e-MANTSHI

A KZNJETCOM Newsletter

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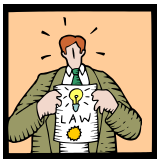
Welcome to the hundredth and fifty seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Minister of Justice and Correctional Services has under section 16(1)(c) of the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000* (Act No. 4 of 2000),designated all Magistrates Courts as Equality Courts. The notice to this effect was published in Government Gazette no 42717 dated 19 September 2019. In the same Government Gazette he also designated all Magistrates courts and Regional courts within whose area of jurisdiction the decision of the information officer or relevant authority of the public body or the head of a private body has been taken; the public body or private body concerned has its principal place of administration or business; or the requester or third party concerned is domiciled or ordinarily resident as a court for purposes of the *Promotion of Access to Information Act, 2000* (Act No. 2 of 2000). In terms of the *Promotion of Administrative Justice Act, 2000* (Act No. 3 of 2000) all Magistrates Courts and Regional Courts were designated as courts within whose area of jurisdiction the administrative action occurred or the administrator has

his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced. In the case of all three Acts the designations will be effective from 1 October 2019.

2. Under section 1(2)(*b*) of the *Prescribed Rate of Interest Act*, 1975 (Act No. 55 of 1975), the Minister of Justice and Correctional Services, has published a rate of interest of 10,00 percent *per annum* as from 1 September 2019 for the purposes of section 1(1) of the said Act. The notice to this effect was published in Government Gazette no 42713 dated 20 September 2019.

Recent Court Cases

1. V v V (AR72/2018) [2019] ZAKZPHC 61 (13 September 2019)

Unlawfulness is not a requirement for a protection order in terms of the Domestic Violence Act.

Masipa J (Chetty J concurring)

Introduction

[1] The appellant appeals against the judgment of the court a quo handed down on 17 August 2016 in the Durban Magistrate's Court which confirmed an interim order issued in terms of the Domestic Violence Act.

The Facts

[2] The respondent approached the Magistrate's Court for an interim protection order against the appellant who is her husband. In her application, she highlighted the abuse she experienced, including physical, mental and emotional abuse According to the respondent the appellant had threatened both her and their baby and forcefully removed them from their marital home. When she resisted this, he assaulted her.

[3] It is apparent from the record that the relationship between the appellant and the respondent was volatile. He had been evicted from her parental home in [….] on

numerous occasions prior to the obtaining of the order appealed against. Pursuant to the last eviction, the appellant secured accommodation in a block of flats at the Bluff which was close to his work and that of the respondent.

[4] After the appellant's relocation to the Bluff, the respondent continued to live in Phoenix with their minor child. Since the child was small and still being breastfed, the respondent took her to a day care centre near her workplace. It became strenuous for the respondent and the child to travel daily from Phoenix to the Bluff since they had to leave early in the morning and drive through heavy traffic. Despite her previous problems with the appellant, when he offered that they move in with him, she accepted this. This was during June 2016. While the parties initially lived as husband and wife, it appears that the respondent soon moved into a separate bedroom.

[5] On or about 5 August 2016, an argument ensued between the parties as a result of the respondent accessing the appellant's bank account and effecting certain transactions from the account. It is common cause that the appellant had previously provided the respondent with his banking login credentials. The appellant contends however that he had not authorised her to effect any payment on that day. The respondent contended that the appellant owed her monies for expenses incurred when the baby was born and while they lived in Phoenix. Also, that they had agreed to share the expenses of the child equally, which the appellant was not doing. In view of this and on this particular day, she decided to access his bank account electronically and effected some payments which included the child's day care fees.

[6] The appellant confronted the respondent about this and following her response, he left their apartment. There was no further communication between them and the next day, he left for his dayshift. The respondent took the child and went to her parental home and returned on 10 August 2016.

[7] On their return, the respondent took the child to the day care centre and went to the apartment to collect her laptop before going to work. Upon arrival at the apartment, she noticed that her belongings were packed in boxes. She told the appellant that he had no right to evict her from the apartment. In reply, he said 'my love, I am tired' and told her that he was arranging a removal company and sending her back to Phoenix. The appellant left the apartment and the respondent followed shortly thereafter.

[8] It appears that when the appellant left, it was because he went to obtain a protection order against the respondent arising from the incident of 5 August 2016. He went to the police station and he was not assisted. He was directed to court where he obtained a protection order. He could not receive assistance from the police to serve it and returned home. On arrival at the apartment, he went to sleep as he was exhausted. The respondent returned later with the child and went into his bedroom where she started removing his items from the wardrobe.

[9] According to the appellant, since the respondent was behaving irrationally, he slapped her to put some sense into her. However, in his oral evidence, he said she threw a can of deodorant on the floor and when he woke up from the bed to restrain her from throwing his clothes to the floor; he tripped on the can and fell on her. Another version is a complete denial of any assault on the respondent which contradicts the self-defence argument raised by his counsel. The respondent retreated into the second bedroom and on her version, sat on the bed to breastfeed the child. While doing this, the appellant went into the bedroom verbally abusing her. She retaliated and the appellant continued to assault her. He denies this assault as well. The respondent contends that the appellant forcefully removed the baby from her while she was breastfeeding. She had to beg him to return the baby to her as the baby was crying out of fear. She phoned her brother who arrived and took her to the police station.

[10] While the respondent was at the police station to lay a charge, the appellant approached her with a family friend who is also a police officer to serve a protection order on her. On her version, this was not served as the police officer was not on duty and in uniform and she left the police station and went to Phoenix. She went to court the next day to seek a protection order and was issued with an interim protection order.

[11] The terms of the interim protection order prohibited the appellant from committing domestic violence in the form of physical abuse and verbal abuse. Also, that he was not to enlist the help of another person to commit these acts. The appellant was also interdicted from entering the respondent's residence in Phoenix and not to enter her workplace. The order directed the police to accompany the respondent to collect her personal belongings from the apartment.

The issue

[12] The issue in this appeal relates to whether the decision of the court a quo in confirming the interim order was reasonable and justified.

[13] In considering whether or not to confirm the interim order, the court a quo was guided by the preamble to the Domestic Violence Act 116 of 1998 (the Act). The court also took into account the meaning of domestic violence in the Act being physical abuse, in particular emotional, verbal and psychological abuse, as it is relevant in this case.

'Where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant. Emotional, verbal or psychological abuse means a pattern of degrading or humiliating conduct towards a complainant including repeated insults, ridicule or name calling, repeated threats to cause emotional pain, repeated exhibits of obsessive possessiveness or jealousy which is such as to constitute serious invasion of the complainant's privacy, liberty, integrity and security.'

The meaning of physical abuse as envisaged in the Act is as follows:
'physical abuse means any act or threatened act of physical violence towards a complainant. And 'emotional, verbal and psychological abuse' means a pattern of degrading or humiliating conduct towards a complainant, including-

(a) repeated insults, ridicule or name calling;

(b) repeated threats to cause emotional pain; or

(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty, integrity or security;'

[14] The court a quo concluded that it was required to determine whether on a balance of probabilities, the evidence proved that the appellant committed domestic violence. It found that there was no dispute that there had been physical contact which was unbecoming which fell within the definition of domestic violence in the Act.

[15] It was argued before the court a quo that unlawfulness was a necessary requirement to determine whether conduct constitutes domestic violence. The court rejected this argument on the basis that there was nothing in the Act to provide for this. Consequently, it rejected an invitation by the appellant to read the requirement of unlawfulness from either the law of delict or criminal law.

[16] The court a quo found it difficult to accept that for a violent act to constitute domestic violence, unlawfulness must be found to exist. It concluded that this was not what was contemplated in the Act and the Constitution. The court found that in any event, the appellant had in his oral evidence admitted to pushing and pulling the respondent leading to her falling to the floor. This conduct it found to constitute domestic violence in the form of physical abuse. The court in confirming the interim order, found that there was insufficient evidence to conclude that there was verbal abuse and therefore discharged the order in this regard.

Submissions by Counsel

[17] It was argued by Mr *Parker*, for the appellant, that it was possible that the actions of the appellant were involuntary and that he slipped, lost his balance and fell onto the respondent. He identified the issue to be determined as being whether the appellant's action on the day can be categorised as physical abuse as required by the Act.

[18] While the Act defines physical abuse as 'any act or threatened act of physical violence towards a complainant', he argued that the proper interpretation should be, 'any act of physical violence towards a complainant or any threatened act of physical violence towards the complainant.' In my view, the distinction he makes between the definition in the Act and his interpretation is of no consequence as the result remains the same.

[19] He relied on the definition of violence in The Concise Oxford Dictionary 7 ed which defines it as 'the unlawful exercise of physical force.' Consequently, he argued that it was incumbent for the court a quo to find that the admitted action by the appellant comprised unlawful exercise of physical force. It was argued further that the findings of the court that unlawfulness was not an element required for domestic violence cases gave the phrase 'physical abuse' a far too wide interpretation.

[20] Mr *Van Reenen*, for the respondent, argued that it was incorrect to conclude that the court a quo granted the final interdict after finding that there was physical abuse. It was submitted that the court had in fact found on a balance of probabilities that the appellant's conduct constituted domestic violence. The evidence before the court was sufficient to justify its conclusion.

[21] Initially, the respondent raised an issue of the appeal having lapsed and after considering the matter, withdrew this point and accepted that proper procedures were followed. Condonation was however required in respect of the appellant's practice note and after considering the matter and the interest of the parties and of justice, this court ruled in favour of granting condonation.

[22] Mr *Parker* submitted that the manner in which the court a quo decided on the matter took away the right of individuals to act in self-defence. He argued that the appellant was protecting his possessions and if he had done so in a public space, there would be no consequences. It therefore was inexplicable that in a domestic environment, self-defence could not be raised. If the action was lawful by virtue of it being in self-defence, then there would be no abuse. He submitted that the respondent was the aggressor and the appellant used moderate force to protect his property. Consequently, the court erred in finding that because there was force, it followed that there was domestic violence.

[23] Mr *Van Reenen* argued that the definition of domestic violence was clear in the Act and the purpose for which the Act was promulgated was apparent from the preamble. The Act refers to domestic violence as relating to conduct that harms. It is not in the context of assault as envisaged in criminal law.

[24] It was submitted that on the appellant's version, it was improbable that he could have slipped. He accepted that he used moderate force. It could not be said that the respondent was the aggressor as he arrived home and found her belongings packed while the appellant opposed confirmations of the order on the basis that nothing transpired after the interim order was granted. There was no prejudice to the appellant if the order is confirmed as it served to prevent future harm. In support of these submissions, Mr *Van Reenen* relied on *Ndwandwe v Ndwandwe* [2012] JOL 29617 (KZP); *Trainor v S* [2003] 1 All SA 435 (SCA); and *Mnyandu v Padayachi* [2016] 4 All SA 710 (KZP).

[25] As regards the issue of unlawfulness raised by Mr *Parker*, he submitted that the Act specifically referred to harm in respect of domestic violence and that this was consistent with the finding of the court a quo. Consequently, the criminal and delictual tests were not applicable. Mr *Parker* submitted that confirmation of the order served no purpose since it sought to keep the parties away from each other which was already achieved by them living apart.

Analysis

[26] In interpreting a statute, regard is always had to the preamble, where such exists, which sets out the main objects of the Act. The aim is to ascertain the intention of the legislature. The preamble is part of the context of the Act. See: G M Cockram *Interpretation of Statutes* 3 ed Juta (1987) at 62. In *S v Mhlungu* 1995 (7) BCLR 793 (CC) para 112, Sachs J stated the following in relation to the preamble of the 1993 Constitution:

'The preamble in particular should not be dismissed as a mere aspirational and throat-clearing exercise of little interpretative value. It connects up, reinforces and underlies all of the text that follows. It helps to establish the basic design of the Constitution and indicate its fundamental purpose.' (Footnote omitted)

[27] While in the past this, applied in instances of ambiguity or lack of clarity, courts have pursuant to the advent of the 1996 Constitution evidenced readiness to invoke the use of preambles to legislative instruments irrespective of perceived clarity or ambiguity of the language that stood to be construed. See *Gaming Association of South Africa (KwaZulu-Natal) & others v Premier, KwaZulu-Natal, and others* (No 1) 1997 (4) SA 494 (N) at 501B and L du Plessis *Re-Interpretation of Statutes* Butterworths (2002) at 239-242. It is not surprising that the court a quo in its decision, took cognisance of the preamble to the Act in order to arrive at the correct interpretation. It is apparent from the preamble that the intention of the legislature in dealing with domestic violence matters was to apply different principles to those set out in Criminal and Delictual laws.

[28] In defining domestic violence, the Act specifically excluded the phrase 'unlawful (ness)' and referred only to conduct that 'harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant'. When the Act was enacted, the legislature was alive to the criminal and delictual principles dealing with abuse. However, in passing this Act, consideration was given to the rights protected in the Constitution more particularly, the right to equality, freedom and security of person and violence against women and children. The purpose of the Act was dealt with by the Constitutional Court in *Omar v Government of the Republic of South Africa & others (Commission for Gender Equality, Amicus Curiae)* 2006 (2) SA 289 (CC) and I align myself with the views expressed by Van der Westhuizen J in para 13, stating:

'[D]omestic violence in our society is utterly unacceptable. It causes severe psychological and social damage and there is clearly a need for an adequate legal

response to it.'

[29] In *Ndwandwe* Steyn J referred to *S v Engelbrecht* 2005 (2) SACR 41 (W), where Satchwell J considered the complexities of domestic violence as follows:
'[341] I agree with the argument that the wide definition of 'domestic violence' in the DVA is unequivocal recognition by the Legislature of the complexities of domestic violence and the multitude of manifestations thereof.
[342] It must be accepted that domestic violence, in all manifestations of abuse, is intended to and may establish a pattern of coercive control over the abused woman, such control being exerted both during the instances of active or passive abuse as well as the periods that domestic violence is in abeyance. (My emphasis)'

[30] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the court had the following to say about interpretation:
'. . .Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.' (Footnote omitted)
This was followed in *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at 525-527.

[31] The Act introduced a wider form of protection by making reference to the word 'harm'. In the absence of this wide meaning, all that would have been achieved by the legislature would have been to introduce a law which simply added onto the delictual or criminal principles already in existence and not to achieve the purpose which this Act sought to do. What the appellant seeks to do by adding the requirement of unlawfulness is exactly this. To give this restrictive interpretation to the provisions of the Act would be to defeat the purpose for which it was passed. This was in fact concluded in *Engelbrecht* where Satchwell J held that the wide definition of domestic violence is an unequivocal recognition by the legislature of the complexities of domestic violence and the multitude of manifestations thereof. On a consideration of the facts and the arguments submitted, I find no reason to interfere with the interpretation by the court a quo.

[32] As set out in *Coetzee v Griessel* (27576/2010) [2011] ZAWCHC 318 (24 August 2011) in determining whether or not to grant a final interdict the following

requirements must all be present:
‘18.1. A clear right, which the applicant has to prove on a balance of probabilities:
18.2. An act of interference, which is an act constituting an invasion of another's right; and
18.3. Proof that there is no other satisfactory remedy available to the applicant.
(See C B Prest: The Law and Practice of Interdicts Juta Law at pp42-48.)’

[33] In *Minister of Law and Order & others v Nordien & another* 1987 (2) SA 894 (A), the court held that an applicant seeking an interdict is not required to establish on a balance of probabilities that flowing from the undisputed facts, injury will follow. All he has to show is that it is reasonable to apprehend that injury will result. The test for apprehension is an objective one. The court must decide on the facts presented whether there is any basis for the entertainment of a reasonable apprehension by the applicant.

[34] On the facts, it can be concluded that the respondent’s protection against physical abuse as set out in the Act evidences a clear right. This right was interfered with when the appellant assaulted her. The argument that she was the aggressor and that the appellant was acting in self-defence cannot be sustained since the test applicable is not the criminal law test. In any event, the appellant admitted that he assaulted her and said this was because she was acting irrationally. It was never his evidence before the court a quo that he acted in self-defence.

[35] There was a history of domestic violence and the respondent felt threatened by the appellant. The only security available to her was therefore the confirmation of the order as this would continue to keep stable relations between the parties. I say this because following from the provision of the interim order, no further incidents occurred. In the absence of the court order, the fact that the respondent relocated back to her parental home would be of little consequence as the appellant had in the past followed her there and conducted himself in an intimidating or unruly manner in the presence of the respondent’s elderly father.

Order
[36] In the result, the following order is made:
1. The appellant’s appeal is dismissed with costs.

2. Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others (CCT320/17) [2019] ZACC 34 (18 September 2019)

The common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.

(The first part of the judgment is excluded from the judgment below. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZACC/2019/34.html

Mogoeng, C J

Is chastisement unconstitutional?

[32] Freedom of Religion rightly seeks to distinguish reasonable and moderate parental chastisement from the kind of assault and abuse of children that every campaign or challenge to end this common law defence is actually intended to curb. But, the difficulty they have is the attempt to locate this chastisement outside the boundaries of assault.

[33] They quite interestingly make the point that not every parent, who out of religious or cultural considerations chastises their children as a way of instilling or enforcing discipline or consequence management, intends to harm or does actually harm and abuse their children. Freedom of Religion displays an implicit appreciation of the reality that just as a verbal reprimand could have an even more traumatising or brutalising effect and an enduring negative impact on the well-being of a child, so can chastisement that is unreasonable and immoderate, often triggered by anger or an unbridled attitude or disposition of a tough disciplinarian. They only seek to protect and preserve a parental entitlement to lovingly discipline their children just or almost as positively as alternative methods reportedly do.

[34] The approach of Freedom of Religion is not purely biblical. There is, however, an allusion to the appropriateness of scriptural injunctions on the use of a rod and to parents' entitlement to administer reasonable and moderate chastisement on their children as an integral part of the exercise of the right to freedom of religion. But, it fundamentally seeks to protect the pre-existing common law defence of chastisement available to all parents irrespective of their religious persuasions, cultural practices or non-belief in a deity. It bears repetition that one of Freedom of Religion's major concerns is the apparent conflation of reasonable and moderate chastisement with blatant child abuse and brutal assault by holding them out as being inherently or fundamentally the same.

[35] The application of force to the body of another may, subject to the de minimis non curat lex (the law does not concern itself with trifles) principle, take the form of the slightest touch, holding a person's arm or bumping against them. But the assault may be justified or rendered lawful on the basis of authority or the right of chastisement. Had it not been for this defence, this application of force could have led to a parent being convicted of assault.

All forms of violence

[36] As indicated already, there are several constitutional rights that could be relied on to determine the validity of reasonable and moderate chastisement. But the issue

can be adequately resolved on the basis of, among others, section 12(1)(c) of the Constitution, which provides:

"(1) Everyone has the right to freedom and security of the person, which includes the right—
. . .
(c) to be free from all forms of violence from either public or private sources."

[37] A proper determination of the constitutionality of chastisement requires that it be located within a criminal law setting, which is its natural habitat. Moderate and reasonable chastisement hitherto constituted an effective defence for parents who had administered it to their children and could be or were charged with assault. And properly so because assault is correctly defined by Burchell and Milton as the unlawful and intentional application of force to the person of another or inspiring a belief in that person that force is immediately to be applied as threatened. This accords with the definition our courts have given to assault, like the intentional application of unlawful force to the person of a human being.

[38] The dictionary meaning of violence is "behaviour involving physical force intended to hurt, damage or kill someone or something". And this is the ordinary grammatical meaning that ought to be ascribed to the word "violence" within the context of section 12(1)(c) of the Constitution. More importantly, even when contextually and purposively interpreted, as it should, the definition of assault by Snyman, Burchell and Milton converges on the same meaning. Violence is not so much about the manner and extent of the application of the force as it is about the mere exertion of some force or the threat thereof.

[39] Turning to the language of section 12, the operative words are "free from all forms of violence". The first question is whether we ascribe a highly technical meaning to the word "violence" or give it its ordinary grammatical meaning which connotes any application of force, however minimal. Chastisement does by its very nature entail the use of force or a measure of violence. To appreciate the connection, alluded to by the respondents and the amici, between reasonable and moderate chastisement and violence, we must ask why it is necessary to resort to chastisement in the first place. Is it not the actual or potential pain or hurt that flows from it that is believed to be more likely to have a greater effect than any other reasonably available method of discipline? Otherwise, why resort to it?

[40] It is the bite of the force applied or threatened that is hoped to be remembered to restrain a child from misbehaviour whenever the urge or temptation to do wrong comes. How then can reasonable and moderate chastisement not fall within the meaning or category of violence envisaged in section 12(1)(c)? After all, reasonable and moderate chastisement includes corporal punishment with the instrumentality of a rod or a whip. That accords with the biblical injunction referred to above namely,

"He who spares his rod, hates his son, but he who loves him disciplines him promptly." The reference to violence does, therefore, extend to all forms of chastisement, moderate or extreme – a smack or a rod.

[41] The objective is always to cause displeasure, discomfort, fear or hurt. The actionable difference all along lay in the extent to which that outcome is intended to be or is actually achieved. Since punishment by the application of force to the body of a child by a parent is always intended to hurt to some degree, moderate and reasonable chastisement indubitably amounts to legally excusable assault. And there cannot be assault, as defined, without meeting the requirements of "all forms of violence" envisaged in section 12(1)(c) of the Constitution.

[42] The mischief sought to be addressed through section 12(1)(c) is not only certain or some forms of violence, but "all forms". We have a painful and shameful history of widespread and institutionalised violence. And section 12 exists to help reduce and ultimately eradicate that widespread challenge. "All forms" is so all-encompassing that its reach or purpose seems to leave no form of violence or application of force to the body of another person out of the equation. To drive the point home quite conclusively, the Constitution extends the prohibition to violence from "either public or private sources".

[43] It is necessary to emphasise that in terms of our law, the application of force, including a touch depending on its location and deductible meaning, or a threat thereof constitutes assault. And parental authority or entitlement to chastise children moderately and reasonably has been an escape route from prosecution or conviction. This means that the violence proscribed by section 12(1)(c) could still be committed with justification if that parental right is retained. But, if it is accepted that what would ordinarily be criminally punishable, but for the common law defence of moderate and reasonable chastisement, is indeed what section 12(1)(c) seeks to prevent, then children would be protected by that section like everyone else. One would be hard-pressed to suggest that assault, which chastisement however moderate or reasonable is, does not fall within the catchment area of section 12(1)(c). "All forms of violence" means moderate, reasonable and extreme forms of violence. Besides – "a culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands."

[44] This proscription does put an end to any argument, however sound, that might be raised on any ground in support of the retention of the defence of reasonable and moderate parental chastisement. For there are indeed sound and wisdom-laden, faith-based and cultural considerations behind the application of the rod. That said, parental chastisement of a child, however moderate or reasonable does, in my view, meet the threshold requirement of violence proscribed by this constitutional provision and, therefore, limits the right in section 12(1)(c). The conclusion that it cannot escape the reach of section 12(1)(c) is inevitable.

The right to human dignity

[45] There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J, correctly points out, the role and stressed importance of dignity in our Constitution aims "to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past." Unsurprisingly because not only is dignity one of the foundational values of our democratic State, but it is also one of the entrenched fundamental rights. And section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[46] Children are constitutionally recognised independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans or have parents. The word "everyone" in this section also applies to them. In S v M this Court gave appropriate recognition to the child's rights to dignity in these terms:

"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. . . . Individually and collectively all children have a right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."

The right to dignity and freedom from violence are some of those highlighted for special attention and most fitting recognition.

[47] There is a sense of shame, a sense that something has been subtracted from one's human whole, and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree. I say this alive to the reality that being held accountable for actual wrongdoing generally has the same effect. Being found guilty of misconduct or crime and the consequential sanction like imprisonment, however well-deserved, has a direct impact on one's dignity. It is all a matter of degree.

[48] That said, moderate and reasonable chastisement does impair the dignity of a child and thus limits her section 10 constitutional right. As with section 12(1)(c), the question that remains is whether the limitation is justifiable.

Justification analysis

[49] Sections 10 and 12 provide for the protection of human dignity and the freedom and security of the person respectively in the Bill of Rights. And section 36 of the Constitution provides for their possible limitation in these terms:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose."

[50] It must immediately be said that the common law defence of reasonable and moderate chastisement is a law of general application and may, therefore, potentially limit the rights in the Bill of Rights. This defence is available to all parents, regardless of their religious, cultural or other persuasions, when charged with assault of their children. And it limits a child's constitutional rights to dignity and to be protected from all forms of violence. What remains to be determined is whether that limitation is reasonable and justifiable, regard being had to some of the factors listed in section 36.

The nature, purpose and importance of the limitation

[51] The reality is that parental chastisement is significantly different from the institutionalised administration of corporal punishment that has since been abolished. The one is intimate and administered by a loving parent whereas the other is somewhat cold, detached and implemented by a stranger of sorts. Parents have the inherent obligation to raise their child to become a responsible member of society whose delinquency they stand to be blamed for, whereas strangers like teachers only had an official and possibly less-caring duty to punish. The primary responsibility to mould or discipline a child into a future responsible citizen is that of parents. For example Christian parents have a "general right and capacity to bring up their children according to Christian beliefs". The abolition of the defence forces them —

"to make an absolute and strenuous choice between obeying a law of the land or following their conscience . . . to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children."

[52] The invalidation of the defence of moderate and reasonable chastisement in Gauteng thus means that the chastisement aspect of their religiously or culturally ordained way of raising, guiding and disciplining their children is no longer available

to them. To discipline them in terms of the prescripts of their faith or culture would expose them to criminal prosecution, possible conviction and possible imprisonment. And the only safety valve available to them is the abovementioned de minimis rule. Although this rule has acute shortcomings in terms of its inability to prevent the abolition of the defence from possibly imposing a strain on the family structure by allowing parents to be prosecuted for even the minutest of well-intentioned infractions, it is at least of some benefit in that it could save parents from being needlessly imprisoned. It does, barring diversion, not necessarily exclude the unlawfulness of the chastisement and a criminal conviction of assault, but only allows the assault to go unpunished on account of its triviality.

[53] Arguments for the retention of the defence of reasonable and moderate chastisement are understandable. Barring anger, frustration, abuse of intoxicating substances or sheer irresponsibility, parents who truly chastise their children on the love-driven religious or cultural bases do not always intend to abuse or traumatise their children. For they presumably love them and want only the best for them. It is also debatable whether the use of that method of discipline invariably produces negative consequences.

[54] It would thus be an over-generalisation to brand the very possibility of retaining reasonable and moderate chastisement on religious or cultural grounds as an inescapable recipe for widespread excessive application of violence or child abuse. Properly managed reasonable and moderate chastisement could arguably yield positive results and accommodate the love-inspired consequence management contended for by Freedom of Religion. And that would explain why so many other civilisations and comparable democracies have kept this defence alive and relatively few have abolished it.

The nature of the affected interests and rights

[55] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." Children are, after all, most vulnerable. Some of them are so young that they are incapable of lodging a complaint about abusive or potentially injurious treatment or punishment, however well-intentioned it might have been. Even those who are of school-going age might often be ignorant of what they could do to alert the law enforcement authorities to actual or potentially harmful parental conduct that they are made to endure. This alludes to an interesting speculation, not completely irrelevant though, whether the child in this matter would have reported the assault case had the mother not been a victim of the assault too.

[56] The State is obliged to respect, protect, promote and fulfil a child's section 28 protections and the Judiciary is thus bound by the provisions of section 28. That means that in our approach to a parent's entitlement to chastise a child reasonably and moderately, of paramount importance should be the best interests of the child in

respect of protection from potential abuse and the need to limit the right because of the good a child and society stand to derive from its retention as a disciplinary tool.

[57] More telling is that the drafters of section 28(2) chose not to say that the "interests" of a child are of "importance" in "some matters" concerning a child. The Constitution provides that "in every matter" concerning a child, her "best interests" are of "paramount importance". That, however, does not mean that the best interests of a child are superior to all other fundamental rights. This much was made clear by this Court in several matters. This Court in S v M held that—

"the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited."

[58] The paramountcy of the best interests of a child was further explained in these terms:

"Does the fact that section 28(2) demands that the best interests of children be accorded paramount importance mean that children's rights trump all other rights? Certainly not. All that the Constitution requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. The Constitution demands that our criminal-justice system should be child-sensitive."

[59] In Christian Education South Africa, we highlighted the paramount importance of the children's best interests in these terms:

"Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has. The principle is not excluded in cases where the religious rights of the parent are involved."

[60] It follows that these observations on the utmost necessity of child protection and the paramountcy of the importance of the best interests of a child find application regardless of the belief behind the practice that has potentially injurious consequences on the child. It could be religious, cultural practices or any other basis on the strength of which parents believe that their children ought to be treated in a particular way that happens to be harmful to their well-being.

[61] Section 28(2) wisely anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child. Unsurprisingly, it is crafted in terms so broad as to leave no doubt about the choice it makes between the best interests of the child and the parent's perceived entitlement to resort to unreasonable and immoderate chastisement meant to procure a child's obedience to a parent's legitimate directive and orders. However, what remains to be determined is whether chastisement that is moderate and reasonable, is constitutionally justifiable in our kind of democracy, regard being had to the paramountcy of the best interests of a child.

The extent of the limitation and its relation to purpose

[62] Parents have over the years enjoyed the right to discipline their children in a variety of ways. One of the instruments for instilling discipline in their children is the administration of moderate and reasonable chastisement. As indicated, its foundation is both religious and cultural in character. It is thus regarded partly as an incidence of the enjoyment of one's constitutional right of freedom of religion or culture.

[63] The disadvantage though is that, unlike the constitutional protections available to the child, the right to freedom of religion does not expressly provide for parental entitlement to administer moderate and reasonable chastisement to the child nor does any provision of the Constitution acknowledge the existence of a cultural right to the same effect. Freedom of Religion's reliance on "the right to parenting" grounded on South Africa's international obligations under several conventions that deal with the right to family in particular must suffer the same fate. Not only does international law not recognise the right to discipline, but our Constitution does not make express provision for it, unlike the rights sought to be vindicated here.

[64] And this is compounded by the paucity of clear or satisfactory empirical evidence that supports chastisement as a beneficial means of instilling discipline. Though not conclusive, there are, however, some pointers to the potentially harmful effect of chastisement. Some of that research is open to criticism in that very little effort seems to have been made to distinguish between moderate and excessive or abusive application of force to the body of a child. In many of those studies, there has been a strong leaning on the effects of plain abuse and excessive application of force on the well-being of a child and very little on truly moderate and reasonable chastisement. That said, positive parenting reduces the need to enforce discipline by resorting to potentially violent methods. It could replace occasionally harsh and inconsistent parenting with non-violent and consistent strategies for discipline like positive commands, tangible rewards and problem-solving, obviously depending on age.

[65] What militates more against the retention of the defence of moderate and reasonable chastisement is the best interests of the child, which are of paramount

importance in all matters involving a child. To retain this kind of chastisement, it would have to be demonstrated that apart from the fact that it ordinarily falls within the category of assault, there is something about it that advances the best interests of the child. In other words, there must be something about this excusable crime of assault that evidently redounds to the good of the child. It bears repetition that not much was said to help us appreciate that the benefits of that chastisement indeed outweigh its disadvantages, and thus justify the limitation.

[66] To properly locate the best interests of the child, it is necessary to come to grips with the nature of those interests in relation to chastisement. Chastisement is meant to discipline and help a child appreciate consequence management. In other words, the purpose of moderate and reasonable chastisement is to mould a child into a responsible member of society. What then is in her contextual best interests? It is, in my view, to achieve the same laudable objective without causing harm or unduly undermining the fundamental rights of the child. In other words, if there exists a disciplinary mechanism or measure that is more consistent with love, care, the more balanced protection of the rights and advancement of the well-being of a child and another that is less so, the former must be preferred for it gives expression to what is in the best interests of the child. It recognises, in a practical way, the paramount importance of a child's best interests.

[67] The application of force or a resort to violence, which could be harmful or abused, cannot in circumstances where there is an effective non-violent option available be said to be consonant with the best interests of a child. For indeed the best interests of a child is about what is best for her in the circumstances – what benefits her most with no or minimum harm. But the absence of any form of discipline can never be in the best interests of a child. That said, moderate and reasonable chastisement as a tool for discipline, cannot be retained at the expense of a child's fundamental right to dignity. And the limitation of that right has not been properly explained.

Less restrictive means to achieve purpose

[68] What undermines the justification for retaining chastisement, more revealingly, is the availability of less restrictive means to achieve discipline. Chastisement is, after all, traditionally supposed to be the option of last resort, employed only when all else fails. Besides, the experience-borne traditional approach generally adopted by South African parents over the years has been to teach, guide and admonish their children, resorting to chastisement only as a measure of last resort. No research is required to verify this reality. It is as obvious as the side of the road on which South Africans drive their vehicles. The unreasonable and immoderate chastisement which constitutes assault proper, maltreatment or child abuse has always been a criminal offence which all sound-minded parents agree must be punishable. It is an aberration that has inexplicably been left to permeate society with consequences that somehow militate against or undermine the retention of moderate and reasonable

chastisement.

[69] The positive parenting approach relied on by the friends of the court is fundamentally about educating a child about good behaviour and the do's and don'ts of life. It also entails a more effective parent-child communication to help a child realise the adverse consequences of unacceptable conduct and to generally guide her on how best to behave in life. This is the most basic or commonsensical approach. And it is indeed a fairly well-known means of discipline that has coexisted with reasonable and moderate chastisement for many years. More importantly, it is a less restrictive means of discipline that could potentially be effective in the attainment of the same purpose that moderate and reasonable chastisement is intended for. Of concern to many others could be the apparent less regard for more effective consequence management in the approach to positive parenting that the friends of the court seem to be advocating for. Meaningful consequences must arguably follow repeat or serious wrongdoing. For it is that appropriate admonition that should never be played down.

[70] All of the above considered, I am satisfied that important though the purpose of the possible limitation of these rights is, the paucity of proof that the chastisement is beneficial and the availability of less restrictive means to instil discipline militate against the reasonableness and justification of the limitation. Children are indeed vulnerable and delicate. They are not always able to protect themselves and may not always know what to do in the event of the law being broken to the prejudice of their best interests. This conclusion is arrived at without branding parents, who prefer moderate and reasonable chastisement, as unloving, irresponsible and inclined to harm or abuse their children.

[71] The right to be free from all forms of violence or to be treated with dignity, coupled with what chastisement does in reality entail, as well as the availability of less restrictive means, speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement. There is, on the material before us, therefore, no justification for its continued existence, for it does not only limit the rights in sections 10 and 12 of the Constitution, but it also violates them unjustifiably.

Conclusion

[72] It suffices to say that any form of violence, including reasonable and moderate chastisement, has always constituted a criminal act known as assault. The effect of relying on this common law defence was to exempt parents from prosecution or conviction. Identical conduct by a person other than a parent on the same child would otherwise constitute indefensible assault.

[73] The High Court was correct in its conclusion that the common law defence of reasonable and moderate chastisement is constitutionally invalid and that this

declaration be prospective in its operation.

[74] A proliferation of assault cases against parents is a reasonably foreseeable possibility. Parliament would, hopefully, allow itself to be guided by extensive consultations, research and debates before it pronounces finally on an appropriate regulatory framework. That approach would enable it to benefit not just from lobby groups, but also from parents and possibly children themselves whose interests are at stake.

[75] How law enforcement agencies would deal with reported cases of child abuse flowing from this declaration of unconstitutionality is a matter best left to be dealt with on a case-by-case basis.

Order

[76] In the result, the following order is made:

1. The application for direct access is granted.
2. Freedom of Religion South Africa is granted leave to intervene.
3. The application for leave to appeal is dismissed.
4. It is declared that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.
5. There will be no order as to costs.

From The Legal Journals

Heaton,J

“Notes on the Proposed Amendment of Section 21 of the Children’s Act 38 of 2005”

***PER* / *PELJ* 2019(22)**

Abstract

In terms of section 21 of the Children's Act 38 of 2005, an unmarried father acquires full parental responsibilities and rights in respect of his child if he lives with the child's mother in a permanent life-partnership when the child is born. He also acquires full parental responsibilities and rights if, regardless of whether or not he has ever lived with the child's mother, he consents or successfully applies to be identified as the child's father or pays damages in terms of customary law, and contributes or attempts in good faith to contribute to the child's upbringing and maintenance for a reasonable period. Several provisions of section 21 are unclear and/or unsatisfactory. The draft Children's Amendment Bill, 2018 seeks to address problematic aspects of the section. Unfortunately, the proposed amendments to section 21 leave one disappointed. Although some of the amendments are welcome, the draft Bill fails to address several of the uncertainties flowing from the current wording of section 21 and even creates additional uncertainties. The wording of many of the amendments has not been properly thought through, and the draft Bill fails to address the key question of whether the requirements in section 21(1)(b) operate conjunctively or independently.

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

Contributions from the Law School

Hate speech: acceptable remedies in a Constitutional democracy

Introduction

Various pieces of enabling legislation have been enacted in South Africa to regulate the advocacy of hatred. However, legislative measures against regulating hate speech as a criminal offence have proven to be limited in their scope. These include both section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 which regulates hate speech as a discriminatory practice.

Further section 10(2) provides that in addition to the civil remedies provided for in the Act, an Equality Court may refer a case of hate speech to the Director of Public Prosecutions for the institution of criminal proceedings *in terms of the common law or relevant legislation* for prosecution as crimen injuria (Botha and Govindjee "Regulating cases of 'extreme hate speech in South Africa: A suggested framework for legislated criminal sanction" (2014) 2 *South African Journal of Criminal Justice* 153-154. It is necessary to consider whether the courts were correct in following both a civil and criminal approach in *ANC v Sparrow* (02/26 [2016] ZAEQC 1.

Promotion of Equality and Prevention of Unfair Discrimination Act 2000

In the case of *ANC v Sparrow (supra)*, the complaint arose from a facebook post, posted on 3 January 2016 by Penny Sparrow. The post read as follows:

"These monkeys that are allowed to be released on New Year's Eve and onto public beaches, towns, etcetera, absolutely have no education whatsoever. So to allow them loose is inviting huge dirt and troubles and discomfort to others. I am sorry to say that I was among the revellers and all I saw was black on black skins. What a shame. I do know some wonderful thoughtful black people. This lot of monkeys just don't want to even try but think they can voice opinions about statute and their way. Dear, oh, dear, from now on I shall address the blacks of South Africa as monkeys as I see the cute little wild monkeys do the same, pick, drop and litter (*ANC v Sparrow supra* 33).

The complainant alleged that the words constituted hate speech as per the definition set out in section 10(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (herein after referred to as the Equality Act)(at 33-34). More specifically that the words could be interpreted as being hurtful towards particular race groups, that of Africans, coloured and Indian people (at 33-34). The Equality Act prohibits hate speech and provided that:
"No person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds against any person that could reasonably be construed to demonstrate a clear intention to a) be hurtful; b) be harmful or to incite harm and c) promote or propagate hatred."

In addition, the Equality Act sets out a list of prohibited grounds which are defined in section 1 as including: race, ethnical region, and colour and listed or any other unlisted grounds where discrimination based on human dignity adversely affects the equal enjoyment and freedom in a serious manner (at 42). In determining whether the defendant's words constituted 'hate speech' the court considered not only the number of times that the word monkey was used, but also the 'ordinary' meaning of the words (at 43. In this respect see also *Argus Printing and Publishing Company Limited & Others v Esselen's Estate* 1994 (2) SA 1 (A)). The court then went on to examine the objective test to establish whether defamation had occurred: "What would a

reasonable person aware of the context and circumstances understand by the words in their natural and ordinary meaning?" (at 43). When examining the ordinary meaning the following meaning became apparent (1) by using the term monkeys in relation to black individuals implied that they were not worthy of being described of as human beings and have low intelligence (2) use of the term "allowed to be let loose" in context used meant that such individuals should have restricted movement (3) that such individuals are generally uneducated and (4) that such individuals should not be allowed on public beaches or in town and (5) black people display characteristics of monkeys in that they "pick, drop and litter" (at 43)

The Equality court, in deciding that the speech did not enjoy protection in terms of section 12 of the 'Equality Act' where speech does not attract liability where made in bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information in accordance with section 16 of the Constitution 1996 was clearly not applicable in this case (at 47). Therefore, any words posted by the defendant were not protected by section 12 of the Equality Act and not only amounted to publication but further she could be held that she knew or ought to reasonably have known or anticipated that her words would be republished on social media (at 47). While it is important to note that the statements made by the defendant are 'not made in a vacuum' and must be considered in light of South Africa's historical context, that is in light of our past history of past segregation, intolerance and systemic discrimination it becomes clear that apartheid was used as a weapon of institutionalized discrimination against the majority of individuals (at 35). Therefore, in this sense then, while it could be argued that freedom of expression, could be viewed as being fundamental to a constitutional democracy, it is not "preeminent right ranking above all others, nor is it an unqualified right which automatically trumps the right to human dignity and it does not enjoy superior status in our law" (at 40; see also S v Mamabolo 2001 (5) BCLR 449 (CC)).

What was noteworthy about the Sparrow judgment was that the defendant was also subsequently charged with *crimen injuria (State v Penelope Dora Sparrow* 708/2016 (unreported case in the Scottburgh Magistrate's Court). This point was made clear where the court highlights the point that "[s]ections of society that are painfully slow to change or that refuse to, given our disgraceful history, should perhaps be compelled to do so under the threat of criminal sanction" (at 51). This raises an important consideration. Was the court correct in following such an approach, especially where the words that were prosecuted falls outside the ambit of section 10 of the Equality Act. This is also important to consider in light of the fact that the remedies provided for in PEPUDA are aimed at healing 'a convalescent society' (Marais 'A Constitutional Perspective on the Sparrow Judgments" (2017) 42:2 *Journal for Juridical Science* 25 at 61). Further, does it not in fact have a chilling effect and constitute a violation of free speech to invoke such a common law offence? (*ibid*).

<u>Crimen injuria</u>

To answer this question, the definition of crimen injuria needs to be considered. It has been defined as “the unlawful, intentional and serious violation of the dignity or privacy of another” (CR Snyman *Criminal law*. 6th ed. 2014). One of the central requirements for this offence is that “plaintiffs self-esteem must have actually been impaired and that person of ordinary sensibilities would have regarded the conduct as offensive, tested by the general criterion of unlawfulness, namely objective unreasonableness” (Marais supra at 59; see also *Delange v Costa* (433/87) 1989 ZASCA 6; 1989 2 All SA 267 (A):paras 15-17). It could be argued that Sparrows guilty plea should not have been accepted in absence of subjective intention at time of the offence, nor is it evident that each of complainants self-esteem was in fact impaired (Marais *supra* at 59). As Marais has noted, “if the criminal law offence of *crimen iniuria* by means of expression does not narrowly apply to insult directed at a particular individual, but extends to general discriminatory utterances against groups to which the individual is affiliated, it does not pass constitutional muster” (Marais supra at 61).

The contention that common-law crimes are not tailored to adequately cater for hate speech are demonstrated in the conflation of motive with intention in criminal law:

“Intent is a form of culpability, which is required to render an offender criminally liable. Motive, on the other hand, is the underlying reason why an offender committed a particular crime and is irrelevant in determining intent or criminal liability. Therefore, the fact that an offender committed a particular crime for altruistic reasons will not exclude intention and, at most, will mitigate the sentence. In terms of the hostility or animus model for hate crimes the victim is selected because of the offender’s hostility or hatred towards the group that the victim represents. The hatred or hostility becomes an element of the crime. This model gives rise to the practical difficulty of proving beyond a reasonable doubt that the perpetrator harboured a subjective hostility or hatred motive, but more importantly for our purposes it has also been argued that the inclusion of motive as an element of the crime renders the introduction of a stand-alone hate crime in South Africa untenable” (Botha and Govindjee *supra* at 123-124)

In addition, these theorists have noted that existing legislative measures that regulate hate speech as a criminal offence in South Africa are similarly limited in their scope. For instance, they make reference to the *Riotous Assemblies* Act 17 of 1956 which criminalises the act of incitement to commit a crime, but does not specifically regulate the use of hate speech as a form of incitement (Botha and Govindjee *supra* 126). Section 18(2) provides that ‘Any person who … incites, instigates, commands or procures any other person to commit any offence… shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing the offence would be liable’. They argue that since the crime is broadly defined, an inciter is “somebody who comes into contact with another and influences

or seeks to influence the other to commit a crime" (*S v Nkosiyana* 1966 (4) SA 655 (A). Since "the concretisation requirement of the crime entails that the inciter should not be too vague" they do not "adequately regulate the harm caused to *target groups* as a consequence of the advocacy of hatred" (Botha and Govindjee *supra* 125).

It should be noted that section 16(2) Constitution of 1996 provides, that the right to freedom of expression does not extend to three categories of excluded expression, namely propaganda for war, incitement of imminent violence and the 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Furthermore, for the insult to be prosecutable, it would appear to need to be directed towards a particular group rather than at a particular individual:

"Extreme hate speech is not regulated as a legislated criminal offence in South Africa at present. This form of speech is limited to a narrow category of expression and is usually defined as speech which either expressly, or by implication, 'threatens, advocates or justifies violence against an identifiable group' of persons Whilst the boundary between (ordinary) hate speech and extreme hate speech can become blurred, the use of the words 'extreme hate speech' entails speech that advocates severe harm or violence and undermines the public order" (Botha and Govindjee *supra* at 117-118)

In addition to the problems with common law offences, other arguments have also been advocated for not prosecuting hate speech. These include: (1) existence of well developed civil law remedies (2) low number of prosecutions (3) limited redress available to victims through criminal prosecutions and (4) trends in other jurisdictions which indicate that criminalisation should occur only under 'extreme and strictly defined circumstances (Marais *supra.* See further authority provided for by this author at footnote 132: *Soldiers Are Murderers* decision, BVerfGE 93, 266-312I, where the court was of the view that the larger the collective to which a disparaging statement refers, the weaker the extent to which an individual member can be personally affected. The court also made a distinction between a speaker's views of the demerits of a group and violating the personal honour of an individual member of the group; par. 32. Sec. 319(2) of the Canadian Criminal Code prohibits expression that "promotes hatred against any identifiable group". This does not apply to private speech, and proof of the subjective impairment of individual complainants' dignity is, therefore, not required).

<u>Conclusion</u>

It is submitted that whatever routes the courts decide to take, whether it be through the use of common law crimes or through the use of a formal hate crime, the task is best left to legislature to determine the ambit and scope of the development of such an offence. (In this respect, see Botha and Govindjee recommendations for a

possible legislative intervention in the form of a hate crime to mitigate the substantive effects of this conduct as well as *Preventing and Combating of Hate Crimes and Hate Speech Bill* 2018). The enactment of this Bill has been regarded as a constitutional mandate in terms of section 12(1)(c) of the South African Constitution, which provides: Everyone has the right to freedom and security of the person which includes the right ... to be free from all forms of violence, from either public or private sources. Since the perpetration of violent crimes against the individual is a serious violation of personal security, it has been suggested that the state has a duty under section 12(1)(c) of the South African Constitution to protect individuals by restraining itself and by restraining private individuals from violating personal security" (Naidoo "The Shaping, Enactment and Interpretation of the First Hate-Crime Law in the United Kingdom - An Informative and Illustrative Lesson for South Africa" (2017)20 PER/PELJ 1 at 16). Whether prosecution in terms of such a Bill will be successful remains to be seen. Various problems have been raised. For instance, not only does the hate speech offence not relate to hate speech as understood in the Constitution, but it also violates the right to freedom of expression. In addition, the hate speech provision mirrors that of PEPUDA. This replication is problematic since:

"due to the contentious nature of the Equality Act's prohibition – itself currently facing a constitutional challenge to be heard by the SCA on appeal. It is also unclear how the public would distinguish the bill's criminal offence from the same expression prohibited in the Equality Act. No thresholds are built into the offence with consideration to the reach, frequency or magnitude of the audience exposed to the speech, which would distinguish this criminal offence from the same expression prohibited in terms of the Equality Act" (Botha "The States attempt to criminalise hate speech is flawed and unconstitutional" https://www.news24.com/Columnists/GuestColumn/the-states-attempt-to-criminalise-hate-speech-is-flawed-and-unconstitutional-20190224

Whether the right to freedom of expression can be viewed as being unreasonably broad and not necessarily justified, is a matter for courts to determine (Botha *supra*).

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Matters of Interest to Magistrates

[NOT] FLYING THE FLAG: A SAGA OF TWO CASES

Introduction

In *Nelson Mandela Foundation Trust v Afriforum NPC* (EQ02/2018) [2019] ZAEQC 2 (21 August 2019) (*NMFT 1*) the South Gauteng High Court, sitting as Equality Court, declared that the display of the old South African flag at the Black Monday demonstrations in October 2017 constituted hate speech, unfair discrimination on the grounds of race, and harassment as prohibited by sections 10(1), 7 and 11 respectively of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (the Equality Act).

The Court then went on to declare that *any* display of the flag in circumstances not falling within the proviso in section 12 of the Equality Act also amounts to hate speech, unfair discrimination and harassment, as prohibited by the Act.

It is worth recording upfront that the proviso in section 12 provides that the hate speech prohibition does not extend to the "bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution."

So, the Court's declarator in effect means that the *gratuitous* display of the flag, i.e. in circumstances *not justified by the exemptions in the proviso*, would amount to prohibited hate speech, unfair discrimination and harassment. However, in an obvious challenge to the impact of this declarator, Ernest Roets of Afriforum then immediately tweeted an image of the old flag, asking if he had engaged in hate speech. The NMFT reacted by launching contempt proceedings against both Afriforum and Roets. The decision of this Court is reported as *Nelson Mandela Foundation Trust v Afriforum NPC and Roets* (EQ02/2018) [2019] ZAGPJHC 324 (13 September 2019) (*NMFT 2*).

This note sets out the key aspects of the respective judgments in relation to the hate speech issue. Before analysing the judgment in *NMFT 1*, a brief summary of the history of the old flag is provided.

History of the "Old Flag"

The old South African flag was adopted in June 1927 by the then parliament, which consisted only of white persons. The old flag was brought into operation in 1928. The Hansard records show that it was introduced as a means to achieve racial reconciliation (between the English and Afrikaans speaking communities) and as a symbol of independence from British imperialism. It was abolished in 1994 by South Africa's first democratic and non-racial parliament and replaced with the new national Flag. Since then the old flag has been controversial in South Africa. Most South Africans view it as symbolic of oppressive apartheid, racial segregation and white supremacy. Some people, however, believe it should be regarded as an "historic and a proud symbol of Afrikaner-English unity and heritage".

The Equality Court in *NMFT 1* reached the following conclusions:

Words v expressive conduct

Section 10(1) of the Equality Act prescribes that no person may publish, propagate, advocate or communicate *words* on a prohibited ground against any person that could reasonably be construed to demonstrate an intention to a) be hurtful; b) be harmful or incite harm; c) promote or propagate hatred. Afriforum argued that the display of the old flag was not prohibited by the Act because it is a symbol and not "words". The Court disagreed. The term "words" should be broadly construed with reference to all interpretational aids, including the constitutional mandate, relevant international law and the interpretative instructions in section 3 of the Equality Act (which requires a court to consider the context of the dispute and the purpose of the Act).

The Court correctly observed that the constitutional paradigm is one that values human dignity and equality; that international law mandates the prohibition of the advocacy of hatred (broader than hateful words); that the purpose of the Equality Act is to promote equality and prohibit conduct which unfairly discriminates and / or propagates hatred; and that the context of the dispute in issue made it clear that the gratuitous display of the old flag causes harm on the grounds of race.

The Court also based its finding on four textual factors. Firstly, the section 10 heading specifically prohibits speech, and is wider than mere words. Secondly, the use of the terms "advocate" through to "communicate" in the provision point to a broader context – these verbs involve more than the conveyance of words. Thirdly, the constitutional definition of hate speech uses broader terminology and stipulates that freedom of expression does not include the advocacy of hatred. The definition is not limited to words. Fourthly, the section 12 proviso in the Equality Act excludes various forms of expression from the ambit of section 10(1). These forms of expression include artistic creativity, academic enquiry, the publication of any information and the like. The language used in the proviso is obviously wider than words.

Thus, the Court held that section 10(1) should be interpreted broadly to prohibit the publication, propagation, advocacy or communication of speech, ideas, ideologies, beliefs, meaning, or instructions based on one or more of the prohibited grounds with the intention to harm, hurt or promote hatred. Symbols and other non-verbal representations fall within the ambit of the prohibition. To hold otherwise would result in the following incongruous result: the Act prohibits a white racist from using words to label a black person as a "baboon", but on Afriforum's interpretation, it is not prohibited "to circulate an image of a black person superimposed on the body of a baboon."

The Court's interpretation makes sense and is one that academics have been suggesting for years. It is a purposive interpretation which is consistent with the Constitution and the ordinary principles of interpretation developed by our courts.

Demonstrates a clear intention to be hurtful, hateful, harmful

Afriforum argued that the mere display of the old flag would not demonstrate a clear intention to engage in hate speech. It contended that "different people may have different intentions when they display the old flag". So, even if the Act were to regulate the display of the old flag, it would need to do so "on a case by case basis".

The Court disagreed. It held that the intention requirement in section 10(1) does not require a subjective enquiry. Instead, the test is objective and asks whether the speech, with reference to context, objectively demonstrates a hurtful, harmful or hateful meaning. The Court added that it could determine this issue with the full benefit of argument from the parties on the historical and contextual meaning of the display of the flag. In this respect, the NMFT and the SAHRC presented affidavits containing testimonies to the effect that the display of the flag: others black people; is dehumanising; and amounts to an endorsement of the apartheid regime, representative of the indignity and suffering of black people.

Afriforum did not engage explicitly with this evidence, but conceded that the display of the flag has the capacity to cause offence and emotional distress. It also acknowledged that most South Africans denounce apartheid as a crime against humanity and do not approve of the old flag. Similarly, the FAK, an organisation founded in 1929 and established "with the purpose of promoting and advancing the Afrikaans language and culture and Afrikaner history", acknowledged that even though the flag had cultural and historical significance as a symbol of reconciliation between the Boers and the British, its display would also in some situations be "frowned upon and actively discouraged, including in the broader Afrikaner community."

In light of the context and history, the evidence presented and these concessions, the Court concluded that the gratuitous display of the flag demonstrates a clear intention

to hurt, harm and incite hatred. The Court added that its display would promote hatred and harm by: "stimulating" the very negative feelings associated with apartheid – including oppression, humiliation, and indignity; inciting white supremacy against black people; dehumanising and demeaning black people; and undermining "our feeling of oneness as South Africans". The Court added that when the old flag is displayed gratuitously it is done with full knowledge of its current and historical effects and therefore with a clear intent to harm black people and as a demonstration of the rejection of tolerance, reconciliation and the values underlying the Constitution.

The effect of the ban

Afriforum argued that the declaratory relief sought by the NMFT would amount to an outright ban of the old flag. The court held otherwise. It found that the relief sought was not a "banning order" against the old flag. Instead, the order was one that would provide legal certainty and "declare to all South Africans … that the display of the impugned flag must be confined to genuine artistic, academic or journalistic expression in the public interest" (i.e. within the qualifications of the proviso in section 12 of the Equality Act). Plus, "[a]ny display beyond that may be brought before the Equality Court for the displayer to prove that the display was defensible (under the proviso) or to prevail on the Court to make an appropriate remedy."

The second case – *NMFT 2*

A few hours after the judgment was delivered, Ernest Roets, of Afriforum, published a tweet on his personal Twitter account containing an image of the old flag, saying: "*Did I just commit hate speech?*" The next day Roets published another tweet. He repeated his first tweet and added: "*The reaction to the tweet is as expected. The judgment said that the flag may be used for academic purposes. I am a scholar of Constitutional Law, currently doing my doctorate. This is an academic question. It seems to the NMF's quest for apartheid style censorship and banning continues*" [sic]. Roets was also interviewed on radio. He asserted that his intention was not to disrespect the Court or undermine the rule of law. His justification was that a court's ruling is not in itself a reflection of a good or moral law.

The NMFT then launched an urgent application seeking a rule nisi requiring Roets and Afriforum to show cause why they should not be declared in contempt of the Equality Court's second order in *NMFT 1* (i.e. that any gratuitous display of the old flag amounted to hate speech) and why they should not be ordered to pay a fine, jointly or severally, or be imprisoned.

Liability of Afriforum for Roets' conduct

The Foundation argued that Afriforum was a litigant in *NMFT 1* and that Roets was present when the order was delivered. Both parties had full knowledge of the

judgment. Afriforum did not distance itself from Roets' tweets. Thus, both Afriforum and Roets should be held responsible for Roets' behaviour. Roets, however, stressed that he acted on his accord and denied that he was acting on behalf of Afriforum.

The Court in *NMFT 2* agreed with Roets and held that there was insufficient evidence on the papers to show that Roets had acted on behalf of Afriforum.

Was Roets in contempt of court?

The NMFT argued that the ruling in *NMFT 1* should be interpreted as a prohibition directing that no person may display the flag in a gratuitous manner and that non-compliance with the order is punishable by contempt proceedings.

The Court in *NMFT 2* began its judgment by setting out the law on contempt. In brief, this entails that there must be a court order in existence, which requires the contemnor either to do something or not to do something (an order *ad factum praestandum*) – see *Mafjhabeng Local Municipality v Eskom Holdings Ltd* 2018 (1) SA 1 (CC) para 50. Properly interpreted with reference to the manifest purpose of the order and its language, the rulings in *NMFT 1* did not meet these requirements. The first ruling was a declarator in relation to past conduct (the Black Monday events). The second ruling related to future conduct. The order was cast as a declarator and did not require the alleged contemnor to do or not do something – it was not an order *ad factum praestandum*. The Court in *NMFT 1*, in fact, insisted that its declarator was not a banning order or a directive prohibiting the display of the flag. Instead, its order merely stated what certain conduct constitutes and amounted to a statement setting "the standard of morality" expected by society – i.e. that the gratuitous display of the flag is prohibited inter alia by section 10(1) of the Equality Act.

The Court in *NMFT 2* then stressed that the actual prohibitions are located in sections 7, 10 and 11 of the Equality Act and that future cases involving displays of the flag must be dealt with separately (i.e. by each Equality Court required to deal with the enforcement of the prohibition). A complaint must be laid and then the requisite court must hear the matter and make appropriate rulings. This is because each Equality Court: a) has a presiding office trained in Equality Court procedures; b) can structure its proceedings to allow the parties the opportunity to ventilate the issues fully; and c) can impose a wide-range of remedies to address the prohibition and control the conduct. These remedies are not available to a court punishing a contempt of its order. To this list must be added the fact that the relevant Equality Court would be required to enquire whether the display was, in fact, gratuitous – i.e. whether or not the display of the flag should be exempted by the defences in the proviso.
Thus, the *NMFT 2* Court concluded that Roets was not in contempt of the court order. The application was dismissed with no order as to costs. A separate case would have to be launched against him in an Equality Court.

Concluding comments

Despite the symbolic significance of the judgment in *NMFT 1*, it is of limited jurisprudential value. It serves two main purposes: a) words in section 10(1) should be interpreted broadly to include symbols, representations, and images; and b) *prima facie*, the display of the old flag amounts to hate speech. Thus, it will not be necessary for an Equality Court dealing with a future case to enquire into the question of whether the mere display of the flag demonstrates an intention to be hateful, hurtful or harmful. The real enquiry will be whether the display is exempted by the proviso.

So, future displays of the flag are not outright banned. The complainant will need to launch a separate complaint and, if the respondent raises a proviso defence, the relevant Equality Court will be required to consider whether the display should be exempted because it falls within the scope of the proviso. An example would be the publication of the flag in a history book or academic journal. In such a case, the onus will be on the respondent to prove that the proviso applies.

It is ironic that Afriforum's argument in *NMFT 1* that the mere display of the old flag does not demonstrate a clear intention to engage in hate speech and that each case should be decided on an individual basis, in fact, ultimately decided the outcome in *NMFT 2*. Afriforum may have had more success in *NMFT 1* if it had focused on the demonstrates intent requirement as read with the defences in the proviso. This was a far better case than the obviously restrictive "words" argument.

Finally, whilst Roets may be congratulating himself on his victory in *NMFT 2*, he should bear in mind that the divisive manner in which he and Afriforum approach equality, dignity and freedom of expression litigation should be urgently reassessed. I suggest that he re-read the judgment of Froneman J in *Afriforum v University of the Free State* 2018 (2) SA 185 (CC). Roets' acerbic behaviour, especially as an apparent scholar of constitutional law, does not endear himself to those persons who take seriously the need to act out the constitutional mandate in their everyday life and engagements.

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A Last Thought

"[132] "Words" in section 10(1) of the Equality Act may be interpreted to mean ideas, ideologies, beliefs, instructions, etc conveyed by the words. Words thus mean what the words convey or mean and not just a conglomeration of letters, which though constituting a word or words may be meaningless in a particular context. What the section targets is thus the meaning behind words and not simply words, although the subject of the verbs is stated as "words". What is behind words, that is, their meaning, may be represented by verbal and non-verbal expressions. A wider meaning is thus clearly the most sensible, reasonable and consistent with the principle-based interpretive framework. It is the correct meaning."

Per MOJAPELO DJP in Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others (EQ02/2018) [2019] ZAEQC 2 (21 August 2019).