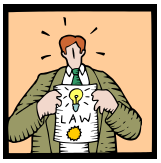
e-MANTSHI

A KZNJETCOM Newsletter

February 2019: Issue 150

Welcome to the hundredth and fiftieth 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. A notice was given in terms of rules 271 and 276 of the Rules of the National Assembly that the Minister of Social Development intends to introduce the Children's Amendment Bill, 2019 ("the Bill") in the National Assembly and in the National Council of Provinces during 2019. The notice was published in Government Gazette no 42248 dated 25 February 2019. The Bill seeks to amend the Children's Act, 2005 (Act No 38 of 2005) to address critical gaps and challenges in the underlying child care and protection system. Furthermore, it responds to a High Court order relating to the foster care challenges and seeks to provide for a comprehensive legislative system in regards thereto. The Bill also provides for coordinated provision of care and protection services to children.

The Bill intends to:

a) further promote and protect the child's right to physical and psychological integrity;

b) to further regulate the position of unmarried fathers;

c) to extend the children's court jurisdiction to hear applications for guardianship;

d) to provide for matters relating to the provision and funding of early childhood development programmes;

e) to strengthen provisions relating to the National Child Protection Register; to further regulate the initiation of care and protection proceedings;

f) to further regulate the medical testing of children for foster care and adoption purposes;

g) to clarify procedures for children in alternative care;

h) to further regulate matters relating to adoption and inter-country adoption;

i) to expedite the hearing of child abduction matters and to provide for legal representation of children;

j) to adjust the criteria relating to surrogate motherhood and to provide for related matters;

k) to align the Act with the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, and the Jurisdiction of Regional Courts Amendment Act, 2008;

l) to align the Act with court judgments; to strengthen provisions relating to children with disabilities; to empower the Minister to make additional regulations; to remove certain inconsistencies; and

m) to provide for matters connected therewith.

A copy of the Bill can be obtained from the Department of Social Development's website at http://www.dsd.gov.za or from the Parliamentary Monitoring Group website at http://www.pmg.org.za.

Recent Court Cases

1. Jacobs v S (A365/18) [2019] ZAWCHC 4 (11 February 2019)

In sentencing an accused who had pleaded guilty the presiding magistrate must use the factual matrix as set out in the plea upon which he convicted the appellant and which the prosecutor accepted and not a contradictory factual matrix which is presented by the accused in mitigation of sentence.

Henney, J

Introduction:
[1] The Appellant was convicted in the Magistrates Court, Malmesbury on a charge of assault with intent to do grievous bodily harm as a result of the incident that happened between him and the complainant, Christiaan Amerika on 31 July 2015 at or near Mimosa Street, Riebeeck Kasteel, where it was alleged that he stabbed the complainant with a broken bottle in his face, causing him grievous bodily harm.

The Section 112(2) Plea Statement
[2] The appellant was legally represented and pleaded guilty to the charge. He however, in his plea, set out in a statement in terms of the provisions of section 112(2) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), admitted that he assaulted the complainant with the intent to do him grievous bodily harm. He says in his plea statement that on 31 July 2015 at the place as mentioned in the charge sheet, he assaulted the complainant, by hitting him with a beer bottle in the face as a result of which, the complainant sustained serious injuries.

[3] He further states that they were drinking on this particular day, he was in the company of the complainant and his girlfriend. He observed that the complainant was walking with his girlfriend and he wanted to know where they were going to. The complainant did not give him an answer and that resulted in an argument between the two of them. The complainant had a beer bottle in his hand and wanted to hit him with the beer bottle, whereupon he himself, picked up a beer bottle and then proceeded to hit the complainant with this bottle in his face.

[4] He further admitted that he foresaw that through his conduct, that the complainant would sustain serious injuries and that he reconciled him with such a result, but he

nonetheless, proceeded with such conduct. Based on his plea and the words used by the Appellant, it clearly indicates that he did not have a direct intention to assault the complainant, but formed an intention in the form of *dolus eventualis*. As a result of this plea, of guilty, he was convicted. The prosecutor thereafter proved, that the accused had one previous conviction also for assault with the intent to do grievous bodily harm that was committed on 19 September 2009, for which he was convicted on 24 March 2010 and sentenced to a period of 12 months correctional supervision in terms of section 276 (1) (h) of the CPA and he was further sentenced to an additional 12 months, imprisonment which was suspended for a period of 5 years on condition that he is not convicted on a charge assault with the intent to do grievous bodily harm and which is committed during the period of suspension.

Evidence before Sentence

[5] The Appellant was called by his legal representative to testify in mitigation of sentence. In his evidence, he stated that he is 26 years old, a father of one child, who is 4 years old. He works on a farm and earns R700 per week. He expressed his regret about the incident and said that he was under the influence of liquor. In cross-examination by the prosecutor, he stated that he was on top of the complainant and he could not say whether the complainant assaulted him.

[6] He further stated that the complainant did not in any way threaten him. And he admitted that he stabbed the complainant in his face with a broken bottle. Based on this set of facts, it would seem that the appellant formed a direct intention to stab the complainant in the face. During his address in mitigation of sentence, his legal representative requested the court to impose a suspended sentence. He further argued that the court should consider the fact that the Appellant consumed alcohol as a mitigating factor. And he further argued that the appellant and complainant were involved in a love triangle, which spurred him on to commit the offence.

[7] The prosecutor on the other hand, based on the evidence presented, argued that the appellant admitted that his life was not in danger. And that he admitted that the complainant was lying on the ground and that he was on top of him when he assaulted the complainant. After the magistrate has considered all the evidence and arguments, the appellant was sentenced to a period of 3 years imprisonment.
Leave to appeal against his sentence was refused by the magistrate, and with the leave of this court, the appellant now appeals the sentence imposed by the magistrate.

Grounds for appeal

[8] The grounds against which the appellant appealed the sentence can be summarised as follows:- that the magistrate, did not properly consider the circumstances under which the offence were committed, that the appellant is a productive member of society; that he pleaded guilty by showing true remorse. The Respondent in opposing this appeal, submits the appellant has a previous conviction

on the same offence committed on 19 September 2009, for which he was convicted on 24 March 2010 and five years later, the appellant was again convicted of the same offence. The offence constitutes an element of violence.

[9] According to the Respondent, the sentencing court properly considered and attached proper weight to the personal circumstances of the appellant. And that the personal circumstances are not the only factors which the court has to take into consideration. The Respondent submits that the further aggravating factors are; that the appellant intentionally stabbed the complainant with a broken bottle in the face.

[10] The Respondent further submitted that according to the medical report the complainant sustained serious injuries in his face which left him with a scar in his face, for life. The attack was unprovoked. That the aggravating factors far outweigh those factors and circumstances presented in mitigation on behalf of the appellant and that the sentence that was imposed was lenient, not disproportionate, nor does it induce a sense of shock.

Issues on appeal

[11] There seems to be two conflicting versions relating to the circumstances under which the assault took place. The one version was given during the section 112 (2) plea of guilty, and another version was given during his evidence presented in mitigation of sentence. The version given during the session 112 (2) plea was to the effect that the complainant wanted to attack him with a beer bottle, whereupon he also picked up a beer bottle which he used to hit the complainant in the face for which he formed an intention in the form of *dolus eventualis*. That portrays the complainant as the aggressor and who provoked the Appellant. Whereas in evidence during mitigation of sentence, he said, that he is unable to say whether the complainant assaulted him.

[12] He further stated that the complainant did not threaten him. And he further admitted that he was on top of the complainant while he stabbed him in the face with a broken bottle. And based on those facts, it seems that the complainant was not the aggressor who attacked the Appellant first with a beer bottle. The attack on the complainant was not unprovoked and there could also not have been any direct intention to stab him in the face.

[13] The question for consideration in this appeal is whether the factual matrix presented by the appellant during the plea, which was accepted by the prosecution, or the factual matrix presented by the appellant in mitigation of sentence should have been taken into consideration the purposes of sentence.

Discussion

[14] In terms of the provisions of section 112 (3) of the CPA, nothing in this section shall prevent the prosecutor from presenting evidence or the court from hearing

evidence, including evidence or a statement made by or on behalf of the accused with regard to sentence, or from questioning the accused on any aspect of the case for the purpose of determining an appropriate sentence. It was in terms of the provisions of this subsection that the appellant testified under oath, with regard to sentence. The question now to consider was whether the version as put up by the appellant during his evidence should be accepted above the version as set out in his section 112 (2) plea.

[15] The version given by the appellant during the sentencing proceedings as to the circumstances under which he had committed the offences was relied upon by the prosecutor. And it seems that the magistrate also took into consideration and placed great emphasis on the version as proffered by the appellant during evidence with regard to sentence after he had been convicted which I said earlier, proves that the Appellant had formed a direct intention to stab the complainant in the face and that the attack on the complainant by the Appellant was unprovoked.

[16] It must however be remembered, that it was not a version which the prosecutor had placed before the court by evidence which he had presented to the court after conviction, but it was evidence which the appellant had voluntarily given during the sentencing proceedings. It was not evidence put up by the prosecutor to contradict the version given by the appellant during the plea, but evidence given by the appellant himself. In this particular case it was the appellant himself contradicted his version.

[17] The fact, however, remains that the prosecutor full well knowing that the facts upon which the plea of guilty was based was contradicted by the facts and evidence he or she had available. Unfortunately under those circumstances, the prosecutor by accepting the plea was bound by it. It is trite that where the prosecutor does not dispute the facts as proffered by an accused person in a plea of guilty, such prosecutor is bound by it.

[18] In S v Van Der Merwe and Others 2011 (2) SACR 509 (FB), it was held that … "*where an accused person pleaded guilty and handed in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, detailing the facts on which his plea was premised, and the prosecution accepted the plea, the plea so explained and accepted constituted the essential factual matrix on the strength of which sentence should be considered and imposed. Such an essential factual matrix could not be extended or varied in a manner that adversely impacted on the measure of punishment as regards the offender".* See also *S v Balepile* 1979 (1) SA 702 (NC).

[19] This court in *S v N 2015 JDR 0112 (WCC)* per Binns-Ward J said the following regarding this aspect in a case where the magistrate as well as the prosecutor relied on the contents of a probation officer's report that was in contradiction with the factual matrix as set out in a section 112 (2) plea that was accepted by the magistrate upon

which the conviction of the accused followed.
"*[12] Regrettably, it is also necessary to address the magistrate's misdirections on the evidence with regard to sentence. It appears from the magistrate's response that he saw no reason to be astute to the effect of evidence adduced in respect of the sentence proceedings that was at odds, in respect of the circumstances of the commission of the offence, with that which had been accepted for the purpose of convicting the accused.*
And at para [14] "*The facts accepted by the state and the court for the purpose of the conviction thus placed the deceased in the role of the aggressor in the fight in which he was killed. They had the deceased starting the fight by stabbing the second accused and being fatally stabbed himself in the ensuing melee.*
[22] *The magistrate was incorrect in concluding that the accused had agreed to the hearsay evidence in contradiction of the version of events given in their plea statements being admitted against them".*
And at paragraph 23:
"*The magistrate should have raised the issue of the conflict between the probation officer reports and the facts admitted by the accused if he was considering preferring either of the versions in the reports. The prosecutor was certainly not at liberty to lead evidence in aggravation in contradiction of the facts that had been accepted for plea purposes; see e.g. S v Moorcroft* 1994 (1) SACR 317 *(T) at 320g, S v Nel* 2007 (2) SACR 481 *(SCA) at para 20 and S v Mnisi* 2009 (2) SACR 227 *(SCA) at para 33 (p. 238f)."*

[20] This subsection may only be used to supplement the version of an accused person and clear up uncertainties and ambiguities in the plea. It cannot be used to contradict the version of an accused person, even under circumstances where such an accused person to his own detriment and aggravation contradicts the version as set out in the plea. Under such circumstances, the prosecutor is obliged before the court pronounces a verdict, based upon the plea to request that the court enters a plea of not guilty in terms of the provisions of Section 113 of the CPA.

[21] The court must also on the other hand, after it had become aware of facts during the sentencing proceedings, which contradicts the version as set out in the plea, enter plea of not guilty in terms of the provisions of section 113. In this regard, it has been said that section 112 (3), cannot be used to avoid a court from applying the provisions of section 113.

[22] The Magistrate therefore clearly in my view misdirected himself by relying on a factual matrix that was inconsistent and contradicted by the factual matrix as set out in the plea upon which he convicted the appellant and which the prosecutor accepted. Even though such factual matrix which contradicted the version in the plea was presented during mitigation of sentence, which ironically were used as aggravating circumstances for the purposes of sentence.

[23] The proper and appropriate cause of action would have been either for the prosecutor to have requested the court to enter plea of not guilty after the accused, had presented the plea or for the magistrate upon becoming aware of the different set of facts to have entered a plea of not guilty in terms of the provisions of section 113 of the CPA. It is precisely for circumstances such as these, that the provision of Section 113 caters for an order to prevent a miscarriage of justice.

[24] The magistrate was therefore wrong to have regard to the facts that was presented during evidence in mitigation of sentence by the appellant and should have sentenced the appellant on the facts, which was set out in his section 112 (2) plea of guilty. This court therefore, is obliged to interfere with the sentence imposed by the magistrate, based on a set of facts, which was improperly placed before the court.

[25] The fact however remains that the appellant had been convicted of a very serious offence, which calls for a severe sentence. The complainant has suffered a severe injury which left the scar in his face. It seems also that the appellant has not learnt from his mistakes, because five years prior to committing this offence, he was convicted of a similar offence. The appellant in my view still deserves to be sentenced to a period of direct imprisonment. I would therefore uphold the appeal against sentence and substitute it with the following sentence:
"*That the accused is sentenced to a period of 36 months imprisonment of which 18 months imprisonment is suspended for a period of 5 years on condition that he is not convicted of any crime of violence committed to a person, which is committed during the period of suspension*."

2. Minister of Police v Vowana and Another (884/2014) [2019] ZAECMHC 5 (14 February 2019)

A Magistrate may never defer the writing of any judgment to the legal representative who appeared in front of him/her.

Malusi *et* Jolwana JJ:

[1] The matter came by way of a review to set aside a judgment written by the second respondent in a trial presided over by the first respondent. The misconduct which culminated in this review, to the best of our knowledge, is unprecedented in the annals of the judiciary in this country. We hope it will never be repeated by any judicial officer.

[2] The first respondent was a magistrate based in the Magistrates' Court for the district of Herschel. We were informed at the hearing that the first respondent *(the magistrate)* passed away before the date of hearing. The second respondent is an attorney in private practice.

[3] It is necessary to provide a background which led to the trial in the court *a quo.* An elderly woman was raped and murdered in her shack at Silindeni Administrative Area, Sterkspruit. A group of residents in the area attacked and burnt down the home of a person suspected to have committed the crimes. The police arrested six people who had allegedly been involved in the arson and mob justice. Each of the six persons later initiated a claim for damages for unlawful arrest and detention against the applicant *(the Minister).* Before the trial in the court *a quo* all six cases were consolidated into one case *(Case No 12/2009)* as per agreement amongst the parties. The six plaintiffs were all represented by the second respondent as their attorney of record.

[4] At the trial during November 2012 the Minister led the evidence of one witness and four of the plaintiffs tendered evidence. The magistrate reserved his judgment.

[5] On 26 November 2012 the magistrate prepared a draft judgment which was four pages in length. It will become clear later in this judgment the reason we referred to this document as a draft judgment. He sent the unsigned draft judgment to the second respondent per facsimile on 27 November 2012. Shortly after the second respondent received the draft judgment she discussed it telephonically with the magistrate. The respondents contend that it was during this telephone conversation that an agreement was reached between them that the second respondent would re-write the draft judgment. It was neither sent to the Minister's attorney nor was he informed of the involvement of the second respondent in re-writing the draft. The reasons for this conduct have not been stated by either of the respondents.

[6] On 30 November 2012 the second respondent sent per facsimile the judgment to the magistrate. The judgment was ten pages in length with significant amendments and additions effected to the draft. In a statement made later to the police the magistrate stated that he considered the ten page judgment the *'final, official judgment'.* Further comment on the differences between the draft and the judgment will be provided later.

[7] On 4 December 2012 the magistrate appended his signature to the judgment and sent it per facsimile to the second respondent. The Minister's attorney collected a copy of the judgment in the court file from the Clerk of the Court. He transmitted it to the State Attorney for them to comply with the order.

[8] It appears that during April 2013 the second respondent enforced payment of the damages and costs awarded to the plaintiff as these had not been defrayed until then. It is at this stage that it came to the attention of the Minister's employees that there had been a gross irregularity or misconduct in the writing of the judgment. A criminal case on a charge of corruption was opened against the magistrate by the police in Sterkspruit. The magistrate deposed to a warning statement and answered questions from the police. The Minister launched the present review only on 1 April

2014.

[9] At the hearing Mr Matyumza, who appeared on behalf of both respondents, raised a *point in limine* that there has been an unreasonable delay in the launch of the application by the Minister. His argument relied on the contention in the answering affidavit that the judgment at issue was delivered *'during November 2012'* whereas this review application was launched only on 1 April 2014. Mr Matyumza argued that there has been a delay of more than sixteen months which has not been explained. The court was prevailed upon to dismiss the application on this point without a consideration of the merits.

[10] Mr Sishuba, who appeared on behalf of the Minister, submitted that there has only been an eleven months delay. He argued that the Minister could not have known of the misconduct until it came to the attention of the police during April 2013. He correctly conceded that there has been no explanation of the eleven months delay. He strongly argued that the misconduct has been so egregious and unlawful that the court ought to condone the delay so as to deal with the misconduct.

[11] The Constitutional Court has held that when an applicant seeks condonation for delay, a full explanation that covers the entire period must be provided.[1] That court has also stated that the delay cannot be *'evaluated in a vacuum'.* It is necessary that all the relevant factors be considered and a determination be made whether or not there are sound reasons for overlooking the delay.[2] *Tasima* cautioned that *'A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review…'.*[3]

[12] It is perhaps appropriate that the common law principles on undue delay which were recently summarized by the full court of this division be highlighted. They are the following:

"(a) where no time limit has been specified for the institution of review proceedings, such proceedings must be instituted within a reasonable time;

(b) common law remedies may be withheld by a court if a party has delayed unreasonably in bringing the proceedings. The rationale for this rule is that the respondent may be prejudiced by the delay because witnesses may no longer be available, or it may no longer have recollection of the events;

(c) the party seeking condonation must furnish a full and reasonable explanation for the delay which covers the entire duration thereof;

---

[1] *Van Wyk v Unitas Hospital* 2008 (2) SA 472 (CC), 2008 (4) BCLR 442 (CC) at para 22.
[2] *Department of Transport v Tasima (Pty) Ltd* 2017 (1) BCLR 1 (CC) 2017 (2) SA 622 (CC) at para 159.
[3] *Tasima ibid* at para 160.

(d) the issue as to whether or not the delay is unreasonable is a factual enquiry and is not related to the court's discretion;

(e) relevant factors to be taken into account in determining whether an undue delay should be condoned include the nature of the relief sought, the extent and cause of the delay, its effects on the administration of justice and other litigants, the importance of the issues to be raised in the proceedings, and the prospects of success, and;

(f) the potential of prejudice to the respondent occasioned by the delay is a crucial factor in determining whether a remedy should be granted or withheld.[4]"

[13] The issues raised in the review have a wider effect surpassing the narrow interests of the parties involved. They affect the public interest fundamentally. The misconduct at issue is an affront to the foundational values of the Constitution and the basic tenets of the judiciary. The misconduct is a stain on the judiciary which requires that the court determines the merits. It is of singular importance for the integrity of the judiciary that the merits of the review are considered. It would be *'irresponsible and not in the interests of justice'* for this court not to consider the important issues to be raised on the merits. There has been no averment that the respondents would be prejudiced if the delay is condoned and we also could not find any. The applicant has good prospects of success. We are in agreement with the approach propounded by Pickering J (Lowe J concurring) when he dealt with a defective condonation application stating that:

"Unsatisfactory as the circumstances may be, due to the nature of the issues it is preferable to deal with the merits."[5]
The respondents' point *in limine* stands to be dismissed and condonation granted.

[14] In terms of section 165 of the Constitution[6] the judicial authority of the Republic is vested in the courts. A magistrate's court is recognized by the Constitution as a court. Section 165 of the Constitution provides:

"165 (1) The judicial authority of the Republic is vested in the courts.

(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.

---

[4] *Member of the Executive Council for the Department of Health Eastern Cape Province v Gono* (2053/13) [2017] ZAECMHC 48 (24 November 2017) para 15.
[5] *Minister of Safety & Security v Jongwa & Another* 2013 (3) SA 455 (ECG); 2013 (2) SACR 197 (ECG) at para 33.
[6] Constitution of the Republic of South Africa, 1996.

(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

[15] When dealing with these foundational principles the Constitutional Court has said:[7]

"[18] The Constitution thus not only recognizes that courts are independent and impartial, but also provides important institutional protection for courts. The provisions of section 165, forming part of the Constitution that is the supreme law, apply to all courts and judicial officers, including magistrates' courts and magistrates. These provisions bind the Judiciary and the government and are enforceable by the Superior Courts, including this Court. It is in this context that the issues raised in the present matter must be decided.

. . .

[19] In De Lange v Smuts NO and Others, Ackerman J referred to the views of the Canadian Supreme Court in The Queen in Right of Canada v Beauregard, Valente v The Queen and R v Genereux on the question of what constitutes an independent and impartial court, describing them as being 'instructive'. In this context, he mentioned the following summary of the essence of judicial independence given by Dickson CJC in Beauregard's case:

'Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual Judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual, or even another Judge – should interfere in fact, or attempt to interfere, with the way in which a Judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence.'

[20] This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at institutional level it requires structures to protect courts and judicial officers against external interference."

[16] The requirement of judicial officers to not only be independent but also be seen to be independent is one of the foundational prescripts of our law and one of the very important aspects of the rule of law – a fundamental jurisprudential principle. On this constitutional principle the Constitutional Court has said:[8]

"[31] Judicial officers must act independently and impartially in the discharge of their

---

[7] *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa intervening)* 2002 (5) SA 246 (CC) at page 268C-269C.

[8] *Van Rooyen and Others supra* at 271H-272F.

duties. In addition, as O'Regan J points out in De Lange v Smuts, the courts in which they hold office must exhibit institutional independence. That involves an independence in the relationship between the courts and other arms of government. It is that relationship, as laid down in the Magistrates' Act and the Magistrates' Court Act that the High Court held to be inconsistent with the Constitution.
[32] In dealing with this, the High Court adopted the test used in R v Genereux, which is whether the court or tribunal 'from the objective stand point of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence'. That the appearance or perception of independence plays an important role in evaluating whether courts are sufficiently independent cannot be doubted. The reasons for this are made clear by the Canadian jurisprudence on the subject, particularly in Valentine v The Queen where Le Dain J held that:

'Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operations. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception.'

The jurisprudence of the European Court of Human Rights also supports the principle that appearances must be considered when dealing with the independence of courts.

[33] When considering the issues of appearances or perceptions, attention must be paid to the fact that the test is an objective one. Canadian courts have held in testing for a lack impartiality

'the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal … that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude".'

[17] The above test which was formulated in the Canadian jurisprudence and quoted sixteen years ago by our Constitutional Court in the *Van Rooyen* case does aptly define the central issue in this matter. The test is *'what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.'*

[18] Among other things, section 165 of the Constitution deals with the accountability of judicial officers. They account to all persons to whom the Constitution applies. The people are entitled to assume with confidence that the law is applied without fear, favour or prejudice and the constitutional principle of legality is painstakingly observed.

[19] The independence of the courts and judicial officers is not only enshrined in our Constitution but it is a universal principle respected by all civilized judicial systems. The Bangalore Principles of Judicial Conduct[9] identify independence, impartiality, integrity and propriety amongst the six core-values of the judiciary. These principles are intended to establish standards of ethical conduct for judges. They provide guidance to judges in the performance of their judicial duties and afford the judiciary a framework for regulating judicial conduct.

[20] The Bangalore Principles of Judicial Conduct provide that:
"*a Judge shall exercise the judicial function independently on the basis of the Judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference direct or indirect from any quarter or for any reason…. Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made. A Judge shall ensure his or her conduct is above reproach in the view of a reasonable observer. …The behavior and conduct of a Judge must reaffirm the peoples' faith in the integrity of the judiciary. Justice must not merely be done but must also be seen to be done…A Judge shall in his or her personal relations with individual members of the legal profession who practice regularly in the Judge's court, avoid situations which might reasonably give rise to the suspicion or appearance of favoritism or partiality."*

[21] The importance of the independence of the decision maker and the reasons he/she has given for the order has been stated in a number of cases, mostly those dealing with bias. The Constitutional Court in *Stuttafords Stores*[10] dealt with a matter where the Judge had reproduced the heads of argument of counsel for the respondents save for adding thirty-two lines of his own writing. It appeared that the judgment was substantially a reproduction of the heads of argument instead of being the original reasoning of the Judge. The Constitutional Court stated as follows:

"[10] This Court has stated that furnishing reasons in a judgment—
'explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.'

[11] While some reliance on and invocation of counsel's heads of argument may not be improper, it would have been better if the judgment had been in the judge's own words-
'The true test of a correct decision is when one is able to formulate convincing

[9] www.undoc.org>judicial group;accessed on 24/1/2019
[10] *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC) at paras 10 and 11.

reasons (and reasons which convince oneself) justifying it. And there is no better discipline for a judge than writing (or giving orally) such reasons. It is only when one does so that it becomes clear whether all the necessary links in a chain of reasoning are present; whether inferences drawn . . . are properly drawn; whether the relevant principles of law are what you thought them to be; whether or not counsel's argument is as well founded as it appeared to be at the hearing (or the converse); and so on.
. . .
*The very act of having to summarize in one's own words what a witness has said, or what is stated in an affidavit or what a document says or provides, is in itself a very good discipline and is conducive to a better and more accurate understanding of the case.'" (*Footnotes omitted).

[22] Meer J in *Calligeris NO*[11] was faced with facts strikingly similar to those in *Stuttafords Stores*. An award by an arbitrator was a word for word regurgitation of the claimant's heads of argument. It did not contain any independent consideration or assessment of the defendant's argument and defence which were presented to the arbitrator both orally and in writing. The learned Judge expressed herself in the following terms:
". . . the manner in which the arbitrator abrogated his duty to write his own award, and his failure to address the trustees' arguments and defences, prevented a fair trial of the issues. In replicating the heads of argument as his award, the arbitrator did not exercise his own judgment in deciding the issues. The arbitrator's actions clearly prevented the trustees from having its case fully and fairly determined and thus falls under the purview of gross irregularity. . . His actions also permitted his decision making function to be usurped by the claimant's heads of argument in a manner subversive of his independence, and prevented the exercise of his own judgment in deciding the issues. . ."

[23] The Supreme Court of Appeal had occasion in *Total Support Management*[12] to consider the conduct of an arbitrator who had an assistant throughout the hearing. After the hearing the assistant had conducted research and based on a discussion with the arbitrator had drawn the first draft of the award. The arbitrator later spent fifteen hours writing the award himself though he had utilized the draft drawn by the assistant. The court expressed itself in the following apt words regarding the conduct of the arbitrator:
"[41] When selecting an arbitrator the parties to an arbitration agree to someone in whom, by dint of (his or her) experience and ability, they can repose the necessary confidence and trust to determine their dispute. What they seek is a judgment from the person chosen. An arbitrator is not entitled to delegate this function. He alone must perform the duties he has undertaken and with which he has been entrusted ...

[11] *Calligeris N.O. & Another v Parker N.O. & Another* (7937/2017) [2018] ZAWCHC 35 (22 March 2018) at para 27.
[12] *Total Support Management (Pty) Ltd & Another v Diversified Health Systems (SA) (Pty) Ltd & Another* 2002 (4) SA 661 (SCA) at para 41.

Because of the essentially personal nature of his appointment he should be circumspect about using the services of an assistant.... In no circumstances may the assistant be allowed to usurp the decision making function of the arbitrator or act in a manner subversive of his independence. . . ."

[24] It is manifest that this matter impacts on section 34 of the Constitution which provides:
"Everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."
The learned Pickering J has stated that section 34 has the effect of entrenching, as a constitutional value, the right to a fair trial.[13]

[25] In *S v Le Grange*[14] where the Supreme Court of Appeal was dealing with the alleged bias of a presiding officer, the following was stated:
"[14] A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be 'manifest to all those who are concerned in the trial and its outcome . . . .' The right to a fair trial is now entrenched in our Constitution. . . . The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour or prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognized as lying at the heart of the right to a fair trial."

And later in the judgment the learned Ponnan JA eruditely stated:[15]

"[21] It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described - perhaps somewhat inexactly - as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. . . . Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."

[26] The magistrate forwarded his draft judgment to the second respondent. He thereafter discussed the contents of his judgment with the second respondent. He agreed with her that she would write the final judgment. He engaged in the

---

[13] *Jongwa ibid* at para 36 and the authorities cited therein.
[14] *S v Le Grange* 2009 (2) SA 434 (SCA) at 449B-D.
[15] *Le Grange ibid* at 459C-F.

dishonorable conduct of abdicating his responsibility of writing a judgment in the matter to the second respondent. Her involvement in writing the judgment was the antithesis of impartiality. She had a vested interest in the outcome of the case as she represented the four plaintiffs in the matter. It would have been most surprising if the judgment she wrote had dismissed their claims!

[27] An explanation of the misconduct by the magistrate, who did not depose to an affidavit in these proceedings, can be gleaned from an annexure to the replying affidavit. This is a warning statement made by the magistrate to the police in connection with a charge of corruption relating to the impugned judgment. This is the closest one gets to hearing an undiluted version of events from the magistrate.

[28] The magistrate stated the following:
"2. I made the judgment in the matter in question myself on 26 November 2012 and I gave it to Miss Vuthu to type. After the judgment was typed it was brought to me and I read it through. When I was satisfied by the content I then signed it (judgment) and I later faxed it to Mrs Ponoane, the attorney of the plaintiffs on 27 November 2012. I wish to add that my judgment was in favour of Mrs Ponoane or the plaintiffs.
3. Later on, I am not sure about the date, Mrs Ponoane phoned me to confirm receipt of the judgment. On the day Mrs Ponoane phoned me she also raised the format in which my judgment was written. She further informed me that there was a better format that she had seen from a certain advocate with whom she handled another civil matter. Mrs Ponoane and myself agreed that she was to rewrite my judgment, meaning the same judgment I already gave her, in the same manner she had seen without altering the content of my judgment.
4. On 30 November 2012 I received a copy of the judgment that Mrs Ponoane had re-written for me. That judgment was sent by fax to Lady Grey Magistrates Court when I do magisterial work every Thursday of the week. Upon receiving the judgment from Mrs Ponoane I read it through and I was interested by the format in which it was written. When I was satisfied I signed the judgment from Mrs Ponoane.
5. On 04 December 2012 I caused Mr Sipamla, a senior interpreter at Sterkspruit Magistrate's Court to fax the same judgment back to Mrs Ponoane. I kept the fax that I received from Mrs Ponoane in my office for future reference.
6. There was no favour or benefit of any kind to anybody in the process."

[29] The signed draft judgment never found its way to the court file. The first respondent also says he destroyed his manuscript thereof after it was typed. He did not even inform the applicant's attorney that he had asked the plaintiffs' attorney, the second respondent, that his judgment was to be re-written by the latter for whatever reason. After the judgment was re-written from initially having only four pages it more than doubled to ten pages. This is not explained. Most importantly the only signed judgment that was found in the court file is the ten page judgment which had admittedly been re-written by the second respondent.

[30] With these scandalous anomalies not having been explained we are unable to accept the innocence with which this behaviour is sought to be deceptively imbued. On the respondents' own showing it is clear that there was improper conduct on the part of the magistrate who got the second respondent involved in his work, all without the knowledge of the applicant. The behaviour of the second respondent was equally deplorable, probably driven by improper motives. According to her version it was her unsolicited suggestion that the judgment of the first respondent be re-written so that it then '*is in keeping with modern trends of judgment writing*'.

[31] The behaviour of both respondents has not been explained on any cogent basis. It was dishonest and crafty for the magistrate to have no compunction at all at having had secret liaisons with the plaintiffs' attorney about a matter in which he presided. Similarly the second respondent who, after all, is an officer of this court, perhaps blinded by dishonesty and unprofessionalism, sees nothing wrong with what they both did. Her own craftiness and deceit is palpable and in our view has brought the attorneys' profession into disrepute. The audacity with which she sought to unashamedly explain the inexplicable even when her subterfuge had been uncovered is shocking.

[32] This brings us to the magistrate's election not to depose to an affidavit in these proceedings and instead, merely deposing to a confirmatory affidavit. In a case of this nature in respect of which a judicial officer is a litigant it is simply not enough for such a respondent to be content with merely deposing to a confirmatory affidavit.

[33] It is odd and perturbing, to put it mildly, that the magistrate saw no need to depose to an affidavit and in his own words account on how he exercised the authority that the Constitution vests in him. It needs no emphasis that a judicial officer in respect of a matter in which he presided is not an ordinary litigant when the exercise of his judicial authority is being questioned. In such an affidavit the magistrate ought to have given a full, personal version of events in his own words. This is crucial in light of the fact that in essence, the misconduct is that he had abdicated his judicial office and thus put the judiciary as an institution into disrepute.

[34] The conduct of the magistrate is utterly unacceptable as he is not an ordinary litigant. This court was confronted with the unedifying spectacle of a magistrate deposing to a confirmatory affidavit when it
is his judgment that was at issue in the review. Instead the attorney for the plaintiffs *(second respondent)* deposed to the answering affidavit. This was deplorable conduct by the magistrate in failing to explain his scandalous abrogation of the responsibility of writing a judgment to the attorney. Our view that the magistrate had compromised his independence and impartiality was bolstered by the fact both respondents were represented by the same firm of private attorneys – the second respondent's firm - and the same Counsel.

[35] A comparison of the draft and the judgment indicates that the judgment was predominantly in the second respondent's words. She assessed the evidence of the witnesses and decided to reject the evidence of the Minister's sole witness. She further accepted the evidence of her own clients and gave reasons for doing so. The difference between the two documents is pronounced. This misconduct violated the core values of the judiciary including the truism from antiquity that *'one cannot be a judge in his own case'.*

[36] The second respondent astonishingly explained the differences between the draft and the judgment in the following terms:
"I wish to point out that even where one compares these two annexures [the draft and the judgment], he will find that their tone and style is not the same up to their respective court order though the content of the results it's the same being in favour of the plaintiff."
Read in the context of the affidavit as a whole, she makes the point that the re-writing was not improper as the magistrate had already indicated the order to be granted in the draft. The magistrate in his statement to the police labours under the same fallacious reasoning that only the order is important.

[37] A court order is a consequence of the assessment of the evidence and the application of the law to the facts. It is manifest from the authorities cited above that it is not only the order that is important. Equally important are the reasons which result in the order. The process of coming to a decision for a judicial officer starts with the consideration of the matter and a formulation of the reasons. It is those initial steps that inform the order to be granted. It is an act of inherent intellectual dishonesty at best and at worst down-right fraudulent to have one person decide what order to give and thereafter have another person make up the reasons for that order post *facto*.

[38] In the answering affidavit the respondents sought refuge in the version that the draft had been the magistrate's judgment. The second respondent asserted that she only improved on the draft to show the magistrate a better way to write a judgment in the future. This version only has to be stated for it to be rejected as a fabrication. The purported signed version of the draft sent to the second respondent has never been produced nor was it placed in the court file. For all we know, it does not exist. The magistrate directly contradicted this version in his warning statement to the police. The magistrate said the judgment is the *'final, official'* one.

[39] Another aspect requires our comment. The judgment was ostensibly delivered by the magistrate in faxing it to the second respondent. The magistrate in his statement to the police further disclosed that it is an accepted procedure in the magistrates' court for a judgment to simply be placed in the court file and the parties' attorneys are expected to uplift the judgment from the court file.

[40] Section 5(1) of the Magistrates' Court Act 32 of 1944 provides that:
"(1) Except where otherwise provided by law, the proceedings in every court in all criminal cases and the trial of all defended civil actions shall be carried on in open court, and recorded by the presiding officer or other officer appointed to record such proceedings." (Own emphasis).
Rule 55 of the Magistrate's court rules provides that:
"(10) All opposed applications shall be heard in open court." (Own emphasis).

[41] Applying the principles of interpretation enunciated in *Endumeni Municipality,*[16] both the Magistrates' Court Act and the rules require that hearing of trials and applications be conducted in open court. The word hearing in this context must be read to include the delivery of judgments and orders. It is absurd to read the Act and the rules to provide that only the tender of evidence and arguments constitute a hearing to the exclusion of delivery of judgments. Such an absurdity would also be contrary to transparency which is a thread that runs through the Constitution.

[42] It is trite that our Republic is a constitutional State. The institutions of State and the officials may act only in accordance with the powers conferred on them by law. This is the principle of legality, an incident of the rule of law[17] which is a foundational value of the Constitution. It is salutary practice that delivery of a reserved judgment must be done in open court. The High Court and the Appellate Courts routinely follow this practice. We find no reason for the magistrate's court not to apply this practice. If this practice had been applied in this case there would have been no allegation by the respondents that the draft was the actual judgment.

[43] In our strong view the only reasonable conclusion is that the conduct of the respondents was indeed an unconstitutional, disgraceful, dishonest and unlawful abuse of the judicial authority which the Constitution vests in the courts. In our view the misconduct under review is beyond the pale. The costs are to be awarded on a punitive scale as a mark of our disapproval of the respondents' misconduct.

[44] Accordingly, the applicant must succeed in his application. In the result the following order will issue:

44.1 The proceedings and judgment in consolidated Case No 12/2009 in the magistrates' court for the district of Herschel are reviewed and set aside.

44.2 The trial in the abovementioned case must be heard *de novo* before another magistrate from outside the magisterial district of Herschel.

---

[16] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 ALL SA 262 (SCA); 2012 (4) SA 593 (SCA).
[17] *Gerber v MEC of the Gauteng Provincial Government, Development Planning & Local Government* [2002] 4 ALL SA 518 (SCA), 2003 (2) SA 244 (SCA) at para 35.

44.3 This judgment is referred to the Legal Practice Council to investigate the conduct of attorney Zoleka Susan Ponoane.

44.4 The first and second respondents are ordered to pay the costs of this application on an attorney and client scale.

From The Legal Journals

Spies, A

"The judicial relevance and impact of victim impact statements in the sentencing of rape offenders"

SACJ Volume 31 Number 2, 2018, 212

Abstract

*This article explores the relevance and importance of victim participation in criminal justice proceedings, specifically the use of victim impact statements in the sentencing of rape offenders. It questions the restorative framework within which victim participation has developed and, analyses key court decisions to establish if the restorative purpose of victim impact statements are adhered to. Feminist arguments are explored and focus on the dangerous influence victim impact statements might have in reinforcing sexist and racist stereotypes in an already conservative criminal justice system. Although the South African government advocates for a criminal justice system that supports restorative justice principles, its sovereign state character maintains a retributive framework. The conclusion is reached that victim impact statements are of little use in sentencing practice, as its restorative character is distorted by retributive outcomes***.**

Reddy, M

"Section 174 of the Criminal Procedure Act: Is it time for its abolition?"

2018 *De Jure* 251

This article can be downloaded here:
http://www.dejure.up.ac.za/images/files/vol51-2-2018/Chapter%20Reddy_2_2018.pdf

Bekink, M

"S v Haupt 2018 (1) SACR 12 (GP) *Defeating the anomaly of the cautionary rule and children's testimony"*

2018 *De Jure* 318

This article can be downloaded here:
http://www.dejure.up.ac.za/images/files/vol51-2-2018/Chapter%20recent%20case%20law_2_2018.pdf

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

Contributions from the Law School

Mistaken identity of the victim in criminal law

Along with the drama and pathos that the trial of Oscar Pistorius brought to a multitude of South Africans, who devotedly followed the events (and dissections of events) with great dedication, the case also highlighted and publicized a number of legal rules and doctrines. Who would have thought, for example, that the term of art *dolus eventualis* would emerge as the subject of such quizzical interest for so many? Other issues which emerged are no less interesting from a legal perspective, but are admittedly of much more narrow and parochial interest, being limited to those who are required to apply substantive criminal law, whether in the courts or in the classroom. One of these is the *error in obiecto* notion (the spelling '*obiecto*', rather than '*objecto*' which more typically appears in the textbooks, is more correct, and will be used below). The word 'notion' is carefully selected, since describing *error in obiecto* as a *rule*, has been firmly (and, it is submitted, correctly) dismissed as incorrect by Snyman (*Criminal Law* 6ed (2014) 188): '[It] is not the description of a legal rule; it merely describes a certain type of factual situation.' Burchell's point of departure is even more stark: '[T]he so-called *error in objecto* rule has uncertain, dubious origins and reference to it, even as a description of a factual predicament,

should be excluded from the lawyers' lexicon' (*Principles of Criminal Law* 5ed (2016) 406n58). Phelps ('The Role of *Error in Objecto* in South African Criminal Law: An Opportunity for Re-evaluation Presented by *State v Pistorius*' (2016) 80(1) *The Journal of Criminal Law* 45 at 46) uses the phrase 'little-known principle' to describe this 'factual predicament'. The author in Kemp *et al Criminal Law in South Africa* 3ed (2018) 263 does not use any nomenclature when discussing the legal position arising out of this factual situation.

Let us investigate further. The definition of *error in obiecto* (in the criminal law context) is 'mistake as to the quality or identity of the object of the attack' (Hiemstra & Gonin *Trilingual Legal Dictionary* 2ed (1986) 192). Technically, it should be said, the definition extends to both an *error in persona*, a mistake regarding the identity of the person on whom the harm is inflicted, and an *error in obiecto*, which mistake, as already indicated, relates to the quality of an object. For the purposes of the present discussion, and for the sake of simplifying the discussion, the term *error in obiecto* will be used (but this usage is subject to the *caveat* just mentioned). The discussion will also be limited to homicide, though clearly *error in obiecto* has a wider application.

Although mentioned in a number of textbooks, the term *error in obiecto* has to a large extent lain dormant in the language of our legal practice, the judgments of the courts. However, it emerged in the extensively analysed and criticised judgment of the trial court in the Pistorius murder trial (*S v Pistorius* 2014 JDR 2127). In the judgment of the court the following statement of the law was set out (at 45, emphasis in original):

'There is thus in the case of error in *objecto* so to speak an undeflected *mens rea* which falls upon the person it was intended to affect. The error as to the identity of the individual therefore is not relevant to the question of *mens rea*.'

This is a correct statement of the law, and indeed, the court's affirmation of this position is further clarified in relation to the facts (at 47, emphasis in original), when it states:

'We are clearly dealing with error in *objecto* or error in *persona*, in that the blow was meant for the person behind the toilet door, who the accused believed was an intruder. The blow struck and killed the person behind the door. The fact that the person behind the door turned out to be the deceased and not an intruder, is irrelevant.'

Unfortunately this is the high point of the court's reasoning, as it then proceeds to conclude (at 50) that the accused 'did not subjectively foresee' as a possibility that the shots he fired would kill the deceased, thus excluding *dolus eventualis*, and the possibility of a murder conviction, and concomitantly rendering any discussion of *error in obiecto* unnecessary. This conclusion flies in the face of the court's further conclusion that the accused was acting in putative defence (at 69-70): either the accused failed to foresee the fatal harm resulting when he fired through the toilet door at the 'intruder', and therefore lacked intention, *or* he acted intentionally, believing as he fired the shots that he was entitled to do so (putative defence). The accused cannot logically occupy both factual positions.

Phelps has written in support of the judgment of the trial court in *Pistorius*. After a good general synopsis of the development in South African law which has given rise to the current position based on the subjective, psychological approach to criminal liability, which incorporates a discussion of *dolus eventualis*, *error in obiecto* and putative defence, Phelps makes three arguments which pertain directly to what Phelps believes is a mistaken approach to *error in obiecto*. She argues (i) that the identity of the deceased is still relevant to some extent in a charge of murder (at 59-60); (ii) that if identity were never relevant, *dolus indeterminatus* would be rendered superfluous (at 60); and (iii) that in considering the relevance of the victim's identity in a charge of murder it is necessary 'to distinguish between an abstract prohibition (the definition of the crime) and the concrete charge' (at 60-61).

On appeal, the Supreme Court of Appeal gave short shrift to the contention that the identity of the victim matters. Applying *error in obiecto* (puzzlingly referred to as a principle of *dolus eventualis*), the court held that 'although a perpetrator's intention to kill must relate to the person killed, this does not mean that a perpetrator must know or appreciate the identity of the victim' (*Director of Public Prosecutions, Gauteng v Pistorius* 2016 (1) SACR 431 (SCA) at para [31]). Pistorius was consequently convicted of murder.

What of Phelps' arguments? As indicated, Phelps argues that identity of the victim remains relevant insofar as a murder charge is concerned, citing (at 60) definitions of the test for intent in the case law and in academic writing referring to 'the deceased' or 'the victim' to indicate that the intent applies to a *particular* victim, on the basis of the definite article 'the' (argument (i)). However, it is submitted, such definitions merely reflect the factual scenario in such a case. The accused in a murder trial is not charged with the death of a hypothetical victim, but a real one, and it is with regard to this real victim that the accused must intend harm.

But what of the contention that this would render *dolus indeterminatus* superfluous (argument (ii), at 60)? Phelps states that *dolus indeterminatus*, which can occur in association with any of the standard forms of intention (direct, indirect or *dolus eventualis*), refers to where the perpetrator 'does not have a particular victim in mind, but they intend to kill someone' (at 60). The SCA accepted that the situation in *Pistorius* – shooting at an intruder through a closed toilet door – would amount to *dolus indeterminatus* (at para [31]). However, the victim in *Pistorius*, though not known to the appellant, was certainly determinate – it was the person behind the door, a particular and specific victim. This addresses Phelps' concern. Accepting that *error in obiecto* does not negate liability – it is murder where a specific human being is targeted and killed, even if the victim's identity is mistaken by the perpetrator - does not do away with *dolus indeterminatus*, which deals with the situation where the perpetrator's intention is directed, in Snyman's words (at 196), 'not at a particular person, but at anybody who may be affected by his act'.

Phelps' contention that a distinction must be drawn between the abstract prohibition and the concrete charge (argument (iii)) relates back to the point raised earlier (pertaining to argument (i)). Indeed, a criminal charge relates to a particular act, a particular harm, a particular victim. If the accused did not subjectively intend to

unlawfully inflict the particular harm, then liability cannot follow for an intention-based crime. In this Phelps is entirely correct. However, the example that she proceeds to use, and the conclusion that she draws on this basis, are less secure. Phelps (at 61) uses the example of X, who intentionally blows up a shopping centre, killing a number of persons. X acts with *dolus indeterminatus* – that is, he does not know the identity of the victims he is targeting, but nevertheless intends their death. Unbeknown to X, his mother, who he believes to be safe in bed at home, is also at the shopping centre when the bomb detonates, and is one of the fatalities. Phelps argues that X does not have intention in respect of his mother's death, as he did not at any stage intend to kill *her*. However, in terms of *dolus indeterminatus* (as indicated above), X clearly intended the death of the unknown victims at the shopping centre when the bomb detonated. His mistake as to the identity of (one of) the victims can hardly avail him, in the light of his steadfast intent to kill all those who were in the vicinity of the bomb.

Before concluding, it may be useful to return to Burchell's analysis of the legal position. Burchell argues that *error in obiecto* amounts to a type of transferred intent 'leading to an *automatic* exclusion from the intention inquiry of the relevance of the identity of the ultimate victim' (at 404, author's emphasis). Burchell continues to argue that such an approach is moreover 'inflexible', should, if applied, be limited to situations involving *dolus directus*, but should preferably be abandoned altogether (at 405). He further contends (at 405) that

'[a] rule that error as to the identity of the ultimate victim or victims is *always* irrelevant to criminal liability for homicide is very different from a particular general form of intent that requires the State, in every case where it is in issue, to prove the presence of this general form or forms of intent beyond reasonable doubt.'

In response, it may first be noted that, as Burchell agrees (at 406n58), *error in obiecto* is not a *rule* binding the court, but merely the description of a particular factual scenario. Secondly, motive or desire plays no role in liability, thus it is irrelevant whether the accused *wanted* to kill the particular victim. The relevant question is whether the accused *intended* to kill the particular victim, whom he or she (at least) foresaw might be unlawfully killed as a result of the accused's act (or omission). Whether the result was *desired*, is a matter for sentencing. Thirdly, Burchell's argument does not sit well with Milton's statement (which Burchell cites with approval at 404), that *error in obiecto* liability flows from 'an undeflected *mens rea* which falls upon the person it was intended to affect'. Why abandon this terminology, when it usefully labels a particular situation where liability continues, as a result of such a mistake being non-material? Use of such a term helps to distinguish this situation from a material mistake, such as when the accused in fact killed a person while believing he was shooting an animal. Where the death of an animal was intended, the necessary element of murder that the killing of a human being must be intended would be excluded, and thus liability for murder could not follow.

To conclude, there is no need to throw the baby out with the bathwater, on the basis of antipathy to the result in *Pistorius*. Though unelaborated in the case law and previously essentially limited to a theoretical concern in South African criminal law,

and though non-existent in English law, *error in obiecto* (and *error in persona*, which as indicated above, is really what is contemplated when we are discussing mistaken identity in the context of murder) is well-known in Dutch and German law, and became a part of South African criminal legal theory at the same time as the reception of *dolus eventualis*. As a descriptor of a particular factual situation which does *not* negate intention to commit a crime, *error in obiecto* still has a useful role to play in South African law, just as it does on the European continent.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

Will new hate speech Bill criminalise social media activism against racism, sexism and homophobia?

The National Assembly Portfolio Committee on Justice and Correctional Services is currently processing the Prevention and Combating of Hate Crimes and Hate Speech Bill. While the Bill has laudable aims, the sections of the draft Bill dealing with hate speech is not without its problems. The fear is that in its current form the Bill might well be used by those with economic, social or political power to silence their critics, and to end difficult discussions about race, gender and sexuality (amongst other things).
As I grow older, I have become more sceptical of the power of legislation (and of constitutional rights) to undo systemic forms of oppression and social and economic injustice. It is true that the law can sometimes provide relatively quick relief to individuals who have been wronged by somebody else – if those individuals have access to the requisite resources, of course. It can also be argued that the law may (over time) have a positive impact on the society, because at its best it may serve to educate people and to change societal culture for the better.

But it would be rather naïve to believe that passing the *Prevention and Combating of Hate Crimes and Hate Speech Bill* will lead to a quick end to systemic racism, patriarchy or homophobia in South Africa. But even on its own terms, the Bill is not without its problems. The aspect of the Bill that particularly interests me is section 4 which creates the criminal offence of hate speech. While the Promotion of Equality

and Prevention of Unfair Discrimination Act (PEPUDA) currently regulates hate speech, it does not criminalise hate speech. Individuals found guilty of hate speech in terms of PEPUDA do not get a criminal record and cannot be imprisoned.

Section 4 of the new Bill would change that. Section 4(1)(a) of the Bill defines the crime of hate speech as follows:

Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to (i) be harmful or to incite harm; or (ii) promote or propagate hatred, based on one or more of the following grounds: age; albinism; birth; colour; culture; disability; ethnic or social origin; gender or gender identity; HIV status; language; nationality, migrant or refugee status; race; religion; sex, which includes intersex; or sexual orientation, is guilty of an offence of hate speech.

The Bill does not say what would be "harmful", but does define "harm" as "*any* emotional, psychological, physical, social or economic harm". Harm is not qualified by requiring that it must be 'severe" "significant" or "substantial". This means that if a reasonable person would conclude that your statement was intended to inflict any emotional, psychological or economic harm on another person because that person (amongst others) is white or black, male or female, gay or straight, religious or an atheist, it would constitute a criminal offence.

Let's think of some possible examples to see whether the Bill might not have consequences not intended by the drafters. As the examples will illustrate, I fear that the Bill might have a chilling effect on speech aimed at exposing injustice and privilege, and on many forms of robust political engagement.

First example. Imagine yet another prominent man is accused of rape or sexual harassment and in response to this a woman tweets: "We need to fight back against these disgusting men. All men are thrash." Depending on the context, a reasonable person may well conclude that the woman had the intention to cause emotional or phycological harm to the alleged perpetrator because he is a man, or to some or all men, or that she was inciting emotional or psychological harm against some or all men. If correct, the woman would be committing a criminal offence and in terms of section 6(3)(a) of the Bill for (if it was a first conviction) she could be sent to a prison term of up to 3 years.

Second example. Imagine a white man criticises the leader of the Economic Freedom Fighters (EFF) and points out that Malema still faced possible prosecution for corruption, fraud and money laundering relating to government contracts his political allies secured in Limpopo. In response an EFF supporter then tweets back: "Go back to Europe, you bloody settler. You whites stole the land so you must shut up. No matter what you say, we are coming for your land." Again, given the broad definition of harm, and depending on the context, the EFF supporter may well be guilty of a criminal offence and liable for a 3-year jail sentence.

A third example. The heterosexual owners of a wedding venue refuse to host same-sex weddings. I am incensed. I write an article in which I criticize "toxic heteronormativity" and heterosexual privilege and call for a boycott of the wedding

venue owned by “these vile heterosexuals”. By doing so, I might well be exposing myself to possible prosecution for hate speech, again facing up to 3 years in jail.

Similarly, if yet another white person goes on a racist rant, and in response people on Twitter advocate a boycott of the “white owned business” where the racists is employed, it might meet the definition of the crime of hate speech as the tweets might reasonably be construed as having the intension to incite economic harm against people based on their race.

Some of these examples illustrate a further problem with the Bill. As it currently reads, it does not take account of the fact that the impact of hateful speech on those who have suffered and continue to suffer from patterns of disadvantage and harm, will be far more severe than on those who are politically, socially and economically privileged and are not systematically subjugated because of their race, gender or sexuality.

There is a huge difference between a white person, heterosexual person or a man using speech with the intension to humiliate, inflict psychological harm, or incite physical harm against a black person, homosexual person or a woman respectively, than the other way around. In most cases (and, again, depending on the context) the impact in the first set of instances would be potentially far more severe than in the latter set of instances.

It is true that section 7 of the Bill requires the National Director of Public Prosecutions (NDPP), after consultation with the Director-General: Justice and Constitutional Development and the National Commissioner of the South African Police Service, to issue directives prescribing circumstances in which a charge of hate speech *may* be withdrawn, or a prosecution stopped. Moreover section 4(3) states that any prosecution for hate speech must be authorised by the Director of Public Prosecutions or a person delegated by him or her.

This may potentially limit the possible impact of the crime of hate speech, but this may itself be a problem as it would grant an almost unlimited discretion for prosecutors to decide when to prosecute and when not. The principle of legality requires legislation that creates criminal offences to be clear and precise. Granting such a broad discretion to the NDPP allowing them to decide case-by-case when to prosecute and when not to prosecute, might infringe on the legality principle as it might become very difficult to know when you have done something that will be prosecuted and when not. In any event, this section does not preclude the pursuit of a private prosecution so does not address my earlier concerns.

The Bill contains another provision that may make it a criminal offence to call out racists, sexists and homophobes on social media, and may make it difficult, maybe in some cases even impossible, to alert others on Twitter or Facebook or WhatsApp about such racist, sexist or homophobic statements. Section 4(1)(b) states that:

Any person who intentionally distributes or makes available an electronic communication which that person knows constitutes hate speech as contemplated in paragraph 4(1)(a), through an electronic communications system which is: (i) accessible by any member of the public; or (ii) accessible by, or directed at, a specific person who can be considered to be victim of hate speech, is guilty of an offence.

Recall the event last year when someone distributed the racist rant of Adam Catzavelos on social media in order to expose his racism. Most people who distributed the video in which Catzavelos used the most extreme racist language did so because they knew that this constituted hate speech, were disgusted by the video, and wanted to alert others to this racism, perhaps hoping that a groundswell of disgust from South Africans would have both economic and legal consequences for Catzavelos.

If section 4(1)(b) as it now reads had been passed at the time this happened, every single person who distributed the video or quoted from the video on Facebook, Twitter or WhatsApp may well have been guilty of a criminal offence. Section 4(1)(b) is phrased in such a way that the state would not have to prove that you had the intension to promote hate speech when you distributed it, but only that you had the intension to distribute the hate speech (even if this was to expose the racism of Catzavelos).

It is true that section 4(2)(c) of the draft Bill provides important exceptions to protect individuals against prosecution, stating that the prohibition on distributing hate speech does not apply if it is done in good faith in the course of engagement in:

fair and accurate reporting or commentary in the public interest or in the publication of any information, commentary, advertisement or notice, in accordance with section 16(1) of the Constitution of the Republic of South Africa, 1996.

The exact meaning of this section is not easy to decipher. The first part obviously protects journalists who report or comment on hate speech occurrences. But how would they get to know about it if it is a criminal offence to spread hate speech as stated by section 4(1)(b) of the Bill? Also, in the age of social media, how does one make a neat distinction between fair and accurate reporting or commentary (presumably by journalists) and the more chaotic “reporting” done by citizens on social media. It is as if this section was drafted in 1994, before people who are not paid journalists had the ability to share and distribute information via social media.

I have re-read the second part of clause 4(2)(c) about 20 times and I still do not understand what it means. Maybe it is an attempt to cover the kind of situation that arises when ordinary people distribute hate speech in order to expose it – as happened in the Catzavelos case. But if that is so, the section does not achieve what it sets out to do. This is because it appears to allow non-journalists to publish information or commentary that is protected by the freedom of expression provision contained in section 16(1) of the Constitution. That would not include hate speech excluded by section 16(2) of the Constitution, which means the distribution of the Catzavelos video might remain a criminal offence.

I have raised only some of the potential problems with the current text of the draft Bill. Parliament still has the opportunity to amend the Bill and when it does so, it would be good for members of Parliament to consider the potential ways in which the Bill may be abused to stop robust (even rude) political discussion, or to protect the privileged from criticism.

Prof Pierre de Vos on the blog *Constitutionally Speaking* on 26 February 2019

A Last Thought

…" despite the best efforts of judges to be fair and impartial they *cannot* keep an open mind throughout the trial. In fact, a fundamental component of human cognition is the automatic evolutionary impulse to "make sense" of and give meaning to the barrage of stimuli to which it attends, even under circumstances in which the information is insufficient to support a definitive conclusion. A crucial attribute of automatic brain processes is their inescapability; they occur despite a deliberate attempt to bypass or ignore them. Thus, judges, as are all human beings, are not passive information receivers; they are active information processors."

Gravett '*Opening address: Powerful tool of persuasion or a waste of time?* ' 2018 *De Jure* 194-214 on 196