e-MANTSHI

A KZNJETCOM Newsletter

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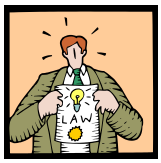
Welcome to the hundredth and fifty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 establishment of an Investigating Directorate in the Office of the National Director of Public Prosecutions has been proclaimed by the president in respect of amongst others the following criminal offences:

1. Common law offences of:

(a) Fraud,

(b) Forgery,

(c) Uttering

(d) Theft; and

(e) Any offence involving dishonesty; and

2. Statutory offences including but not limited to contraventions of:

(a) The Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004);
(b) The Prevention of Organised Crime Act, 1998 (Act No. 121 of 1998);
(c) The Protection of Constitutional Democracy against Terrorist and Related Activities, 2004 (Act No. 33 of 2004);
(d) The Public Finance Management Act, 1999 (Act No 1 of 1999);
The proclamation in this regard was published in Government Gazette no 42383 dated 4 April 2019.

Recent Court Cases

1. S v Wildridge 2019 (1) SACR 474 (ECG)

A presiding officer is to actively assist an unrepresented accused in order to ensure that his or her trial is fair.

Plasket,J
[1] The appellant was convicted, in the Magistrate's Court, King William's Town, of negligent driving, an offence created by s 63(1) of the National Road Traffic Act 93 of 1996. He was sentenced to a fine of R2 000 or six months imprisonment suspended for four years. He appealed, with the leave of the court below, against his conviction. The State conceded the appeal on the basis that the appellant's trial had been unfair. We set aside the appellant's conviction and sentence, and undertook to furnish reasons in due course.

[2] The appellant was initially represented by a legal representative. He apparently lost faith in his legal representative and decided to defend himself in his trial. Not surprisingly, he ran into difficulties during the course of the trial. The crux of this appeal, in large measure, concerns the way in which the magistrate conducted himself when the appellant did not know how to proceed.

[3] Section 35(3) of the Constitution provides that everyone has the right to a fair

trial. That right includes the right to be represented by a legal practitioner of an accused person's choice[1] and to be legally represented 'at state expense, if substantial injustice would otherwise result'.[2] The corollary of the right to legal representation is the right to represent oneself.

[4] In *S v Nkwanyana & others*,[3] Nestadt JA said that while an accused has a common law fundamental right to legal representation, 'he also has a fundamental right to represent himself'. And, in *S v Khanyile & another*,[4] Didcott J held:

'Like most rights, the right to representation is capable of being waived. Once it is forgone willingly and with a true understanding of things, what is more, the waiver is accomplished. Foisting a lawyer on somebody determined to do without one then infringes his rights. For the right to conduct his own defence, should he so wish, is no less essential to a fair trial than the right to be represented.'

[5] The effect of an accused deciding to represent himself or herself, and the duties it creates for the presiding officer, were commented on by Milne JA in *S v Tyebela*:[5]

'There is a further general factor which must be borne in mind. Generally speaking, the length of a criminal trial increases substantially if the accused declines to accept the services of counsel and conducts his own defence. He is quite entitled to do so but it substantially increases the burden on the trial Judge. The Judge is then in the invidious position of being an arbiter and, at the same time, an adviser of the accused because he must explain the rules of procedure and evidence to the accused. In these circumstances, it is a human failing if the Judge gives way to irritation when confronted with the situation that the accused declines to accept the services of *pro deo* counsel. That it is a failing, however, admits of no doubt . . .'

[6] A criminal trial is not a game and a presiding officer is not a mere umpire. He or she is 'an administrator of justice' whose duty is not only 'to direct and control proceedings according to recognised rules of procedure but to see that justice is done'.[6] That duty has special significance when an accused is unrepresented. Generally speaking, an unrepresented accused will have little to no knowledge of procedure and the law of evidence and little, if any, forensic skills. As a result, the law places obligations on a presiding officer to actively assist an unrepresented accused in order to ensure that his or her trial is fair.[7]

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[1] Section 35(3)(*f*).
[2] Section 35(3)(*g*).
[3] *S v Nkwanyana & others* 1990 (4) SA 735 (A) at 738E.
[4] *S v Khanyile & another* 1988 (3) SA 795 (N) at 811B-C.
[5] *S v Tyebela* 1989 (2) SA 22 (A) at 31D-E.
[6] *R v Hemsworth* 1928 AD 265 at 277.
[7] Steytler *The Undefended Accused* at 61.

[7] The presiding officer's duty, in such a case, includes controlling the production of evidence and preventing the admission of inadmissible evidence;[8] informing the accused of his or her right to cross-examine every State witness and to explain to the accused the nature and purpose of cross-examination in a meaningful way;[9] and accommodating the accused's inability to cross-examine by assisting him or her (by, for instance, helping to formulate his or her questions) and by questioning some State witnesses himself or herself (for instance, experts or witnesses concerning identification).[10]

[8] The record discloses a disturbing failure on the part of the magistrate to comply with his enhanced duties to ensure a fair trial when an accused is unrepresented. In the first place, he was pointedly hostile to the appellant because he had opted to defend himself and used this fact as an excuse, it seems to me, to be decidedly unhelpful. This became clear early in the proceedings when the prosecutor wanted to hand in a sketch map – and this before he had called the witness who had drafted it. The magistrate asked the appellant if he objected to the sketch map being handed in and, when he said that he contested its accuracy, the record continues as follows:

'Court: The question is, do you have any objection for that acceptance of this?
Accused: Am I – if I – I do not understand the procedure.
Court: That is why you need a lawyer. That is why you need an attorney. You see now you are stuck and you do not understand what you have to do now.
Accused: I can ask the . . . (intervention).
Court: Because I have not to assist you how to conduct the proceedings.
Accused: If I accept these plans does it mean I cannot challenge anything in it? Because it shows me turning from within the road and I . . . (intervention).
Court: You see the lawyer was going to say we will provisionally accept this and you are going to . . . (indistinct).
Accused: I cannot hear you. Can I not come closer?
Court: You must please get a Legal Aid attorney to assist you otherwise this trial is not going to – I do not think it is in your best interest that you conduct your own defence, you need somebody to assist you in the proceedings. As I am looking at the things right now you will need somebody to assist you, you have to go back to Legal Aid and make a re-application otherwise we cannot proceed with you, I do not think it would be . . . (intervention).

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[8] Steytler *The Undefended Accused* at 140; *S v Nkosi* 1980 (3) SA 829 (A) at 845C; *R v Noorbhai* 1945 AD 58 at 74-75; *R v W* 1947 (2) SA 708 (A) at 717.
[9] Steytler *The Undefended Accused* at 142-143; *Sitole v R* 1959 (1) PH H82 (N) at 177; *Field v S* 1967 (2) PH H308 (N) at 583; *S v Mkhise* 1986 (2) PH H105 (W) at 183.
[10] Steytler *The Undefended Accused* at 144-151; *S v Khambule* 1991 (2) SACR 277 (W) at 280g-282b; *S v Kibido* 1988 (1) SA 802 (C) at 804H-J; *S v Sebatana* 1983 (1) SA 809 (O) at 812G-813A; *S v Rall* 1982 (1) SA 828 (A) at 831C.

Accused: May I ask one question, if I accept this plan can I not say it does not show when I give my evidence . . . (intervention).
Court: It is not the court procedure that you have to ask the Court and then the Court has to answer you. That is why I am saying you need an assistance of Legal Aid attorney.
Accused: Your Worship, I am sorry I do not know the procedure, but I do wish to defend myself. I wish to ask the witnesses questions myself.
Court: It is difficult, now you are asking me questions of which you are not supposed to do that.
Accused: I do not know the . . . (intervention).
Court: That is the reason, if you do not know you need someone who is legally trained to assist you, you are going to tell him the whole story, and then he knows very well how to present the case before Court.
Accused: Mr – Your Worship I did tell an attorney my case and he was supposed to tell me the court date, he told me a wrong court day, he told me a Saturday. I asked him to please let me know the correct date, I heard nothing from him, I had to go myself to find the correct date.
Court: That does not have any relevance to what we are dealing with right now.
Accused: No, it explains why I do not have – why I would rather defend myself. All I am asking is for you or somebody to tell me the consequence of admitting this document. Does it mean I cannot challenge it or does it mean it is just like other evidence, it can be challenged, that is all I ask.
Court: Mr Wildridge I think it is wise that you get a lawyer, otherwise we cannot . . . (indistinct).
Accused: Your Worship I truly believe that I can defend myself if I know the consequence of admitting . . . (intervention).
Court: Well, do not ask me questions please.
Accused: I won't ask you.
Court: Don't ask me anything what to do.
Accused: No, I am sorry if I asked you questions when I should not have. I do not understand . . . (intervention).
Court: Do you have any objection for the acceptance of this document that the State made an application for the handing in to court?
Accused: I would like to object yes, Your Worship.'

[9] When the first State witness had given his evidence in chief, the Magistrate gave the appellant an explanation of sorts in respect of cross-examination. He told him that he could put questions to the witness to 'dispute whatever fact you do not agree with in his testimony' and that 'you may as well reveal your side of the story and tell the witness what actually happened on the day in question'. This explanation apprised the appellant of the bare minimum of the purpose of cross-examination

and, it seems to me, was inadequate.

[10] When the prosecutor objected to a question that the appellant had put to a witness, on the basis that 'it is hearsay which is not taking this Court anywhere on the case', the magistrate simply asked the appellant: 'What is your reply to the objection?' No explanation of the basis of the objection was given by the magistrate and he did not even explain to the appellant what hearsay evidence was. The magistrate did not ask the appellant whether he intended calling the expert witnesses whose opinions he had referred to in the question. This may have resolved the objection. He did not advise the appellant that it would be necessary to call them if he wanted to establish what they had said in their affidavits.

[11] The magistrate also failed to assist the appellant, and was unhelpful and hostile, when he wished to rely on a photograph of the scene of the accident, which incidentally had already been shown to two State witnesses. When the appellant referred to the photograph in his evidence in chief and wanted to hand it to the magistrate, the record proceeds as follows:
'Court: It is not accepted, it is not complying with the requirements laid down by the law for the acceptance of the photograph.
Accused: How do I – I do not understand, what must I do to have it accepted Your Worship? I do not know. It is a photograph which I could show the witnesses, can I not show you as well?
Court: For acceptance, you see here are the key (?) I did not accept this as evidence to stand because it does not comply with the requirements sought by the Court.
Accused: Well . . . (intervention).
Court: So if you want that to be accepted by the Court you have to lay down foundations which are required by the law of evidence for the acceptance of those photographs.
Accused: And I am afraid I don't know what these requirements are, can you tell me what they are?
Court: Well I cannot be representing you as an attorney to tell what requirements you should meet.
Accused: Your Worship I understand in . . . (intervention).
Court: And to convince the Court as to why those photographs to be accepted.
Accused: I understand from the Constitution Your Worship that I do have a right to defend myself.
Court: Yes you do have the right, but I am not – I cannot stand to represent you.
Accused: So I cannot find out how to have these photos submitted, that is it.
Court: Mr Galt please let us not make a dialogue. You are leading evidence and I am telling you I am not accepting it because it does not comply with the requirements, you have to lay down the foundations for the Court to accept the photographs in your

hand.
Accused: Then I will do it verbally Your Worship, if I may . . .'

[12] It is clear from the passages from the record that I have quoted that the magistrate expressly disavowed his duty to assist the unrepresented appellant, and told him in no uncertain terms not to seek his assistance. In this respect he committed an irregularity that prejudiced the appellant in the conduct of his defence and rendered the trial unfair.

[13] There is a further feature of the trial that rendered it unfair. When the appellant was cross-examined by the prosecutor, the magistrate allowed him to interrupt the appellant repeatedly so that he was prevented from replying to questions properly and fully. This, taken with the passages I have quoted above is indicative of hostility towards the appellant on the part of the magistrate (with the prosecutor not far behind) and, at the very least, the creation of an apprehension in the mind of a reasonable person that the magistrate was not even-handed and fair.

[14] Mr Els, who appeared for the State, conceded the appeal as he could not support the conviction in the light of the magistrate's conduct. That was a correct and proper course to take as a State Advocate or prosecutor acts not as a partisan participant in the proceedings, entitled to pursue a conviction at all costs, but as a representative of the State and the community at large, and in the interest of justice:[11] the State Advocate or prosecutor is, as Lansdown, Hoal and Lansdown said more than 60 years ago, 'a minister of truth'.[12]

[15] Mr Els and the appellant signed a document drafted by Mr Els consenting to an order setting aside the appellant's conviction and sentence on the basis that he had not had a fair trial. We then made an order to that effect.

[16] These, then, are our reasons for the order we made setting aside the appellant's conviction and sentence.

2. S v Khathutshelo and Another 2019 (1) SACR 480 (LT)

A legal representative should always maintain the decorum of the court and protect its legitimacy in the eyes of the public so that its confidence is not eroded in their eyes.

[11] Steytler *The Undefended Accused* at 135.
[12] Lansdown, Hoal and Lansdown *Gardener and Lansdown: South African Criminal Law and Procedure* (6 ed) Vol I at 384.

Mangena AJ

[1] The two accused are charged with the offence of contravening section 4 read with section 1,2,4 (2),24,25 and 26(1)(a) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. They appeared before magistrate Kellerman of the Regional Division of Limpopo held at Dzanani.

[2] They pleaded not guilty to the charges and stated the following as the basis of their defence in terms of section 115 of the Criminal Procedure Act 51 of 1997 as amended.

i. The name of the agent as indicated on the directive of the DPP differs from the actual agent utilized in the entrapment.

ii. The entrapment and their subsequent arrest took place outside of the time frame period indicated on the directive of the DPP.

iii. The conduct of the said agent went beyond providing an opportunity to commit an offence, and

iv. The handler of the agent and the actual agent was one and the same person.

[3] As the state was relying on the provision of section 252(A) of the Criminal Procedure Act, the accused through their legal representative submitted to the court that they deny the admissibility of the trap evidence which is in the possession of the state. They then indicated that they would like to have a trial - within - a trial held to determine the admissibility of the trap evidence. The state objected to the holding of a trial-within-a trial on the basis that the evidence on the admissibility is intertwined and closely connected to the evidence on the merits of the case.

[4] After listening to the submission, the learned magistrate made a ruling that "a trial - within - a trial is not necessary .The accused will allow the state to present its evidence before the court and the court will then after hearing all of the evidence make a ruling with regard to the admissibility of entrapment"

[5] Aggrieved by the ruling, the accused are approaching this court by way of a special review in terms of section 304(4)(A) of the Criminal Procedure Act 51 of 1977 as amended.

[6] The review landed on the desk of my brother Makhafola J who directed a query to the parties in the following terms:

"The most important question to attend first is ; *Can* a *special review be at the instance and request of* a *legal practitioner or is it at instance and request of* a *Magistrate?*

[7] Comments were received from Advocate Madzhuta of the office of the Director of

Public Prosecutions as well as magistrate Kellerman. I am thankful for their valuable inputs. I am in agreement with the submission they made that section 173 of the constitution grants the high court inherent powers to review cases brought to them where the interest of justice so requires. However, I am of the view that such proceedings should be brought on notice in terms of the procedure prescribed by the Uniform Rules. There should be a substantive application clearly setting out issues for determination and same should be supported by an affidavit. The accused failed to do so and there is therefore no proper review to be considered.

[8] In the event I am wrong in my finding that the accused did not follow the correct procedure, I nevertheless believe that the review should still fail.

[9] It is trite that, as a general rule, a high court will not by way of entertaining an application for review; interfere with uncompleted proceedings in a lower court. See Motata v Nair No and Another, [2008] ZAGPHC 215; 2009 (1) SACR 263.

[10] In Wahlhaus and Others v Additional Magistrate, Johannesburg and Another, 1959 (3) SA 113 (A) Ogilvie Thompson JA (as he then was) put the position as follows:
"It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may in a proper case,, grant relief by way of review, interdict or mandamus against a decision of a magistrates court given before conviction. This, however, is a *power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power, for each case must depend on its own circumstances .The learned authors of Gardiner and Lansdown state that*
"While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, *and will do* so *in rare cases where grave injustice might otherwise result or where justice might not by other means be attained----in general, however ,it will hesitate to intervene especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available"*

[11] In Ismail and others v Additional Magistrate,Wynberg and others, 1963 (1) SA 1 (A),the position was authoratively stated by the learned Judges as follows:
"I should point out that it is not every failure of justice which would amount to a gross irregularity justifying interference before convicti6n. As was pointed out in Wahlhuis and others v Additional Magistrate, Johannesburg and another, where the error relied upon is no more than a *wrong decision, the practical effect of allowing an interlocutory remedial procedure would be to bring the magistrates decision under*

appeal at a *stage when no appeal lies. Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is* a *real one and should be maintained. A superior court should be slow to intervene in unterminated proceedings in the court below. and should generally speaking. confine the exercise of its powers to rare cases were grave injustice might otherwise result or were justice might not by other means be attained'*

[12] The above position has been followed in a number of cases and it has been expressed that the underlying reluctance of the courts to interfere in unterminated proceedings in the lower court is the undesirability of hearing appeals or reviews piecemeal. In Eliovson v Magid, 1908 TS 558 at P 561, Innes CJ stated the position as follows:
" *It is quite true that as a judicial rule judicial proceedings are only brought under review after a final decision has been given and as a general rule that would be the most convenient and proper course". See also Lawrance v Assistant Resident Magistrate of Johannesburg,* 1908 TS 525.

[13] In the context of the review of the decision regarding the procedure to be followed in case of entrapment, the court held in S v Matsabu, 2009 (1) SACR 513 that our courts have long accepted that it is both desirable and necessary, to the end of achieving a fair trial, to try issues of the voluntariness of extra-curial statements or conduct of accused persons separate from the merits of the case. Therefore the holding of a trial within-a-trial will usually be appropriate to decide admissibility under S252A.However section 252A (7) provides implied legislative sanction for a trial court to exercise a judicial discretion on whether to try admissibility as a separate issue. There is recognition that there may be cases where the interest of the accused will not be prejudiced by either the making of a ruling without hearing evidence or even delaying a ruling until the conclusion of the case.

[14] The reason why legislature gave the presiding officer the discretion in such matters is to enable him/her to be in control of the proceedings. A presiding officer is inherently possessive of a fair and just mind. Her oath of office requires of her in the performance of her duties to exercise the discretionary powers in the interest of justice .The role of a presiding
officer in the management of the trial was stated by Curlewis J A in R v Hepworth, 1928 AD 265 as follows;
"A criminal trial is not a *game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and* a *Judge's position in* a *trial court is not merely that of an empire to see that the rules of the game are observed by both*

parties. A Judge is an administrator of justice, he is not merely a *figure head; he has not only to direct and control the proceedings according to the rules of procedure but see that justice is done"*

[15] The exercise of the discretion may favour either the accused or the prosecution. None of the parties is entitled to have the discretion exercised in his or her favour. Once the discretion has been exercised, it can be called into question on appeal on various grounds.

[16] A careful perusal of the record reveals that the learned magistrate was aware of the provisions of section 252(A) as well as the risks inherent in the evaluation of the evidence in so far as admissibility is concerned. She has in my view correctly applied her mind to the facts including the basis of defence stated by the accused and in the exercise of her judicial discretion arrived at a decision that a trial-within-a-trial will not be necessary. This is made clear by the following statement:
"the court is not saying that the court is not going to rule on the admissibility of the entrapment, the court is just indicating that with regard to this case, it is from what the prosecution had addressed the court upon, not possible to isolate the evidence that will be led in the trial-within-a-trial from the evidence that touches on the merits of the case".

[17] In the circumstances, I am not able to find any reason to interfere with the ruling of the learned magistrate. The accused have failed to demonstrate and make out a case for intervention to avoid grave injustice.

[18] I am accordingly not persuaded that the circumstances of this case warrant an exercise of the power to set aside the proceedings.

[19] Having disposed of the matter, I am constrained to comment on the conduct of counsel for the accused and the utterances he made after the magistrate had ruled on the procedure. The record shows that counsel said the following:
Counsel: I am here to defend my client's and I do not just want to be overruled in that manner.
Court: You are not overruled.
Counsel: Ja but you must learn to listen. Listen to what I am saying.
Court: Please proceed
Counsel: You have to listen to me Court: I am listening
Counsel: We are not only here to listen to you
Court: Counsel, please proceed. I am listening
Counsel: I can't hear
Court: I am saying I am listening. Please proceed.

Counsel: Yes I am saying that we do not want this court to hear the merits of the case. That is why we want a trial-within-a-trial to be held. Now it cannot be, not in that fashion. Why jump straight into the merits of the case and then claim you will tell us when you want, you feel that a trial within a trial will be held. I cannot even think that feeling here. It will never be held. I still maintain, let us hold a trial within a trial. What is the difficulty with that, it is the state because they say it will make the trial long unnecessarily."

[20] The words used by counsel were both unnecessary and unfortunate. They demonstrated acute lack of respect to the court and its role in the administration of justice. Judges and magistrates alike have been entrusted with the most difficult job....to find the truth and administer justice between man and man. They are fallible like all others and in recognition of this weakness, there is a hierarchy of courts so that mistakes can be corrected on appeal or review. It does not serve any purpose for a practitioner to be theatrical and make demands which he knows the court is not in a position to accede to.

[21] The ethics of the legal profession says an advocate is an officer of the court. As an officer of the court he is required to assist the court in the administration of justice. In as much as counsel has a duty to advance his/her client's case with zeal, vigour and determination, he should always remember that his primary duty is to the court. His role in court is not only to push his or her client's interests in the adversarial process. Lord Reid puts it better when he says " *As an officer of the court concerned in the administration of justice,* a *barrister{legal practitioner] has an overriding duty to the court, to the standard of the profession, and to the public, which may and often does lead to* a *conflict with his client's wishes or with what the client thinks are his personal interests".*

[22] It is axiomatic therefore that an advocate should in the execution of his duties act with integrity and professionalism. He should always measure his words and be of good temperament. He should understand that he makes submissions to court with a view to persuade it to find in his client's favour. He does not make demands. Once the court has made a ruling, it becomes his duty as a person trained in law to advise a client on the remedies available to correct what he may regard as an error of fact, law or procedure.

[23] He should always maintain the decorum of the court and protect·its legitimacy in the eyes of the public so that it's confidence is not eroded in their eyes. More than hundred years ago in the winter of 1908 Chief Justice Innes said the following about practitioners:
"*Now practitioners, in the conduct of* cases, *play an important part in the*

administration of justice. Without importing any knowledge or opinion of their own....they present the case *of their clients by urging everything both in fact and in law, which can honourably and properly be said on his behalf". Incorporated Law Society v Bevan,* 1908 TS 724.

[24] The paramountcy of the duty to the court is of the utmost importance to the effective functioning of the legal system. It is imperative that lawyers, clients and the public understand this. The integrity of the rule of law and the public interest in the administration of justice depend upon it. When lawyers fail to ensure that their duty to the court is at the forefront of their minds, they do a disservice to their clients, the profession and the public as a whole. See paper by Honourable Marilyn Warren AC, 09 October 2009: The duty to the court - sometimes forgotten.

[25] In the premises, the special review application is dismissed. The accused must appear before the same Magistrate Kellerman for the matter to be proceeded with in accordance with her ruling.

From The Legal Journals

Radyn, L

“Determining the crime for concealment of birth.”

***De Rebus* 2019 (April) 19.**

This article can be accessed here:
http://www.derebus.org.za/determining-the-crime-for-concealment-of-birth/

Hoctor, S

"Of Housebreaking and Common Purpose : *S v Leshilo* 2017 JDR 1788 (GP)"

Obiter 2018 825

Abstract
Some aspects of substantive criminal law generate more controversy than others. One of the features of the common-law crime of "housebreaking with the intent to commit a crime" is the possible difficulty of proving what "further intent" the accused harboured upon breaking into premises: what crime did the accused intend to commit within? To assist the prosecutor in this regard, the legislature intervened by extending the ambit of the common-law crime to include not just housebreaking where the "further intent" of the accused could be properly identified, but also housebreaking where the "further intent" of the accused could not be identified. Thus, in terms of the Criminal Procedure Act (51 of 1977), a charge of housebreaking with intent to commit a crime "to the prosecutor unknown" (s 95(12)), and a conviction in these terms (s 262) was established. (Similar legislative assistance dates back to the early 20th century. For further discussion, see Hoctor "Some Constitutional and Evidential Aspects of the Offence of Housebreaking with Intent to Commit a Crime" 1996 17 1 Obiter 160). These provisions have proved very controversial, with De Wet commenting that in providing this statutory extension to the common-law crime, the legislature miraculously created a representation of something that is conceptually impossible (De Wet Strafreg 4ed (1985) 369).

Jokani, M, Knoetze, E and Erasmus, D

"A criminal law response to the harmful practices of *ukuthwala"*

Obiter 2018 747

Abstract
This article deals with the criminal consequences of the customary law practice of ukuthwala that has been in the news in the recent past in both print and electronic media, whereby elderly men forcibly take young girls for purposes of marriage. A distinction is drawn between ukuthwala, forced and early marriage in order to clarify the concept of ukuthwala. The article considers the question of whether additional legislation is needed to criminalise the thwala custom. The article concludes that forced and early marriages constitute crimes, are illegal, harmful and have no place in a modern constitutional order. It further provides a response to the legal

*challenges arising from the customary law practice by means of common law and legislation. In conclusion, it recommends that South Africa does not need separate legislation to criminalise ukuthwala and its variants***.**

Van der Walt ,G

"Alternative care in South Africa."

Obiter 2018 615

Abstract
Currently, South Africa has an estimated 5,2 million abandoned children in need of care. Facing the highest rate of deaths worldwide from HIV/AIDS, and as a developing country, many children are left in need of care. The current article considers the status of alternative care in South Africa in light of the State's ability to provide appropriate alternative care for those in need thereof.

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

Contributions from the Law School

What is the position where a fingerprint is the only evidence implicating the accused?

In the case of *Ben Nkomo (also known as Bhekani Khumalo) v The State*, unreported case no. A150/2018, the appellant was convicted by a regional court of robbery with aggravating circumstances on the sole basis of a fingerprint of his which was found on a fence at the back of the property where the robbery took place. On petition to the high court, he was granted leave to appeal against his conviction only.

It is not necessary to discuss the evidence of the complainants – the appellant did not challenge their evidence but simply contended that he had not been the perpetrator of the robbery.
The complainants had not been able to identify the appellant at an identification parade.
However, there was fingerprint evidence incriminating him.
The evidence relating to the robbery showed conclusively that the robbers had exited the property at the back, by climbing over a fence there. A single fingerprint belonging to the appellant was found on the fence.
In relation to fingerprint evidence generally the court observed that circumstantial evidence that an accused's fingerprints were found at the scene is usually strong probative evidence linking the accused to the crime. Normally it is decisive evidence. However, the court cautioned that the evidential value of fingerprint evidence found at the scene is a question of fact which must be assessed on the totality of the evidence. In certain circumstances even partly speculative evidence may exonerate the accused. In other words, where the accused can provide a plausible possible explanation for the presence of his fingerprints at the scene, other than that he was involved in the crime, this must be evaluated on the probabilities and the explanation may exonerate him, even if it is partly speculative (at para [7]). The court referred to the cases of *S v Legote en n ander* 2001 (2) SACR 179 (SCA) at para 3, and *S v Nzimande* 2003 (1) SACR 280 (O) at 283 i-g in this regard (at para [7]). An older case which is relevant is *R v du Plessis* 1944 AD 314 where the accused who was confronted with the fact that his fingerprint was found on a stolen car, rebutted the incriminating value of the evidence by partly speculative evidence.
In the instant case, the appellant sought to introduce such speculative evidence in an attempt to exonerate himself. He provided three possible explanations for the presence of his fingerprint on the fence at the back of the robbed house, including that it had been planted there. Cross examination revealed the overwhelming improbability of his proffered explanations, which were ultimately rejected by the appeal court. The court concluded that '[t]he evidence in respect of the appellant's fingerprint was clear and persuasive and the court a quo correctly convicted the appellant solely on that evidence' (para [11]). In the result the appeal was dismissed.
It is by no means unusual for an accused to be convicted on fingerprint evidence alone in South Africa (see, for example, *S v Arendse* 1070 (2) SA 367 (C), *S v Nzimande* 2003 (1) SACR 280 (O), *Lekgau v S* (A 191/15) ZAGPPHC 281 (9 March 2016), *S v Nduna* 2011 (1) SACR 115 (SCA)). In South Africa seven points of similarity between the lifted print and that of the accused is sufficient to prove a match. Comparable jurisdictions have traditionally required between eight and sixteen matching characteristics (L Meintjies-Van Der Walt 'Fingerprint Evidence-Probing Myth and Reality' (2006) *SACJ* 152 at 166) with some (like Brazil and Argentina) requiring thirty, and some abandoning the numeric approach altogether in

favour of a more holistic assessment (W De Villiers 'Fingerprint Comparison Evidence has been under Sustained Attack in the United States of America for the Last Number of Years: Is the Critique Sufficiently Penetrating to Warrant the Exclusion of this Valuable Evidence?' (2014) 42:1 *International Journal of Law, Crime and Justice* 54 at 73).

Internationally there has been a great deal of concern about the reliability of fingerprint evidence. There have been a number of major reports commissioned, including, most recently, 'The Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods Report by the President's Council of Advisors on Science and Technology' report of 2016 (available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf accessed on 28 March 2019), and 'The Forensic Science Assessments: A Quality and Gap Analysis: Latent Fingerprint Examination of the American Association for the Advancement of Science' report of 2017 (available at https://www.aaas.org/resources/latent-fingerprint-examination accessed on 28 March 2019).

In the case under discussion, it appears that the reliability of the fingerprint match was not challenged by the defence. The court only concerned itself with whether the appellant could rebut the prima facie case that he was identified at the crime scene by proffering plausible explanations for the presence of his fingerprint there. The dangers of relying on the adversarial system to test fingerprint evidence have been identified. W De Villiers says that:

'[i]t is … not a safe premise to admit the evidence and then to rely on the accused to test the evidence by way of cross-examination and contrary evidence. The vast majority of accused in South Africa do not have the means to secure the services of an attorney or an expert fingerprint examiner and the system of state-funded counsel does not adequately protect accused against injustice. In many instances the state appointed attorney only sees the client the first time minutes before the start of the trial' (supra at 78).

See also the discussion of 'the failure of cross examination as an accusatorial test for expert evidence reliability' by J-M Visser, H Oosthuizen and T Ver Schoor 'A Critical Investigation into Prosecutorial Discretion and Responsibility in the Presentation of Expert Evidence' (2014) 131 *SALJ* 865 at 875-878.

As the law stands however, a court is obliged to accept expert affidavits tendered in terms of s 212 (4) (a) of the Criminal Procedure Act 51 of 1977 as definitive proof of the facts stated therein, unless they are challenged by the defence. In *Seyisi v The State* [2012] ZASCA 144 at para [12], the court held that '[o]ur law is quite clear that if evidence is prima facie evidence and it is not discredited or placed in dispute by the defence … then it must be accepted as proven evidence.'

Challenging expert scientific evidence is however no mean feat, especially in a resource scarce country like South Africa. The problem is not however confined to

South Africa and the international reports, including the two mentioned above, have repeatedly recommended a focus on educating the legal fraternity (both practitioners and decision makers) and making scientific evidence accessible to the ordinary person. A useful place to start is with L Meintjies-Van Der Walt's article 'Fingerprint Evidence: Probing Myth and Reality' (supra at 171-2) where, in her conclusion, she sets out and explains the various ways in which the defence might challenge fingerprint evidence.

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Matters of Interest to Magistrates

A comparison of sections 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act)
Part 2

Introduction

The broad aim of this note is to compare sections 10 and 12 of the Equality Act. In Part 1 the objectives of the Equality Act were set out, followed by an overview of the requirements for hate speech in section 10(1) of the Act. Part 2 addresses the elements of section 12, which prohibits the dissemination and publication of information that unfairly discriminates. Thereafter, sections 10 and 12 are compared

and an indication given of the circumstances in which the prohibitions would be best applied. Finally, as both sections 10 and 12 are qualified by the proviso, its role and the components are also briefly discussed.

Section 12 introduced

Section 12 provides that:

No person may –
a) disseminate or broadcast any information;
b) publish or display any advertisement or notice
that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person.

This section also contains the proviso, which qualifies both sections 10 and 12, and which stipulates that 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 is not precluded by this section". The role of the proviso and a suggested interpretation of its components are set out at the end of this note, once the broad requirements for the section 12 prohibition are clarified.
Section 12 has been much debated. The confusion is caused mainly because the provision classifies and prohibits expressive conduct as a form of unfair discrimination (and not hate speech). Most of the criticism is directed at the unfortunate wording of the prohibition in combination with the proviso and the conflation of unfair discrimination with the prohibition of expressive conduct / hate speech (see Albertyn *et al Introduction to the PEPUDA* (2001) 93-4, 101; Kok "The PEPUDA: Why the Controversy?" 2001 (9) *TSAR* 294; Currie and De Waal *The Bill of Rights Handbook* (2016) 360; Botha and Govindjee "Prohibition through confusion: Section 12 of PEPUDA 4 of 2000" 2017 (2) *Stell LR* 245). Despite this confusion, it appears that the purpose underlying the prohibition accords with a recognised objective in both international and domestic law, namely the protection of equality and the eradication of all forms of unfair discrimination, including speech which promotes discrimination.

The elements of section 12

Unfair discrimination
It is important to note firstly that section 12 prohibits unfair discrimination. This means that the prohibition must be read with the definition of "discrimination" in the Act. Section 12 should therefore be understood to prohibit communications which demonstrate an intention to *discriminate unfairly* against a person *on a prohibited*

ground. Discriminate, in turn, is defined in section 1(1)(viii) as "any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly – (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds". From there it will be necessary to test the fairness of the expressive conduct against the factors in section 14 of the Equality Act.

An intention to discriminate?

Section 12 prohibits a) the dissemination or broadcast of any information and b) the publication or display of any advertisement or notice, *which demonstrates an intention to discriminate*. The intention requirement entails that an objective test be used to determine whether the author intended to subject the group targeted to discrimination. Thus, neither the subjective opinion of the author of the communication, nor the opinion of the recipient thereof, would be decisive in the enquiry. Instead, the intention to discriminate must be reasonably evident from the publication of the expressive conduct, with the context and circumstances surrounding the publication playing an important role. Relevant contextual factors include:

the vulnerability of the target group,
the degree to which the publication reinforces existing stereotypes,
the content and tone of the publication,
the social and historical background at play,
the credibility of the publication,
the purpose of the publication, and
the manner of presentation and its reach.

These factors are similar to those used to test the fairness of discrimination in section 14 of the Equality Act, so there could be some overlap in the enquiries.

It has been argued that an objective test for intention creates an overbroad prohibition. The same arguments are used to object to the hate speech test in section 10(1). As indicated in Part 1, however, in remedial human rights legislation, an objective test for intention is acceptable, provided that the other components of the respective tests are narrowly crafted to ensure a rational connection between the provision and its purpose. In human rights law the emphasis should be on the *effect of the speech* on the target group and the resultant harm, as opposed to the subjective intention of the author of the publication. The Equality Act aims to overcome systemic discrimination against vulnerable groups and promote transformation and reconciliation in society. The underlying purpose of the types of expressive conduct prohibited by section 12 is to create an environment where discrimination flourishes and is easily justified. The focus should be on remedying

such effects. It is also important to bear in mind that the Equality Act does not require intention as a requirement for unfair discrimination – see the definition of discrimination and the prohibitions in section 6 to 9 of the Act. A subjective intention requirement is therefore not needed.

The dissemination or broadcast of any information

None of these terms are defined in the Act. Their meaning must be ascertained by considering their ordinary meaning, not in isolation and "divorced from the broad context of their use", but with reference to the purpose of section 12 and the entire Act.

The word "disseminate" is best defined as the act of spreading information widely or publicly (by circulation in the media or through the means of the internet, for example). "Broadcasting" is similarly wide. It is defined in the Broadcasting Act 4 of 1999 as involving telecommunications intended for the public "by means of radio or any other means of telecommunication or any combination" thereof. These definitions are equally applicable to section 12.

Section 12(a) prohibits the dissemination or broadcast of "any information". It is interesting that "ideas" is omitted, especially as the Constitution protects the reception and imparting of both information *and* ideas as part of freedom of expression. "Information" is usually defined as "facts provided or learnt" about a "situation, person or event" and is a "constituent of knowledge. Thus, in *Democratic Alliance v ANC* (2015 (2) SA 232 (CC) para 144) the Constitutional Court held that "information" includes "only factual statements", as opposed to opinions and comments. The term must be distinguished from "ideas", which is more widely defined. The omission of "ideas" from the ambit of section 12(a) is an indication that the drafters intended to include only factual claims within the restriction. In any event, the task of separating facts from opinions (and ideas) is not an easy one and has caused controversy in both international and foreign law. Perhaps the broadcast and dissemination of "ideas" was specifically omitted to avoid having to deal with potentially hard cases, such as the case of "holocaust denial"?

In summary, section 12(a) should be interpreted as prohibiting the wide and public propagation of actual information that demonstrate an intention to discriminate. The use of the words "*any* information", however, is wide and creates the possibility of an overly broad threshold test (an issue which falls beyond the scope of this note).

The publication or display of an advertisement or notice

Section 12(b) bans the publication or display of any discriminatory "advertisement or notice". These terms are also not defined in the Act. The meaning of "advertisement" is somewhat vague. However, as pointed out by the Supreme Court of Appeal in *Independent Outdoor Media (Pty) Ltd v the City of Cape Town* ([2013] 2

All SA 679 (SCA)) the essence of advertising is “what we all know it to be”, namely to publicise a product, service or event in order to promote sales or attendance or to make something known. Thus, an advertisement is usually a “notice or display advertising something” and a form of communication between the advertiser and the person whose business the advertiser seeks to attract. An advertisement would also include the situation where a person places an advertisement in a newspaper intending to make a discriminatory viewpoint known to the public (as occurred in *Owens v Saskatchewan Human Rights Commission* 2006 SKCA 41, involving the publication of a discriminatory advertisement on the grounds of sexual orientation – discussed below). A notice, on the other hand, is ordinarily defined as a “displayed sheet or placard” containing information, news or instructions.The advertisement or notice must be either displayed or published. The ordinary meaning of display is “to put something in a prominent place” so that it can be easily seen. Similarly, in the Consumer Protection Act 68 of 2008 “display” in relation to a notice or visual representation is defined as meaning “to place or publish” such notice or representation. The term “publish” ordinarily means to make something generally known, either verbally or in writing. In the context of section 12, a publication would also include the communication of an advertisement or notice to others by way of a post on social media (whether on Facebook or an advertising site, such as Gumtree). Thus, the use of “publish” in section 12(b) of the Equality Act potentially permits a far wider range of communications to fall within its scope as compared to section 12(a), bearing in mind that it is only notices and advertisements which demonstrate an intention to discriminate that are regulated.

Examples of expressive conduct falling within the ambit of section 12

Having set out the elements of section 12 of the Act, it is useful to reflect on the types of cases which would fall within the ambit of the prohibition. Here, Canadian law is a useful comparator because the display of "discriminatory signs" is banned both federally and in the provincial human rights codes. Some case examples include:

Stacey v Campbell and Choose Life Canada (2002 BCHRT 35) where a derogatory advertisement was placed in a newspaper criticising the Court for endorsing sexual orientation as a ground of discrimination.

Saskatchewan Human Rights Commission v Bell ([1994] 5 WWR 460 Sask CA) where the respondent displayed and offered for sale three different types of stickers which depicted derogatory caricatures of persons of Chinese, Sikh and African descent within a red circle and with a red stroke through the face (the "universal symbol" for "not wanted or forbidden"). The Court held that the stickers were malevolent and added that "the stickers caused or tended to cause others to engage in discriminatory practices … the inescapable inference is that that was both the purpose and effect of any display of the stickers … their message is obvious. Bell, by displaying them for sale and selling them, provided the means to discriminate. For example, a businessman at his place of business, or a provider of public accommodation at the premises he has let, by posting the stickers … would make it clear that any goods, services or amenities provided would not be made available to the group depicted, or at least that their trade was not wanted."

Owens where, the respondent, an ardent Christian, placed an advertisement in a local newspaper in response to a "gay pride" advertisement which had appeared in the same newspaper. The respondent's advertisement comprised the citation of four Biblical passages (all condemning homosexuality), followed by an equal sign and then a depiction of two stickmen holding hands with a "not permitted" diagonal slash superimposed over the image. It was common cause that in placing the advertisement, the respondent was motivated by a "sincere and *bona fide* conviction forming part of his religious beliefs". After its publication, three homosexual men lodged complaints alleging that it "gave licence to people who wanted to discriminate against gay men". The Court held that an objective approach should be adopted and it had to be considered whether "a reasonable person aware of the relevant context and circumstances of the speech in question" would regard it as exposing members of the target group to discrimination. On the facts, the Court found that whilst the advertisement was offensive and distressing, considered objectively and in context, it amounted to the expression of a sincerely held religious belief.

A perfect South African case for the application of section 12 was *Thiem v MacKay*, SAHRC (SAHRC 18-09-2013 case no FS/1314/008). Here, the respondent, a school teacher, addressed the African children in his class as "baboons" and "kaffirs" and displayed an old South African flag and a poster depicting a caricature of Julius

Malema alongside baboons in his classroom. The teacher was held to have contravened section 10(1) of the Equality Act by engaging in hate speech, but it is certainly arguable that the display of the flag and the poster demonstrated an intention to perpetuate harmful stereotypes about African people and to subject the learners to discrimination.

Another scenario where section 12 could have been better applied was *Democratic Alliance v Volkraad Verkiesing Kommissie* (SAHRC 05-12-2013 case no. MP1213/0024). Here, as part of a protest, placards containing statements such as "Bring my R4" and "Black cowards – leave our women and children alone" were displayed. When responding to the complaint, the respondent stated in justification thereof: "the perpetrators of these killings are black. This is a fact – not unfair discrimination". The SAHRC referred to section 12, quoting it in full. It was not applied however and instead the SAHRC found that the statements constituted hate speech in terms of section 10(1). The SAHRC did however find that the speech was not exempted by the proviso in section 12.

Practical examples of where section 12 could apply include: unfairly discriminatory advertisements, whether used to sell products or to advertise properties for rental or for recruitment purposes (in which case other legislation such as the Employment Equity Act and the Consumer Protection Act may also apply); notices announcing that certain groups of persons are not welcome in a particular store - such as the so-called "Whites only" or "Jews forbidden" signs in shop windows; the display of posters with an unfairly discriminatory message; the broadcasting of discriminatory information – such as an announcement that all people of a particular race or religious grouping are to be denied access to certain facilities; the display of the old South Africa flag where the context demonstrates an intention to discriminate unfairly; and the display of discriminatory advertisements and posts on social media, see, for example, https://www.fin24.com/Companies/ICT/facebook-to-block-discriminatory-ads-in-historic-legal-accord-20190319

Comparison between sections 10 and 12

The purpose of the prohibition in section 12 is to regulate the publication or display of specific types of expression, such as signs, notices, advertisements and the dissemination of information, which demonstrate an intention to discriminate unfairly on a prohibited ground. Here, we are dealing with expressive acts that have the capacity to promote or instigate unfair discrimination. The underlying purpose of prohibiting these forms of expression is to protect vulnerable groups from unfair discriminatory treatment arising from a) the broadcast of discriminatory information and b) the display or publication of advertisements and notices with insidious messages. The focus should be on expression which has a definite propensity to stereotype vulnerable groups by justifying discriminatory treatment against them (as opposed to any person).

The hate speech regulator in section 10, however, should be regarded as a provision intended to regulate all types of speech which promote hatred against a target group and which have the potential to cause harm. The problem, however, is that the wording of section 10 is very wide and tends to blur the lines between hate speech proper (which is concerned with the promotion of group hatred and which incites harm against the group targeted and / or cohesion in society in general) and hurtful inter-personal speech on a prohibited ground. It is for this reason that section 10 has been the subject of much criticism and debate – see Part 1 of this note and the March 2019 findings of the SAHRC dealing with the various Julius Malema hate speech cases, where the issue of the disjunctive and conjunctive interpretation of section 10 is also addressed, https://www.sahrc.org.za/home/21/files/SAHRC%20Finding%20Julius%20Malema%20&%20Other%20March%202019.pdf.

The reality is that in practice many cases fall within the ambit of *both* sections 10 and 12, although the latter section should be reserved for the discriminatory signs, notices and information broadcasting type cases. However, despite the overlap, practitioners should be aware of the distinctions between the two different causes of action. Section 10 requires the application of the hate speech specific requirements (as discussed in Part 1). There is no need to prove unfair discrimination. Section 12, however, requires proof of unfair discrimination in the form of the display or publication (etc) of notices, advertisements, posters (etc) which demonstrate an intention (determined objectively and in context, often overlapping with the unfairness test in section 14 of the Act) to expose vulnerable groups to discriminatory treatment.

The proviso

The proviso 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 the prohibitions in sections 10 and 12. The wording of the proviso has been subjected to much academic criticism, but this is not addressed here (see generally Botha & Govindjee "Hate speech provisions and provisos" 2017 20 (1) *PER* 902). Instead the following key points are made:

The proviso should be treated as a defence in section 10 and 12 cases.
The respondent bears the onus of proving that the speech in issue falls within the proviso's ambit.
The respondent must prove either that the speech amounted to artistic creativity, *or* academic and scientific inquiry, *or* fair and accurate reporting in the public interest, *or*

the publication of any information, advertisement or notice in accordance with section 16 of the Constitution.

The "*bona fide* engagement" requirement in the proviso means that the form of expression in issue must be assessed in its entirety and in light of its context and purpose to determine whether it can genuinely and legitimately be regarded as the engagement in either artistic creativity, or scientific enquiry or fair and accurate reporting in the public interest.

The proviso should thus be used to exclude genuine cases of reporting, the display of artworks and scientific and academic works. See, for example, the decision in *Cape Party v Iziko Art Gallery* (Cape Town Equality Court 04-07-2017 Case No. ECO2/2017), where the Equality Court held that a multi-media artwork by artist Dean Hutton depicting the words "fuck white people" was not prohibited by sections 10 and 12 as it amounted to the *bona fide* engagement in artistic creativity. Here, the fact that the art was displayed at an art gallery as part of an exhibition of protest art were relevant factors.

The meaning and purpose of the phrase "in accordance with section 16(1) of the Constitution" has caused some confusion. Some academics assert that it qualifies all the forms of expression in the proviso. Others argue that it applies only to the publication of any information, advertisement or notice. This section of the proviso is undoubtedly problematic. The better view is that it applies specifically to section 12 of the Act and would find limited application in hate speech type cases. The drafters appear to have repeated the essence of section 12 and then precluded such forms of expression from liability if published "in accordance with section 16(1) of the Constitution". The problem is that it is very difficult to determine the distinction between a notice, advertisement or information falling foul of the Act and one which would be exempted as having been published in accordance with the right to freedom of expression.

Conclusion

The objective in this note was to provide practical input into the elements of sections 10 and 12 of the Equality Act and to explain the interplay between the two sections. Section 10 is a measure which should be used to regulate hate speech. Section 12, on the other hand, should be invoked in cases where the specific types of expressive conduct listed in the section are used as a means to instigate or promote discriminatory treatment of the group targeted. The reality is, however, that poor legislative drafting has clouded the purpose of the respective provisions and opened the door to a number of constitutional challenges. Legal certainty is desperately needed. The effective regulation of hate speech and unfair discrimination is a national priority and should not be obstructed by definitional imprecision.

Whilst not part of this note, practitioners should also bear in mind that section 7 of the Act is also regularly used as a means to address the regulation of racist expressive conduct as a form of unfair discrimination. The academic journal articles referred to in this note address the relevance of section 7 and practitioners are referred to these articles for further reference.

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A Last Thought

In *S v Hadebe, 1998 (1) SACR 422 (SCA) at 426E–H.* Marais JA cited the following passage in *Moshepi & others v R* (1980 – 1984) LAC 57 at 59F–H:
'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.'

Per Majiedt J A in Naidoo v S (333/2018) [2019] ZASCA 52 (1 April 2019) Par 69