e-MANTSHI

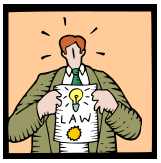
A KZNJETCOM Newsletter

May 2019: Issue 153

Welcome to the hundredth and fifty third 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. **MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION CONCERNING ITS RELEASE OF ISSUE PAPER 36 ON PROJECT 142: INVESTIGATION INTO LEGAL FEES**

The South African Law Reform Commission (SALRC) was established by the South African Law Reform Commission Act 19 of 1973. It is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

The investigation into legal fees and tariffs payable to legal practitioners is prescribed by legislation. Sections 35(4) and (5) of the Legal Practice Act, No.28 of 2014, which came into operation on 1 November 2018, mandate the SALRC to investigate and report and report back to the Minister with recommendations on the circumstances giving rise to legal fees that are unattainable for most people; legislative and other interventions in order to improve access to justice by members of the public; and the

desirability of establishing a mechanism which will be responsible for determining fees and tariffs payable to legal practitioners. If the SALRC considers such a mechanism to be necessary and desirable, it is required to apply its mind on the composition of the mechanism that is contemplated and the process it should follow in determining fees and tariffs. Furthermore, the SALRC is required to consider the desirability of giving users of legal services the option to pay less or in excess of any amount that may be set by the mechanism, and the obligation by a legal practitioner to conclude a mandatory fee arrangement with a client when that client secures that legal practitioner's services.

In doing this, the SALRC must be guided by best international practices; the public interest; the interests of the legal profession; and the use of contingency fee agreements as provided for in the Contingency Fees Act, No.66 of 1997. The issue paper is the first document published by the SALRC during the course of this investigation and therefore does not contain any recommendations for law reform. The paper aims to announce the investigation, initiate and stimulate debate, seek proposals for reform, and will serve as a basis for further deliberation by the SALRC.

The issue paper contains questions aimed at discovering the issues at hand and the extent of the need for law reform. The SALRC specifically requests input and comment on the issue paper as a whole, including the questions which are posed in it. The SALRC would appreciate receiving comment and input from stakeholders on or before 30 August 2019 at the following address:

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South African Law Reform Commission
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The issue paper can be accessed here:
http://www.justice.gov.za/salrc/ipapers/ip36-prj142-LegalFees.pdf

Recent Court Cases

1. Ex Parte: Goosen and Others (2019/2137) [2019] ZAGPJHC 154 (17 May 2019)

The determination of whether or not a judge should recuse himself on the grounds of a reasonable perception of bias was fact specific.

(This is an edited (shortened) version of the judgment. Ed.)

The Court:

Introduction

[1] This judgment addresses a preliminary controversy that arose in the matter of *Ex Parte Goosen & Others,* Case no 2019/2137 before a Full Court of the Division. The controversy was an application that one of the judges, Millar AJ, recuse himself. An order was made dismissing the application for recusal and Millar AJ continued to sit. The judgment on the merits in that matter has been given separately. This judgment gives the reasons for the dismissal of the recusal application.

[2] The Full Court was composed of Sutherland and Modiba JJ and Millar AJ. When the judge president acting in terms of section 14(1) of the Superior Courts Act 10 of 2013, convened the Full Court, the composition of the bench was decided by him.

[3] The matter of *Ex Parte Goosen and others* concerned a controversy regarding the proper interpretation of a point of law. The law in question was the Legal Practice Act 28 of 2014. The controversy arose when certain applications came before the Gauteng Local Division for admission to practice in terms of section 3 of the Advocates Admission Act 74 of 1964 (AAA). The Judge President articulated the terms of reference for the issues to be considered by the Full Court thus:

"Legal Issues:

3. Until 01 November 2018, the admission of Advocates was regulated by the Advocates Admissions Act 74 of 1964 ("the old Act"). On this day the Legal Practice Act 28 of 2014 ("the new Act") came into operation which consequently repealed the "old Act". The new Act contains additional requirements which a prospective advocate has to fulfil before he/she may qualify for admission as an Advocate. These requisites are contained in Section 24 and 26 of the new Act and include vocational

training, a competency examination and community service.

4. It appears that Section 115 of the Legal Practice Act 28 of 2014 may be ambiguous in the sense that it permits any person who was entitled to be admitted as an dvocate under the old Act to be admitted as an advocate in terms of the new Act. The Section is not clear on the issue of compliance with the additional requirements as set out in Sections 24 and 26 therein. The different interpretations of Section 115 have led to conflicting Judgements which could be detrimental to the Advocates profession and the Judiciary if the true intention of the Legislature and meaning of this provision is not clarified.

5. The following issues were raised for the Full Court to consider:

5.1 Should applications for admission as an advocate that were filed prior to the commencement of the new Act on 01 November 2018 be granted or should such applications be considered on the basis of the new requirements as set out in the new Act? In other words, does *section* 115 of the new Act apply to applicants for admission as an advocate, whose applications for admission were pending in any court on 1 November 2018?

5.2 Does Section 115 of the new Act exempt applicants who filed their applications before the commencement of the new Act, from complying with the requirements in terms of the new Act?

5.3 If so, does such exemption apply to all such applicants, *ad infinitum,* and/or should provision be made for a cut off period within which applicants are found to qualify for exemption, should apply for admission?

6. The following additional issues are referred to the Full Court to also determine: –

6.1 Whether a person admitted as an attorney of the High Court before 1 November 2018 is required to:

6.1.1 have his or her name removed from the roll of attorneys before undergoing the practical vocational training prescribed for pupils who intend to be admitted and enrolled as advocates as contemplated in Regulation 7 of the Regulations promulgated under the LPA;

6.1.2 undergo the practical vocational training prescribed for pupils before converting his or her enrolment as an attorney to that of an advocate as contemplated in section 32(1)(a) of the LPA;

6.1.3 whether it is competent for the Legal Practice Council to impose as a condition for the conversion of enrolment contemplated in section 32(1)(a) of the new Act, that

an attorney who wishes to convert his or her enrolment as an attorney to that of an advocate to undergo the practical vocational training prescribed for pupils who wish to be enrolled as advocates?"

[4] In the referral, the Judge President invited several entities concerned with the regulation of the Legal Profession, as cited above, to assist the Full Court as *Amici Curiae.* These invitations constitute invitations by the Court, notwithstanding the fact that the Judge President did not himself sit in the matter. Among the *amici* was the Legal Practice Council (LPC). Submissions were made on behalf of the LPC on the questions of law. These submissions were prepared by counsel: Adv H Maenetje and Adv R Tshetlo and argued by Adv Tshetlo. It was unnecessary for any *amici* to adduce any evidence and the issues at stake were purely questions of interpretation of the LPA.

[5] Millar AJ is a practising attorney. He is also a sitting member of the LPC. The capacity in which he sits on the LPC is as an *ex officio* representative of the Attorneys Fidelity Fund. That membership is part-time and unremunerated.

[6] Mr Mullins, for the GCB, at the hearing, moved for Millar AJ to recuse himself in order, so it was contended, to avoid the perception of bias arising from a conflict of interest derived from his membership of an *amicus* appearing in the matter. The application disavowed the existence of any actual bias and was premised purely on the need for any perception of bias to be avoided.

[7] The fact that Millar AJ is a member of the LPC was probably well known by the Legal Profession, and his membership of the Full Court was made known when its composition was communicated to the parties and to the *amici*. In any event, the fact of his position on the LPC was expressly disclosed to the parties and to the *amici* immediately prior to the hearing on 13 February 2019.

[8] The application for a recusal was not supported by any of the ten applicants who were the parties before court. Counsel for the first applicant, Goosen, expressly disavowed any support for the recusal application and argued that Millar AJ continue to sit.

[9] Other than the Pretoria Bar, the other *amici* did not support the application for recusal. Some *amici* took up the stance that disclosure of the membership of the LPC was sufficient to eliminate any lack of transparency. They were content that Millar J continue to sit.

The Law on recusal by a judge

[10] The Code of conduct[1] for judges addresses recusal thus:

[1] R865: GG35802, 18 October 2012.

"Article 13: Recusal
A judge must recuse him- or herself from a case if there is a-

(a) real or reasonably perceived conflict of interest or

(b) reasonable suspicion of bias based upon objective facts,

and shall not recuse him - or herself on insubstantial grounds.

Notes:

Note 13(i): Recusal is a matter regulated by the constitutional fair trial requirement, the common law and case law.

Note 13(ii): A judge hears and decides cases allocated to him or her, unless disqualified therefrom. Sensitivity, distaste for the litigation or annoyance at the suggestion to recuse him- or herself are not grounds for recusal.

Note 13(iii): A judge's ruling on an application for recusal and the reasons for the ruling must be stated in open court. A judge must, unless there are exceptional circumstances, gives reasons for the decision.

Note 13(iv): If a judge is of the view that there are no grounds for recusal but believes that there are facts which, if known to a party, might result in an application for recusal, such facts must be made known timeously to the parties, either by informing counsel in chambers or in open court, and the parties are to be given adequate time to consider the matter.

Note 13(v): Whether a judge ought to recuse him- or herself is a matter to be decided by the judge concerned and a judge ought not to defer to the opinion of the parties or their legal representatives."

[11] Article 13 of the Code reflects the effect of our case law on the question. The leading authority is the decision in *President of the Republic of South Africa and Others v South African Rugby Football Union & Others* 1999 (4) SA 347 (CC). The test was addressed at [35] – [48]. In summary, the Constitutional Court emphasised that the presence of impartiality by a judge to be a 'cornerstone of any fair and just legal system'. The question to be posed is whether a reasonable apprehension of bias on the part of the judge exists. There is an anterior presumption that a judge is impartial (this plainly must apply to an acting judge too[2]). The test must therefore be objective and an onus to establish the pertinent facts and the inference rightfully to be drawn, rests on the person who alleges it.

[12] The Constitutional Court expressed itself thus at [45]:

'From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the *onus* of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in

[2] Examples of cases where an acting judge has been the subject of a recusal application include: Moch v Nedtravel 1996 (3) SA 1 (A); Locabail (UK) v Bayfield Properties Ltd and Another et al [2000] 1 ALL ER 65 (CA).

Canada. For the past two decades that approach is the one contained in a dissenting judgment by De Grandpr, J in *Committee for Justice and Liberty et al v National Energy Board:*

'. . . 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. . . . [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude".'

In R v S (RD) Cory J, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet:*

'Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough,* or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Judge was not impartial.'

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.'

[13] More recently, the Constitutional Court, in applying this norm, said the following, per Ngcobo CJ in *Bernert v ABSA Bank* 2011 (3) SA 92 (CC) at [31] – [33]:

'[31] What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'. Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'. And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution.

[32] As is apparent from the Constitution, the very nature of the judicial function requires judicial officers to be impartial. Therefore, the authority of the judicial process depends upon the presumption of impartiality. As Blackstone aptly observed, '(t)he law will not suppose a possibility of bias or favour in a judge, who [has] already sworn to administer impartial justice, and whose authority greatly depends upon that

presumption and idea'. And, as this court observed in *SARFU II*, judicial officers, through their training and experience, have the ability to carry out their oath of office, and it 'must be assumed that they can disabuse their minds of any irrelevant personal beliefs and predispositions'. Hence the presumption of impartiality.
[33] But, as this court pointed out in both *SARFU II* and *SACCAWU*, this presumption can be displaced by cogent evidence that demonstrates something the judicial officer has done which gives rise to a reasonable apprehension of bias. The effect of the presumption of impartiality is that a judicial officer will not lightly be presumed to be biased. This is a consideration a reasonable litigant would take into account. The presumption is crucial in deciding whether a reasonable litigant would entertain a reasonable apprehension that the judicial officer was, or might be, biased.'

[14] Accordingly, it is self-evident that the fate of a recusal application depends on the totality of the relevant facts in a given case. This means that the person who is 'reasonably' aggrieved by the presence of a particular judge would also have to have been 'properly informed' as to the relevant facts and take an objective, view of those facts.

Is there a *reasonable* apprehension of bias?
[21] Independently of the lack of standing, satisfaction of the test for bias is addressed.
[22] The question can posed thus: Could there be an apprehension, reasonably held, that Millar AJ, (an attorney in private practice, who, in a part-time and unremunerated capacity serves the legal profession as a non-executive member of the LPC, which institution, at the request of the court, has briefed counsel to contribute to a debate on a point of law) is likely to be biased about the views expressed on behalf of the LPC about that point of law?

[23] The fact that several of the *amici* and the parties themselves did not think so is not evidence that the perspective is unreasonable. Nevertheless, it may be appropriate, in a given case, to give those views weight.

[24] In our view, the application made by Mr Mullins for the GCB, errs on the side of undue fastidiousness.

[25] It is unnecessary for a judge to occupy a place of utter isolation from an issue or from even a party for that matter. Judges do not recuse themselves when the banking Institution who keeps their money is sued and comes before them. Similarly, holding shares in a public company quoted on the stock exchange does not trigger bias or a perception of bias unless the value of the shareholding is substantial and likely to be affected by a judgment.

[26] In the absence of the LPC having a view on an issue at stake, it cannot be

said that a member of the LPC acting in a judicial role, could be compromised.[3] Millar AJ is, in any event, not bound by the views of the LPC in his personal capacity or his professional capacity as an attorney, still less in his capacity as an acting judge. The application does not rely on the LPC having a view, other than self-evidently its counsel advising it of *their* view in composing the argument presented.

[27] What exists is 'mere' association. More is needed. The association must be of a nature to contaminate the expectation of a fair and unbiased decision

[28] The facts and circumstances in *Goosen* can be sharply contrasted with that in the leading case on 'association' - *R v Bow Street Metropolitan Stipendary Magistrate and Others Ex Part Pinochet Ugarte* [1999] 1 ALL ER 577(HL) (the Pinochet case). Lord Hoffmann was held to have erred in not recusing himself in the Court of Appeal under circumstances where he and his wife had a connection to Amnesty International, a charity, which held views adverse to Mr Pinochet's interests, and, had on its own initiative, sought to be, and had been admitted, as an *amicus* in the matter brought before the Court of Appeal. No similar predicament exists in this matter; the LPC has no view about the ten applicants who are the parties and its concerns are related solely to what meaning can be attributed to the provisions of the LPC.

[29] There is in our view, an absence of the type of "connection" described in *Ebner v official Trustee in Bankruptcy* (2000) HCA 63; 205 CLR 337 at [8]. There it was held that:
"There must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a judge …has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the *nature of the interest and the asserted connection with the possibility of departure from impartial decision making is articulated*." (Emphasis supplied)

Conclusions
[30] Accordingly, the recusal application was without merit and accordingly refused.

[3] Cf: *S v Boesman (Supra).*

From The Legal Journals

Schwikkard, P J

"Does cross-examination enhance accurate fact-finding?"

SALJ, Volume 136 Number 1, Mar 2019, p. 27 - 41

Abstract
In this note I argue that cross-examination does not contribute sufficiently to the truth-seeking function of the court and that it is time for a reconsideration of our colonial procedural heritage. I have deliberately chosen to focus on cross-examination, a single component of complex trial procedure. I do so for two reasons: (i) to make the scope of this note manageable; (ii) because it sits at the heart of adversarial systems.

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

Contributions from the Law School

Corporal punishment and the new Constitutional Dispensation

Introduction
In terms of the common law, the position was that parents were permitted to chastise their children providing it was done moderately and reasonably for the purpose of maintaining authority, educating or disciplining child. In such cases the conduct would be viewed as being lawful (B Bekink "When do parents go to far? Are South African parents until allowed to chastise their children through corporal punishment in their private homes (2006 *SACJ* 173 at 178). Various factors were set out by the courts to determine whether or not such conduct was deemed equitable and fair: (1) type of

offence committed by the child (2) motive of the parent (3) degree of punishment (4) objective of chastisement (5) mental and physical condition of child (B Bekink *supra*). Further, because the common law conferred authority on parents to act, they were hesitant to interference with such authority (B Bekink *supra*). With the advent of the new constitutional democracy, various fundamental changes were brought to the South African legal system. Most notably that not only are all laws or conduct that are inconsistent with the Constitutional invalid but further that obligations imposed by the Constitution must be fulfilled. In other words, the state is obliged to protect, respect and promote any rights set out in the bill of rights. Therefore, the common law position in relation to disciplinary chastisement would now need to be evaluated against rights set out in the Bill of Rights. (Bekink 180). This would essentially mean that in terms of section 8(3) of the Constitutional of the Republic 1996, all laws are subject to constitutional scrutiny and the court may therefore, have to develop the common law to give effect to a right or to limit a right if it becomes necessary. The question is then whether the reasonable and moderate chastisement defence as well as subsequent cases supporting this position (*R v Janke and Janke* 1913 TPD 382; *Du Preez v Conradie and Another* 1990 (4) SA 46 (BG)) can survive constitutional scrutiny? It would appear that they do not.

The Constitutional challenge: YG v S

In the case of *YG v S* 2018 64 (GJ) the appellant was tried in the Johannesburg Regional court on two charges of assault with the intention to do grievous bodily harm. The first charge related to an assault of the accused's 13 year old son and the second charge related to an assault of his wife (at para [1]) The trial court convicted the appellant, finding competent a verdict to common assault. It was common cause that on the day of the incident, the appellant found his son watching pornographic material on an iPad. The appellant then confronted his son who denied having done such a thing. After a verbal exchange, the appellant then hit his son and after the son still refused to confess, the boy then fell off the bed whereby the appellant continued to kick and beat him (at para [3]). The appellant alleged that he appellant claimed that he did not intend to assault his son and that he merely intended to "discipline him out of concern to show him in the future what is right and what is wrong" (at para [6]). The Appeal court therefore found that the trial court was correct in its finding that the appellant had exceeded the bounds of moderate chastisement. The appellant clearly exceeded the bounds by delivering more than a few slaps. His actions including punching and kicking the victim over a period of time (at para [94]).

The court noted that parental power, or rights based origins of the defence are clearly at odds with the child-focused model of rights envisaged under our Constitution (at para [64]. However, it would be too simplistic to consider this on its own to be sufficient to condemn the defence to the realms of history. It is important to bear in mind that there are aspects of the defence that implicitly at least give some recognition to the protection and wellbeing of the child. While studies have indicated that children are negatively affected by corporal punishment, questions have been

raised by the lack of studies that represent the parents perspective. In other words, to what extent are parents and teachers abused by children? (S Evans “Reasonable and moderate chastisement is not abuse, Concourt hears in spanking case” https://www.news24.com/SouthAfrica/News/reasonable-and-moderate-chastisement-is-not-abuse-concourt-hears-in-spanking-case-20181129). Another question raised is concerning the type of support programmes that parents could expect from government in light of the vacuum created by outlawing reasonable and moderate chastisement? The end result of the decision in YS v G *supra* would be that parents could possibly be sentenced to jail "for the lightest smack". The problem was that the case at hand was not one where the parent was inflicting reasonable and moderate chastisement. In other words, this case was clearly an example of overt abuse on the part of the parent (S Evans *supra*).

From a constitutional perspective, in determining whether the defence of reasonable and moderate chastisement meets the standards of reasonableness and justifiability required by section 36 of the Constitution, the following important points should be considered. First, the defence of moderate chastisement is a law of general application, in terms of which the rights of children affected by the defence includes the rights to dignity, equality, freedom and security of person and specific rights as contained within section 28 of the Constitution. Since these rights are identified as being fundamental rights, strict requirements must be met before these rights can be curtailed. The importance and purpose of the limitation has been highlighted in various court judgments and was identified to be for education, correction and discipline and to ensure that children become responsible adults who contribute to society (D Kleynhans “ Considering the Constitutionality of the Common law defence of ‘reasonable and Moderate chastisement’” (2011) *LLM* 68). Concerning the nature and extent of the defence, it could be argued that it provides parents with justification ground when a criminal case for assault arises. The question then arises as to what would the position be if no defence were available in law for parents to rely on in such cases? What is clear is that children constitute a vulnerable group that is deserving of protection. The relationship between the defence and its purpose is that corporal punishment does not achieve the purpose it seeks to achieve, namely that children become responsible adults but rather “ it does not necessarily result in moral internalization, which is necessary for successful socialization, and it is “associated with harmful side effects such as aggression and delinquency in childhood, crime and antisocial behaviour in adulthood, low empathy or conscience, poor parent-child relations, and mental health problems such as depression” (D Kleynhans *supra* at 69). Therefore, when viewing the relationship between the defence and the purpose it seeks to achieve is deemed weak, as “corporal punishment is ineffective at best and harmful at worst” (D Kleynhans *supra*). Lastly, it could be argued that there are more effective methods of punishment available to parents. Therefore, corporal punishment cannot be deemed to be reasonable and justifiable within an open and democratic society bases on human dignity, equality and freedom, as a less restrictive means to achieve the purpose would necessarily speak to the rationality and reasonableness of the limitation. In addition to the Constitution, both the United Nations Convention on

the Rights of the Child 1989 as well as the African Charter on Rights and Welfare of Child 1990 have given “legal contour” to the rights of children internationally. In South Africa the Constitution of the Republic of South Africa, 1996 has played a significant role in legitimising and substantially contributing to the effective protection of children’s rights (M Cousens “Le Roux v Dey and Children's Rights Approaches to Judging” (2018) *PELJ* 1 at 3).

It could be argued that even if corporal punishment is eliminated, violence will continue on, but in other forms such as through attitudes and policies of parents and professionals. For instance, where children are deemed to not be conforming, they could be labeled with certain illness or disorders with prescription drugs such as Ritalin being prescribed (M Freeman and B Saunders “Can we conquer child abuse if we don’t outlaw Physical chastisement of children” (2014) *International Law Journal Child Rights* 681 at 699) This forms part and parcel of “…a domineering, non-communicative attitude towards, the child, on which disregards the child’s opinions and views, leaves the child outside the realm of understanding and logic” (M Freeman and B Saunders *supra*). Clearly as Freeman et al suggests, children are participants in the social process, not social problems. Furthermore, children are not property of their parents and therefore this suggests a move away from autonomy and privacy of families (M Freeman and B Saunders *supra*).

Despite these contentions, there still appears to be compelling reasons for abandoning the defence of moderate and reasonable chastisement. First, children in the South African perspective, have constitutional rights to human dignity (section 10) freedom and security of person (section 12(1) and special rights to protection from maltreatment, abuse or degradation (section 12 (1(d). However, the common law has painted a very different picture of disciplinary chastisement, and has in fact indicated that it is an entrenched practice of discipline. Not only are these rights guaranteed in the Constitution, since, South Africa is a signatory to the Convention on the Rights of Child 1990, it places a duty on states to promote and protect these rights. A key provision in this Convention is article 12, which highlights that children have participatory rights in the social process. That is, they act as agents or decision makers in their role as citizens. That is, children have ‘participatory rights’ and because they are vulnerable and in need of protection, they are entitled to respect for their human dignity as autonomous human beings (M Freeman and B Saunders *supra* at 698).

Second, corporal punishment also has links to domestic violence. Research seems to suggest that the more punishment children receive, the more likely they are to act violently towards family members (E.T. Gershoff “More Harm Than Good: A summary of Scientific Research on the Intended and Unintended Effects of Corporal punishment of Children” 7(3) (2010) *Law & Contemporary problems* 30 at 35). Furthermore, the “only way to maintain the initial effect of spanking is to systematically increase the intensity with which is delivered, which can quickly

escalate into abuse" (Committee on Psychosocial Aspects of Child and Family Health (April 1998) 101(4pt1): 723 at 728).

Conclusion

Time will indicate whether the constitutional ruling in YG v S *supra* will continue to be upheld. What is however apparent is that corporal punishment, although it may vary in intensity and degree remains a violent form of punishment and with the commencement of the Constitution all forms of corporal punishment have become not only redundant but contrary to the spirit an purport of the new constitutional dispensation Bekink *supra* 191).

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Matters of Interest to Magistrates

Dagga and the workplace: Why the CCMA got it wrong- Pierre de Vos

The ruling handed down last year by the South Africa's Constitutional Court that it was unconstitutional to criminalise the private cultivation and use of cannabis (dagga), appropriately left it to Parliament to pass legislation further to regulate the matter. Meanwhile it is now legal to cultivate and use cannabis in private – although the legislature must still define what would be considered a "private" space. However, recently the Commission for Conciliation, Mediation and Arbitration (CCMA) upheld the dismissal of several employees who tested positive for cannabis. I believe the CCMA got it wrong, primarily because it did not understand how cannabis testing works and what is being tested.

In 2017, after an employee's urine sample tested positive for traces of dagga, the management of NCT Durban Wood Chips ordered that a similar test be done on all employees. Four employees eventually tested positive for having traces of cannabis in their system and were dismissed. Three of the employees challenged their

dismissal at the CCMA, but the CCMA held in *Mthembu and others / NCT Durban Wood Chips [2019] 4 BALR 369 (CCMA)* that the dismissal was fair – even though use of cannabis for private purposes was no longer unlawful.
I suspect the CCMA decision was wrong. The CCMA relied on two factors to justify its decision. First, it noted that the company had adopted a substance abuse policy in 2016 and that all employees had been made aware of this policy. The CCMA described the policy as follows:

It states that no one under the influence of drugs will be allowed on the premises. The policy further states that the respondent has a zero-tolerance approach to substance abuse. Paragraph 4 states that the possession, sale or use of illegal drugs is prohibited. It is immaterial that they use the Cannabis outside of the premises. Their policy is zero tolerance.

According to the CCMA this meant that employees had to ensure that when they used dagga in private "it must not result in them reporting for work under the influence thereof." This, said the CCMA, "is no different to consuming alcohol to such a degree the night before that the employee reports for duty under the influence the next day placing himself and other employees and the company at risk and exposes the company to unnecessary financial claims and fines".
Second, the CCMA pointed out that this particular workplace was dangerous as the employees worked in an environment where dangerous machinery was being operated. It would become a problem if employees were permitted to work on the dangerous work floor while under the influence of drugs or alcohol.
Because of the high degree of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to have in place rules prohibiting the consumption of such substances at the workplace or reporting to work under the influence of such substances. It is not disputed that it is an intoxicating substance and the court seems to accept this among other considerations and therefore limits its use to private use.
The applicants were therefore dismissed because they were found guilty of being "under the influence of intoxicating substances whilst on duty', something that created a risk for everyone at the company.
In determining whether a dismissal was fair the CCMA is required to consider: (a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and (b) if a rule or standard was contravened, whether or not (i) the rule was a valid or reasonable rule or standard; (ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; (iii) the rule or standard has been consistently applied by the employer; and (iv) dismissal was an appropriate sanction for the contravention of the rule or standard.
The pivotal questions here was whether the rule that prohibits working under the influence of either alcohol or cannabis was reasonable and valid and whether the rule applied to the facts of the case. The CCMA held that it did:

Because of the high degree of safety required of companies with heavy machinery and generally dangerous equipment, it is reasonable for employers to have in place rules prohibiting the consumption of such substances at the workplace or reporting to work under the influence of such substances… Given the factual matrix of the present matter it would be reasonable to expect the applicants not to present themselves to work under the influence of cannabis because of the inherent dangers present at the workplace.

As the CCMA pointed out, a rule prohibiting employees from coming to work *hoog gerook* on dagga would be no different from a rule prohibiting an employee from arriving at work roaring drunk. But, the comparison between alcohol and cannabis cannot be taken too far.

This is because alcohol leaves the blood within a few hours after ingestion. As a person sobers up, traces of alcohol disappear. When a person tests positive for alcohol in the blood this is a good indication that the person was in fact intoxicated at the time the test was done.

The urine test used to detect traces of dagga in somebody's body differs from the blood test for alcohol because traces of dagga stays in the body long after a person is no longer experiencing any effects from the dagga.

While detection windows depend on many factors – including on how often the person uses dagga and on his or her body weight – urine tests can detect dagga in the urine for approximately 3–30 days after use. This means that is more than likely that a person testing positive for having traces of cannabis in their system, will not be under the influence of cannabis at all.

Though a blood test exists that can detect some of marijuana's components, there is no widely accepted, standardized amount in the breath or blood that gives police or courts or anyone else a good sense of who is impaired. In any event, the employer in this case used a urine test which provides no proof of whether the employee was intoxicated at the time when the test was taken.

The CCMA ruling suggests that the Commissioner was not aware of the limitations of urine tests used to detect traces of dagga in the body. The Commissioner found that the "applicants were tested through a urine test and found to be *under the influence of cannabis* which was admitted by the applicants". This must be wrong as the test could not have found that the employees were under the influence of cannabis at the time of testing. It is therefore also unclear whether the employees admitted to being under the influence or admitting that they had used cannabis previously and that there were therefore traces of cannabis in their urine.

The correct legal position must be that an employee cannot be dismissed for being under the influence of dagga at work merely because a urine test detected traces of cannabis in his or her urine. Unless the employer can prove that the employee was under the influence of dagga while at work (something that cannot be done by using a urine test), it would normally not be legally permitted to dismiss that employee for substance abuse or for being under the influence of dagga at work.

Some jobs may require a degree of attentiveness that may preclude *any* use of cannabis in the few days before an employee has to work. Flying a passenger plane

might be such a job. In such cases it may be reasonable for an employer to adopt a rule that testing positive for traces of cannabis in your urine is a dismissible offence in all cases.

But for most jobs it would not be reasonable to adopt such a rule. Just as it would not be reasonable to prohibit an employee from drinking any alcohol in the days or weeks before they come to work, it would not be reasonable for most employers to prohibit employees from using cannabis in the days or weeks before they come to work.

It is for this reason that I suspect the dismissed employees from NCT Durban Wood Chips were hard done by.

The above post appeared on the blog of Prof Pierre de Vos *Constitutionally Speaking* on 16 May 2019

A Last Thought

[12] According to Snyman *Criminal Law* 5ed (Durban: Lexis Nexis 2008) at 531 , 'fraud' is '*the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another*'. In order to secure a conviction on fraud the State had to prove (i) a misrepresentation; (ii) prejudice or potential prejudice; (iii) unlawfulness and (iv) intention. The appellant misrepresented to Ms Malatji that if she paid R 700 000 she will receive trucks within two weeks of her making the payment. She was even provided with a list of the trucks she supposedly bought. As a result of the misrepresentation she was induced to pay the amount of R 700 000. The representation was clearly false as the trucks were not delivered as promised and she suffered prejudice as a result.

[13] A person commits theft by false pretences if he or she unlawfully and intentionally obtains moveable, corporeal property belonging to another with the consent of the person from whom he or she obtains it, such consent being given as a result of a misrepresentation by the person committing the crime, and appropriates it.

All cases of theft by false pretences are at the same time also fraud-(Davies 1928 AD 165).

As far as the theft charges are concerned the onus rests on the State to prove an intention to steal (*animus furtiva*) beyond reasonable doubt.(*S v Luther* 1962 (3) SA 506 A; *S v Qumbella* 1966(4) SA 356 A; *S v Hartyani* 1980(3) SA 613 T). In *S v*

Boesak [2000] ZASCA 112; 2000 (3) SA 381 (SCA) at para.[97].5] it was held as follows:

'*Theft, in substance, consists of the unlawful and intentional appropriation of the property of another (S v Visagie* [1990] ZASCA 124*;* 1991 (1) SA 177 *(A) at 181I). The intent to steal (animus furandi) is present where a person (1) intentionally effects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, and (4) knowing that he is acting unlawfully in taking it (Milton South African Criminal Law and Procedure vol II 3rd ed at 616).'*

Per Windell J in *Nkosi v S (A276/2015) [2018] ZAGPJHC 604; 2019 (1) SACR 570 (GJ) (2 November 2018)*