements were hate speech, as prohibited by section 10(1) of the Equality Act. The judgment can be sourced here: http://www.saflii.org/za/cases/ZAEQC/2017/1.html This prompted the appeal to the SCA. See the SCA judgment here: http://www.saflii.org/za/cases/ZASCA/2018/180.html

The issues

The SCA's delineation of the issues undoubtedly contributed to the problematic outcome in this matter. According to the SCA, the most important issue was the Equality Court's interpretation of hate speech. The SCA specifically linked this to the prohibited grounds in issue, that is whether the speech targeted people based on religion or ethnicity (Jewish people) or people subscribing to a particular ideology (Zionists). The SCA then added that counsel for the SAHRC disavowed reliance on section 10(1) of the Equality Act during the hearing before it and that the real issue for consideration was whether the speech was excluded from constitutional protection because it fell within the ambit of section 16(2)(c) of the Constitution. The SCA found that this disavowal was correctly made, as section 10(1) is phrased in broader terms than section 16(2)(c) and it is debatable whether the Equality Act's definition of hate speech can be justified using section 36 of the Constitution given that section 16(2) creates an internal limitation clause. As explained below, this approach is incorrect for a number of reasons and also undermines the principle of subsidiarity.

The SCA's finding

The SCA confirmed the importance of freedom of expression for South Africa's constitutional democracy. It recognised nonetheless that protected speech does not include hate speech. The SCA specifically dealt with the question of whether Mr Masuku's speech amounted to hate speech with reference to the constitutional definition of hate speech, focusing its attention on whether "Zionism" fell within the scope of the four prohibited grounds in section 16(2)(c). After exploring the meaning of Zionism, it found that the offending statements did not connote either religion or ethnicity. Plus, even though the words used may have been threatening, hurtful and insulting, taken in context they did not amount to the advocacy of hatred or the incitement of harm. The statements were mere political speech and fell within the boundaries of protected constitutional expression. Accordingly, the appeal was upheld and the order of the Equality Court set aside.

Commentary

There are many aspects of the SCA's judgment worthy of critical analysis, but for the purposes of this note, the more important issues are highlighted below.

- The SCA misinterpreted the relationship between section 16(1), which protects freedom of expression, section 16(2) – which excludes three types of speech from constitutional protection – the internal limitation clause, section 36 – the general limitation clause, and section 10(1) of the Equality Act, which contains a wider definition of hate speech than section 16(2)(c) of the Constitution.
- The SCA should have referred to the Constitutional Court (CC) decision in *Islamic Unity Convention v Independent Broadcasting Authority* 2002 (4) SA 294 (CC), which dealt specifically with the regulation of hate speech in terms broader than section 16(2)(c). In determining the constitutionality of the clause in issue in *Islamic Unity*, Langa CJ held that "[W]here the state extends the scope of regulation beyond expression envisaged in section 16(2), it encroaches on the terrain of protected expression and can do so only if such regulation meets the justification criteria in section 36(1) of the Constitution" (para 32). The clause in question was broader than the constitutional definition of hate speech and thus limited freedom of expression. For this reason, the CC proceeded to conduct a justification analysis in terms of section 36. It concluded that the code's limitation to freedom of expression was not justifiable in terms of section 36.
- The SCA in *Masuku* failed to appreciate that an internal limitation is definitive of the scope of the right. Legislation which proscribes hate speech in exactly the same terms as section 16(2)(c) will not limit freedom of expression and will not require a section 36 limitation analysis. But, this is not to say that legislation which defines hate speech in a wider fashion (for example by including more than four grounds) is automatically unconstitutional and that a section 36 analysis is not required. The SCA's suggestion that this proposition

was debatable may have been prompted by a misunderstanding of the role section 36 plays in situations where a court considers the scope of a right in terms of a reasonableness enquiry, as occurs with the socio-economic rights entrenched by sections 26 and 27 of the Constitution. This is certainly a contentious question and there is a real debate about whether there is a meaningful difference between the standard of review in terms of the internal limitation in the wording of the right itself (see section 26(2) – the state must take reasonable measures) and the reasonableness enquiry in terms of section 36. See, for example, *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

- In summary, when testing the constitutionality of a hate speech prohibition (whether in the Equality Act or other legislation) which exceeds the parameters of the constitutional definition, and thus limits the right to freedom of expression, section 36 must be used to test the legitimacy of the prohibition in issue. See, for example, *South African Human Rights Commission v Qwelane (Freedom of Expression Institute and Another as amici curiae) and a related matter* [2017] 4 All SA 234 (GJ) where this approach was used.
- In any event, the constitutionality of section 10(1) of the Equality Act was not an issue before either the Equality Court or the SCA. Mr Masuku's contention was that the speech in question was not based on a prohibited ground (Zionism being a political ideology) and that the offending speech did not fall within the parameters of section 10(1) of the Equality Act. This is what the SCA was asked to decide. The SCA was thus duty bound to decide the matter within the "four corners" of the Equality Act.
- The SCA indicated that the SAHRC recanted its reliance on section 10(1) of the Equality Act and that for this reason the question of whether the speech was hate speech fell to be decided in terms of section 16(2)(c) of the Constitution. With respect, as explained above, this approach makes little sense and also disregards the precedent of the Constitutional Court in matters such as *MEC for Education: KwaZulu Natal v Pillay* 2008 (1) SA 474 (CC) and *De Lange v Presiding Bishop of the Methodist Church of Southern Africa* 2016 (2) SA 1 (CC). In these cases, the CC emphasised the principle of constitutional subsidiarity and explained that claims brought under the Equality Act, as enabling legislation giving effect to a constitutional right, must be decided within the parameters of that Act. Neither a litigant, nor the court, can circumvent such legislation and rely directly on the constitutional right. In the words of Langa CJ: "Absent a direct challenge to the Act, courts must assume that the Equality Act is consistent with the Constitution and claims must be decided within its margins."

Conclusion

The SCA was bound by the principle of constitutional subsidiarity and obliged to decide *Masuku* in terms of the Equality Act provisions. Absent a challenge to the constitutionality of section 10(1), the SCA overstepped the limits by relying directly on the constitutional protection of freedom and the hate speech limitation in section 16. The real question the SCA should have addressed was whether the speech fell within the ambit of section 10(1), more specifically whether it: was based on a prohibited or analogous ground; met the other section 10(1) requirements; and could be excused in terms of the section 12 proviso. An appeal to the Constitutional Court is needed to resolve these issues.

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A Last Thought

"…the Courts must be constantly reminded that as the final arbiters in matters involving gender based violence, they have the power to protect abused women and to effectively punish the offenders, and in so doing send a clear message to perpetrators that such conduct will not be condoned. That they have the inherent ability to ensure that court room policies and procedures are sensitive to the victims, and that the victims who go through the legal system are not subjected to secondary trauma in the form of harsh, humiliating and unnecessary cross-examination when they present themselves to testify. This is crucial because as a Colleague, Justice Cameron, once observed, 'Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, pre-conceptions, opinions and prejudices. These are invariably expressed in the decisions they give, constituting "inarticulate premises" in the process of judicial reasoning'. Judges are the creations of their societies and naturally carry all sorts of prejudices and stereotypes of which they may not even be aware. So while there has been a marked ideological shift in the ways Judges adjudicate matters relating to gender based violence and femicide in recent times, including the abolition of cautionary rule in respect of sexual offences, and the conduct of many judicial officers can be commended, the fate of these victims should not be left to the off-

chance that the individual Judges hearing their cases will be attuned to the sensitivities. There should be a formalization and standardization of these norms so that it is incumbent on the Courts to pay particular attention to the treatment of victims in these cases."

Judicial and Legal Responses to Gender Based Violence and Femicide **Presented by Justice Mandisa Maya Gender at the Violence and Femicide Summit, Pretoria, 1 November 2018**