e-MANTSHI

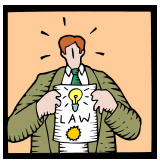
A KZNJETCOM Newsletter

October 2019: Issue 158

Welcome to the hundredth and fifty eighth 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 Rules Board for Courts of Law has under section 79 of the *Promotion of Access to Information Act*, 2000 (Act No. 2 of 2000) made rules for these courts which will come into operation on 4 November 2019. These rules were published in Government Gazette no 42740 dated 4 October 2019. In the same Government Gazette rules for the *Promotion of Administrative Justice Act*, 2000 (Act No. 3 of 2000) were published which will also come into operation on 4 November 2019. The rules can be accessed here:
http://www.justice.gov.za/legislation/notices/2019/20191004-gg42740rg10991gon1284-PAIA.pdf

2. The Legal Practice Council has in terms of section 6 of the *Contingency Fee Act*, Act 66 of 1997 made rules for publication in the Government Gazette. These rules

were published in Government Gazette no 42739 dated 4 October 2019.These rules can be accessed here:
http://www.justice.gov.za/legislation/notices/2019/20191004-gg42739gen525-LPA-Rules.pdf

3. The Minister of Transport intends to amend the *Administrative Adjudication of Road Traffic Offences Regulations*, 2008 by revoking the Regulations published in Government Notice No. R. 753 of 16 July of 2008, with the exception of Schedule 3 with amended regulations which has been published for public comment. The notice to this effect was published in Government Gazette no 42765 dated 11 October 2019. All interested parties who have any objections, inputs or comments to the proposed amendments are called upon to lodge their objections, inputs or comments within thirty (30) days from the date of publication of the notice. The proposed amended regulations can be accessed here:
www.gpwonline.co.za/**Gazettes/Gazettes/42765** 11-10 Transport.pdf

4. The Rules Board for Courts of Law has under section 6 of the *Rules Board for Courts of Law Act*; Act 107 of 1985 amended the rules regulating the conduct of the proceedings of the Magistrates Court with the approval of the Minister of Justice and Correctional Services. The amended rules are rule 68 and Part II of Table C of Annexure 2. The notice to this effect was published in Government Gazette no 42773 dated 18 October 2019 and the amendment will come into operation on 22 November 2019. The amended rules can be accessed here:
http://www.justice.gov.za/legislation/notices/2019/20191018-gg42773rg10994gon1343-RulesBoard-HC.pdf

Recent Court Cases

1. Nelson Mandela Bay Municipality v Gcora (992/2016) [2018] ZAECPEHC 34; 2019 (2) SACR 451 (ECP) (10 July 2018)

Scandalizing the court as a form of contempt of court *ex facie curiae* is committed by the publication, either in writing or verbally, of allegations which, objectively speaking, are likely to bring judges, magistrates or the administration of justice through the courts generally into contempt, or

unjustly to cast suspicion on the administration of justice.

(The judgment below is an edited version in which only the issue of scandalizing the court is dealt with. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZAECPEHC/2018/34.html)

Mbenege JP:

[27] On 14 January 2018 at 2:30pm, the respondent addressed a further email to the Head of the Judiciary, Chief Justice Mogoeng Mogoeng, and copied to the Manager in which he remarked:
[27.1] "…how dangerous Pickering J is in the image of the judiciary";
[27.2] "an objective and impartial judge would have noticed that there are other grounds apart from contractual nexus that give rise to an employer having to pay a subcontractor";
[27.3] "The judgment of Pickering J is illegal and unconstitutional, and he should be held accountable for this judgment";
[27.4] "…we do not want to judged (sic) based on judges that undermine decisions of the Constitutional Court and the Supreme Court of Appeal….We ask you Sir to protect us against this oppression and racism through available systems within the management of judicial affairs";
[27.5] "…we cannot allow illegal judgments to stand in our way";
[27.6] "The suffering of my children, my elderly mother, my wife and my derailed career does not give me enough time to go through an appeal process properly, especially because there is nothing to appeal, I do not have to recognise a racial and unlawful judgment";
[27.7] "The Eastern Cape High Court cannot be allowed to pretend to be a court of higher status that (sic) the CC and the SCA. This is racism I reject"; and
[27.8] "I have every reason to believe that certain judges in our courts are settling certain scores using judicial officer and we are victims of certain unspoken racial tensions within the judiciary. I urge you Sir, to establish a mechanism for urgently investigating this despicable conduct."

[28] The respondent addressed a further email on 18 January 2018 at 6:53am to, *inter alia*, the Manager and the Executive Mayor wherein he made the following remarks:
[28.1] "the judgment of Pickering is null and void";
[28.2] "the judge simply embarrassed himself and the entire legal profession and judiciary";
[28.3] "we know judges are not scrupulous people hence I am promoting ADR";
[28.4] "I am warning you about the lawyers you are using they are lying to you not that I trust attorneys and SC"; and
[28.5] "The NMBM and Pickering J failed dismal (sic) to set aside Madonsela's report…"

[29] On the same day, 18 January 2018, the respondent addressed an email to, *inter alia*, Mr Maimane wherein he said the Public Protector's report had not been reviewed and set aside at all.

[30] On the following day, 19 January 2018, the respondent addressed a further email to, *inter alia*, Mr Maimane in which he threatened to have the Municipality's "*lawyers locked up*." He further remarked that the judgments of the Port Elizabeth High Court should not be relied upon.

The applicant's case

[31] The applicant laments, in pursuit of the declaratory relief, that these communications have brought the judicial process into disrepute and detracts from the rule of law; the respondent should be held to be in contempt of court and punished in a fitting manner.

[32] Insofar as the interdictory relief, it is contended that the requisites for the grant of an interdict have been fulfilled and that there is no alternative remedy at the applicant's disposal.

The respondent's case

[33] Besides raising preliminary issues,[1] in his opposing affidavit the respondent contends that he is not liable to be found guilty of contemptuous behaviour because he "*neither disobeyed any court order nor any court proceedings*". Apropos the interdict, the respondent contends that, because he had made undertakings to the applicant that he would not be communicating with it any further, there is nothing remaining for him to be precluded from doing.

[34] In addition, the respondent has this to say in his opposing affidavit:

"10.2.2.7 The application is an attempt by the Applicant to prevent its hypocrisy from being known as it advises the public that it stands for a corrupt free society, good governance, while as a matter of fact it spends public funds protecting maladministration and illegalities.

10.2.2.8 The application is an attempt by the Applicant to use court resources to only act against some, whilst protecting some, I say so because it is a matter of public record that the Municipality has launched an application in this court seeking relief for recovery of certain funds spent in pursuit of what it submits is an illegal contract, while on the other hand, it is defending its conduct which has been confirmed by the above Honourable Court and the former Public Protector to be misconduct, maladministration, unlawful, violation of the section 195 of the Constitution and violation of section 217 of the Constitution. I refer to Annexure D

[1] Lack of urgency; lack of jurisdiction by reason thereof that the entire Division is affected by the application and that, therefore, none of the judges in this Division should hear the matter; *sub-judice* and *lis pendens*, because there are pending applications for leave to appeal in related proceedings.

and the review application under case number 1414/2016 read with Annexure C in the founding papers.
10.2.2.9 In essence, the Applicant seeks an order that will ensure that its hypocrisy is protected.
10.3 There is nowhere in its papers where the Applicant has stablished by any facts any incident where I have prepared and printed any defamatory material and made it available to public, there is nowhere. The word public means "concerning people in general".
10.4 I have of cause reported certain irregularities and conduct that is precluded by law which relates to how the Applicant has put the name of judiciary and public administration in doubt and in disrepute.
10.5 Those irregularities have been reported to relevant people such as the Executive Mayor of the Applicant, council members of the Applicant, Members of the Democratic Alliance which is the party that has been in the forefront or presented itself to be in the forefront regarding fighting against illegalities, maladministration, violation of the rule of law and corruption in state affairs.
10.6 Due to the offices and interest these persons I have chosen, represent in our society they are not general public, they are relevant persons who should be made aware of the very same conduct they have assured South Africans that they will fight it wherever it surfaces, and some of these persons are under obligation in terms of the law to fight those irregularities hence they have been advised of these irregularities.
10.7 There is therefore no basis for the relief sought by the Applicant, the application should be dismissed and the City Manager of the Applicant should be held personally responsible for the legal fees he paid to counsel for the Applicant for pursuing this futile application, which itself will only cause further harm to the image of our judiciary and public administration over and above the issues I deal with here under."

The counter-application

[35] In his counter-application the respondent has averred that the statements made by the Manager in support of the applicant's review application in previous related proceedings, insofar as these relate to payment certificates not revealing what amount was paid for houses and for internal services, had been false, with the result that the applicant should be found to have deliberately committed financial misconduct in terms of the MFMA.

[36] After the applicant had delivered its replying affidavit, the respondent delivered, amongst others, an "*additional affidavit*" wherein he states, *inter alia,* that the comments he previously made about the court and the applicant (including its officials) were made *"foolishly and without proper application of mind"*. He further states that the statements were "*inappropriate, unfortunate and embarrassing*". He tenders an apology, adding that he "*acted out of frustration and pain*". He specifically apologizes to Pickering J and claims to lack sufficient words to express his

embarrassment towards the judge. In the same affidavit he seeks to justify his conduct in certain respects.

Issues for determination

[37] The preliminary issues referred to in paragraph [33] above were, correctly so in my view, not persisted in when the matter was being heard. This leaves the Court having to determine the following issues:

(a) whether-

(i) the statements made by the respondent of and concerning the court and the applicant and its officials are offensive and render the respondent liable to be found guilty of contemptuous behaviour; and

(ii) a case has been made out for restraining the respondent from making the impugned statements;

(b) whether the counter-application passes muster; and

(c) what costs order should be made.

Contemptuous behaviour

[38] The respondent's concession that he made the impugned statements without reflection and his regret at having made same, do not, in the circumstances of this case, translate into an unequivocal admission of guilt on his part; he seeks to justify his conduct and contends that he never breached any court order and is thus not liable to be declared to be in contempt of court. Annexed to the affidavit embodying the apology is a letter written on a "*without prejudice*" basis. The letter does not admit guilt or liability to the Manager for any harm that the statements may have caused to him or any other person. Therefore, a pronouncement regarding what these statements constitute is still required.

[39] It is indubitably so that the remarks made by the respondent adumbrated above constitute contemptuous conduct; they constitute unlawful disdain, in the extreme, for judicial authority. The remarks render nugatory the provisions of section 165 of the Constitution which effectively vouchsafes judicial authority and the supremacy clause of the Constitution which accords judicial authority on the courts and precludes any person or organ of state from interfering with the functioning of the courts.[2]

[40] The remarks in question are a classic example of contempt *ex facie curiae,* particularly scandalizing the court, which is clearly covered by the following definition by C R Snyman:[3]

"Contempt of court consists in unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or a judicial officer in his judicial capacity…"

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[2] Also see article 9(b)(iii) of the Code of Judicial Conduct adopted in terms of section 12 of the Judicial Service Commission Act 9 of 1994 which makes it incumbent on judicial officers to be courteous to the parties, and to require them to act likewise.

[3] Criminal Law (5th Ed) p325

[41] The question as to why there is such an offence as scandalising the court at all in this day and age of constitutional democracy was answered by Kriegler J in *S v Mamambolo (E TV & Others Intervening)* [4]as follows:
"The answer is both simple and subtle. It is, simply, because the constitutional position of the judiciary is different, really fundamentally different. In our constitutional order the judiciary is an independent pillar of state, constitutionally mandated to exercise the judicial authority of the state fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of state; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of state and, ultimately, as the watchdog over the Constitution and its Bill of Rights — even against the State."

[42] I am satisfied that the respondent has been proven with the requisite degree to be in contempt of court *ex facie curiae* resulting from his contumacious conduct and the contemptuous remarks he made.

Sanction
[43] It now remains to consider an appropriate sanction. This is done not with a view to protecting the dignity of the judicial officers scandalized, but the integrity of the administration of justice.[5] The following remarks by Gubbay CJ in *In re Chinamasa*[6] are apposite:
"The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed."

[44] It is a matter of concern that, despite having been cautioned against levelling serious allegations against members of the bench by Pickering J, the respondent persisted in his wanton attacks, heedless of the cautioning. The apology tendered by the respondent and his explanation for why he behaved in an unbecoming fashion, count in his favour. When the matter was heard the respondent evinced contriteness, and addressed the court as follows:

"If it pleases the Court I would like to address the issues before the Court to the best of my ability. First of all, and with the greatest respect, I wish to put it to the

[4] 2001 (3) SA 409 (CC) at para [16]
[5] *Mamabolo* case(*Supra*) para [25]
[6] 2001(2) SA 902 (ZS); 2000 [12] BCLR 1294 at 1311 C-D

Court that I am here today because I respect the law of the country, I respect the authority of this Court. I have not been forced to be here today when I became medically fit to be here. I am here because I respect that this Court is got authority over everyone in the region. I am here exactly because I fully acknowledge and respect the authority of the Court, but this is a very difficult situation. In the papers I have tried to point out certain difficult periods in my life. In front of me I have got a report from doctors that confirms that I am suffering from stress…

In my entire life I have never intended to be involved in criminal conduct. As a result I have spent every day I have had in my life trying to better myself by studying. As a result I have managed to have a formal qualification in Civil Engineering from the Nelson Mandela Bay University. As a result of that qualification and further studies I did with association of arbitrators of South Africa, and the experience I have gathered starting from the mediation proceedings I participated in these projects. I have been able to play a different role in the industry in the form of assisting SMME's with their dispute resolution mechanisms. And as we speak I have over 108 SMME's I have represented. Their matters are being considered, their arguments have closed, but obviously not in court because I do that in terms of the ADR… If I can be incarcerated sir a lot of people are going to suffer. It is not a matter of trying to influence the Court, my family has been depending on me and entirely on me. And I think part of the damage I have been watching happening to my family must have… driven me to lose control and say things I would not have said if I had appropriate support… "

[45] In all the circumstances of this case, taking into account the mitigating and aggravating circumstances, and regard being had to the triad,[7] a non-custodial sentence seems just and equitable.

[53] I therefore grant the following order:
(a) The respondent is declared to be in contempt of court and is hereby sentenced to undergo 6 months' imprisonment, the whole of which is suspended for 5 years on condition that he is not found guilty of contempt of court, committed during the period of suspension.

2. Mokoena v S (200/2018) [2019] ZASCA 74; 2019 (2) SACR 355 (SCA) (30 May 2019)

An order in terms of section 342A (4)*(a)* of Act 51 of 1977 cannot be granted in the absence of any notice given beforehand by the State that it intended to apply for such an order.

[7] The interests of society, the nature and seriousness of the crime and the personal circumstances of the offender (*S v Zinn* 1969 (2) SA 537 (A))

Saldulker JA (Maya P, Tshiqi and Swain JJA and Gorven AJA concurring):

[1] This appeal, with the special leave of this court, is directed against the order of the Gauteng Local Division, Johannesburg (Weiner and Mailula JJ).
They upheld an appeal by the appellant, Mr Moeketsi Mokoena, against his conviction for the theft of R1 million, for which he was sentenced to 15 years' imprisonment before the Johannesburg Regional Court (Magistrate A Petersen). The high court found that the magistrate had incorrectly applied the provisions of s 342A(3)*(d)* read with s 342A(4)*(a)* of the Criminal Procedure Act 51 of 1977 (the Act) when ruling that the proceedings were to continue and be disposed of as if the case for the appellant had been closed. The high court however then ordered that the matter be remitted to the regional court for the trial to continue before the same magistrate.

[2] There are two issues on appeal. First, whether the magistrate was entitled *mero motu* to invoke the provisions of s 342A(3)*(d)* read with s 342A (4)*(a)* of the Act, in the absence of the requisite notice by the State given beforehand, that it intended to apply for an order that the proceedings be continued and disposed of as if the case for the defence had been closed. Second, whether the high court was correct to remit the matter for the re-opening of the defence case, to the same magistrate (who had already convicted and sentenced the appellant), and to allow the leading of further evidence where the same magistrate had already made strong credibility findings against the appellant.

[3] The appeal arises against the following factual backdrop. The appellant was charged with the theft of R1 million which was the property of SBV Cash Services and its employers. At the time of the theft the appellant was in the employ of SBV Cash Services. The trial against the appellant commenced in September 2013 in the regional court. During March 2014, the State informed the appellant that it was not relying on a witness who was to testify in respect of certain video footage and made the witness available to the appellant. After the close of the State's case, the appellant testified in his defence, and the matter was thereafter postponed to June 2014 for the purpose of securing the attendance of this witness along with the necessary equipment to show the video footage.

[4] However, by the adjourned date no steps had been taken to secure the attendance of the witness by subpoena. The magistrate informed the appellant that this would be a final postponement for securing the attendance of the witness. The matter was postponed until August 2014. On the adjourned date and despite a subpoena having been issued for his attendance, the witness did not attend court. The appellant requested another postponement but declined the offer by the magistrate that a warrant of arrest be issued to secure the attendance of the witness. The State objected to a further postponement of the matter. The magistrate, in

refusing the postponement, stated that the appellant had been made abundantly aware of the fact that the matter had been finally postponed and that the provisions of s 342A of the Act came into effect, as the appellant had 'been given due notice of the aspect of the matter been final today'. The magistrate then concluded that the completion of the proceedings was being delayed unreasonably and because the appellant sought a further postponement and did not wish to proceed with the matter at that stage, an order as contemplated in subsection (3)*(d)* of the provisions of s 342A[8] of the Act, should issue that the 'proceedings be continued and disposed of . . . as if the case for the defence has been closed'. After hearing argument, the regional court convicted and sentenced the appellant.

[5] In its judgment, the high court, pointed out that it was common cause that neither the defence nor the State had applied for an order in terms of the above section, and that neither of the parties had given notice of their intention to seek such an order. However it rejected the argument by the appellant, that the refusal by the magistrate to grant a postponement and the grant of an order in terms of s 342A(3)*(d)* of the Act, in the absence of the requisite notice, vitiated the proceedings. This was despite the high court finding that the provisions of s 342A must be strictly interpreted in view of the serious consequences of such an order and its effect upon the right to a

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[8] Section 342A of the Criminal Procedure Act 51 of 1977 reads:

'**Unreasonable delays in trials**

(1) A court before which criminal proceedings are pending shall investigate any delay in the completion of proceedings which appears to the court to be unreasonable and which could cause substantial prejudice to the prosecution, the accused or his or her legal adviser, the State or a witness.

(2) In considering the question whether any delay is unreasonable, the court shall consider the following factors:

(a) The duration of the delay;

(b) the reasons advanced for the delay;

(c) whether any person can be blamed for the delay;

(d) the effect of the delay on the personal circumstances of the accused and witnesses;

(e) the seriousness, extent or complexity of the charge or charges;

(f) actual or potential prejudice caused to the State or the defence by the delay, including a weakening of the quality of evidence, the possible death or disappearance or non-availability of witnesses, the loss of evidence, problems regarding the gathering of evidence and considerations of cost;

(g) the effect of the delay on the administration of justice;

(h) the adverse effect on the interests of the public or the victims in the event of the prosecution being stopped or discontinued;

(i) any other factor which in the opinion of the court ought to be taken into account.

(3) If the court finds that the completion of the proceedings is being delayed unreasonably, the court may issue any such order as it deems fit in order to eliminate the delay and any prejudice arising from it or to prevent further delay or prejudice, including an order-

(a) refusing further postponement of the proceedings;

. . .

(d) where the accused has pleaded to the charge and the State or the defence, as the case may be, is unable to proceed with the case or refuses to do so, that the proceedings be continued and disposed of as if the case for the prosecution or the defence, as the case may be, has been closed;

. . .

(4) *(a)* An order contemplated in subsection (3) *(a)*, where the accused has pleaded to the charge, and an order contemplated in subsection (3) *(d)*, shall not be issued unless exceptional circumstances exist and all other attempts to speed up the process have failed and the defence or the State, as the case may be, has given notice beforehand that it intends to apply for such an order.'

fair trial as envisaged in s 35(3) of the Constitution.

[6] In this respect the high court erred because in terms of s 342A(4)*(a)* no order shall be issued in terms of 342A(3)*(d)* unless exceptional circumstances exist and all other attempts to speed up the process have failed, and the defence or the State as the case may be, has given notice beforehand that it intends to apply for such an order as provided for in s 342A(4)*(a)* of the Act. The requirements of s 342A(4)*(a)* are clearly peremptory. Thus, the defect in these proceedings was that the regional court magistrate acted *mero motu* in terms of s 342A(4)*(a)* in the absence of any notice given beforehand by the State that it intended to apply for such an order. Because the application of the provisions of s 342A(4)*(a)* may have far reaching consequences, it is essential that proper notice as required by the section be given to the other party so as to enable such party to prepare in advance.

[7] Although the magistrate stated when the matter was postponed for further hearing in June 2014, that it was a final postponement for the defence to secure its remaining witness to testify on the video footage, the magistrate did not refer to s 342A, nor did the State give notice that it intended to rely on this section. It was only when the regional court magistrate made the ruling that the provisions of s 342A were referred to for the first time. The magistrate purported to deal with the requirement of notice by stating that the defence had accordingly been made aware of the fact that the matter was finally postponed, and that the provisions of the section therefore came into effect. This quite obviously did not constitute the requisite notice in terms of the section.

[8] In this context it must be stressed that there is a significant difference, between the situation, as in the present case, where the magistrate warns a party that this will be a final adjournment of the matter and the situation where that party is given notice in terms of the section. In the latter instance, the magistrate will be asked to make an order that the case of that party is closed. In the former situation the affected party still possesses an election whether to close their case or not, and may decide not to close his or her case and lead additional evidence not related to the issue that caused the delay, whereas in the latter situation, that election is removed and placed in the hands of the magistrate. It should be made clear that s 342A(4)*(a)* requires the State or a party to give notice. A magistrate may not do so.

[9] The grant of the order in term of s 342A(3)*(d)* was clearly a technical irregularity. Once an irregularity has been committed, the provisions of s 309(3) of the Act find application. Section 309(3) provides:
‘. . . [N]o conviction or sentence shall be reversed or altered by reason of any irregularity . . . in the record or proceedings, unless it appears . . . that a failure of justice has in fact resulted from such irregularity . . . .’
The question thus arises whether the irregularity in question resulted in a failure of justice. The answer is clear. In *S v Naidoo* 1962 (4) SA 348 (A) and *S v Moodie* 1962

(1) SA 587 (A), a technical irregularity was described as one which justified the setting aside of a conviction by the court of appeal where it precluded valid consideration of the merits. In this case material evidence relating to a video footage was excluded. A failure of justice resulted.

[10] I turn to deal with the second issue on appeal, namely whether the high court was correct to remit the matter for the re-opening of the defence case, to the same magistrate. The high court agreed with the submission by the State that the same magistrate would hear any further evidence and apply his mind to the facts and the evidence in arriving at his decision. In addition, the high court's remittal order was problematic, as the high court did not set aside the conviction and sentence, and in the absence of such an order, the magistrate would have been unable to continue with the trial. In doing so the high court failed to take into account that the magistrate had made serious credibility findings against the appellant and had rejected his version on the evidence.

[11] Where an irregularity which gives rise to a failure of justice occurs, the provisions of s 324*(c)* of the Act apply. In terms of this section where a conviction and sentence are set aside by a court of appeal on the grounds that there has been a technical irregularity or defect in the procedure, then proceedings in respect of the same offence may be instituted as if the accused had not been previously arraigned, tried and convicted: Provided that no Judge or assessor before whom the original trial took place shall take part in such proceedings. The need for the proviso is clear. When a presiding officer has already concluded that the appellant is guilty of an offence and furnished his reasons for doing so, he or she cannot hear any further evidence in the matter. Importantly, according to *Director of Public Prosecutions, Transvaal v Mtshweni* [2006] ZASCA 165; [2007] 1 All SA 531 (SCA) this provision does not conflict with s 35(3) of the Constitution, as it does not result in double jeopardy because of the vitiating nature of the irregularity. The appeal must accordingly succeed and the conviction and sentence of the appellant be set aside in terms of s 324*(c)* of the Act.

[12] In the result the following order is made:
1 The appeal is upheld.
2 The order of the high court is set aside and replaced with the following order:
a. The appeal succeeds and the conviction and sentence of the appellant are set aside.
b. It is ordered in terms of s 324*(c)* of the Criminal Procedure Act 51 of 1977, that proceedings in respect of the same offence for which the appellant was convicted may again be instituted on the same charge, suitably amended if necessary, as if the appellant had not been previously arraigned, tried and convicted: Provided that the magistrate before whom the original trial took place shall not take part in the proceedings.'

From The Legal Journals

De Villiers, W P

"Permanent stay of prosecution: *S v Brooks* 2019 1 SACR 103 (NCK)"

2019 (82) THRHR 332

Lochner, H & Horne,J

"Regional court magistrates' recommendations for improving the efficacy of taking statements from children."

South African Journal of Criminal Justice, Volume 32 Number 2, 2019, p. 202 – 222

Abstract

National Instruction 3/2008 of the South African Police Service recognises the fact that taking children's statements (irrespective of whether they are victims of, or witnesses to, a crime) is a challenge requiring special skills. There are thus well-documented instructions, guidelines and prescriptions for taking written statements from children who are victims of crime. The purpose of the research on which this article is based was to indicate, from the point of view of a criminal investigator, crucial aspects that are not covered in the Standing Orders[2] of the South African Police Service or National Instruction 3/2008, and to support these with empirical evidence and references from the literature. Taking a witness statement from a child does not happen in a vacuum, and the investigating officer who performs this task is central to the investigation of the reported case and its successful prosecution. In this article, the authors examine and report on the requisite skills, make recommendations and identify aspects which regional court magistrates consider when evaluating children's evidence based on their witness statements.

Khumalo, K

"A commentary on the principles underpinning the crime of public violence committed by means of threat of violence."

South African Journal of Criminal Justice, Volume 32 Number 2, 2019, p. 223 – 232

Namakula, C S

"When the tongue ties fair trial: the South African experience."

South African Journal on Human Rights 2019, VOL. 35, NO. 2, 219–236

Abstract
The overarching duty of South African courts to guarantee fair trial is subject to language warranties. The dynamics of language in democratic South Africa are connected to difficult historical factors that require long-term holistic interventions. The judiciary is battling with mainstreaming all eleven official languages, a task that requires high standards of judicial interpreting. In the process, the tongue threatens the core mandate of the courts; evidence is distorted or lost in translation, court processes are delayed; and legal representation is compromised.

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

Contribution from the Law Faculty at NMU

CONSTITUTIONAL COURT DECLARES DRACONIAN INTIMIDATION ACT SECTIONS UNCONSTITUTIONAL: PLUS, LESSONS IN STATUTORY INTERPRETATION

Introduction

On 22 October 2019 in *Moyo v Minister of Police; Sonti v Minister of Police* [2019] ZACC 40 the Constitutional Court declared sections 1(1)(b) and 1(2) of the Intimidation Act 72 of 1982 unconstitutional and invalid.

The first applicants in the cases were Mr Moyo and Ms Sonti. Both were charged with intimidation in terms of section 1 of the Intimidation Act. Mr Moyo challenged the constitutional validity of section 1(1)(b) of the Act on the basis that it unjustifiably infringed the right to freedom of expression in section 16 of the Constitution. He was unsuccessful in the High Court and the Supreme Court of Appeal (SCA) and then lodged an appeal in the Constitutional Court. Ms Sonti challenged the constitutionality of section 1(2) of the Intimidation Act on the grounds that it violated the fair trial rights entrenched by sections 35(3)*(h)* and *(j)* of the Constitution, namely the rights to be presumed innocent, to remain silent and not to be compelled to give self-incriminating evidence. The SCA declared the section unconstitutional. She sought the Constitutional Court's confirmation of the SCA's order.

The constitutionality of section 1(1)(b) of the Intimidation Act

Section 1(1)(b) introduced

Section 1 of the Intimidation Act criminalises intimidation. Section 1(1)(a) criminalises the act of intimidation. Its constitutionality was not challenged. Section 1(1)(b) of the Act is much broader. It criminalises any person who:

"*b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication –*

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person."

In the Supreme Court of Appeal

The applicants argued that section 1(1)(b) criminalises any expressive act which creates a subjective fear in any person for themselves, their property or livelihood, regardless of whether that fear was reasonable or intended. The applicants contended that the law was overbroad and criminalised legitimate forms of expression protected by section 16 of the Constitution.

The majority held that section 1(1)(b) could be interpreted in a manner which does not unjustifiably infringe the right to freedom of expression. It held that the crime of intimidation created by the section could be interpreted strictly to include five extra requirements. These were:

1. Only intimidatory acts falling within the scope of the Act are criminalised. Intimidation must be narrowly interpreted as "incitement to imminent harm or an inculcation of a reasonable fear for imminent harm".
2. Thus, the fear created must be one of imminent harm.
3. The intimidatory conduct must induce a genuine, reasonable fear of harm (tested objectively) – i.e. not subjective fear.
4. There must be proof of *mens rea* – an intention to induce fear.
5. The conduct must be unlawful. So, an expressive act that intentionally causes a reasonable and genuine fear of imminent harm, but which is otherwise protected by law (the Constitution or any other statute), is not criminalised by section 1(1)(b), because this is not unlawful *per se*. So, whilst a person engaging in constitutionally-protected expressive act might be unable to avoid being arrested, charged, detained, and brought to trial under the language of the section, he / she could escape conviction by relying on the defence of lawfulness.

So qualified, the majority held that section 1(1)(b) only criminalises unlawful expressive acts intended to cause reasonable and genuine fear of intimidation in the form of imminent harm.

In the Constitutional Court

The Applicants and the Amicus Curiae (the Right2Know Campaign) argued that the SCA's interpretation of section 1(1)(b) was unduly strained. They claimed that the plain language of the section, read in context and in light of the Act's purpose (a product of apartheid and designed to control political dissent), did not only criminalise expressive acts intended to cause a reasonable fear of imminent harm. Instead, the provision explicitly criminalised expressive acts which create a subjective fear of harm, even if that fear is neither reasonable nor intended. An overbroad criminal sanction like this would censor political and other types of speech vitally necessary in a democracy. Additionally, the SCA's extra requirements created vagueness and uncertainty, undermining the rule of law. Criminal prohibitions impacting on the exercise of constitutional rights must be clear and specific. People must know what conduct the law prohibits. In the words of Mokgoro J in *Case v Minister of Safety and Security* 1966 (3) SA 617 (CC) para 56: "That is so because of the chilling effect that overbroad legislation may have, discouraging others from engaging in constitutionally protected activities because legislation which on its face prohibits such activity remains on the statute books." Thus, the purpose of restrictively interpreting all criminal provisions is so that every person "clearly and certainly knows when he or she is subject to penalty by the state" (see *DA v ANC* 2015 (2) SA 232 (CC) para 130). The correct approach to interpretation is to interpret criminal prohibitions like section 1(1)(b) to mean what they say and then to declare them invalid if they unjustifiably limit a constitutional right.

A unanimous Constitutional Court agreed with the arguments presented by the Applicants and the Amicus. In summary, the Court, per Ledwaba AJ, held that:

- It was clear from a literal reading of section 1(1)(b) that the prohibition limited the right to freedom of expression. The "net" of criminal liability was cast too wide because of the subjective fear requirement. For example, according to the Court, "the act of handing out fliers advocating for expropriation of land without compensation in a known libertarian suburb could, all things considered, lead to a charge of intimidation." It is quite possible that such activity would "be fear-causing". The overbreadth infringed section 16 of the Constitution and was not justifiable in a democratic society.
- The majority of the SCA added extra requirements to the prohibition to interpret it in conformity with the Constitution – a principle of constitutional interpretation and the so-called "reading down" approach.
- The main issue was whether the SCA's interpretation was unduly strained.
- The principles of statutory interpretation adopted by the SCA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) were confirmed. These are now summarised.
- The interpretative process does not involve a mechanical step-by-step process.
- Context, purpose of the provision and the statute, language, grammar, coherence and objectivity are all important factors.
- "Slavish attention" to the plain meaning of the words is not the primary criterion.
- Where there is a constitutional challenge, section 39(2) of the Constitution requires the provision be interpreted in a manner which promotes the spirit, purport and objects of the Bill of Rights.
- This means that where there are "multiple, plausible, interpretations", then the one that best conforms with the Constitution should be preferred – see too *Investigating Directorate: Serious Economic Offences & others v Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) para 24. The challenged provision can be read-down to ensure consistency with the Constitution.
- "Reading-down" is not "reading-in". Reading-in is a constitutional remedy used only after a provision is declared unconstitutional (see section 172(1) of the Constitution and *Daniels v Campbell NO* 2004 (5) SA 331 (CC) para 86). Reading-in involves adding words to a statutory provision after it has been declared unconstitutional. Reading-down, on the other hand, is an interpretative tool used to interpret a statute so as to ensure constitutional compliance.
- Reading-down has its limitations. A provision must not be unduly strained. The court is constrained by what the text is reasonably capable of meaning. Also, when reading-down, the interpreting Court should not re-write the legislation. This infringes the doctrine of separation of powers and the rule of law. Even

when reading-in, care must be taken not to intrude into the domain of the legislature, which is responsible for legislative drafting.

- Special rules apply to criminal prohibitions:
    - The law must be clear and precise.
    - A charged person must understand the elements of the offence from the charge sheet.
    - A court should prefer an interpretation that best promotes the liberty of a person over one which does not.
    - There can be no criminal liability without fault.
    - Any conduct subject to criminal sanction must be unlawful.
    - The last two canons of criminal statutory interpretation are not qualifications that can be "read-in" to a provision - they flow from the legitimate manner in which a criminal statute is to be read.
- The SCA added extra requirements to section 1(1)(b). Specifically, it required fear of imminent harm to align the prohibition with the ambit of section 16(2)(b) of the Constitution, which excludes from constitutional protection expressive acts that incite *imminent violence*.
- The problem is that the imminent harm requirement is not included in the text of section 1(1)(b). Also, the SCA's incitement to imminent harm requirement is broader than section 16(2)(b) of the Constitution, which does not protect incitement to imminent violence. Not all harm is caused violently as is clear from the plain meaning of section 1(1)(b).
- The Constitutional Court concluded that the SCA's definition of intimidation amounted to an unjustified "reading-in" and was an interpretation that unduly strained the text. Note here that the Constitutional Court should have added that if the SCA's interpretation amounted to reading in, then the correct approach would be to declare the section unconstitutional first. Perhaps the Constitutional Court meant that the SCA engaged in strained reading-down?
- Section 1(1)(b) was declared unconstitutional in terms of section 172(a) of the Constitution. The Court opted not to suspend the declaration of invalidity. Thus, the order of invalidity operates immediately from date of the judgment and also applies retrospectively to any pending matter involving a charge under section 1(1)(b) that has not been finalised on appeal.

The Constitutional Court's decision is welcomed. It is impermissible for courts to use the rules of statutory interpretation to construe criminal prohibitions in a manner which creates vague and imprecise laws. This impacts on legal certainty and the rule of law. The situation is worse where a prohibition violates a constitutional right, such as freedom of expression, the exercise of which is crucial for the democratic project. The overbreadth of criminal prohibitions cannot be cured by interpretation because people will inevitably be deterred into not engaging in constitutionally protected speech, erring on the side of caution – the so called "chilling effect" of speech prohibitions.

Confirmation of constitutional invalidity of section 1(2) of the Intimidation Act

Section 1(2) of the Act reads as follows: *"In any prosecution for an offence under subsection (1), the onus of proving the existence of a lawful reason as contemplated in that subsection shall be upon the accused, unless a statement clearly indicating the existence of such a lawful reason has been made by or on behalf of the accused before the close of the case for the prosecution."*

Section 1(2) must be read with section 1(1)(a) of the Act, which criminalises threats to kill, injure or cause damage to a person "without lawful reason". Section 1(2) does not apply to prosecutions under section 1(1)(b) of the Act. Section 1(2) places the onus of proving a lawful reason to issue a threat on the accused, unless the accused admits making a threat and gives reasons for the threat before the close of the State's case.

The SCA declared section 1(2) unconstitutional because it infringed the right to be presumed innocent, the right to silence, the right to be compelled to make self-incriminating admissions, and the right to expression. The Constitutional Court was asked to confirm the declaration. The majority and the minority of the SCA differed on the type of onus created by the provision. The minority held that the onus created an impermissible reverse onus of proof. The majority, however, found that the onus was merely an evidentiary burden. Whilst the distinction did not influence the constitutionality outcome (as both types of onus unjustifiably infringe the Constitution's fair trial rights and displace the presumption of innocence), the parties challenged the majority's conclusion that the onus was a mere evidentiary one.

The Constitutional Court did not dwell on the issue. It held that the inclusion of the words "*the onus of proving* the existence of a lawful reason … shall be upon the accused" created a reverse onus. This absolved the State from proving all the elements of the crime and allowed for an accused to be convicted in circumstances where there exists a reasonable doubt as to the unlawfulness of the conduct. An accused person who invoked the right to remain silent and not to be compelled to self-incriminate, would bear the onus of proving a lawful reason for the conduct in question.

Section 1(2) was therefore declared unconstitutional with immediate effect and with retrospective application to the extent that it applies to pending trials and pending appeals where the onus was based on section 1(2) of the Intimidation Act.

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Matters of Interest to Magistrates

A CONCISE DISCUSSION ABOUT JUDICIAL INDEPENDENCE AND TRANSFORMATION AND HOW THESE ASPECTS OF OUR LAW RELATE TO ACCOUNTABILITY OF THE JUDICIARY.

1. INTRODUCTION

This discussion is intended to provide some perspectives as well as insight on the question of judicial independence and transformation after the advent of constitutional democracy and triumph of the rule of law in South Africa. The attainment of this new political order is also coupled with, *inter alia*, rationalization of the judicial system, promotion of transformation of the judiciary in order to make it accountable, as it were, to the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution) and the law. The hallmark of the above-mentioned question forms the substratum for the process of judicial transformation. This judicial transformation process is, in turn, dedicated to the creation of a judicial system that is representative of the diverse population of South Africa. It is also dedicated to foster a culture of accountability in order to build and entrench confidence for the judiciary to all South Africans, and more importantly, to uphold and promote the constitutional values of human dignity, equality, advancement of human rights and freedoms.

It is important to take note of the fact that the topic which is the subject of this discussion is very wide and complex. In fact, these evolving concepts of judicial independence, transformation and accountability of the judiciary entail a plethora of academic and professional ideas and information. All these emanate from written literature as well as from research data that has been collected by academia and scholarly people. The Constitution, the new order legislation, the Office of the Chief Justice of South Africa, the Courts, legal practitioners and organized legal organizations and formations have also contributed, and are contributing, immensely towards entrenchment of judicial independence, transformation and accountability of the judiciary in the South African judicial system.

However, there are also a number of incidents whereby these evolving concepts or aspects of our law have been compromised and impugned. One of these incidents or cases even involves a public international law matter, namely, the Omar Al-Bashir saga (the now deposed former President of Sudan). In this case the South African

Government plainly and willfully ignored the North Gauteng High Court ruling against Omar Al-Bashir to be arrested (for genocide and war crimes in Darfur region of Sudan) in terms of a warrant of arrest issued by the International Criminal Court (the ICC) despite the fact that South Africa is a signatory to the Rome Statute which established the ICC. This conduct, *per se*, although the South African Government, in my view, stated solid and genuine reasons for its non - compliance with the Court Order and thus contempt, undoubtedly undermined and compromised the independence of the judiciary.

Since my discussion precludes a detailed account of this complex topic, I will concentrate mainly on the question of judicial independence and transformation *vis-a-vis* accountability of the judiciary briefly in general, and more specifically in the Magistrates Courts, with specific reference to one of the leading judgments as well as the relevant legislation.

2. ASSESSING THE QUESTION OF JUDICIAL INDEPENDENCE AND TRANSFORMATION AND HOW THESE ASPECTS OF OUR LAW RELATE TO ACCOUNTABILITY OF THE JUDICIARY.

Judicial independence has been entrenched in our constitutional democracy, but there are nonetheless some serious challenges to it. Judicial independence has two main components, namely: individual or personal independence, and on the other hand institutional or functional independence. Individual independence refers to judicial officers' independent and impartial performance of their duties, free from any outside undue influence or interference by an organ of State *(Schedule E, Article 4 of Regulations for Judicial Officers in the Lower Courts, Magistrates Act, 1993).*

Institutional or functional independence refers to the provision and availability of structures to protect the Courts and judicial officers from undue interference by other organs of State as required by the Constitution of the Republic of South Africa, 1996 (the Constitution).

Section 165 of the Constitution provides as follows:

"Judicial Authority

165 (1) The judicial authority of the Republic is vested in the courts.
(2) The Courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
(3) No person or organ of state may interfere with the functioning of the courts.
(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence,

impartiality, dignity, accessibility and effectiveness of the courts.

(5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies."

"Judicial system

166 The courts are-

(a) the Constitutional Court;
(b) the Supreme Court of Appeal;
(c) the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
(d) the Magistrates' Courts; and
(e) any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

In section 166 of the Constitution the Courts are described as institutions responsible for the administration of justice. These include Courts established in terms of an Act of Parliament, for example, the Labour Court, Land Claims Court, Electoral Court, Military Court, etc.

Section 165 of the Constitution depicts the Courts as institutions that wield judicial authority and how they must function in exercising that judicial authority. The section also regulates how other persons and organs of State must interact with these institutions. This section further emphasizes the significance of institutionalizing judicial independence in the functioning of the Courts as entities or institutions that are vested with judicial authority. In fact, section 165 also enjoins organs of State to promulgate legislation for the purpose of assisting the Courts to uphold judicial independence, ensure neutrality and accessibility to justice as required by section 34 of the Constitution and maintain dignity, fairness and effectiveness of the Courts**.**

In an address to the Cape Town Law Society, the former Chief Justice of South Africa, the late Chief Justice Arthur Chaskalson posited that "judicial independence is a requirement demanded by the Constitution, not in the personal interest of the judiciary but in the public interest."

However, it is of particular importance to note that judicial independence regardless of its significance, has met certain serious challenges on numerous occasions. One of these challenges to judicial independence arose in a case of *S and Others v Van Rooyen and Others (General Council of the Bar of South Africa, Intervening) (CCT21*

*/ 01) [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (11 June 2002) (*hereinafter referred to as *Van Rooyen).*

Since this is a lengthy judgment by the Constitutional Court concerning this issue, and since my discussion does not entail a detailed account of this topic, I will only provide a synopsis of the legal principles emanating from this judgment. This synopsis of legal principles derived from the above-mentioned judgment concerns the constitutional legitimacy of the magistracy and the Magistrate Commission, the impugned provisions of the Magistrates Court Act of 1944 and the Magistrates Act of 1993, respectively, as well as the Regulations made by the Minister of Justice in terms of the Magistrates Act of 1993, (later to be referred to herein as 'Ministerial Regulations').

In *Van Rooyen (supra)* the first applicant (an accused in a criminal case) was convicted and sentenced to a term of six years imprisonment by the Pretoria Regional Court after being found guilty on various counts of theft and unlawful possession of a firearm and ammunition. The first applicant, after lodging an appeal to the High Court also sought review proceedings in which he contended that the regional court that convicted and sentenced him lacks institutional independence as required by section 165(2) of the Constitution. In another matter, the second respondent (an accused in a criminal case) was charged with murder and malicious injury to property and applied for bail which was refused. He then instituted review proceedings in which he sought to set aside that decision of the regional court on the grounds that it lacked institutional independence as required by section 165 (2) of the Constitution. Again, the sixth respondent (an accused in a criminal case) who faced charges of fraud in the Pretoria Regional Court entered a plea to the effect that the Court had no jurisdiction to hear the matter because it lacked judicial independence as contemplated in section 165 (2) of the Constitution.

The seventh respondent, namely the regional magistrate who heard the sixth respondent's case decided to uphold his plea and then referred the matter for adjudication by the High Court. The fifth respondent, the Director of Public Prosecutions lodged a review application in the High Court and requested to have the seventh respondent's decision set aside.

These three matters were consolidated for the purpose of the hearing. The second applicant, namely, the regional magistrate and the third applicant, that is, the Association of Regional Magistrates of South Africa (ARMSA) were given leave to intervene in the proceedings and they did so**.**

Before the judgment was delivered one of the two judges who initially heard these matters died, and the judgment was subsequently delivered by the remaining judge.

The judge of the High Court found that the control and administration of the lower Courts that was exercised by the Minister of Justice does indeed interfere with and limit the judicial independence of the Magistrates' Courts. The High Court then held that the magistrate Commission, which is a body that is mainly responsible for appointment, promotion, transfer or discharge of magistrates is an executive structure

that is not independent and because of this, magistrates Courts lack institutional independence required by section 165 (2) of the Constitution.

The High Court also found that the Magistrate Commission, as presently constituted, will be perceived by an objective, informed and reasonable person to be in conflict with or undermining the independence of the magistracy, and that it cannot ensure that the promotion, transfer or dismissal of or disciplinary steps against magistrates take place without favour or prejudice.

Regarding the changes to the composition of the Magistrate Commission made in terms of the Magistrates Amendment Act of 1996, the High Court came to the conclusion that such changes were made in order to give the legislature and the executive control over the Magistrate Commission so as to enable the Minister of Justice to manipulate the Magistrate Commission and ultimately the magistracy.

The High Court further found that the Ministerial Regulations and certain provisions of the Magistrates Court Act of 1944 and the Magistrates Act of 1993, respectively, concerning the under-mentioned issues of the Magistrate Commission and the magistracy, impair the institutional independence of magistrates, were inconsistent with the Constitution and therefore invalid**.** These issues that were considered are the following:

(a) Objects of the Magistrate Commission;
(b) composition of the Magistrate Commission;
(c) term of office of the members of the Magistrate Commission;
(d) complaints against magistrates;
(e) complaints Procedure made by the Minister of Justice;
(f) Committees of the Magistrate Commission;
(g) appointment of magistrates in terms of the Magistrates Court Act of 1944;
(h) appointment of magistrates in terms of the Magistrates Act of 1993;
(i) qualifications for appointment as a regional magistrate or magistrate;
(j) appointment of acting or temporary magistrates;
(k) conditions of service of a magistrate;
(l) Code of conduct for judicial officers in the lower Courts;
(m) determination of magistrates' salaries;
(n) a *proviso* enabling the executive to allow a magistrate to continue in office after reaching retiring age;
(o) the High Court also found that the provision requiring the Minister, at the request of a magistrate, to allow such magistrate to vacate his or her office is inconsistent with the requirement of the independence of the magistrate Court and section 174 (7) of the Constitution;

Section 174 (7) reads:

"Appointment of judicial officers

174 (1)….
(2)….
(3)….

(4)….
(5)….
(6)….
(7) Other judicial officers must be appointed in terms of an Act of Parliament which must ensure that the appointment, promotion, transfer or dismissal of, or disciplinary steps against, these judicial officers take place without favour or prejudice.
(8)…."

The High Court also held that:

(p) suspension and removal of magistrates from office were inconsistent with their judicial independence; and
(q) the provisions enabling the executive to define what misconduct is as well as the circumstances under which and the manner in which a judicial officer may be found guilty of misconduct would be perceived in terms of application of a reasonable-person-test to encroach on the independence of the magistrates' profession as they can be used to influence the way in which magistrates perform their judicial functions.

However, in terms of section 172(2) of the Constitution the order of invalidity is of no force or effect unless confirmed by the Constitutional Court, and for this reason the High Court referred the matter to that Court for confirmation of the invalidity of the provisions that were struck down by it.

In a unanimous judgment delivered by then Chief Justice of South Africa, the late Chief Justice Arthur Chaskalson, the Constitutional Court came to the following conclusions, namely, that:

- The Magistrate Commission is a properly constituted body that is required to discharge its functions in accordance with the provisions of the Constitution. There are powerful constitutional and judicial safeguards that are in place and which prevent interference by the two other spheres of government with the functions of the Magistrate Commission. The fact that the executive has a strong influence in the appointment of members of the Magistrate Commission does not necessarily mean that magistrates' Courts lack functional or institutional independence. Furthermore, the composition of the Magistrate Commission resembles that of the Judicial Service Commission, a body responsible for appointment, promotion, discharge, etc. of judges and created by the Constitution, and the Magistrate Commission plays a major role in protecting judicial independence regarding any issue concerning the magistracy.

- The Ministerial Regulations for judicial officers in the lower Courts, viewed objectively, are consistent with the Constitution and the judicial independence required by them, and they pose no threat to magistrates.

These Ministerial Regulations, according to the Constitutional Court, are made after the Magistrate Commission has made recommendations to the Minister of Justice, and are subject to constitutional control by the higher Courts.

- Regarding regional Courts and magistrates' Courts, the Constitutional Court held that the Constitution protects the independence of these Courts as well as the core values of personal independence of judicial officers presiding in these Courts. Decisions emanating from these Courts are subject to appeal and review by the higher Courts.

Although, according to the Constitutional Court, there are certain parts of the provisions of the old order legislation concerning magistrates that are inconsistent with institutional or functional independence of the magistrates' Courts, this does not at all suggest that previous decisions that were taken by magistrates must now be set aside as nullities. In fact, regional Courts and magistrates Courts are just 'ordinary Courts' within the meaning of section 35 (3) of the Constitution. Therefore, judicial officers who ordinarily preside in these Courts are fit and proper to determine all the cases within these Courts' jurisdiction.

However, it is important to take note of the fact that most of the findings of the High Court concerning invalidation of certain sections of the old order legislation concerning magistrates, were set aside by the Constitutional Court since the latter found that they were not inconsistent with the Constitution. These findings by the Constitutional Court were also countenanced by the General Council of the Bar of South Africa which made invaluable submissions about constitutional legitimacy of the magistracy and the Magistrate Commission**.**

By strengthening judicial independence with its concomitant aspect of transformation in relation to accountability of the judiciary, the judiciary will be conforming to one of its qualities as an essential component of the new constitutional democracy**.**

Transformation as one of the evolving aspects of our law is now entrenched in the judiciary, and there are robust support systems, for example, the Constitution; the Office of the Chief Justice of South Africa; the organized legal organizations and formations, etc. that ensure that this indispensable ideal is indeed realized in our democratic system.

Judicial transformation entails creation of a judicial system that is apt to conformity and commensurate with a democratic form of government in which the rule of law permeates within its spheres and structures.

The basic tenets for judicial transformation invariably include, *inter alia*, creating government structures which are capable of fostering judicial independence; elimination of barriers between legal practitioners in private practice and those in government so that a pool of candidates is broadened for public legal practitioners to be appointed at the highest level of the judiciary; and ensuring that the Courts are demographically representative of various racial groups in terms of judicial appointments as contemplated in section 174 (2) of the Constitution. In fact, the need to address past racial inequalities and to diversify the judiciary and its subsidiaries are fundamental elements of transformation. Another important dimension of judicial

transformation is increased access to justice, including physical access to Courts; provision of competent sworn interpreters so that Court proceedings are understandable; provision of lawyers at State expense for indigent persons and communities as required by various sections of legislation e.g. section 29(4) of the Restitution of Land Rights Act of 1994, as amended; section 73(2A), 2B and 2C of the Criminal Procedure Act of 1977, as amended; etc. Therefore, increasing access to justice inevitably develops a culture of accountability among the judiciary, and this helps foster judicial independence and enhances transformation.

In order for South Africa to achieve transformative jurisprudence that is firmly rooted on constitutional values of human dignity, equality and advancement of human rights and freedoms, judicial officers must, without outside interference, be free to uphold independence and integrity of the judiciary as well as the moral authority of the Courts. This requires that judicial officers be exposed to new ways of thinking about law and to recent developments in the domestic and international legal fields if transformative jurisprudence is to be an achievable reality. Strictly speaking, judicial education and training is key to transformation of the judiciary and this is explicitly stated and accentuated in the objects of as well as the preamble to the *South African Judicial Education Institute Act, Act 14 of 2008* (later on herein referred to as *SAJEI 2008*).

SAJEI 2008 provides for establishment of a body which will be responsible for education and training of prospective, newly appointed and experienced judicial officers. By provision of education and training, this will unequivocally enable the judiciary to realize the goals of judicial independence and transformation and be able, as it were, to facilitate accountability of the judiciary.

At the presentation of the Judicial Annual Report for 2017 / 2018 financial year, the Chief Justice of South Africa, Chief Justice Mogoeng Mogoeng introduced a new level of accountability of the judiciary by stating that the discharging of powers and decisions of the Courts are an independent function, “and with independence comes accountability.” It is from this premise that public confidence is based on the moral authority of the Courts.

3. CONCLUSION

The Constitution wisely acknowledges the importance of the Courts and that judicial authority is vested in the Courts as stipulated, respectively, in sections 165 and 166 of the Constitution. This is appropriately confirmed by the fact that the High Court in *Van Rooyen (supra)*, despite its declaration of invalidity of certain provisions of the old order legislation concerning the magistracy and the Magistrate Commission, did not declare the magistrates’ Courts as unconstitutional because of their lack of institutional independence. Furthermore, the High Court found that the first applicant, the second respondent and the sixth respondent could not benefit or are not entitled to the relief they sought from its declaration of invalidity of certain impugned statutory provisions. The High Courts’ order concerning refusal of the relief sought by the three

litigants above, was also confirmed by the Constitutional Court which finally held that regional magistrates and magistrates presiding in the lower Courts, and whose authority is derived from the statute administer justice impartially, independently and in accordance with the law.

The Constitution also establishes mechanisms for the appointment of judicial officers and provides clear procedures to be followed in this process. It also provides for organized government structures to be responsible for all matters concerning the judiciary, like the Magistrate Commission in the case of the magistracy. These structures have power and authority to build a judiciary that is dedicated to protecting, promoting and advancing the new democratic dispensation by upholding independence, exercise transformation in order to foster accountability of the judiciary.

The most effective way of preserving judicial independence, achieving transformation and therefore accountability of the judiciary is through continuous education and training of judicial officers as envisaged in *SAJEI 2008.*

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A Last Thought

"13. The NPA's reliance or the requirement for prosecutors to rely on the conviction rate as a performance yardstick must be corrected. They don't convict. Judicial Officers do. How then can it ever be appropriate to measure their performance on the basis of what they don't do? Theirs is to present cases, and even support an acquittal where the interests of justice would be served by doing so. Not to pursue a conviction at all costs."
From *THE JUDICIAL ACCOUNTABILITY SESSION* ADDRESS BY Chief Justice MOGOENG MOGOENG THURSDAY 3 OCTOBER 2019