e-MANTSHI

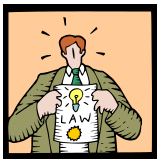
A KZNJETCOM Newsletter

August 2019: Issue 156

Welcome to the hundredth and fifty sixth 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 Chief Justice of the Republic of South Africa issued the following directive:

"In terms of section 8(3) of the Superior Courts Act, the date for the Judiciary Day, 2019 is determined to be 03 October 2019." The notice to this effect was published in Government Gazette no 42605 dated 31 July 2019. The notice by the Chief Justice was issued in terms of section 8 of the Superior Courts Act, 2013 (Act no 10 of 2013) (the Act). The Inaugural Judiciary Day took place in November 2018. This was a historical event as it was the first time the Judiciary, as an Arm of State, took the lead in accounting for its work, and for the power and authority the State has endowed to it. On 03 October 2019, the Chief Justice will, on the behalf of the Judiciary, present the Judiciary Annual Performance Report; and deliver an address on the state of the Judiciary.

2. The Portfolio Committee on Justice and Correctional Services intends to introduce - Promotion of Access to Information Amendment Bill, 2019. The notice to this effect was published in Government Gazette no 42604 dated 31 July 2019. Interested persons are invited to submit written comment on the Promotion of Access to Information Amendment Bill, 2019 by 16h30 on 31 August 2019.
The Bill seeks to amend PAIA to regulate the recordal, preservation and availability of information in respect of private funding to political parties and independent candidates.
2.2 The clause of the Bill gives an obligation to the accounting officer of a political party (which is defined to include an independent candidate), to create and keep records of any money paid or donated by persons or entities to a political party which is more than R100 000; any money lent to the political party; any money paid on behalf of a political party; assets, services or facilities provided to a political party; and any sponsorships provided to a political party. The records must be available on social media platforms on a quarterly basis. Furthermore the clause requires that the records be updated and be made available on social media platforms of the political party concerned two months before the election of the National Assembly or provincial legislature and before municipal elections.
The Bill can be accessed here:

http://www.justice.gov.za/legislation/notices/2019/20190731-gg42604-GoN1015-Bill-PAIA.pdf

3. The President has assented to *Act No. 4 of 2019: the Administrative Adjudication of Road Traffic Offences Amendment Act, 2019.* The act was published in Government Gazette no 42648 dated 19 august 2019.The purpose of the Act is To amend the Administrative Adjudication of Road Traffic Offences Act, 1998, so as to substitute and insert certain definitions; to improve the manner of serving documents to infringers; to add to the functions of the Road Traffic Infringement Authority; to repeal certain obsolete provisions; to establish and administer rehabilitation programmes; to provide for the apportionment of penalties; to provide for the establishment of the Appeals Tribunal and matters related thereto; to effect textual corrections; and to provide for matters connected therewith. The act will only come into operation on a date to be determined by the President. The act may be accessed here:

http://www.gpwonline.co.za/Gazettes/Gazettes/42648_19-8_Act4of2019AdminiAdjudicRoadTrafficOffencesAmendAct.pdf

4. Act no 7 of 2019 the *National Credit Amendment Act, 2019 has* been published in Government Gazette no 42653 dated 19 August 2019. The purpose of the Act is to amend the National Credit Act, 2005, so as to provide for debt intervention; to insert new definitions; to include the evaluation and referral of debt intervention applications as a function of the National Credit Regulator and to provide for the creation of

capacity within the National Credit Regulator and logistical arrangements to execute this function; to include the consideration of a referral as a function of the Tribunal; to provide for the recordal of information related to debt intervention; to require a debt counsellor to investigate whether an agreement is reckless; to provide for a court to enquire into and either refer a matter for debt intervention or make an order related to debt intervention; to provide for a Magistrate's Court and the Tribunal to determine the maximum interest, fees or other charges when re-arranging debt and for guidance to be prescribed in this regard; to provide for an application for debt intervention and the evaluation thereof; to provide for the Tribunal to re-arrange a consumer's obligations and make an order in respect of an unlawful credit agreement; to provide for orders related to debt intervention and rehabilitation in respect of such an order; to provide for mandatory credit life insurance to be prescribed; to provide for offences related to debt intervention, prohibited credit practices, selling or collecting prescribed debt and related to failure to register as required by the Act; to provide for measures when an offence is committed by a person other than a natural person; to provide for penalties in relation to the newly created offences; to provide for the Tribunal to change or rescind an order under certain circumstances; to require the Minister to make regulations related to a financial literacy programme; to provide in a transitional provision for the application of this Amendment Act to credit agreements entered into before its commencement; and to provide for matters connected therewith. The act will come into operation on a date to be determined by the President. The Act can be accessed here:

http://www.google.co.za/url?url=http://www.gpwonline.co.za/Gazettes/Gazettes/42653_19-8_Act7of%25202019NatCreditAmendAct.pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjluuGMwZPkAhWOKFAKHWljASsQFgggMAI&usg=AOvVaw2iMOp7o_WR7aDb2f-Fg8kq

Recent Court Cases

1. S v Z G (70/W 3389548) [2019] ZAWCHC 45; 2019 (2) SACR 162 (WCC) (27 February 2019)

Section 18(2) of the Child Justice Act expressly provides that section 56(1)(c) of the Criminal Procedure Act - relating to an admission of guilt and payment of a fine - does not apply to a written notice in terms of the Child Justice Act.

Francis, AJ

1. This matter has been referred to this Court by the Magistrate of Montagu with a recommendation that the admission of guilt fine paid by the accused, on 24 June 2011, when he was still a minor, and the resultant deemed conviction in terms of section 57(6) of the Criminal Procedure Act 51 of 1977, be set aside. This follows representations made by the accused's legal representative, Mr Johann Bester, as well as an affidavit made by the accused himself and a confirmatory affidavit by his mother. They all set out their objections to the admission of guilt and deemed conviction.

2. According to the accused's affidavit, he was apprehended at his mother's residence for the unlawful possession of cannabis in contravention of section 4(b) of the Drugs and Drugs Trafficking Act, 140 of 1992. He was aged 17 at the time. The accused was taken to the Montagu Police Station, accompanied by his mother, where he was charged for the illegal possession of cannabis and his fingerprints were taken. The fact that he was under 18 years of age was apparently an issue for the police officers but the arresting officer told the accused and his mother that if the accused paid an admission of guilt fine of R40, the Accused would be released and that would be the end of the matter. Both the Accused and his mother were relieved by this offer and immediately agreed. The Accused was given a written notice making provision for the payment of an admission of guilt fine in terms of section 56(1)(c) of the Criminal Procedure Act, his mother paid the fine of R40, and the Accused was then released from custody. At no stage was either the accused or his mother made aware of the full consequences of paying an admission of guilt fine. Nor were the provisions of section 18 of the Child Justice Act, 75 of 2008 applied - in terms of this section, it was obligatory to hold a preliminary inquiry relating to the nature of the allegations, and the ensuing consequences thereof for the accused, prior to any sanction being imposed.

3. The accused's mother was with him during the arrest and the payment of the admission of guilt fine and signed an affidavit in which she confirmed the accuracy of the facts recounted in the accused's affidavit.

4. Mr Bester furnished a helpful submission which may be summarised thus:

4.1 The accused was a child at the time of his arrest and ought to have been treated as such by the arresting officer.

4.2 The accused was alleged to have been in possession of a small quantity of drugs and his alleged offence is listed as item 16 on schedule 1 to the Child Justice Act. As such, the accused ought to have appeared at a preliminary inquiry.

4.3 Section 18(2) of the Child Justice Act expressly provides that section 56(1)(c) of the Criminal Procedure Act - relating to an admission of guilt and payment of a fine - does not apply to a written notice in terms of the Child Justice Act.

4.4 Contrary to the provisions of sections 18(1) and 18(2) of the Child Justice Act, the accused was given a notice in terms of section 56 of the Criminal Procedure Act and advised to pay an admission of guilt fine of R40.
4.5 It was not possible to obtain a copy of the section 56 notice which the arresting officer had issued to the accused due to the lapse of time. Once the audit of the admission of guilt records had been conducted, these records were destroyed in terms of the Departmental and Archival Instructions.
4.6 The arresting officer did not advise the accused, and/or his mother, of the accused's rights and the consequences of paying the admission of guilt fine.

5. On the basis of the documents contained in the record as well as the facts recounted in the accused's affidavit, there is much to find support in the submissions made by Mr Bester. The courts, especially after the advent of the Constitution, have insisted that a fair procedure be followed where an accused is invited to consider paying an admission of guilt fine (see, for example *S v Pryce* 2001 (1) SACR 110 *(C)*). In *S v Parsons* 2013 (1) SACR 38 *(WCC)* and *S v Tong 2013 (1) SACR (WCC)*, this Court, with particular emphasis on constitutional values, has held that an accused person should be properly warned of the consequences of signing an admission of guilt fine.

6. The irregularity ought to have been picked up by the judicial officer at the Montagu Magistrates Court when subsequently examining the documents as the Magistrate was obliged to do in terms of section 57(7) of the Criminal Procedure Act. If the Magistrate had done his/her job properly, it would have been noticed that the accused was a child and the payment of an admission of guilt fine by him was proscribed by section 18(2) of the Child Justice Act. The failure of justice was compounded by the fact that the accused was a minor at the time of his arrest and the arresting officer was aware of this fact but nonetheless continued with the issue of a section 56 notice.

7. The Child Justice Act approaches the plight of children in conflict with the law comprehensively, taking into account their vulnerability and special needs. It aims to prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children, including use of diversion (see the Preamble and section 2(d) of the Child Justice Act). Where a child is alleged to have committed a minor offence, such as in the case of the accused, police officials considering release or detention of a child after arrest, but prior to the first appearance at a preliminary inquiry, should ideally release the child on written notice into the care of a parent, an appropriate adult, or a guardian (section 21(2)(a) of the Child Justice Act).

8. In the matter at hand, the conduct of the arresting officer fell far short of what is required when issuing a section 56 notice. In addition, because the accused was a

child, the issuing of the section 56 admission of guilt notice by the arresting officer was contrary to the provisions of section 18(2) of the Child Justice Act; this, in and of itself, is fatal. This failure of justice is buttressed by the fact that the Child Justice Act was ignored in its entirety. For these reasons, I consider that the accused's admission of guilt was not in accordance with justice and should be set aside.

9. In the circumstances, the following order is made:
(a) The accused's admission of guilt in terms of section 57 of the Criminal Procedure Act 51 of 1977, made on 24 June 2011, is set aside.
(b) The resultant entering in the criminal record book of the particulars contemplated in section 57(6) of the Criminal Procedure Act by the clerk of the court is set aside and such particulars shall be expunged from the criminal record book.

2. Mong v Director of Public Prosecutions and Another (17593/2018) [2019] ZAWCHC 106 (23 August 2019)

A deemed conviction and sentence (where admission of guilt has been paid) in terms of section 57 (6) of the CPA is a conviction with regard to the provisions of section 57 (7). Such conviction and sentence is regarded as a conviction and sentence that can be entered onto the Criminal Record Book for the purposes of a previous conviction in terms of section 271 of the CPA.

(The judgment below is only the second half of the full judgment. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZAWCHC/2019/106.html)

Henney, J

[44] Issues for consideration

1) whether an entry made into the Criminal Record book by the Clerk of the Court of an admission of guilt in terms of section 57 (6) would amount to a conviction and sentence; and
2) if so, would it then amount to a previous conviction that would be entered into the Criminal Record book of the South African Police Services; and
3) whether it would ***only*** amount to a conviction and sentence, ***after*** a judicial officer presiding at the court in question has determined, in terms of the provisions of section 57 (7), that such conviction and sentence is in accordance with justice, which would amount to a criminal record entered into the Criminal Record book of the South African Police Services.

Discussion

[45] One of the questions to consider in this matter, is whether an AOG fine paid at the police station, or local authority as the case may be, in a case where the Summons or written notice had only been forwarded to the Clerk of the Court, who entered the essential particulars of such summons or written notice as the case may

be into the Criminal Record Book for admissions of guilt would have the effect, that the accused person shall be deemed to have been convicted and sentenced by the court in respect of the offence in question, as provided for in section 57 (6) of the CPA. That is, if the documents upon which the admission of guilt fine was paid, were not examined by a judicial officer presiding at the court in question in terms of the provision of section 57 (7) of the CPA.

[46] The further question to consider is whether the deemed conviction and sentence, as contemplated in section 57 (6), which is subject to the provisions of subsection (7), can be considered as a conviction and sentence if there was non-compliance with the provisions of subsection (7). Put differently whether the deemed conviction and sentence can still be regarded as such if it had not been examined by a judicial officer presiding at the court in question.

[47] The approach a court should follow in interpreting a statute was set out in the judgment of *Wallis JA* in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)* at para 18. In that matter it was stated that interpretation is the process of attributing meaning to the words in the document, be it legislation or some other statutory instrument or contract. And that the process of interpretation requires consideration of the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears and the apparent purpose to which it is directed. It is further established law that an interpretation which renders the meaning or use of some words and phrases meaningless is to be avoided.

[48] It is clear that the conviction and sentence in terms of section 57 (6) is based on a so-called deeming provision. In this regard, this deeming provision has a specific purpose, which is the recording of a conviction and sentence based on the payment of an AOG fine, in order to avoid the person accused of those crimes, having to appear in court. The deeming provision as set out in section 57 (6) of the CPA does not operate beyond it specific purpose as referred to above. In the case of *Lawyers for Human Rights and Another v Minister of Home Affairs Director-General: and Another 2003 JDR 0283 (T)* it was held that where a constitutional obligation or function, like the detention of an illegal foreigner, which are usually performed by a state functionary, is deemed to be performed by some other person in terms of legislation, the deeming provision does not shift the constitutional obligation of the state onto a non-state functionary.

[49] The court held, at pages 27-28, that "*[a] deeming provision is just that: It deems, for a specific purpose, something that may not be a fact to be a fact, sometimes until the contrary is proved and sometimes finally. A deeming provision does not operate beyond its specific purpose. Deeming provisions have no uniform meaning. Their meaning must in each instance be determined in accordance with the ordinary canons of construction (S v Rosenthal 1980 (1) SA 65 (A.D). at 76 and*

77.)"

[50] In *S v Rosenthal* (supra) it was held, at pages 75 F-H and 76 A-B that "*[t]he words 'shall be deemed' … are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, e.g. a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect, must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject-matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject-matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrary thereto, as being merely prima facie or rebuttable. I should add that, in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive."*

[51] The court in *Rosenthal* relied heavily on the dictum in *R v Haffejee and Another 1945 A.D. 345,* in dealing with the question as to how a deeming provision should be interpreted, and at page 77 A-B says the following: "*Hence, Haffejee's case is sound authority for the proposition that the words 'shall be deemed' in the appropriate context can have the last meaning and effect mentioned above, namely, that the deeming is merely prima facie or rebuttable, even in the absence of any express qualification to that effect".*

[52] The erstwhile Appeal Court of South Africa, in dealing with a similar deeming provision in the previous Criminal Procedure Act, Act 56 of 1955, which dealt with admissions of guilt fines paid in terms of section 351 of that Act, in the matter of *NGJ Trading Stores (Pty) Ltd v Guerreiro 1974 (4) SA 738* (A) also relied heavily on the decision of *Watermeyer CJ* in *Haffejee* (supra), where *Holmes JA,* at 744, held that in interpreting this deeming provision one must examine the aim, scope and object of the legislative enactment in order to determine the sense of its provisions, which is in line with what is proposed in *Natal Joint Municipal Pension Fund*.

[53] The court in *NGJ Trading Stores* (supra), having had regard to the deeming provision relating to admissions of guilt in that particular act, concluded that although the word *"convicted*" ordinarily means *"adjudged to be guilty by a court"*, that does not imply, if regard is to be had to other provisions of that act, that "*adjudged to be guilty"* needs to be done, for example, by a weighing up of evidence. "*Adjudged to be guilty"* or "*convicted"* shall be interpreted by an examination of the aim, scope and object of

the Criminal Code.[1] In this regard, the court referred to section 258 (1) (a) of the Criminal Code, where there is no question of adjudging the accused to be guilty, in the sense that it has to weigh up evidence of an offence to which an accused pleads guilty. And in such cases an accused person is found guilty and sentenced without any evidence being led. Similarly, in certain minor cases, as in the case of section 112 (1) (a), and more serious cases in the case of 112 (1) (b), 112 (2) and 105A of the current CPA, an accused person is also found guilty without being adjudged in the ordinary course.

[54] The court went into on to say, at 745 para C-D: "*Similarly, when the clerk of the court has entered the document of admission of guilt in the criminal record book of the court under sec. 351 (5) and the court is passing sentence, there is no issue between the State and the accused in the matter of conviction."*

[55] The Appeal Court further stated, at page 745 para G – H: "*Returning to sec.351, the words 'deemed to be convicted' in sub-sec. (5) seem to me to be appropriate in relation to this procedure designed for the convenience of the accused and the celerity of the administration of justice. First, the accused, having filed a signed admission of guilt and deposited the estimated sum towards a fine, is not required to appear in court. Second, there is no formal plea of guilty in court. Third, he is not present to hear a verdict. Fourth, after the deemed conviction the door is left open for the court or the Attorney General to send the case to trial. It is only when the court has finally exercised its judicial discretion in deciding the amount of the fine that the proceedings are complete. By this time there is no question of a statutory deeming. There is a conviction and a sentence. Sentence postulates conviction. This is confirmed by the fact that the accused cannot thereafter be charged for the same offence: the plea of autrefois convict would be available to him."* (Emphasis added.)
The court then goes on to say, at 746 A: "*Moreover, the conviction counts as a previous conviction, as counsel for the respondent rightly conceded." (Emphasis added.)*

[56] It is therefore clear that the deemed conviction is subject to the provisions of subsection (7). It is a deemed conviction subject to judicial imprimatur. Put differently, it is a deeming provision which is regarded as a conviction and sentence, and the proceedings are only complete after a judicial officer has exercised its judicial discretion in terms of subsection (7).

[57] The legislature had to make a choice by either providing a procedure in terms whereof the payment of an AOG fine would have the effect of a conviction and sentence by a court, or not. In this context the legislature would have been mindful of the fact that the conviction and sentencing of an accused falls within the exclusive

[1] At page 745 paragraphs A-G.

domain of our courts, which is an important pillar of the doctrine of separation of powers.

[58] In my view, such an interpretation is consistent with the presumption that "statute law does not interfere with or oust the jurisdiction of the courts". In this regard, I make reference to *LAWSA Vol. 25 (1) para 337 at page 332 – 333,* where it is said that: "*The object of this presumption is to vouch for the horizontal division of powers (or trias politica) and, in particular, for the independence of the judiciary, and to ensure access for individuals to the courts and to adjudicative procedures. The Constitution has fundamentally affected this presumption and it is arguable that it has become superfluous."* (Footnotes omitted.)

[59] The authors of *LAWSA* further submit on page 333: "*It is submitted that the common-law presumption against interference with or an ousting of the jurisdiction of the court has largely been subsumed under the Constitution. Section 165 of the Constitution provides for the independence of the judiciary in no uncertain terms and section 34 entrenches the fundamental right of access to adjudication process. Other provisions of the Constitution also demand deference to judicial authority. Section 35, for instance, explicitly involves courts at all the various stages of the criminal process…"*

[60] As referred to earlier, the deeming provision in section 57 (6) of the CPA is for a specific purpose, which is to facilitate the recording of the particulars of summons or notice in the Criminal Record Book for admissions of guilt, which would be deemed to be a conviction and sentence by a court. It does just what it says: it deems, for a specific purpose, something that may not be a fact, to be a fact, either until the contrary is proved or sometimes finally. It cannot operate beyond its specific purpose, which is merely the recording of such particulars in the Criminal Record Book, deemed to be a conviction and sentence of the court, which would in the ordinary course be the function of a Magistrate or judicial officer. The subsection does not deem that the Clerk of the Court actually convicted and sentenced the person to pay the AOG fine. It is a deemed conviction and sentence of the court.

[61] The purpose is not to imbue the Clerk of the Court with the powers of a Magistrate or judicial officer, which would be contrary to the constitutional injunction as set out in section 165 of the Constitution, which is that the judicial authority is vested in the courts and not a person that has not been appointed as a judicial officer.

[62] It is clear that the decision of this court in the case of *Madhinha*, besides the fact that it is clearly wrong, will have, as a consequence, a disastrous effect on our criminal justice system, especially when it relates to the payment and the legal effect of an AOG fine for certain offences.

[63] The court in that case, with the greatest respect, clearly and demonstrably misinterpreted the law regarding this aspect. It clearly failed to interpret the provisions of section 57 of the CPA while having regard to the aim, scope and object of the Criminal Procedure Act, the rules of interpretation as well as the Constitution. The court clearly did not have regard to the fact that the deemed conviction in terms of section 57 (6) is just what it says. And it is not a conviction and sentence by the Clerk of the Court, but by a judicial officer or Magistrate of that court. The conviction and sentence is based on a deeming provision which only becomes complete after judicial imprimatur had been given thereto in terms of section 57 (7).

[64] It is clearly at odds with what the erstwhile Appellate Division said in *NGJ Trading Stores*, which is still binding authority and which states that it is only when the court has finally exercised its judicial discretion, which includes whether the fine paid for the offence is in accordance with a determination by the Magistrate under subsection 5, or whether a determination for the payment of such a fine on the charge for which the accused has been charged has not been made, or whether the sentence is not adequate, and lastly, whether the admission of guilt fine paid does not exceed the amount determined by the Magistrate under subsection 5.

[65] Only after a judicial officer, in terms of subsection (7), is satisfied that the proceedings are in accordance with justice, based on these requirements, and after having exercise his or her judicial discretion, have the proceedings been completed. By which time there is no question of a statutory deeming and there is no conviction and sentence by the Clerk of the Court, because there never was, but rather by the judicial officer presiding at the court. This will amount to a conviction and sentence of that court, even though there was no formal court hearing or appearance of the accused before a Magistrate.

[66] The court in *Madhinha* simply failed to examine the aim and purpose of the proviso in subsection (7) of section 57, and regarded the deeming provision in terms of section 57 (6) not as such, but as an actual conviction, which it mistakenly characterised as a sui generis one. If that had been the case, the legislature would not have made the deemed conviction and sentence subject to the provisions of subsection (7), which entails judicial oversight over the payment of the AOG which resulted in the conviction and sentence.

[67] It would therefore have been a superfluous or meaningless provision. And it would not have been regarded as a deemed conviction and sentence, but as an actual conviction and sentence, which would have been constitutionally impermissible, because only a judicial officer has the power in terms of our law and especially our Constitution (section 165) to pronounce on the innocence or guilt of a person who has committed a criminal offence and impose a subsequent sentence.

[68] Furthermore, as pointed out by the Minister, if the payment of an AOG fine would not result in a conviction and sentence, it may result in a situation where a

person who pays an AOG fine would be treated differently to one who chose not to pay an AOG fine at the police station for the very same offence, and where both are liable to pay the same fine. It would then seem that the person who exercises his or her right to be presumed innocent, the right to confront his or her accusers, the right to testify in open court, the right to call witnesses, and the right to be convicted only upon proof beyond reasonable doubt that he or she committed the offence in question and the right to present evidence in mitigation of sentence, would be in a much more prejudicial position than a person who chose not to exercise those rights when such a person pays an AOG. Such a person, based on the reasoning and logic of the court in *Madhinha,* would, in contradistinction to the person that paid the AOG fine, be "properly" convicted and such conviction and sentence would be regarded as a previous conviction, merely because he or she chose to exercise his or her fair trial rights in terms of section 35 of the Constitution.

[69] Conversely, it would also have deleterious and far reaching consequences for society where, for example, an abusive partner would regularly commit a relatively serious violent offence, like common assault, on his or her partner, would choose to pay an AOG fine and would then not attract a previous conviction. And based on the decision of *Madhinha,* he or she would then remain "under the radar" because the police would not have a record of the offence, and even if they had a record of the offence it cannot be regarded as a previous conviction. Such a person, even if he or she had had committed numerous assaults and paid an AOG, would therefore be able to apply for a firearm licence because such "*convictions and sentence would not be regarded as previous convictions*". The police and prosecution authorities would then be failing in their duty to protect the public, whereas, as pointed out by the Minister, the police would be liable for the negligent breach of a legal duty by granting a firearm licence to an unfit person[2].

[70] Prosecutors may be reluctant to agree to a situation where people can admit guilt by means of the payment of an AOG fine, if such a conviction and sentence will not be regarded as a previous conviction. And will rather prosecute people in the ordinary course through the formal court process. It would have a negative impact on an already over-burdened court system which is exactly what section 57 seeks to prevent, and it will undermine the very aim and purpose of that section.

[71] The court in *Madhinha* either was not aware of the long line of cases in this and other divisions[3], and especially the binding authority of the *NGJ Trading Stores* case, or chose not to follow the settled law in this regard, which held that the payment

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[2]See in this regard Carmichele v Minister of Safety and Security and Another 2001 (4) SA 938 (CC); Minister of Safety and Security v Hamilton 2004 (2) SA 216 (SCA).

[9] S v Parsons 2013 (1) SACR 38 (WCC); S v Tong 2013 (1) SACR 346 (WCC); S v Houtzamer 2015 JDR 0424(WCC); S v Rademeyer (A186/17) [2017] ZAGPPHP 175 (12 April 2017); S v Mutobvu 2013 (2) SACR 366 (GNP).

of an AOG fine for certain cases[4] would result in a conviction and sentence which would be considered as a previous conviction.

[72] I, with the greatest of respect, fail to follow the reasoning and logic of the court in *Madhinha*, where it held that a conviction and sentence in terms of section 57 (6) cannot result in a previous conviction for the purposes of section 271 of the CPA. And that the other courts[5], without having decided the issue, merely accepted that a conviction in terms of section 57 (6) was a previous conviction, and as such a previous conviction to be entered on the Criminal Record. This cannot be correct for the following reasons. Firstly, it is settled law based on the *NGJ Trading Stores* decision that a conviction and sentence based on an AOG fine, not in terms of section 57 (6) but in terms of section 57 (7), would amount to a previous conviction. There was therefore, no need for the other courts to consider it. Secondly, as pointed out, that if regard is to be had to the proper interpretation thereof, it is a conviction and sentence in terms of the CPA in terms of the provisions of section 57 (7) and not section 57 (6), as pointed out in *NGJ Trading Stores*. Thirdly, there is no other provision in our law which provides for the proof of previous convictions, other than section 271 of the CPA. Fourthly, the CPA does not distinguish between previous convictions acquired for a crime based on the payment of an AOG fine and previous convictions based on a conviction which is based on any other provision of the Act. It is immaterial for the purposes of section 271 in what manner a person who has been convicted of a criminal offence, whether such conviction was by means of a payment of an AOG or by means of the formal court process. If that was the intention of the legislature, it would have done so.

[73] In *NGJ Trading Stores* (supra), it was argued that for the purposes of the nonfulfillment of the condition of the lease agreement, the previous conviction acquired after an AOG fine had been paid, cannot be taken into consideration for the purposes of the non-fulfilment of a contractual condition, but can only be regarded as a previous conviction in terms of the previous Criminal Procedure Act in operation at that time. *Holmes JA*, in answer to this, said the following at 746 E-G: "*As to that, it seems to me that it counts for the purposes <u>of all offences, whether under statutes, ordinances, bylaws, regulations or the common law</u>. In respect of all <u>such alleged criminal offences sec.351 provides the machinery for a ready dispensation of the law, leading to the sentence if the accused admits his guilt</u> ... It is difficult to understand how the procedure under sec.351 can be excluded from the meaning of their language." (Emphasis added.)*

[74] The court in *Madhinha* relied on the case of *S v Smullion (Sullivan) 1977 (3) SA 1001 (RA)* to conclude that because there was no verdict pronounced in a court of

[4]Except if such an offence had been compounded in terms of section 341 of the CPA in the case of minor offences; such offences are listed in schedule 3 of the CPA and are usually in relation to contraventions of bylaws of the municipality or certain specified offences in terms of the road traffic act.
[5]Referred to above in fn.7.

law, a conviction based on the payment of an AOG cannot be regarded as a previous conviction in terms of Section 271 of the CPA. This case, in my view, cannot be regarded as authority for the proposition that a previous conviction based on the payment of an AOG fine cannot be regarded as such. I say this for the following reasons. Firstly, it dealt with the question whether a person who had been convicted on two counts of drunken driving in a single indictment on the same day, and who was subsequently convicted again on another occasion, whether the later conviction should be regarded as a third conviction which would justify a person's driver's licence being suspended for life in terms of the relevant traffic legislation. It did not deal with a conviction based on the payment of an AOG. Secondly, the court in *Madhinha* did not consider, or it seems was not even aware of, what the appeal court had said decisively in the *NGJ Trading Stores* case, about the interpretation and meaning to be accorded to a conviction and sentence based on the payment of an AOG fine, and wrongly interpreted the law.

[75] The court in *Madhinha*, based on the *stare decisis* principle, had to follow the decisions of the erstwhile Appellate Division in *NGJ Trading Stores* (supra) as a court of higher instance. It was bound by that decision, which, in fact, as said earlier, the court did not even refer or have regard to. It did not state that it was not bound to follow the decisions of this court, as well as the courts in the other divisions, because they were clearly wrong. The decision in *Madhinha*, if left unattended, would have an undesirable effect on our law relating to this subject. In this regard, as mentioned earlier, the Minister submitted that the impact of such an interpretation of the provisions of section 56 and 57 will influence and affect the function of the South African Police Services and have consequences for all police officers who must act in terms of the provisions of these sections.

[76] Furthermore, that it will have a practical effect on the South African Police Services insofar as it may inform police officers about the duties and obligations in terms of these provisions, and how they are expected to go about in carrying out same to achieve the practical result contemplated by the sections, namely a conviction and sentence which is recorded as a previous conviction on an accused's Criminal Record, and that the upkeep and maintenance of an accurate and complete Criminal Record System is of vital importance to the criminal justice system as a whole.

[77] The Minister was not provided with an opportunity to be heard before the decision in *Madhinha* was handed down. And I agree that it has always been accepted and understood by the South African Police Services that admissions of guilt are of the same effect as a conviction and sentence by a court of law and entered into a Criminal Record System.

[78] I also agree with the Minister that the AOG fine system includes a number of statutory and common law offences, records of which not only provide an input to a

presiding officer in passing sentence, but also serves much broader interest, including interests relating to the grant or refusal of a firearm licence and even the private the interests of employers and contracting parties. I am of the view, that the greater public interest, the interests of justice, and implications that this judgment has on the broader criminal justice system as pointed out earlier, requires a reaffirmation of the correct legal position.

[79] Given these concerns of the Minister, it is once again helpful to restate the importance and benefits of the *stare decisis* principle, as was explained by *Hahlo and Khan: The South African Legal System and its Background (1968,) at 214,* where the author said the following: "*The advantages of a principle of stare decisis are many. It enables the citizen, if necessary with the aid of practising lawyers, to plan his private and professional activities with some degree of assurance as to their legal effects; it prevents the dislocation of rights, particularly contractual and proprietary ones, created in the belief of an existing rule of law; it cuts down the prospect of litigation; it keeps the weaker judge along right and rational paths, drastically limiting the play allowed to partiality, caprice or prejudice, thereby not only securing justice in the instance but also retaining public confidence in the judicial machine through like being dealt with alike … Certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis." (Footnotes omitted.)*

[80] This rule was confirmed by the Constitutional Court in the matter of *Ex Parte Minister of Safety and Security and Others: In re S v Walters and Another 2002 (4) SA 613 (CC),* at para 61, where it was held: "*It follows that the trial Court in the instant matter was bound by the interpretation put on s 49 by the SCA in Govender. The Judge was obliged to approach the case before him on the basis that such interpretation was correct, however much he may personally have had his misgivings about it. High Courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue."*
This rule was once again emphasised in the matter of *Afrox Healthcare Bpk v Strydom 2002 (6) SA 21 (SCA).*

[81] It seems that the court in *Madhinha* did not follow, firstly, the settled law as pronounced in the *NGJ Trading Stores* case of the erstwhile Appellate Division, and secondly, three decisions of this court, as well as the decisions of the courts in other divisions of equal tier. In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another 2011 (4) SA 42 (CC)* the Constitutional Court, at page 56 A-B, held: "*The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher*

authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos." (Footnote omitted.)

[82] It is with the greatest of regret, for the reasons as mentioned, that I find that the decision in *Madhinha* is manifestly wrong and should not be followed, because it is in conflict with a long line of decisions on the interpretation and legal effect and consequences of section 57 of the CPA. It was wrong in concluding that the payment of an AOG would amount to a sui generis conviction and sentence by the Clerk of the Court in terms of the provisions of section 57 (6), upon entering the particulars of the Summons or the notice in a Criminal Record Book.

[83] It was further wrong not to interpret the deemed conviction and sentence in terms of section 57 (6) as a conviction without having regard to the provisions of section 57 (7). It was, furthermore, wrong to conclude that such conviction and sentence cannot be regarded as a conviction and sentence that can be entered onto the Criminal Record Book for the purposes of a previous conviction in terms of section 271 of the CPA.

[84] In coming back to this case, it seems that based on the evidence of the documents presented, the deemed conviction and sentence, after it had been entered into the Criminal Record Book by the Clerk of the Court, was never placed before the judicial officer of the court for the district of Malmesbury.[6] Therefore, based on the decision of *NGJ Trading Stores*, the process which would make the deemed conviction and sentence a final one has not been completed, because there is no evidence that the Magistrate has exercised his or her judicial discretion as required by section 57 (7) of the CPA. The appellant was therefore not properly convicted and sentenced.

[85] In the result therefore, the entry of the conviction and sentence onto the Criminal Record Book and into the register of criminal convictions of the South African Police Services, falls to be set aside. As to the question of costs, in my view, this is not a matter, although brought on motion, where the process was strictly adversarial. These types of cases are usually brought on review in terms of section 304 (4) of the CPA. The applicant however, could not follow this route, because it was not a decision of a Magistrate or a Magistrate's Court, but of some other functionary. Neither the respondents are to be blamed nor were aware of the fact that the process was not completed as envisaged in section 57 (7) of the CPA. It would therefore be unfair to grant a cost order against them. It is also a matter of great public importance, where the DPP had to give an input and the Minister had to oppose the application; and especially, where the Minister had to reaffirm its interest in the integrity of the system of payment of AOG fines, and the important role the

[6]See record pages 62 and 63.

South African Police Services plays in the system of AOG fines and the entry of convictions into the National Criminal Record System for persons convicted of a criminal offence.

[86] In the result therefore, I would make the following order:

1) that the entry of the conviction and sentence into the Criminal Record Book under Darling CAS 07/10/2015 and into the register of criminal convictions of the South African Police Services is set aside;
2) that the previous conviction under Darling CAS 07/10/2015 based on such entry in the Criminal Record Book, incurred by the applicant, be removed from such Criminal Record Book;
3) the payment of the admission of guilt fine of R500, be paid back to the Applicant;
4) that the First Respondent make a decision whether to prosecute the Applicant afresh;
5) I make no order as to costs.

From The Legal Journals

Starosta, A

"The equivocal issue of *onus* in evictions – whose problem is it anyway? A critical commentary: *Occupiers, Berea v De Wet NO* 2017 (5) SA 346 (CC)."

2019 TSAR 383

Abstract

In June 2017, the constitutional court handed down a unanimous judgment regarding the eviction of 184 residents from a block of flats in Berea in the matter known as Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC). At first blush, the judgment deals with the very specific issue of whether a court was required to enquire into the circumstances which would render an eviction just and equitable in a scenario where the unlawful occupiers had consented, by agreement, to be evicted, or whether such consent absolved a court of this responsibility. Whilst the ruling that a court would not be absolved of such obligation in a situation where the consent was obtained from only four out of 184 occupiers without formal mandate from the others is not legally

contentious, a number of pronouncements made in the course of the judgment have far-reaching implications on how some courts understand or interpret the procedures that an owner wishing to evict unlawful occupiers is required to follow in order to comply with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
In this note, I rely on the constitutional court's judgment to establish a contextual framework and then proceed to engage with the practical eviction process to highlight how the pronouncements (or the flawed interpretation thereof) have the potential to adversely affect property owners, including those who are indigent and previously disadvantaged at ground level. I will draw on my experience of evictions in the Protea magistrate's court specifically (which is the court with jurisdiction to hear evictions from properties in and around the Soweto area) and explain how the judgment has resulted in the problematic issue of onus. It is my contention that previously disadvantaged property owners who are exploited by unscrupulous tenants, familial relations or property hijackers now bear the brunt of the legislation which was initially enacted to protect their section 26 constitutional rights (the right to access to housing) but is now depriving them of the rights guaranteed in section 25 (the right against arbitrary deprivation of property).

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

Contributions from Peers

DISCRETION OF THE COURT ITO SECTION 50 OF ACT 32 OF 2007 – IS THERE ANY?

The topic discussed in this article is a controversial and often emotive one since the offences under discussion are those where the victims are children or persons with mentally disability.

While the purpose and goals set to be achieved by Section 43 (establishment of a National Register of Sex Offenders) and in particular Section 50 (recording of particulars of offenders) of Act 32 of 2007 (as amended) are to be commended it may

be that circumstances arise where a judicial discretion is not only warranted but imperative, if true justice is to be done to all the parties.

Our legal system and procedure (whether it be criminal or civil in nature) are firmly based on the *audi alteram partem* principle (all parties have a right to be heard). In essence it will be argued that Section 50 completely extinguishes that principle in so far as a convicted offender's right to address the court regarding the recording of his/her name in the National Register of Sex Offenders.

Section 50 states as follows:

(2) *(a)* A court that has in terms of this Act or any other law—

(i) convicted a person of a sexual offence against a child or a person who is mentally disabled and, after sentence has been imposed by that court for such offence, in the presence of the convicted person;

must make an order that the particulars of the person be included in the Register. (Own Emphasis)

The legislature when drafting this particular Act made use throughout of the word "must" whenever ordering a court or person to perform any particular act or comply with a duty. This is a deviation from the norm of almost exclusively using "shall" in legislation where certain acts or duties are mandatory or peremptory.

A comparative analysis of Section 103(1) of the Firearms Control Act 60 of 2000 which also provides for a mandatory declaration, albeit *ex lege*, of a convicted person's unfitness to possess a firearm provides for a judicial discretion by inserting the words "unless the court determines otherwise". The court in this regard is free to receive evidence and/or submissions on behalf of the defense before exercising such discretion.

There is no indication that Section 103(1) of the Firearms Control Act 60 of 2000 has not been effective and achieved the purpose for which it was intended despite the court having a judicial discretion.

The order whereby the name of the accused be recorded in the Sexual Offenders Register in terms of Section 50 is mandatory see the matter of *J v the National Director of Public Prosecutions and Others [2014] ZACC 13* where The Constitutional Court was afforded an opportunity to confirm the ruling of unconstitutionality by the Western Cape High Court of Section 50 in in as far as it does not afford all convicted offenders an opportunity to address the court as to whether the offenders' name be entered in the register or not; where after a judicial discretion would be exercised by the court.

Honorable Justice Skweyiya ADCJ in a unanimous decision states as follows at paragraph 41;

"[41] The wording of section 50 of the Sexual Offences Act, read as a whole, indicates that a court has no discretion whether or not to include an offender's particulars on the Register. Section 50(1) provides that the particulars of the offender "must be included in the Register."[46] Section 50(2)(a) provides that the relevant court "must make an order that the particulars of the person be included in the Register."

The Constitutional Court, however, elected not to confirm the ruling in respect of adult offenders ruling as follows at paragraph 31;

"[31] The facts before the High Court raised the application of the provision to child offenders. Different considerations apply to child and adult offenders. These considerations have not been ventilated properly on the facts or in legal argument in the Court below or in this Court, notwithstanding the opportunity that this Court gave to the parties to make further submissions. It was inappropriate for the High Court to consider the provision's constitutional validity in relation to adult offenders and to extend its order to cover all offenders. It is similarly not in the interests of justice for this Court to make findings on the provision's application to adult offenders."

The Constitutional Court, however, did confirm the ruling in respect of child offenders in its ruling at paragraph 51;

"[51] I conclude that the limitation of the right of child offenders in section 50(2)(a) is not justified in an open and democratic society. While the limitation promotes legitimate and constitutionally sound aims, there exist accessible and direct means to achieve the purpose that are less restrictive to the child offender's rights. Section 50(2)(a) is constitutionally invalid and must be declared so."

As a consequence of the above Constitutional Court ruling, Section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, was amended in so far as children are concerned to provide as follows:

1) The court may not order the inclusion of a child's name in the Register unless;
   i) The prosecutor makes an application for such an order: and
   ii) A report is obtained from a probation officer referred to in section 71 of the Child Justice Act, 2008, which deals with the probability of the juvenile offender committing another sexual offence against a child or a person who is mentally disabled, as the case may be, in future: and
   iii) The court is satisfied that substantial and compelling circumstances exist based upon such report and any other evidence, which justify the making of such an order: and
   iv) The court must enter such circumstances on the record of the proceedings.

Section 52(2) provides that the accused person's name may only be removed and in certain cases never; dependent on the sentence imposed.

The Constitutional Court in both *J v NDPP and Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development and*

Another 2014 (1) SACR 327 (CC) highlighted the adverse consequences of such inclusion.

The Honourable Justice Skweyiya in the *J v NDPP* at paragraph 43 states,

"[43] Being placed on the Register bears serious consequences for the offender. As outlined above, restrictions are placed on the ability to work, on the ability to license certain facilities or ventures, and on the privileges of certain roles in the care of children or mentally disabled persons."

The inclusion of the personal details of sex offenders in a register without their permission and without the right to heard and even sometimes without their knowledge amounts to a violation amongst other rights of the right to privacy stipulated in section 14 of the Constitution of the Republic of South Africa, 1996. *See in this regard The viability and constitutionality of the South African National Register for Sex Offenders: A comparative study* by Professor N Mollema.

South Africa already possesses the Child Protection Register (CPR) provided for by Chapter 7 of the Children's Act 38 of 2005, making the National Register for Sex Offenders an unnecessary duplication. The Child Protection Register records all reported instances and convictions of all sexual offences and violent crimes against children; all attempts to commit violence against a child and possession of child pornography, and also the names of persons deemed to be unsuitable to work with children.

I share the sentiments expressed by Professor Mollema and foresee that should the constitutionality of the mandatory provisions of Section 50 be challenged they will in all probability fail such constitutional challenge.
In light of the decisions in Johannes v S 2013 (2) SACR 599 (WCC) and *J v the National Director of Public Prosecutions and Others [2014] ZACC 13* which dealt with the constitutionality of Section 50 in respect of juveniles I believe that the issue in respect of adult offenders may be ripe for consideration by our Superior Courts.

Mr. GS Nel
Acting Regional Court Magistrate
Maluti Kwazulu-Natal

Matters of Interest to Magistrates

ANALYZING THE ISSUE OF HEARSAY EVIDENCE IN LAND LITIGATION PROCEEDINGS IN THE MAGISTRATE'S COURT AND THE LAND CLAIMS COURT.

1. INTRODUCTION

In this discussion the writer discusses and analyzes presentation of hearsay evidence by a witness or witnesses during land litigation proceedings both in the Magistrate's Court and in the Land Claims Court.

The discussion also focuses on the general rule concerning hearsay evidence as well as legal principles governing its admissibility in the Magistrate's Court and in the Land Claims Court with specific reference to land litigation proceedings.

The Magistrate's Court in its area of jurisdiction, adjudicates land litigation matters falling mainly under Land Reform (Labour Tenants) Act of 1996 (hereinafter referred to as LTA) and Extension of Security of Tenure Act of 1997 (hereinafter referred to as ESTA). This Court also preside over other land-related matters governed by, amongst other statutes, the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act of 1998, commonly known as PIE.

However, in this discussion specific attention will be given to presentation of hearsay evidence, whether oral or written, in land litigation matters administered in terms of LTA and ESTA in the case of a Magistrate's Court, as well as those adjudicated by the Land Claims Court in terms of LTA, ESTA and Restitution of Land Rights Act of 1994 (hereinafter referred to as the Restitution Act).

Briefly, LTA seeks to provide, *inter alia*, for security of tenure for labour tenants and farm dwellers and for matters connected therewith, whilst ESTA deals, *inter alia*, mainly with facilitation of long-term security of tenure of occupiers and to provide for matters connected therewith. On the other hand, the Land Claims Court which has inherent discretionary powers (like any other High Court Division of South Africa) in all land matters, is responsible for implementation and application of the Restitution Act in land restitution matters. Furthermore, this Court has wide powers of review of

orders emanating from the Magistrate's Court which orders have been granted in terms of LTA and or ESTA.

The legal principles governing admissibility of hearsay evidence in the Magistrate's Court are not necessarily similar to the manner in which this type of evidence is tendered and admissible in the Land Claims Court. The reason being that the Land Claims Court besides it being having common law power of inherent jurisdiction is a Court of equity and as such, its proceedings dispensed with strict rules of procedure. On the contrary, the Magistrate's Court is a creature of statute, namely the Magistrate's Court Act of 1944, and all of its proceedings including land litigation, are bound by procedural law. Therefore, the admissibility of hearsay evidence in land litigation proceedings in the Magistrate's Court differs considerably with that of the Land Claims Court as this will appear from the discussion below.

2. PRINCIPLES GOVERNING ADMISSIBILITY OF HEARSAY EVIDENCE WITH SPECIFIC REFERENCE TO LAND LITIGATION PROCEEDINGS.

One of the most important part-perspectives of procedural law is the law of evidence. The law of evidence provides various types or forms of evidence, and one of which is hearsay evidence which is the subject of this discussion. Hearsay evidence can be presented in oral or written form. It is important to take note of the fact that oral or *viva voce* evidence is always presented under oath, however a witness cannot adduce hearsay evidence under oath.

It is trite that a witness in any litigation proceedings will adduce evidence to prove or disprove, to substantiate, to countenance, or to corroborate or to rebut any facts or submission in order to show the Court that on a balance of probabilities he is entitled to the relief sought or that his adversary is not entitled to the relief he seeks. However, certain types of evidence are at common law not generally admissible as evidence in a Court of law unless such evidence complies with certain legal requirements for admission, and hearsay evidence is one of them.

In ordinary common parlance, hearsay evidence simply means any written or spoken statement that was made by somebody outside Court, and is being used by another person to prove the truth of that statement.

According to the author, **Bekink, in *'Minister of Police v M* 2017 38 IJL 402 (LC)' 2017 De Jure 186 – 194,** hearsay evidence is referred to as a situation where a witness reports, during the course of court proceedings, what he or she has heard from another person or read.

The general principle of the common law is that hearsay evidence is inadmissible as evidence in a Court of law because it is unreliable, cannot be tested and has a potential of bringing about prejudice to the other party.

Let us assume the Magistrate's Court is hearing an application for eviction in terms of section 19 of ESTA or the provisions of section 13 of LTA.

Section 19 of ESTA:

"Magistrate's courts

(1) A magistrate's court –

(a) shall have jurisdiction in respect –

(i) proceedings for eviction or reinstatement; and

(ii) criminal proceedings in terms of this Act; and

(b) shall be competent –

(i) to grant interdicts in terms of this Act; and

(ii) to issue declaratory orders as to the rights of a party in terms of this Act.

(2) Civil appeal from magistrate's court in terms of this Act shall lie to the Land Claims Court.

(3) Any order for eviction by a magistrate's court in terms of this Act, in respect of proceedings instituted on or before a date to be determined by the Minister and published in the Gazette, shall be subject to automatic review by the Land Claims Court, which may –

(a) confirm such order in whole or in part;

(b) set aside such order in whole or in part;

(c) substitute such order in whole or in part; or

(d) remit the case to the magistrate's court with directions to deal with any matter in such manner as the Land Claims Court may think fit.

(4) The provisions of subsection (3) shall not apply to a case in which an appeal has been noted by an occupier.

(5) Any order for eviction contemplated in subsection (3) shall be suspended pending the review thereof by the Land Claims Court."

Section 13 of LTA:

"Proceedings in other courts

(1) The provisions of section 7 to 10 shall apply to proceedings pending in any court at the commencement of this Act.

(1A) With the exception of issues concerning the definition of 'occupier' in section 1 (1) of the Extension of Security of Tenure Act, 1997, if an issue arises in a case in a

magistrate's court or a High Court which requires that court to interpret or apply this Act and-

(a) no oral evidence has been led, such court shall transfer the case to the Court and no further steps may be taken in the case in such court;
(b) any oral evidence has been led, such court shall decide the matter in accordance with the provisions of this Act.

(2) Any decision or order made by a magistrate's court in proceedings referred to in subsection (1) or (1A), shall in its entirety be subject to appeal to the Court if any of the grounds of appeal relates to the application or interpretation of this Act in such decision or order.

(3) The Court shall have exclusive jurisdiction to hear any appeal contemplated in subsection (2), notwithstanding the provisions of any other law to the contrary."

Normally, such proceedings in the Magistrate's Court are initiated by landlords or landowners against vulnerable occupiers, in the case of ESTA, and labour tenants whose rights to occupy and use land are governed by LTA. It is in these types of land litigation matters that these occupiers and labour tenants would also, in their examination-in-chief present *viva voce* hearsay evidence about how their feeble rights to occupy the land was acquired as a result of the information given to them or stories narrated to them by their deceased parents or grandparents. Such evidence is presented in order to assert their rights to occupy and use the land and also to show the Court that, on a balance of probabilities, the landlord is not entitled to the granting of an eviction order against them. Conversely, the landlords will adduce hearsay evidence mostly in a written form by presenting documents purporting to be agreements entered into by and between their deceased parent or grandparent and the parents or grandparents of an occupier or labour tenant. These agreements regulated, *inter alia*, number of cattle to be kept by the occupier or labour tenant on the farm, extent of grazing fields, etc.

It has been stated herein above that the general principle of the common law against hearsay is that it is inadmissible as evidence in a Court of law. However, the Legislature has intervened in order to attempt to relax and to somewhat circumscribe this strict or rigid principle of the common law concerning hearsay evidence by enacting the Law of Evidence Amendment Act of 1988 (hereinafter referred to as the Evidence Amendment Act). The purpose of this small piece of legislation is to, *inter alia,* provide for and regulate admissibility of hearsay evidence in criminal or civil proceedings, by laying down the requirements for such admissibility.

In its section 3 (4) the Evidence Amendment Act defines hearsay evidence as follows:

"3 (4) For purposes of this section –

'**hearsay evidence'** means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

This statutory definition has allowed for admission of hearsay evidence provided it is cogent and in the interest of justice to do so.

The peremptory provision of the Evidence Amendment Act which encapsulates the legal principles governing its admissibility or reception (as the latter term was used in a criminal case of *S v Mpofu 1993 (2) SACR 109 (N))* in Court, firstly, accentuates the common law position regarding hearsay evidence and provides as follows:

"3 Hearsay evidence

(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –

(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interest of justice."

This provision in the Evidence Amendment Act is the only tool that is available to the Magistrate's Court when hearing or adjudicating upon an eviction matter in terms of ESTA or LTA. The Court will unequivocally be guided by the requirements of that provision whether to admit or reject hearsay evidence in such proceedings. When considering admissibility of hearsay evidence, the Magistrate's Court is enjoined and bound to examine, *in seriatim,* all paragraphs of the provisions of section 3 of the Evidence Amendment Act and to determine probabilities as follows:

3 (1) (a) In terms of this paragraph, both parties participating in eviction proceedings must agree to the admissibility of hearsay evidence;

3 (1) (a) With regard to this paragraph, this would be not possible since the persons upon whose credibility the probative value of hearsay evidence depends, have passed away.

3 (1) (c) In respect of the interest of justice paragraph, the Court must also, comprehensively, examine the seven considerations or factors concerning admissibility of hearsay evidence, namely:

(i) the nature of the proceedings

Regarding this factor, the Court must take due cognizance of the provisions of section 25 (6) of the Constitution of the Republic of South Africa, as well as the purposes of LTA and ESTA. Section 25 (6) of the Constitution reads as follows:

"Property

25 (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

LTA and ESTA are some of the pieces of legislation that are the product of section 25 (6) of the Constitution.

Another legal reasoning in favour of admissibility of hearsay evidence where it is found to be appropriate to do so (although this was an appeal in a criminal case) appears in *S v Shaik & Others 2007 (1) SACR 247 (SCA)* para 171**,** where the learned Judge stated that "a Judge should hesitate long in admitting or relying on hearsay evidence which plays a decisive or even significant part in convicting an accused, unless there are compelling justifications for doing so."

(ii) The nature of the evidence

The Magistrate's Court must apply its mind properly in assessing evidence that is being tendered by either the occupier, the labour tenant or the landlord. The Court must engage in an investigative exercise to determine whether the hearsay evidence is cogent and reliable, taking into consideration the period that has elapsed since the information was relayed by or the statement was made by a person upon whose credibility the probative value depends.

(iii) The purpose for which the evidence is tendered

The Court must be mindful of the fact that hearsay evidence is being tendered to vindicate occupier's or labour tenant's right to security of tenure, and to enforce a fundamental right entrenched in section 25 (6) of the Constitution.

(iv) The probative value of the evidence

The Court must engage in a comprehensive comparative exercise in order to establish the weight of hearsay evidence as measured against the potential prejudice it might bring to the other party.

(v) The reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends

This factor is similar to paragraph (b) herein above, in that the person or persons upon whose credibility the probative value of such evidence depends is or are no longer alive.

(vi) Any prejudice to a party which the admission of hearsay evidence might entail

The Court must be alive to the dangers of admission of hearsay evidence, and that its admission does not, at all, infringe upon the other party's fundamental right of land ownership or land occupation and use.

(vii) Any other factor which should in the opinion of the Court be taken into account

The Court will take into account any factor it deems necessary and relevant to an eviction matter before it.

Section 30 of LTA provides peremptorily for the application of certain provisions of the Restitution Act to the performance of the Court of its functions in terms of LTA. This section and the word 'Court' refer only to the Land Claims Court and not the Magistrate's Court because the latter does not have the competence to adjudicate upon a restitution matter or apply the provisions of the Restitution Act.

The Land Claims Court has wide powers and discretion to admit hearsay evidence. Firstly, this Court has jurisdiction throughout the Republic on all land litigation matters, as well as powers of review of orders made in terms of land legislation and emanating from the Magistrate's Court. It has wide powers to admit all forms of evidence including evidence that is *sui generis* (section 30 of the Restitution Act) and its processes and procedures, unlike the Magistrate's Court, dispensed with strict rules of procedural law.

Section 30 of the Restitution Act provides as follows:

"30 Admissibility of evidence

(1) The Court may admit any evidence, including oral evidence, which it considers relevant and cogent to the matter being heard by it, whether or not such evidence would be admissible in any other court of law.

(2) Without derogating from the generality of the afore-going subsection, it shall be competent for any party before Court to adduce –
   (a) hearsay evidence regarding the circumstances surrounding the dispossession of the land right or rights in question and the rules governing the allocation and occupation of land within the claimant community concerned at the time of such dispossession; and
   (b) …

(3) The Court shall give such weight to any evidence adduced in terms of subsection (1) and (2) as it deems appropriate."

In *Salem Community v Government of the Republic of South Africa & Others [2015] 2 All SA 58 (LCC)* para 296, the Court held that "the parties also adduced hearsay evidence and expert evidence regarding the historical facts relevant to this claim. They were entitled to do so under sections 30 (1) and (2) of the Act, which allows all evidence that may be 'relevant and cogent' to be admitted, even if it would not ordinarily be admissible. The Court is, however, not obliged to admit such evidence, it has a discretion to do so…"
It must be noted that in terms of section 30 (2) of the Restitution Act, a party in land restitution proceedings shall be capable of adducing hearsay evidence only about the following, namely:

1. circumstances concerning dispossession of land rights, and
2. the rules governing allocation and occupation of land at the time of dispossession.

Further to that in terms of the *Salem* judgment (*supra)*, the Court is not obliged to admit hearsay evidence merely because section 30 (2) (a) of the Restitution Act permits the parties to tender such evidence, but instead it has a discretion to do so. The Court found that there were no compelling grounds for rejecting the hearsay evidence tendered by the witness merely because it is hearsay.

3. CONCLUSION

As has been discussed in the afore-going paragraphs, the Magistrate's Court, just like the Land Claims Court, is duty bound to exercise its discretion with great circumspection in terms of the seven considerations contained in the interests of justice provision of section 3 (1) (c) of the Evidence Amendment Act in order to avoid misdirection and travesty of justice when the issue of admissibility or otherwise of hearsay evidence is at stake. This is particularly important taking into account the provisions of section 19 (3) of ESTA which gives the Land Claims Court wide powers of automatic review of all land litigation orders emanating from the Magistrate's Court, including orders made in terms of LTA and PIE **(***Bergboerdery v Makgoro 2000 (4) SA 575 (LCC)).*

It is also equally important to take note of the fact that the nature of land litigation matters is such that, in many cases those that lived on farms before or those that suffered dispossessions are no longer alive, hence a pointer for admissibility of hearsay evidence.

It is a *fait accompli* that the Land Claims Court as a Court of equity similar to the Equality Court, but of a High Court in nature and stature, has unfettered power to exercise its discretion to admit or reject hearsay evidence in land litigation proceedings. Whereas the Magistrate's Court relies solely on the statutory principles enunciated in the Evidence Amendment Act regarding admissibility of hearsay evidence.

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A Last Thought

"On the face of it, the decision in *Ndlovu* is similar to the matter before us.[7] The accused was unlawfully arrested on 21 October 2008 and brought before a Magistrate in a "reception court" on 23 October 2008. As in this matter, it was common cause that the Reception Court in question as a rule did not consider bail.[8] Instead, the accused was mechanistically remanded in detention for about a week.

The Supreme Court of Appeal in *Ndlovu*, per Petse JA, commented that "reception courts" – which as a rule did not consider bail applications – have ceased to exist.[9] Alarmingly, the facts of the present matter, and a recent High Court judgment,[10] suggest otherwise. We hope that given the duty on Magistrates to apply their mind to the question of bail at the first appearance,[11] "reception courts" do not exist anywhere in South Africa. The practice of mechanistically remanding detained persons axiomatically results in arbitrary and extended pre-trial detention, and contributes to overcrowding in our already overburdened prisons. In 2018, it was estimated that 28.2% of the prison population in South Africa were in remand detention.[12] The practice of using "reception courts" abrogates the duty of judicial officers to consider bail during the first appearance of an arrested person. We strongly urge the Minister of Justice and the Magistracy to address this problem."

As per Theron J in *De Klerk v Minister of Police (CCT 95/18)* [2019] ZACC 32 (22 August 2019)

[7] *Minister of Safety and Security v Ndlovu* [2012] ZASCA 189; 2013 (1) SACR 339 (SCA) (*Ndlovu*).
[8] Id at paras 3-5.
[9] Id at para 13.
[10] *Mlilo v Minister of Police* [2018] 3 All SA 240 (GP).
[11] See below [73].
[12] Institute for Criminal Policy Research *Pre-trial/remand prison population: trend* (2019) available at http://www.prisonstudies.org/country/south-africa#further_info_field_pre_trial_detainees.