e-MANTSHI

A KZNJETCOM Newsletter

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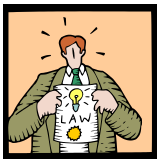
Welcome to the hundredth and fifty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 report by the South African Law Reform Commission on *Assisted Decision-Making* which was completed in 2015 was only published on the SALRC website on 4 July 2019. The report deals with the needs of persons whose ability to make choices has been impaired. The Report concerns the manner in which South African law addresses the needs of persons whose ability to make choices, to exercise their legal capacity, has been impaired ("persons with disability"). The report also concerns the manner in which South African law should address the needs of such persons with disability. The Commission proposes the adoption of a statutory system of supported decision-making that, by its nature, gives recognition to the wide variety of needs that people with decision-making impairment have. The report can be accessed here:

http://www.justice.gov.za/salrc/reports/r_pr122-Assisted-Decision-Making-Dec2015.pdf

Recent Court Cases

1. Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another; Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another (87638/2016) [2019] ZAGPPHC 253 (4 July 2019)

For the crime of incitement in terms of section 18(2)(b) of the Riotous Assemblies Act 17 of 1956 to be committed the accused must possess the direct intention to influence the mind of another so that they may intend to commit a crime.

(Below is an edited version of the judgment which only deals with the courts findings in respect of the Riotous Assemblies Act (RA) and the Trespass Act. The full judgment can be accessed here:
http://saflii.org/za/cases/ZAGPPHC/2019/253.html

Ledwaba DJP, Pretorius J et Molefe J

The constitutional challenge to the RA Act

[11] The applicants argue that section 18(2)(b) of the RA Act should be declared unconstitutional as it criminalises the exercise of free expression protected by section 16 of the Constitution. Section 18(2)(b) provides that:

' (2) Any person who -

(a) ...

(b) Incites, instigates, commands, or procures any other person to commit, any offence, whether in common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.'

[12] The applicants argue that the definition of the crime of incitement is overbroad and that the limitless scope of section 18(2)(b) is an unjustifiable limitation on the right to freedom of expression.

[13] In order to address these arguments we will deal with the following four issues:

1) the proper understanding of the crime of incitement;
2) the scope of the right to freedom of expression;

3) whether section 18(2) of the RA Act infringes this right; and
4) if such an infringement is reasonable and justifiable.

[14] However, a preliminary point must be dispensed with before addressing each of these issues. It would have been ideal for this matter to have gone to trial before the constitutional challenge was raised. In doing so, the trial court might have found that Mr Malema was not guilty of incitement for the very reason that no crime had been incited. In fact, this is exactly what the applicants argue for in this matter.

[15] The applicants have instead decided to challenge the constitutionality of the section in the abstract. This approach comes with its own limitations, as has been discussed elsewhere.[1] A problem in the present case is that much of the applicants' argument focussed on the assertion that the charge against Mr Malema should be dismissed. It is not for this Court to make such an order. The fact that the applicants are confident that the charge is defective raises the question of whether there is in fact a constitutional issue at play.

[16] A second problem is that, in part, the crime of incitement has been largely mischaracterised by the applicants. A trial court would have appropriately dealt with the application of the RA Act, in light of our jurisprudence on the crime of incitement. We have been denied the benefit of the trial court's approach. The applicants argue that Mr Malema's supporters should be taken to be capable of making up their own minds - and so may or may not have followed his words. Any right-infringing action on their part therefore rests solely at their own feet and not at Mr Malema's. The applicants argue that the RA Act does not require any likelihood that the inciting conduct will actually have an effect on the listener.

[17] As the next section shows, these arguments misunderstand the crime of incitement, specifically the fault element of the crime. A proper understanding of the crime is needed for a competent inquiry into whether or not it infringes the right to freedom of expression.

The crime of incitement

[18] The definition of incitement can be found in S v *Nkosiyana.* An inciter is 'one who reaches and seeks to influence the mind of another to the commission of a crime'.[2] The court in *Nkosiyana* further clarified that ' it is the conduct and intention of the inciter which is vitally in issue . . . the purpose of making incitement a punishable offence is to discourage persons from seeking to influence the minds of others towards the commission of crimes'.[3]

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[1] Moyo v Minister of Justice and Constitutional Development and Others; Sonti v Minister of Justice and Correctional Services and Others 2018 (2) SACR 313 (SCA); Savoi and Others v National Director of Public Prosecutions and Another 2014 (5) S A 317 (CC)
[2] S v Nkosiyana (1966] 4 All SA 456 (A) at 458
[3] Ibid at 459.

[19] The crime of incitement is the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime.[4] The question then is what kind of unlawful acts form part of this definition?

[20] It is apparent from this definition that the mere voicing of one' s opinion will not be enough for incitement. Snyman provides the example of a person expressing the desire that ' it would be a good thing if x should die' as not falling under the crime of incitement.[5] Following the position in German law, incitement requires that the inciting words are not too vague or indeterminate. The statement 'take back the land' would likely not constitute incitement as it specifies neither a crime nor an object of which the crime is to be committed against.[6] Support for this can be seen in the case of *Nathie* whereby the Appellate Division, in deciding that the conduct was not incitement, remarked that '[t]he passage in question does not contain any unequivocal direction to the listeners.'[7]

[21] The inciter's conduct need not have an element of persuasion or coercion. It is now settled that the decisive question is not how but if the accused intended to influence the mind of the other person towards the commission of a crime.[8] It is irrelevant whether or not the incitee was indeed influenced by the inciter to commit the crime, or acted upon the conduct or communication of the inciter.[9] In fact incitement is limited to those situations in which the crime is not committed. If it were, liability would result from being an accomplice to the crime.

[22] The types of conduct which constitute incitement are fairly narrow. It also is clear that the intention behind the conduct or communication is vital in deciding whether or not incitement took place. Liability for incitement is further restricted by the manner in which our courts have handled the intention requirement.

[23] Before dealing with our jurisprudence on the intention requirement, the following must be noted. There is no merit to the argument that intention is not a requirement for the crime of incitement, either at common law or under the RA Act. The dictum in *Nkosiyana* above illustrates that the very definition of incitement requires intention.[10] Section 18(2) also does not expressly exclude intention and so no argument can be made that the purpose of the RA Act was to create strict liability.[11]

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[4] See Snyman A Draft Criminal Code for South Africa (Juta, Cape Town, 1995) at 18 for a more detailed definition.
[5] Snyman, Criminal law 6ed (Lexis Nexis, 2014) at 291
[6] See Snyman ' Die misdaad uitlokking' 2005 THRHR 428 at 435 - 38 for a more detailed account of a ' concretisation' requirement.
[7] S v Nathie [1964] 3 All SA 581 (A) at 586
[8] Ibid. See also Nkosiyana supra note 7 at 458 - 459.
[9] Ibid. See also R v O 1952 (3) SA 185 (T)
[10] There is academic consensus that the negligent commission of the crime of incitement is impossible, see Snyman op cit 10 and Burchell Principles of Criminal law 4ed (Juta, 2014) at 544.
[11] S v Coetzee and Others 1997 (3) SA 527 at 177.

[24] Our courts, in applying section 18(2), have required that the State prove that the accused possessed the requisite intention, with the aim of influencing the mind of another to commit a crime, beyond a reasonable doubt.[12] The case of *Nathie* is particularly germane to the allegations against Mr Malema in the present case.

[25] In that case, the appellant sought leave to appeal against his conviction of incitement to contravene the Group Areas Act 8 of 1953. The sordid history of the Group Areas Act is well known and its repeal celebrated. The inciting conduct in that case came from a report authored by the appellant that called on the Indian community to defy the Group Areas Act. The report was to be tabled at a general meeting of the Transvaal Indian Congress. The court remarked that the report was interspersed with 'strongly worded comment' on the political climate of the time.[13]

[26] In overturning the conviction, the Appellate Division held that ' [t]he essential enquiry appears to be: what did the appellant intend to convey to the persons at the meeting when he used the words contained in the passage in question?'.[14] After weighing up the evidence the court concluded that -

'[i]t thus appears that the evidential material upon which the State relies for a conviction does not establish with the requisite degree of proof that the appellant, in addressing the persons attending the meeting, intended his words to be understood as an exhortation to them (and Indians in general) to embark on a campaign involving contraventions of the Group Areas Act.'[15]

[27] This was in light of the fact that the report strongly urged its readers not to remain silent, to fight against injustice and inhumanity , and to make it clear to previous community leaders who had already began defiance campaigns against the Group Areas Act that they were not alone. This is all to show that, shorn of any heated political rhetoric, the clear intention to influence the mind of another to commit a crime must be present. This evidently is a high bar for the State to prove beyond a reasonable doubt.

[28] There is some disagreement on whether or not the incitee must possess the requisite intention to commit the crime they have been incited to commit. The case of *Milne* appears to lend support to the notion that the inciter must also know that the incitee will act with the intention required to commit the crime.[16] There the accused was charged with incitement, having caused another to make false entries into a book of accounts in contravention of the Companies Act 27 of 1914. The accused

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[12] S v Nathie supra note 12 at 595; R v Milne and Ereliegh (7) [195 1] 2 All SA 113 (A); R v Segale [1960] 1 All SA 456 (A) at 732.
[13] Nathie supra note 12 at 585.
[14] Ibid at 586.
[15] Ibid at 587.
[16] Milne supra note 17 at 822.

was not convicted of incitement for the reasons that he knew the entry would be false, but also knew that the person he caused to make the entry did not know the entry to be false and would make the entry thinking it to be correct.[17]

[29] This line of thinking was referred to in *Segale,* where the court held:
'The incitement of municipal employees to stay away from their work on the days in question was therefore in the circumstances of the incitement, clearly an incitement to commit an act which to the knowledge of the inciters would have been an offence if committed by the incitees , and the decision in Rex v. Milne and Erleigh (7), 1951 (1) S.A. 791 (A.D.) at p. 822, is not applicable as in that case the incitee was incited to commit an act which the inciter knew would not constitute an offence if committed by the incitee .'[18]

[30] On this basis it has been argued that the inciter must believe that the incitee will actually possess the requisite intention to commit the crime in question. As only this would satisfy the requirement in section 18(2) of the RA Act that what is incited is the commission of a crime. This would be due to the fact that where there is no intention on the part of the incitee then there can be no crime.[19]

[31] However, the relevance of the intention on the part of the incitee to the liability on the part of the inciter is not clear-cut.[20] It might be required that the inciter is guilty only if the act committed would be a crime for the incitee, including the fact that they possessed the requisite intention, regardless of what the inciter actually believed. This, in our view, would be incorrect for the simple reason that liability for the crime of incitement does not require that the incited crime was actually committed.

[32] The better position is that the presence or absence of intention on the part of the incitee is irrelevant to whether or not the inciter is liable. The question is whether the inciter believed that the act incited would, all things considered, be unlawful, notwithstanding that the incitee might be ignorant to the fact that they are committing a crime. To reiterate what was held in *Nkosiyana,* the decisive question is whether or not the inciter intended to influence the mind of another to commit a crime.

[33] Subsequently, it is clear that for the crime of incitement to be committed the accused must possess the direct intention to influence the mind of another so that they may intend to commit a crime. I must refer back to the fact that the constitutional challenge against section· 18(2) has been brought without the benefit of the trial proceedings being concluded. It is not for this Court to pronounce on the validity of the allegations against Mr Malema. However, it must be said that nothing from the above excursus of the crime of incitement indicates that heated political rhetoric

[17] Ibid at 822.
[18] Segale supra note 17 at 463.
[19] See Snyman op cit note 10 at 294 .
[20] Cf. Burchell op cit note 1 5 a t 545- 7 and Segale supra note 17

would necessarily constitute the crime of incitement.

The declaratory relief sought in relation to the Trespass Act

[34] The applicants argued that even if the RA Act withstands constitutional scrutiny, then it does not necessarily follow that Mr Malema has committed the crime of incitement. This, they argued, is seen when one properly understands the constitutionally compliant interface between the Trespass Act and our post-Constitution eviction laws. Section 1 of the Trespass Act provides that:

'(l) Any person who without permission -

(a) of the lawful occupier of any land or any building or part of a building; or

(b) of the owner or person in charge of any land or any building or part of a building that is not lawfully occupied by any person,

enters or is upon such land or enters or is in such building or part of a building, shall be guilty of an offence unless he has lawful reason to enter or be upon such land or enter or be in such building or part of a building.

(IA) A person who is entitled to be on land in terms of the Extension of Security of Tenure Act, 1997, shall be deemed to have lawful reason to enter and be upon such land.'

[35] The gist of the applicants' argument is that land occupation falls outside the Trespass Act and so the charge against Mr Malema is a ' non-starter' because he in fact incited no crime at all.

[36] The applicants argued that the Trespass Act must be read subject to our post-Constitution eviction laws, including PIE and ESTA. Such a reading, conducted with the injunction of section 39(2) of the Constitution in mind, shows that the Trespass Act stops where PIE starts. In other words, someone who is an ' unlawful occupier' under PIE is not guilty under the Trespass Act. Mr Malema then incited no crime by calling for the occupation of land.

[37] The applicants ask for an appropriate declarator on the proper interpretation of section 1(1) and related relief. We must agree with the respondents that this is ill-conceived for at least two reasons.

[38] The first is obvious in light of the analysis of the RA Act above. The applicant's request for appropriate declaratory relief is just another way of saying that Mr Malema did not commit the crime of incitement. According to the applicants, what Mr Malema actually called for was the occupation of land and, in light of PIE and ESTA, that is no longer a crime. The result is that under the guise of statutory interpretation the applicants are in fact raising a defence to the charge of incitement.

[39] As discussed above, that defence might simply be that Mr Malema never intended to incite any crime by calling for the occupation of land. The main thrust of the

applicants' argument is that on their interpretation of the interplay between the Trespass Act and PIE, Mr Malema did not incite anything unlawful. The defence being that where no crime is committed there can be no incitement.[21] An obvious problem arises regarding the declarator the applicants seek in this regard.

[40] As has already been stated, this Court is not the appropriate forum to adjudicate such a defence. The applicants are in effect asking this Court to determine whether the utterances or conduct of Mr Malema amounted to the incitement of a crime (trespass) or lawful activity (occupation). Such a determination is better left to the trial court.

[41] The crime that is incited need not to have been committed. The pivotal question is whether the accused intended to incite a crime. It is open to the prosecution to prove that whilst Mr Malema called for lawful occupation he also intended to incite people to commit trespass. The exact crime need not be explicitly specified. Whilst a vague statement won' t do, the utterance of ' I want you to attack x, take all his belongings and run away' clearly means to incite the crime of robbery.

[42] Whether or not Mr Malema incited trespass is best left to the trial court to determine. Finally, even if this Court was to give a declarator that ' unlawful occupiers' under PIE are not guilty under the Trespass Act, this would not render an inquiry by the trial court into the charge against Mr Malema unnecessary.

[43] Notwithstanding the above, should this Court embrace the interpretive question in order to decide what appropriate relief should be granted, the second reason for the application being ill-conceived becomes apparent. However, it is difficult to comprehend the crux of the applicants substantive argument. It appears to be a thinly-veiled attack on the constitutionality of the Trespass Act. Certainly this is the way in which the respondents understood the argument.[22]

[44] There is a clear benefit to the applicants mounting an attack on the constitutionality of the Trespass Act. If the applicants fail to show that Mr Malema's conduct concerned not incitement to trespass but unlawful occupation under PIE and ESTA, then the charge can still be avoided by attacking the constitutionality of the Trespass Act directly. Although this is neither here nor there, as we understand the applicants case to be one of constitutional interpretation rather than one seeking an order of constitutional invalidity. The relevance of this to the charge of incitement against the Mr Malema is, for the reasons given above, not altogether clear.

[45] It would appear that the relief sought is a declaration that the Trespass Act is

[21] See paragraph [22] above and the works cited the re.

[22] The respondents sought to have the application dismissed on the grounds that Rule 16A (I) of the Uniform Rules of Courts, regarding the mandatory requirements on any person who raises a constitutional issue in an application, was not complied with.

somehow inconsistent with PIE and ESTA when read in light of the section 39(2) injunction in the Constitution. This is not so. This Court gave judgment in *Zwane,* a matter dealing with a direct constitutional attack to the Trespass Act on grounds substantively similar to those that the applicants gesture to in this case.[23]

[46] In *Zwane* the applicant submitted that:

'[B]oth the Trespass Act and the PIE Act apply to the same class of persons, i.e. 'un lawful occupiers' where in both instances the 'occupation ' is without permission or other lawful right to occupy. . . the effect of the two acts contradict each other. The Trespass Act criminalises unlawful occupation of property and provides for summary ejectment, whereas on the other hand, the PIE Act decriminalises unlawful occupation and limits the eviction only where it would be just and equitable in the circumstances.'[24]

[47] The court in *Zwane* correctly found that this argument conflated the provisions of the Trespass Act and that of PIE. It was held that the ' two Acts can exist together. The two Acts are not necessarily conflicting. They are ' complimentary to each other'.[25] The facts of *Zwane* bear this out.

[48] In *Zwane* the appellant was convicted under section 1(1) of the Trespass Act after unlawfully entering a property that she had been lawfully evicted from under PIE. It would entirely defeat the purpose of PIE if, following a lawful eviction, the appellant was allowed to re-enter the property and remain in unlawful occupation in perpetuity. Section 1(1) of the Trespass clearly applied as the appellant had re-entered and re-occupied the property without the permission of the complainant in order to thwart the eviction order.

[49] The court also dealt with a constitutional challenge to section 2(2) of the Trespass Act, which reads:

'A court which convicts any person under subsection (I) may make an order for the summary ejectment of such person from the land concerned: Provided that an occupier who has a right of resident or right to use land in terms of the Extension of Security of Tenure Act, 1997, shall not be ejected in terms of this subsection from land in respect of which he or she has such a right'

[79] The argument posed there, much the same as put by the applicants in this case, was that section 2(2) allowed for ' eviction by the back door'. There is no merit in this submission. The section merely confers a discretion to a court that it *may* make an order for summary ejectment. This discretion is unfettered and must be exercised judiciously. It requires the court to investigate the relevant circumstances prior to exercising such a discretion. It in no way circumvents PIE nor can it be said to

[23] Zwane v Sand Another 2016 (A635 /2016) (GP) (unreported judgment)
[24] Ibid at 17.
[25] Ibid at 19.

lead to an arbitrary eviction as contemplated in section 26(3) of the Constitution.

[80] Our courts have repeatedly held that ' the Director of Public Prosecutions should not allow prosecutions for trespass to be used as a means to procure a person' s eviction without compliance with the onerous but salutary provisions of the PIE Act'.[26] The court in *Koko* was alive to the fact that a conflict may arise between section 2(2) of the Trespass Act and the provisions of section 4(1) in PIE.[27] However, a conflict could only arise in cases where a court chose to exercise its discretion in terms of section 2(2) and order ejectment.[28] As stated above, such a discretion would have to be judiciously exercised· .

[81] The upshot of all of this is that there is no immediate conflict between the Trespass Act and PIE which requires this Court to grant any declaratory or other relevant relief. Accordingly the applicants challenge to the Trespass Act, absent a direct constitutional attack, must fail.

2. Brackenfell Trailer Hire (Pty) Ltd and Others v Minister of Transport (20825/2017; 22046/2018) [2019] ZAWCHC 30; 2019 (2) SACR 62 (WCC) (20 March 2019)

The presumption in s 73(1) of the National Road Traffic Act 93 of 1996 that the owner of a motor vehicle was the presumed driver thereof, with respect to moving violations, was not applicable to the owner of a trailer.

Binns-Ward J:
Introduction
[1] The applicants seek, in terms of paragraph 2 of their notice of motion, an order declaring that –
(a) 'on a proper construction of sub-sections 73(1), (2) and (3) of the National Road Traffic Act 93 of 1996, the presumptions for which they provide are not applicable to trailers;
alternatively,
(b) the prosecution under the National Road Traffic Act 93 of 1996 of the owner of a trailer for an offence involving the driving or parking of a vehicle towing or having parked that trailer is unlawful and inconsistent with the Constitution of the Republic of South Africa (Act 108 of 1996)'.
[2] The first applicant is Brackenfell Trailer Hire (Pty) Ltd, a company that carries on business in the hiring out of trailers of various types. Its business is an

[26] S v Koko [2005] JOL 14870 (C) at 24; Du Plessis v S [2016] ZAWCHC 68 at 18 . See also Samuels v S [2016] ZAWCHC 33 at 25
[27] The provisions in section 4(1) of PIE are those that guard against summary ejectment and which provide the constitutionally mandated procedure for eviction
[28] Koko supra note 46 at 10

amalgamation of those previously conducted by the second and third applicants individually. The amalgamated business has a fleet of approximately 3000 trailers available to hire. With few exceptions, trailers are required, in terms of s 4 of the National Road Traffic Act ('the NRTA') read with the National Road Traffic Regulations, 2000 (as amended), to be registered and licenced, and it is an offence to operate them on a public road if they are not so registered and licenced. About two thousand of the trailers used in the business were contributed by the second and third applicants, and remain registered in their respective names individually; whilst the balance, which are registered in the name of the first applicant, have been acquired since the company's take over of the second and third respondents' businesses.

[3] Regulation 8 of the National Road Traffic Regulations requires that a natural person 'proxy' be identified when a motor vehicle of which a juristic person is the titleholder is registered. An employee of the first applicant has been nominated as the proxy for this purpose in respect of the trailers owned by the company.

[4] All of the trailers concerned fall within the ordinary meaning of the word, being unpowered vehicles that are towed by another. As its name suggests, the first applicant's business is conducted from premises in Brackenfell in the Western Cape, but the trailers that it rents out end up being towed by its customers to all corners of the country.

[5] Section 73 of the National Road Traffic Act ('the NRTA') resorts in Chapter XII of the Act, which is entitled 'Presumptions and Legal Procedure'. It provides:

Presumption that owner drove or parked vehicle.

(1) Where in any prosecution in terms of the common law relating to the driving of a vehicle on a public road, or in terms of this Act, it is necessary to prove who was the driver of such vehicle, it shall be presumed, in the absence of evidence to the contrary, that such vehicle was driven by the owner thereof.

(2) Whenever a vehicle is parked in contravention of any provision of this Act, it shall be presumed, in the absence of evidence to the contrary, that such vehicle was parked by the owner thereof.

(3) For the purposes of subsections (1) and (2) and section 88 it shall be presumed, in the absence of evidence to the contrary, that, where the owner of the vehicle concerned is a corporate body, such vehicle was driven or parked, as contemplated in those subsections, or used as contemplated in that section by a director or servant of the corporate body in the exercise of his or her powers or in the carrying out of his or her duties as such director or servant or in furthering or endeavouring to further the interests of the corporate body.

(Underlining and bold text provided for highlighting purposes, having regard to the questions in issue in these proceedings.)

[6] Section 73 falls to be construed with appropriate regard to the specially defined meanings of certain of the words used therein. The definitions are to be found in s 1 of the NRTA, which sets out the given meaning of various words used in the statute. The defined meanings given in s 1 are, by virtue of the provision, subject to the important qualification 'unless the context otherwise indicates'. The following

definitions set out in s 1 (which, by virtue of the special definition therein of 'this Act', also apply in respect of the National Road Traffic Regulations) are pertinent for present purposes:

"vehicle" means a device designed or adapted mainly to travel on wheels or crawler tracks and includes such a device which is connected with a draw-bar to a breakdown vehicle and is used as part of the towing equipment of a breakdown vehicle to support any axle or all the axles of a motor vehicle which is being salvaged other than such a device which moves solely on rails

"motor vehicle" means any self-propelled vehicle and includes—

(a) a trailer; and

(b) a vehicle having pedals and an engine or an electric motor as an integral part thereof or attached thereto and which is designed or adapted to be propelled by means of such pedals, engine or motor, or both such pedals and engine or motor, but does not include—

(i) any vehicle propelled by electrical power derived from storage batteries and which is controlled by a pedestrian; or

(ii) any vehicle with a mass not exceeding 230 kilograms and specially designed and constructed, and not merely adapted, for the use of any person suffering from some physical defect or disability and used solely by such person

"trailer" means a vehicle which is not self-propelled and which is designed or adapted to be drawn by a motor vehicle, but does not include a side-car attached to a motor cycle;

"driver" means any person who drives or attempts to drive any vehicle or who rides or attempts to ride any pedal cycle or who leads any draught, pack or saddle animal or herd or clock of animals, and "drive" or any like word has a corresponding meaning or any like word has a corresponding meaning

"owner", in relation to a vehicle, means—

(a) the person who has the right to the use and enjoyment of a vehicle in terms of the common law or a contractual agreement with the title holder of such vehicle;

(b) any person referred to in paragraph (a), for any period during which such person has failed to return that vehicle to the title holder in accordance with the contractual agreement referred to in paragraph (a); or

(c) a motor dealer who is in possession of a vehicle for the purpose of sale,

and who is licensed as such or obliged to be licensed in accordance with the regulations made under section 4, and 'owned' or any like word has a corresponding meaning

"park" means to keep a vehicle, whether occupied or not, stationary for a period of time longer than is reasonably necessary for the actual loading or unloading of persons or goods, but does not include any such keeping of a vehicle by reason of a cause beyond the control of the person in charge of such vehicle.

[7] The only party cited as a respondent in the case was the national Minister of Transport. He is the member of the Cabinet responsible for the administration of the Act. When the application came before Papier J in May 2018, an order was taken, by agreement between the applicants and the respondent, postponing the hearing to

November for wider notice of the proceedings to be given. The order directed that this should occur by way of publication of the order in the Rapport and Sunday Times newspapers and by physical delivery of a copy thereof to the MEC for Transport and Public Works (Western Cape), the Minister of Justice and Constitutional Affairs, the National Director of Public Prosecutions, the Director of Public Prosecutions (Western Cape) and the heads of the traffic departments at Brackenfell and Durbanville. The notice given in terms of the order made by Papier J, which included directions as to how any interested party might intervene in the proceedings, did not result in any other parties coming forward.

[8] When the matter first came up before me, in November 2018, I was concerned that yet wider notice of the application should be given. Road traffic regulation is after all an area of concurrent competence between the national and provincial spheres of government. Traffic and parking are also matters in respect of which municipalities have executive and legislative competence in terms of s 156 of the Constitution. Notice of the application had been given in terms of Uniform Rule 16A, but that was only pertinent in respect of the alternative relief sought by the applicants.

[9] I therefore directed that notice of the application be given by means of substituted service to the all of the provincial and local government authorities nationally, and further postponed the hearing in order for that to happen. In compliance with those directions, a copy of the order and of the notice of motion was served by registered post on the members of the executive councils responsible for road traffic matters and for local government in each of the provinces and by facsimile (telefax) at the national head office and each of the provincial offices of the South African Local Government Association ('SALGA').

[10] The notice that was duly given to these other parties in compliance with the order also did not elicit any reaction.

[11] The respondent did, however, supplement his answering papers after the November postponement, amongst other things, by obtaining a supporting affidavit from a senior state advocate in the office of the Director of Public Prosecutions (Western Cape).

[12] The content of the senior state advocate's supporting affidavit was mainly argumentative. He expressly declined to enter into any debate about the proper construction of s 73 of the NRTA, and confined himself to the questions arising from the alternative relief sought by the applicants in terms of paragraph 2.2 of their notice of motion.

[13] In the result, the Minister of Transport was the only party to oppose the application.

The factual context of the application for declaratory relief

[14] The applicants were moved to bring the application because of the on-going difficulties that each of them is experiencing arising out of the bringing of charges against them for traffic violations, the commission of which is captured by the traffic policing authorities on camera. The overwhelming majority of the violations concerned are driving offences, such as exceeding the speed limit or proceeding against a red traffic light. A very small number of the traffic violations involve parking

offences, in which tickets are issued to the applicants in respect of trailers registered in their names that are found illegally parked.

[15] It is important for the purposes of this case to be mindful of the distinction between offences involving the driving of a motor vehicle (moving violations) and what might be called stationary violations, which would generally have to do with the parking of a vehicle. The dichotomy is significant because it is given express recognition in the wording of the presumptions discretely provided for in subsections (1) and (2) of s 73 of the NRTA.

[16] The traffic violations that are pertinent in respect of the relief sought by the applicants are committed by persons towing or parking trailers that have been hired from the first applicant. As mentioned, the trailers are registered in the name of the company or those of either the second or third applicant. The criminal charges that are preferred arising out of the commission of these offences are brought by means of the service of summons or by the delivery of notice in terms of s 341 of the Criminal Procedure Act 51 of 1977; although, as I shall describe presently, the second and third applicants are in many instances unaware of the institution of the prosecutions until sometime after the issue of warrants for their arrest for being in contempt of court by virtue of their failure to appear for trial.

[17] In the matters that prove problematic for the applicants the commission of the driving offences involved is captured on camera by a device that is so positioned that the motor vehicle used in the offence is photographed from the rear. Owing to the fact that the motor vehicle concerned is towing one of the applicants' trailers at the time, the trailer obscures the rear number plate of the motor vehicle, and only the registration number of trailer is visible on the photograph.

[18] The relevant prosecuting authorities – which, it would appear, are almost invariably the local authorities within whose respective territorial jurisdictions the offences are committed or the local public prosecutors acting in close co-operation with such authorities – proceed in those cases against the applicants. The authorities have no evidence as to the identity of the driver of the towing vehicle at the time of the photographed commission of the offence, but proceed against the applicants on the basis of the registered ownership information obtainable in respect the trailer in tow at the time. The obvious inference is that they proceed against the applicants only by reason of their appreciation of the effects of the presumptions in s 73 of the NRTA, one of which is to provide an incentive to the identified registered motor vehicle owner, if he or she did not commit the offence, to provide the particulars of the person who was using the vehicle at the relevant time. That evidence gathering is indeed one of the objects of the presumptions was noted by Cameron J (Mailula J concurring) in S v Meaker 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73, in respect of the materially equivalent provisions of s 130 of the Road Traffic Act 29 of 1989, which was the immediate predecessor of the NRTA on the statute book.

[19] The notices issued in terms of s 341 of the Criminal Procedure Act in such matters include a section in which the recipient registered owner of the vehicle involved in the alleged offence may fill in the particulars of the person who was using the vehicle at the relevant time. The Director: Road Traffic Legislation and Standards

in the Department of Transport made the answering affidavit on behalf of the respondent. He averred that when an owner completes and returns the s 341 notice to the road traffic authority giving the particulars of the third party who was in charge of the vehicle at the time, no further steps are taken against the registered owner. This was referred to as a 'redirect process'. It was also averred that if a registered owner who had been summonsed to appear in court on the basis of a presumption in s 73 of the NRTA informed the public prosecutor that someone else had been using the vehicle at the time of the alleged offence and provided the third party's particulars, proceedings against the owner would be withdrawn.

[20] The second and third applicants testified that the redirect system did not function efficiently, although the evidence they provided in support of that allegation was sketchy. They also testified that there were many instances in which cases against them were called in court without a summons ever having been served on them. In such matters warrants of arrest for contempt of court had nevertheless been issued because of their failure to appear. In addition to the to be expected prejudicial consequences of warrants of arrest, the applicants allege, and the respondent confirms, that they are also blocked, while such warrants and the payment of any related fines remain outstanding, from being able to renew their drivers' and motor vehicle licences. They claim that these problems are occasioning serious administrative dislocations in their business.

[21] The applicants contend that most of the difficulties would not arise were it appreciated that the presumptions in s 73 apply not against the owners of trailers, but only against the owners of the towing vehicles; hence the application for declaratory relief. Their claim for alternative relief arises only if the court is not with them on the import of s 73.

[22] In the event that it is held that the presumptions are applicable to them in their capacity as owners of the hired-out trailers, they contend that the statutory provisions derogate unjustifiably from their constitutional rights in terms of s 35(3)(h) of the Constitution. Section 35(3) of the Bill of Rights entrenches the right of every accused person to a fair trial, including (in terms of paragraph (h) thereof) the right 'to be presumed innocent, to remain silent, and not to testify during the proceedings'.

The proper construction of s 73 of the NRTA

[23] Any exercise of literary construction, if it is to be well directed, must take place with proper regard to the context in which the language in issue has been employed. Context in this regard includes not only the primary effect of the combination of the words used in the peculiar textual setting, which is the obvious point of departure, but also the apparent purpose of their employment as may be inferred from the evident object of the document in which they have been integrated. The determination of the actual effect of the language should give sensible expression, grounded on the words that have been used, to the objectively discernible object of their provision. This necessarily implies a unitary (or holistic) exercise, as opposed to a componential one. The exercise is objective in character, in that the wording used must speak for itself. Accordingly, if the language employed is contextually unambiguous, effect must be given to it according to its plain tenor, unless to do so would result in an absurdity.

Nothing more, nothing less. Any temptation by a judge to improve on it, in order to give what he or she might consider would be better effect to the apparent object of the text by construing it to have a wider import than the wording used does, should be eschewed, for that would be to stray impermissibly into the realm of legislating or contract-making.

Section 73(1)

[24] It is plain that subsection (1) of s 73 has application only in prosecutions in which it is necessary to prove who was the driver of the vehicle to which the alleged offence relates. It is also clear that the range of offences potentially implicated in the application of s 73(1) all concern the driving of a vehicle. (See the parts of the quoted provision that were highlighted in paragraph [5] above.)

[25] The defined meaning of 'drive' in the NRTA extends the ordinary meaning of the verb by including the riding of a pedal cycle and the leading of animals without derogating from the ordinary meaning of the word. The pertinent ordinary meaning of 'drive' is 'operate and control the direction and speed of a motor vehicle'. One does not drive a trailer when using it; one drives the motor vehicle that is used to tow the trailer. Should a driver unlawfully exceed the speed limit or proceed against a red traffic light or overtake on a sold white line while towing a trailer, he or she commits the relevant driving offence through his or her operation and control of the towing motor vehicle, not through the use of the trailer. The prosecutor's task would be to prove who was driving the motor vehicle too fast, or who was behind the wheel of the motor vehicle when it was driven across the intersection when the light was red or when it overtook another vehicle by crossing a solid white line. That a trailer was being towed at the time would be quite irrelevant to the task of proving the elements of the offence. It follows that the words 'such vehicle' in s 73(1) relate to the vehicle that is being driven when the offence is committed, and not any other vehicle.

[26] There is nothing ambiguous about the language in which s 73(1) is couched. And construing the provision according to its tenor does not give rise to absurd or unbusinesslike results, or defeat the evident object of the provision. One knows from everyday experience that the majority of motor vehicles on the road can be identified, and their registered owners traced, by means of the vehicle's number plate particulars irrespective of whether the vehicle is seen from the front or the rear when the driver commits a moving offence. (The only exceptions that come to mind are motorcycles and trailers, which are required to display only rear number plates.) A situation in which a vehicle's rear number plate is obscured because it is towing another vehicle, while it is not unusual, will nevertheless present in a distinct minority of motor traffic instances.

[27] The regulations made under the NRTA require that number plates should be affixed in a position in which they are readily visible and that the vehicle should not be operated on a public road in conditions in which they are obscured, unless their temporary obstruction is beyond the control of the driver. A specific exception to the general rule in respect of the non-obstruction of number plates applies to towing vehicles by virtue of reg. 35(9) of the National Road Traffic Regulations, 2000, which provides: 'The provisions of subregulation (7) in relation to legibility and visibility of a

number plate which is affixed to the back of a motor vehicle, shall not apply to a motor vehicle which is towing another vehicle'. There is no dispensation, however, from the requirement that a towing vehicle that is required to bear a rear number plate must bear such a number plate even when it is towing another vehicle. Of interest for present purposes is the consistency of the pertinent provisions of the regulations with the provisions of the Act, in which the identities of the towing vehicle and the vehicle that is being towed are treated discretely, it being recognised that two (or more) separate vehicles with their own individual registered identity are involved. My attention was not directed to any provision of the Act that would make it necessary for the prosecution to prove the identity of the owner of a trailer as a necessary element of a driving offence.

[28] The respondent advanced an argument which sought to avoid the effect of the plain tenor of s 73(1) by contending that 'a purposive construction' required accepting that the presumption applied against the owner of the trailer because so many moving offences are identified by means of the use of cameras that photograph the vehicle driven by the offending driver from the rear, with the result that when a trailer is being towed, the rear number plate of the vehicle occupied by the driver is obscured, and all that appears on the photograph is the number plate of the trailer. Distilled to its essence the argument came down to a contention that violence should be done to the plain language of the provision in order to bring within its embrace a class of cases in respect of which the actual wording gives no assistance to the prosecution. The argument was to the effect that construing the provision according to its language would leave a lacuna that would expose a loophole in the ambit of the presumption, and that it was therefore necessary to interpret the provision in a way that would avoid the gap. This was the nature of the so-called 'purposive interpretation' that was contended for. Support was sought for the thesis in the inclusion of 'trailer' in the Act's special definition of 'motor vehicle'.

[29] The argument is fallacious. It proceeds from the misdirected premise that statutory interpretation involves giving effect to a broadly discernible object of the legislation, even if the wording employed by the legislature has not addressed it in a specific aspect. Engaging in that sort of interpretative embroidery would be to add to the legislation, not to construe what the lawmaker has put there. In this case the proper interpretation of the words exposes a possible lacuna, it does not cause it. If the lacuna is problematic, then it is for the legislature to remedy the position by amending the legislation. And were it minded to do so, it would no doubt have to consider the constitutional justifiability of presuming the owner of vehicle B to have been the owner of vehicle A when the vehicle A was used in the commission of an offence. (That was a question that did not arise in Meaker's case supra.)

[30] Moreover, in my judgment, the construction of s 73(1) contended for by the respondent gains no assistance from the inclusion of 'trailer' in the defined meaning of 'motor vehicle'. One can readily understand how, in the context of certain of the statute's provisions, the term 'motor vehicle' might sensibly include a trailer. Section 4, which regulates the licensing and registration of motor vehicles, is an example. But the enactment's special definition of 'trailer', more particularly that element

thereof that defines a trailer as something 'which is designed or adapted to be drawn by a motor vehicle' makes it clear beyond any doubt that the legislature did not have in mind a vehicle that could be driven. It contemplated rather a vehicle that was designed or constructed to be drawn by another vehicle that could be driven. It is the driving of the latter vehicle (i.e. one falling within paragraph (b) of the statutory definition of 'motor vehicle' that enables a trailer to be drawn. It is not without significance in this regard that the definition of 'motor vehicle' has been framed in a manner that draws a line of distinction between types of vehicle that are designed to be drawn (para. (a)) and those capable of being driven rather than drawn (para. (b)). (When the legislation is directed at treating the towing and towed vehicles compositely for any purpose, the expression 'combination of motor vehicles' is employed; a term also defined in s 1 of the NRTA.)

[31] For these reasons I have concluded that the presumption in 73(1) does not operate against the owner of a trailer in in any prosecution in terms of the common law relating to the driving of a vehicle on a public road, or in terms of the NRTA, in which the trailer was at the time being towed by another vehicle being driven at the time by the person involved in the commission of the alleged offence. Put differently, in cases in which it is necessary for the prosecution to prove the identity of the driver of the vehicle used in the commission of an offence, whether at common law or in terms of the Act, the presumption in s 73(1) operates only against the owner of such vehicle, and not against the owner of any trailer being towed by such vehicle at the time, unless the nature of offence concerned pertains to the operation of a 'combination of motor vehicles' (as defined).

(The above is only the first part of the Judgment. The full judgment can be accessed here:
http://saflii.org/za/cases/ZAWCHC/2019/30.html

From The Legal Journals

Albertus, C, Nanima, R D & Hamman, A J

"Voice evidence in criminal trials: reflections on the court's application of section 37(1) (c) of the CPA in *S v Mahlangu* 2018 (2) SACR 64 (GP)"

South African Journal of Criminal Justice, Volume 32 Number 1, Jul 2019, p. 76 – 85

Abstract

In South Africa, voice identification parades in criminal trials are very rare (AH Kruger Hiemstra: Suid-Afrikaanse Strafproses 7ed (2010) 95). Consequently, convictions based mainly on such evidence are not common in South Africa. The conviction of the accused in S v Mahlangu (2018 (2) SACR 64 (GP)) based exclusively on evidence from such a voice parade therefore evokes interest and closer scrutiny. Such interest is intensified when considering the facts of the case which appear to indicate the possible confusion of voice recognition and voice identification at an identification parade. As a result, the authors contextualise the case, discuss the concepts of voice recognition and voice identification and interrogate the evidentiary and procedural aspects of voice identification in criminal cases. The authors also question the appropriateness of applying the general principles of identification parades to voice identification parades without considering the unique nature of such evidence and employing additional safeguards. Finally, the authors make recommendations to improve the admissibility of voice identification evidence.

Musoni, M

"The criminalization of "Revenge Porn" in South Africa."

Obiter, Volume 40 Number 1, 2019, p. 61 – 74

Abstract

This article aims to give an overview of the growing problem of non-consensual pornography in the digital age. The problem of non-consensual pornography grew exponentially when Hunter Moore created a website called IsAnyoneUp.com and

started receiving nude images from scornful ex-lovers who posted them on his website.1 The article discusses the shortcomings of the legal framework that is designed to address non-consensual pornography. In addition, it discusses the provisions in the Cybercrimes Bill 2017 as it relates to criminalisation of non-consensual pornography.

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

Contributions from the Law School

ADMONISHMENT, AND COMPETENCE OF A MENTALLY CHALLENGED ADULT TO TESTIFY IN A CRIMINAL CASE

1.COMPETENCE

A witness is competent if they may lawfully give evidence. Generally, everyone is presumed to be a competent and compellable witness. A compellable witness is one who is competent and in addition can be forced to testify under the threat of punishment in terms of section 189 of the Criminal Procedure Act 51 of 1977. Section 192 of the Act provides:

“Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent to give evidence in criminal proceedings.”

However, some people lack competence because of undeveloped or impaired mental ability (*Two Boys Dladla v The State AR* 483/09 KZN at para 10).

In terms of section 193 of the Criminal Procedure Act 51 of 1977 any question concerning the competence and compellability of the witnesses shall be decided by the Court in which the criminal proceedings are conducted. The Court must decide all the questions relating to the competence of a witness to give evidence, not the parties. (*S v Khumalo* 1962(4) SA 432(NPD) 436 *and S v Katoo* 2005(1) SACR 522 (SCA) para 13).

Neither the accused nor any other party may consent to evidence being given by an incompetent witness. Thus when the state calls a person who is not competent, cross

examination by the defence does not render such person a competent witness. (*S v Kanyapa* 1979(1) SA 824(AD) 836-837).

Disputes about the competence to testify are approached in the same way as disputes about admissibility, namely by way of a trial within a trial (in the normal course). (*CWH Schmidt and H Rademeyer; The Law of Evidence* para 8-4, *S v Thurston* 1968(3) SA 289(A) 291B and *S v L* 1973(1) SA 344(C)). In *S v Zenzile* 1992(1) SACR 444(C), Thiring J held that it is not always necessary to decide the question of incompetency by means of a trial within a trial. The Court may base its decision about a witnesses' competency on its own observation in the witness box.

With regard to mentally disordered and intoxicated persons, section 194 of the Act provides:

"no person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while he is so disabled or affected."

Mental illness or intoxication maybe of a permanent or temporary nature. Incompetence only lasts for so long as the mental illness or intoxication lasts. The fact that a person suffers from a mental illness or defect is not itself sufficient to warrant a finding that he or she is not a competent witness. The mental illness or defect must have a certain effect on his or her abilities. It must deprive the witness of the proper use of their reason, or in other words negatively impact on the witness's ability to observe, to remember what he or she has observed and to convey this to the Court. (*S v Thurston,* supra, at 290D).

In *S v Katoo, supra,* at 527 para 11 the Court held that establishing incompetence in terms of s 194 is a two-step test. Firstly, it must appear to the Trial Court or be proved that the witness suffers from (a) mental illness or (b) that he or she labours under the imbecility of the mind due to intoxication or drugs or the like. Secondly, it must also be established that as a direct result of such mental illness or imbecility, the witness is deprived of the proper use of his or her reason. Those two requirements must both be satisfied before a witness can be disqualified from testifying on the basis of incompetence.

Section 193 enjoins the Trial Court to inquire into the issue and decide whether a witness is in fact competent. This may be done by way of enquiry whereby medical evidence on the mental state of the witness is led or by allowing the witness to testify so that the Court can observe him or her and form its own opinion on the witness's ability to testify. (*S v Katoo,* supra, at 528a; *S v Mahlinga* 1967(1) SA 401(A) 417 F-H).

2.ADMONISHMENT

Section 192 of the Criminal Procedure Act 51 of 1977 requires all witnesses to be sworn in. This may be by way of the oath, affirmation or admonishment.

In terms of section 164, the admonishment, which takes the form of a warning to tell the truth, may be administered to a witness who does not understand the nature and import of the oath.

There need not be a formal enquiry into whether the witness understands the oath. The judicial officer may form this opinion by observing the witness.
What follows is a discussion about the admonishment and competence of a mentally challenged adult in a recent case.

3.HAARHOF CASE

In the case of *Haarhof & another v Director of Public Prosecutions Eastern Cape* [2018] ZASCA 184 (11 December 2018), the two appellants were charged with the rape of a twenty-four year old female who had the mental age of a ten year old. Her mental ability fell exactly on the border between mild mental retardation and borderline intellectual functioning (at para [14]). The appellants were convicted in the trial court, and they unsuccessfully appealed to the full bench of the Eastern Cape Division of the High Court, Grahamstown. They applied for leave to appeal against the majority judgement, which was refused. They then approached the Supreme Court of Appeal, which granted them leave to appeal (at para [8]). They appealed against both their convictions and sentences. The appeal against conviction was based on the argument that the complainant's evidence was not properly before the court, as well as on the merits of the case (at para [10]). They argued that the trial court had erred in accepting the version of the complainant over their versions that the intercourse was consensual. This discussion will focus only on the question of whether the complainant's evidence was properly before the court.
Some months prior to the commencement of the legal proceedings, the complainant was referred to a clinical psychologist for an assessment, for the purposes of assessing her mental ability and ability to testify in court (at para [11]). The prosecution tendered this report to lay a basis for an application for the trial to be held in camera, and for the complainant to testify via an intermediary in terms of s 170A of the Criminal Procedure Act 51 of 1977 (at para [11]). The report turned out to be vital for determining the complainant's competence to testify and whether the admonishment could be used to swear her in. Importantly, the appellants' did not challenge the report.
The clinical psychologist who conducted the assessment of the complainant used scientific psychological tests to assess the complainant's mental functioning. She reached the conclusion that the complainant was able to testify in court and had a cognitive ability which made her suitable for the admonishment. She found that the complainant was not mentally disabled as envisaged by the Sexual Offences Act 23 of 1957. The trial court also directed questions at the complainant aimed at ascertaining whether she understood the distinction between truth and falsehood. Ultimately the trial court found her competent to testify and administered the admonishment to her.
The applicant was allowed to testify via an intermediary.
Before the Supreme Court of Appeal, counsel for the appellants' indicated that they were not challenging the complainant's general competence to testify, but that they took issue with the complainant being admonished. The reason they gave was that although it was established that the complainant could distinguish between truth and

falsehood, she did not understand the moral obligation to tell the truth or its significance (at para [16]). The Supreme Court of Appeal noted that despite this submission, the appellants' did in fact challenge the complainant's general competence to testify in the proceedings before the court. The Supreme Court of Appeal therefore dealt with the issue of the complainant's general competency in its judgement (at para [16]). It started out by distinguishing between the enquiry into the complainant's general competency to testify in terms of s 192 of the Criminal Procedure Act 51 of 1977, and the enquiry into whether the complainant could be admonished because she did not understand the nature and import of the oath, in terms of s 164 of the Criminal Procedure Act 51 of 1977. They are two separate enquiries, on the authority of the case of *S v Katoo* [2006] 4 All SA 348, which the court referred to at para [17].

Competence

The Supreme Court of Appeal first dealt with the question of competency, explaining that every person not expressly excluded by the Criminal Procedure Act 51 of 1977 or the English law of evidence as at 30 May 1961 was presumed to be both competent and compellable in criminal proceedings (S 192 read with s 206 of the Criminal Procedure Act 51 of 1977, referred to in para [19]). Section 194 of the Criminal Procedure Act 51 of 1977 stipulates the specific requirements for determining whether a witness is incompetent to testify. It provides that:

'No person appearing or proved to be afflicted with mental illness or to be labouring under any imbecility of mind due to intoxication or drugs or the like, and who is thereby deprived of the proper use of his reason, shall be competent to give evidence while so afflicted or disabled.'

The first requirement of the section is that the court must be satisfied that the witness suffers from a mental illness or that he or she labours under imbecility of mind due to intoxication or drugs or the like. Secondly, it must also be established that as a result of that condition, the witness is deprived of the proper use of his or her reason. Those two requirements must both be satisfied before a witness can be disqualified from testifying on the basis of incompetence.

The Supreme Court of Appeal referred to the case of *S v Katoo* (supra) where the court had held that imbecility is not a mental illness and that it did not, without more, render a witness incompetent. In the *Katoo* case (supra) the complainant was severely mentally retarded, yet was still found competent to testify. (For other cases in which the court allowed persons suffering from mental disorders and imbecility to testify, as long as they were not thereby deprived of the proper use of their reason, see *S v Thurston & another* 1968 (3) SA 284 (A), *S v J* 1989 (1) SA 525 (A), *R v K* 1957 (4) SA 49 (O) and *S v Malcolm* 1999 (1) SACR 49 (SE)).

The Supreme Court of Appeal pointed out that the complainant in the case before them was in a better position than the complainant in *Katoo's* case (supra); that the clinical psychologist had concluded that she was competent to testify and that the appellants had not challenged this conclusion (at para [21] and [22]). The Supreme Court of Appeal found that the complainant was therefore competent to testify as per

s 192 of the Criminal Procedure Act 51 of 1977. The fact that the complainant was competent to testify did not however automatically mean that she could be sworn in or admonished as a witness (at para [25]).

Admonishment

The next enquiry was whether the complainant met the requirements to be admonished. To be admonished rather than sworn in by oath, it must be established that the witness does not understand the nature and import of the oath (Section 164, Criminal Procedure Act 51 of 1977; para [29]). There need not be an express finding made by the court in this regard. It is sufficient if the facts indicate that the witness cannot comprehend the nature and import of the oath (*S v B* 2003 (1) SA 552 (SCA) at para [15]).

In the trial court, prior to admonishing the complainant, the magistrate engaged in an exchange with the witness. The exchange was directed towards ascertaining whether the complainant understood the difference between truth and lies (per the magistrate in a communication to the legal representatives quoted at para [5]). Immediately after the exchange, the defence counsel submitted that the exchange showed that the complainant was not competent to take the oath. The state advocate then proposed that she be admonished and the defence counsel expressly agreed with this suggestion (at para [26]).

The Supreme Court of Appeal dealt with the purpose of the enquiry prior to admonishing a witness and held that:

'[It] is not to merely determine whether a witness can understand the abstract concepts of truth and falsehood or can give a coherent and accurate account of the events but to determine whether he or she can distinguish between truth and falsity. It must be evident that the witness recognises the danger and wickedness of lying' (para [30], referring to *S v Henderson* [1997] 1 All SA 594 (C)).

The Supreme Court of Appeal further referred to the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & others* 2009 (2) SACR 130 (CC), paras [164]-[167], where the court had stated that it is implicit in s 164 that the person must understand what it means to speak the truth, and that if the person did not understand what it meant to tell the truth, the person could not be admonished and was therefore not competent to testify (See also *Gealall Raghubar v The State* 2012 ZASCA 188 at para [5], referred to in para [31] of *Haarhof's* case (supra)).

If one examines the exchange between the magistrate and the complainant, which had the stated purpose of ascertaining whether the complainant understood the difference between truth and lies, it is troubling. The magistrate asked her whether she understands the difference between what is true and what is not true and she says 'Yes.' She was then asked whether it would be true to say she is a boy and she correctly replied 'No.'She was then asked 'Do you know what happens to someone who does not tell the truth?' and she replied in the negative. Thereafter she was asked whether it is good to tell lies, and she replied 'Yes.' Both legal representatives were then given a chance to ask questions of the complainant. The prosecutor asked

her whether it was true to say she was a boy, and whether it was true to say she was a girl – and she answered the questions correctly. The defence counsel did not pose any questions to the complainant.

The appellants argued that the enquiry conducted by the magistrate was inadequate, and that although it showed that she understood the difference between truth and falsehood it did not indicate that she understood the importance of telling the truth or the moral obligation to tell the truth. The Supreme Court of Appeal acknowledged that while the answer to the first question by the complainant in the truth enquiry indicated an understanding of the difference between telling the truth and falsehood, the answers to the following questions appeared to show the contrary. However, the Supreme Court of Appeal still rejected the challenge to the enquiry, holding that it must be viewed in the context of the unchallenged detailed expert testimony of the clinical psychologist to the effect that she could distinguish between truth and falsehood and would be able to relate the facts and the facts only (para [33]). The Supreme Court of Appeal also gave significance to the fact that the psychologist reported that when the complainant had been asked about dropping out of school she had said that it was because she stole, was rude and caused problems. This, the Supreme Court of Appeal concluded, showed that the complainant 'understood the importance of being honest even if it meant showing herself in a negative light … that is a clear demonstration of someone who understands the moral obligation of telling the truth' (para [33]). The Supreme Court of Appeal also noted that the complainant was nervous in court (para [34]) and observed that that could have explained her strange answers at the truth enquiry.

Ultimately therefore, the Supreme Court of Appeal concluded that the complainant had been properly admonished, and that the complainant's evidence was properly before the court.

It is worth noting that ordinarily it is the court which is required to make the determination of whether the complainant is competent (and whether she may be admonished). There is a reason for this – the court knows the legal requirements pertaining to such a finding. In the case under discussion the court relied upon the clinical psychologist's report. There is no indication that the clinical psychologist had been apprised of the legal requirements for a competency finding, or for a finding that the complainant could be admonished. This is a concern.

It is also noteworthy that the court did not make a finding as to whether the complainant understood the nature and import of the oath, which is a prerequisite for admonishing a witness. It is true that there need not be an express enquiry into this – the presiding officer can satisfy himself that this is the case by virtue of the age and situation of the witness; and by observing her. However, a finding in this regard ought to be formally noted.

It appears also that the court may have muddled up, or at least conflated, the enquiry into competence, and the enquiry into whether the admonishment could be administered. It is true that there is an element of overlap – the ability to distinguish between truth and falsehood being a part of both enquiries. However, as the court emphasised, the two enquiries are distinct. To establish the competence of a child to

testify there is a threefold test. The child must be able to distinguish between truth and falsehood, the child must have the necessary cognitive ability to record information from the past accurately, and to understand and formulate coherent answers to questions posed to her. The complainant in the case under discussion had the mental age of a ten year old – her competency should have been tested by the court as if she was a child.

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Matters of Interest to Magistrates

THE EFF TWEETS NO MORE – AN ANALYSIS OF *MANUEL V EFF*

INTRODUCTION

The decision of the Gauteng High Court in *Manuel v Economic Freedom Fighters and Others* (Dr Mbuyiseni Ndlozi and Mr Julius Malema, respectively the national spokesperson of the EFF and its president) [2019] ZAGP JHC 157 raises a number of interesting issues. See http://www.saflii.org/za/cases/ZAGPJHC/2019/157.html. Firstly, the Court ordered a wide variety of remedies for defamation, including: declaratory relief; an interdict that the statement be removed from all media platforms and not be-tweeted; a public retraction and apology; damages of R500 000 payable to a charity of Mr Manuel's choice; and a punitive costs order. The relief was granted in the form of interdictory relief on a semi-urgent basis. Secondly, because the interdict restrained a publication, the Court was required to balance the rights to freedom of expression and dignity by considering the cautionary requirements developed by the then Appellate Division in *Hix Networking Technologies CC v System Publishers Pty) Ltd* 1997 (1) SA 391 (A) for such interdicts. Whilst the *Manuel* Court acknowledged the tension between these rights and the requirements for an interdict, it failed to refer specifically to the *Hix Networking* principles. Thirdly, the Court developed the reasonable publication defence to defeat the wrongfulness (unlawfulness) and defamatory intent requirements of a defamatory publication. This

defence was previously only available to the media, but the *Manuel* court extended the defence to all users of social media sites when discussing matter of public interest. Fourthly, the Court stressed that false information, published with full knowledge of its falsity, will not be protected by the courts, even if such information was published as "political speech". This is an important development given the current concern with false news. Finally, despite the many issues at stake, the EFF's application for leave to appeal was dismissed with costs in *EFF v Manuel* [2019] ZAGPJHC 172 on 18 June 2019. See http://www.saflii.org/za/cases/ZAGPJHC/2019/172.html

FACTS

The applicant, Mr Trevor Manuel, is a well-known public figure. In early 2019 he was appointed by President Ramaphosa to serve as the Chair of a panel constituted to facilitate the transparent appointment of a new SARS Commissioner. Prior to this, the appointment of the Commissioner was the prerogative of the President, who was empowered in terms of the SARS Act 34 of 1997 to appoint a Commissioner in any manner he deemed fit. The task of the panel was to interview candidates and to recommend a shortlist to the President. One of the candidates was Mr Edward Kieswetter, who was subsequently appointed as Commissioner. Mr Manual recused himself from the interview of Mr Kieswetter as a precaution, because he had worked in a senior position at SARS while Mr Manuel was Minister of Finance.

On 27 March 2019 the EFF published a tweet (the impugned statement) on its Twitter account, which read in abbreviated form as follows:

"THE EFF REJECTS SARS COMMISSIONER INTERVIEW PROCESS
The EFF objects to the patently nepotistic, and corrupt process of selecting the South African Revenue Services' Commissioner … It is confirmed that a panel chaired by the former minister, Trevor Manuel, conducted secret interviews to select the SARS Commissioner and this goes against the spirit of transparency and openness … It has now emerged that the reason is that, one of the candidates … is a dodgy character called Edward Kieswetter, who is not just a relative of Trevor Manuel, but a close business associate and companion."

At the time of publication, the EFF had over 725 000 Twitter followers. The statement was retweeted 237 times. Mr Malema also retweeted the statement from his personal Twitter account (with over 2 million followers). Plus, the statement received wide media coverage.

THE RELIEF SOUGHT

Mr Manuel launched interdictory proceedings by way of a semi-urgent application for final relief, requesting an order: a) declaring the statement to be defamatory, false and unlawful, so as to protect his reputation; b) directing the respondents to remove the statement from their media platforms; c) interdicting the respondents from

publishing the statements in the future; d) that the respondents retract and apologise for the statement; and e) general damages as a *solatium* for the injury to Mr Manuel's reputation. The respondents denied that the statement was defamatory, alternatively argued that it was not unlawful, raising the usual defences to defamation: truth and public interest, reasonable publication and fair comment. The respondents also disputed the urgency of the application.

FINDINGS

Balancing of rights

The Court accepted upfront that it was required to balance the competing rights to dignity and freedom of expression, as is usual when applying the common law of defamation. As discussed below, however, the Court failed to appreciate that the nature of the relief sought (a restraint of publication) required it to apply the more stringent *Hix Networking* principles during the balancing process.

Interdict

The court found that the requirements for a final interdict had been met. Mr Manuel had a clear right to protect his reputation, which had been harmed by the publication of the statement, aggravated by its ongoing dissemination. This conduct also harmed the public interest, given the need to ensure that the public was not misinformed about the appointment process at SARS. Mr Manuel had no alternative remedy as the EFF refused to take down the statement from their media platforms or to apologise.

Urgency

The Court held that Mr Manuel was justified in bringing the relief on a semi-urgent basis, given the ongoing impairment to Mr Manuel's dignity and the compelling need to protect the public interest (the sanctity of SARS). The respondents had been given 10 days to file answering affidavits and the matter was ready to be heard.

Defamation

The Court confirmed that defamation is defined as the unlawful and intentional publication of material about a person which harms his or her reputation. To determine whether a statement is defamatory, two enquiries are involved (see too *Le Roux v Dey* 2011 (3) SA 272 (CC) para 85, confirmed at para 47). First, and with reference to the objective standard of the ordinary reasonable member of the public, the statement's meaning must be ascertained. Second, it must be asked whether the same hypothetical person would regard the statement as lowering a person's reputation. In this case, because the statement was a tweet, this person was construed as the ordinary Twitter reader, who followed the EFF and Malema, and who had an interest in politics and current affairs (para 49). Applying this test, the Court found that the statement meant that Mr Manuel was dishonest, corrupt, and nepotistic, and that this meaning would undoubtedly lower the reputation of Mr Manuel in the eyes of "right-thinking members of society". To counter this conclusion,

the respondents argued that as a public figure involved in crucial state appointments, Mr Manuel had to endure a greater degree of scrutiny and tolerance of political criticism. The court dismissed this argument, relying on *Mthembu-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA), and held that even high-profile political office bearers are entitled to protect their dignity. It is significant that the EFF revisited this argument in its application for leave to appeal.

Once Manuel had shown that a defamatory statement had been published, the statement was then presumed to be unlawful and published with defamatory intent, and the onus was on the EFF camp to rebut such presumptions.

Defences to rebut unlawfulness

The EFF raised the usual defences to rebut lawfulness. The first of these was truth and public interest. Here, the Court found that the statement was clearly not true and the defence failed. Later, went dealing with fair comment, the Court went further and found that the EFF representatives acted maliciously, because they knew that the statement was false and still refused to remove the statement from their media platforms.

The next defence was reasonable publication. This interesting approach resulted in the development of the law. The defence was introduced by the SCA in 1998 in *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) and is traditionally available to the media only. It entitles the media to rebut the presumptions of lawfulness and *animus injurandi*, even if the facts underlying the publication are *not true*, provided that it is in *reasonable in all the circumstances to publish the statement*. When considering the reasonableness of the publication, important factors include: the nature, extent and tone of the publication; the “sting” in the statement; the reliability of the source and steps taken to verify the information; and the fact that greater latitude is allowed when addressing political issues, although this should not be construed as an excuse to lower the standard of care to publish the truth.

The *Manuel* Court held that given the propensity of the public to comment publicly on social media platforms, especially on matters of public concern, the reasonable publication defence should *not* be restricted to the media (paras 61-68). The press should not be placed in a favourable position to ordinary members of the public, who must also be entitled to have their say. For the Court, another supporting factor for the extension of the defence is that social media posts are likely to be disseminated more widely that print stories in the more traditional media. As explained below, this reasoning is flawed and fails to appreciate the importance of the media’s role as watchdog of the democracy, a factor specifically considered when the defence was introduced into our law. It also creates the impression that false statements tweeted by members of the public may be condoned if these statements were reasonably published.

On the facts, however, the EFF was unable to prove that the publication was reasonable, as it had not taken proper steps to verify the accuracy of the various allegations in the tweet.

The defence of fair comment was also unsuccessful. The EFF argued that their comments were fair and that it was in the public interest to discuss the workings of the SARS Commissioner appointment panel, which, in the EFF's view, conducted secret interviews. To succeed with a defence of fair comment, the following requirements must be met: the underlying facts must be true; there must be a comment / opinion, as opposed to a statement of fact; the comment must be fairly made – that is, an honestly-held opinion expressed without malice; and the matter must be in the public interest. The *Manuel* court held that the underlying facts upon which the comments was based were untrue, plus the repeated publication on Twitter indicated that the respondents were actuated by malice. In the words of the Court at para 66: "there can never be a justification for the ongoing publication of a defamatory statement which has been revealed to be untrue unless the principal purpose is to injure a person because of spite or animosity." [Note that the paragraph numbering in the SAFLII judgment appears to be incorrect from para 68 onwards].

The defence of public interest was also raised, but unsuccessfully. The court correctly pointed out that public interest is not on its own a defence to defamation. It is a mere element of the truth and public interest and fair comment defences.

Remedy

The Court awarded a wide-range of remedies. The statement was declared unlawful, its publication restrained, a public apology ordered, and damages as a *solatium* in the sum of R500 000 ordered – as a vindication of Mr Manuel's dignity and reputation – and payable to a charity of Mr Manuel's choice. In assessing the damages, the court considered the seriousness of the defamatory statement (found to be egregious and extremely harmful), its tone, the extent of the publication, the reputation of the parties, and their conduct. Here, and under the heading "Remedy", the Court stressed that the EFF representative had acted maliciously and that "The motive and conduct of the respondents are relevant. They stubbornly refuse to retract, apologise or remove the impugned statement from their social media platforms, when it is evident that they should do so. These factors collectively establish the existence of actual malice and a desire to hurt Mr Manuel in his person, and professionally, through the widespread dissemination of the defamatory statement. Such conduct *warrants a punitive costs order*" (para 71 – own emphasis).

It is noteworthy that in addition to the damages award of R500 0000, the respondents were also mulcted with a punitive costs order – on the scale as between attorney and client.

LEAVE TO APPEAL

The respondents' application for leave to appeal was dismissed with costs. An interesting argument raised was that the statement was not defamatory, because the ordinary objective reader of tweets would be accustomed to the language ordinarily used by the respondents, being *'their colourful rhetorical style'* (para 23). The Court rejected this argument: the publication of defamatory and false statements remains unlawful, even if such style is employed. The respondents also argued that the quantum of damages awarded was excessive. The Court amplified its earlier judgment to elaborate on the factors it considered when assessing the quantum, specifically the conduct and motivation of the respondents and the breadth of the publication.

ANALYSIS

The refusal of leave to appeal in Manuel was surprising and perhaps somewhat unfortunate, given the importance of the issues at stake.

Interdict in restraint of publication

An interdict to prevent a publication is known as interdict in restraint of publication or an anticipatory ban on publication. Interdicts of this sort are infrequently granted, because of the impact on freedom of expression, and because the injured party is ordinarily entitled to a remedy claiming damages using the *actio iniuriarum*. See *Herbal Zone (Pty) Ltd v Infitech (Pty) Ltd* [2017] 2 All SA 347 (SCA).

The principles underlying the proper approach to interdictory relief in these circumstances were set out in *Hix Networking*, an application for an interim interdict to restrain a pending publication. The AD held that a court asked to restrain a publication must act with caution, because if the interdict is granted there will be no publication, which impacts on freedom of expression. The applicant will need to establish: a *prima facie* right (note for a final interdict a clear right is required); a well-grounded apprehension of irreparable harm if relief is not granted; that the balance of convenience favours the granting of the interdict; and there is no other suitable remedy. When assessing balance of convenience, the court must take into that the person whose reputation is injured is not compelled to wait for the damage and sue afterwards, but can approach the court on motion to prevent the damage if there is a risk of irreparable harm to reputation. However, it must also be appreciated that even if the interdict is not granted, the defamed person will still have a separate cause of action for damages. The court in exercising its discretion would need to consider the strength of the applicant's case, the seriousness of the defamation, the difficulty for the respondent to prove a defence in light of the urgency, and that the interdict may be final.

In *Herbal Zone*, with refence to the *Hix Networking* principles and *Midi Television t/a E-TV v DPP (Western Cape)* 2007 (5) SCA 540 (SCA), the SCA added that where a respondent opposing the interdict puts up a defence to rebut the unlawfulness of the

publication, a mere *ipse dixit* does not suffice. The respondent must lay a solid factual basis that will support such a defence. There is no need to prove the defence, but its basis must be laid. Where the interdict is a final one, the applicant will need to go further and prove an infringement of a clear right (as opposed to a *prima facie* right).

The *Manuel* Court appreciated the need to balance the EFF's right to freedom of expression and Manuel's right to his dignity (reputation). It is, however, a pity that the Court failed to consider the *Hix Networking* cautionary principles for an interdict restraining a publication. Had the Court done so, it may have appreciated that it should have addressed the EFF's defences with more circumspection, especially as the matter was dealt with on a semi-urgent final basis. In particular, given the judgment of the Constitutional Court in *Democratic Alliance v African National Congress* 2015 (2) SA 232 (CC), the *Manuel* Court may have wished to engage with the question of whether political statements of this type can be excused on the basis of fair comment or even reasonable publication. This is especially so given the extension of the reasonableness defence, which, in my opinion, applies more appropriately to political speech involving high profile public figures than comments made by members of the public on social media platforms. Of course, the Court's finding that the statement was obviously false and made with malicious intent, probably swung the scales in favour of a restraint. But, at the very least, this factor should have been made more prominent in the balancing enquiry.

The defence of reasonable publication

The *Manuel* Court extended the defence of reasonable publication to allow members of the public to rebut the presumptions of unlawfulness and intention when defamatory statements are published. The reader will recall that the defence was first introduced into our law in *Bogoshi* to allow the media to show that even though a statement is untrue, its publication can be justified, because it was reasonably made in all the circumstances (prior to this, the press was strictly liable for defamatory statements). In *Bogoshi*, the SCA explained at length, and with reference to comparable foreign law, that the media has a special role to play in the constitutional democracy. In particular, the media is required to advance the common good by promoting the free flow of information on matters in the public interest. It is for this reason that the Constitution expressly recognises media freedom in section 16 of the Constitution. Thus, to promote media freedom and to entrench the democracy, the SCA held that the media should be permitted to rely on the defence in specially confined circumstances.

The reasons advanced by the *Manuel* court for the extension of the defence to members of the public do not adequately reflect the careful reasoning in *Bogoshi*. Comments on social media by members of the public should not be confused with genuine news reporting. Anyway, on the *Manuel* facts, the EFF's tweet was a political statement by a political party, not an ordinary member of the public. Although arguable that the defence could be extended to include political statements in the

public interest, this was not the court's ruling. See though the latest Twitter rules for offensive political tweets - https://www.bbc.com/news/technology-48791094

Additionally, the *Manuel* Court's justification for the extension is unconvincing. Firstly, in *Bogoshi*, the SCA warned that the defence does not allow press exceptionalism and does not give the media *carte blanche* to disseminate false material. Secondly, the fact that tweets on social media are far-reaching is the very reason why we should be wary of allowing members of the public to rely on reasonableness to excuse a false statement. Thirdly, there is the added difficult of setting criteria to assess the determination of the circumstances in which an ordinary tweet would amount to a reasonable publication. Take, for example, that some of the factors considered in *Bogoshi* are that the press should verify sources and allow the person targeted in the statement to respond. How would this apply to tweets and comments on social media? On top of this, the Court seems to have overlooked that the defence applies to factual statements, not comments, and excuses both unlawfulness and *animus injurandi* (permitting a negligent, but reasonable, publication of false facts).

The remedy

The *Manuel* court is to be commended for ordering a declaration of falsity and appreciating the value of an unconditional public retraction and apology when it comes to vindicating reputation in the balancing act between freedom of expression and dignity (see *Le Roux v Dey* para 9, paras 195-203, the Court recognising apology as an appropriate remedy for defamation, as one that promotes restorative justice; Trengrove "New remedies for defamation" 2013 (76) *THRHR* 70; Mukheibir "Reincarnation or Hallucination? The Revival (or not) of the Amende Honorable" 2004 (25) *Obiter* 455; Mukheibir "Ubuntu and the Amende Honorable – A Marriage between African Values and Medieval Canon Law" 2007 (28) *Obiter* 583; but compare *Media 24 v SA Taxi Securitisation* 2011 (5) SA 329 (SCA), where the SCA mistakenly refused an apology as a competent remedy and Visser "The revival of the amende honorable as applied to defamation by the media" 2011 (128) 2 *SALJ* 327, where the author argues that an apology does not suffice for media defendants). Nonetheless, the Court seems to have overlooked that both an apology freely given and a court-ordered public apology serve as a factor to be considered when assessing the computation of damages. Indeed, the ordering of an apology has been considered worthy as an alternative to a damages award No mention is made in either judgment of the significance of the apology in this assessment. Additionally, it is most unusual for a damages claim to be awarded in semi-urgent interdictory relief on motion and, to aggravate matters, whilst justifying the quantum, the Court conflates a damages award with a punitive costs order. The way in which the judgment is worded creates the impression that the respondents were punished for their defamatory conduct in more ways than one: a court-ordered apology; a damages award in the sum of R500 000 as an expression of the extent of the *iniuria* inflicted by the particular circumstances of the publication and the conduct of the respondents; *and* a punitive costs order. This approach undermines the jurisprudence

of the Constitutional Court in matters such as *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) where the Court held that there is no place for punitive damages in our legal system.

FINAL WORD

The facts in *Manuel v EFF*, which present a seemingly easy case of an obviously false and malicious defamatory statement, in fact raise a myriad of interesting legal issues, which require further analysis (beyond the scope of this note). It appears that the *Manuel* Court may have overlooked the significance of some of these issues and become clouded by the characters and politics involved.

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A Last Thought

"I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution and punishment but, in the spirit of ubuntu, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence. This is a far more personal approach, which sees the offence as something that has happened to people and whose consequence is a rupture of relationships. Thus we would claim that justice, restorative justice, is being served when efforts are being made to work for healing, for forgiveness and for reconciliation."

Desmond Tutu from *No future without forgiveness* (2000) p 51.