e-MANTSHI

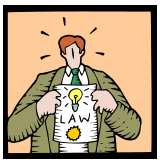
A KZNJETCOM Newsletter

January 2020: Issue 160

Welcome to the hundredth and sixtieth 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 of the Magistrates Act, 1993 (Act No. 90 of 1993), on the recommendation of the Magistrates Commission, made new leave regulations for Magistrates. These new regulations were published in Government Gazette no 42916 dated 20 December 2019. The regulations can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/201912/42916rg11019gon1692_1.pdf

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Recent Court Cases

1. S v Cronje (19113) [2019] ZAWCHC 133; 2020 (1) SACR 74 (WCC)

A uniform term of imprisonment as an alternative to a fine should not necessarily follow a particular fine that a magistrate has determined or *vice versa*.

Boqwana J and Thulare AJ

[1] The proceedings in this matter were considered on review in terms of section 304 and Boqwana J had doubts as to whether the proceedings were in accordance with justice, with particular reference to the sentence imposed. The statement of the judicial officer who presided at the trial was obtained wherein he set forth his reasons for the sentence, and the matter lay for consideration.

[2] The accused appeared before the magistrate in Muizenberg in the district of Simon's Town and pleaded guilty to unlawful possession of seven (7) packets of Tik, a popular abused drug in the Western Cape, which contained methamphetamine which is listed in Part III of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 as an undesirable dependence producing substance.

[3] The magistrate questioned him in terms of section 112(1)(b) of the Criminal Procedure Act, 51 of 1977. The magistrate was satisfied that he is guilty of the offence and convicted him. The State proved four (4) previous convictions against the accused. Three of them were for the same offence for which the magistrate convicted him. On 7 December 2006 he paid an admission of guilt in an amount of R100-00. On 23 March 2011 he was fined R2000 or 4 months imprisonment wholly suspended for 5 years on condition that he was not convicted of contravening section 4(b) or 5(b) of Act 140 of 1992 committed during the period of suspension. On 16 July 2018 he was fined R500 or 10 days imprisonment. The other previous conviction was contravention of section 37(1)(a) of the General Law Amendment Act 62 of 1965 for receiving stolen goods and he was sentenced to 3 years imprisonment wholly suspended for 5 years on condition that the accused is not found guilty of theft or contravention of section 36 (1) of Act 62 of 1955 committed during the period of suspension.

[4] The accused was 28 years of age, unmarried and had a 7 year old child. His highest academic advancement was standard 2. He was unemployed. He resided at […] Street, Overcome Heights, with his father. He supported his child. The State argued for direct imprisonment as the only appropriate sentence. The accused was

sentenced as follows:
“R5000-00 (five thousand rand) or five months imprisonment. A further 10 (ten) months imprisonment is suspended for a period of 5 (five) years on condition that the accused is not convicted of contravention of section 4(b) or 5(b) of Act 140 of 1992 committed during the period of suspension.”
[5] The magistrate was asked to comment on the proportionality of the fine *vis a vis* terms of imprisonment imposed, in the light of *S v Permall* 2018 (2) SACR 206(WCC). It is not necessary to repeat the content of the response received from the magistrate, because of its length, save to deal with the salient features thereof.
[6] The magistrate in his response seems to, *inter alia*, raise an issue that *Permall* appears to take away the discretion of the magistrate in sentencing. The suggestion is that by referring to the mathematical formula, this court held that the computation ought to be rigidly applied in each case when the magistrate decides to impose a fine, thus losing the particular circumstances of an individual case. It is therefore important to deal with that issue.
[7] As a starting point it is important to refer to an established principle which was repeated in *S v Swarts* (181072) [2018] ZAWCHC (13 November 2018)] at para 6 that:
“ Sentencing entails the exercise of a discretion vested in a court which, like all discretionary powers, must be exercised judicially. Mocumie JA expressed herself as follows in Mhlongo, supra at para 3:
“… Especially in criminal matters where the liberty of a person is at stake, it must be exercised judiciously and in accordance with principles of fairness and justice.”
[8] It is important to state upfront that, to the extent that *Permall* conveyed that a formula ought to be applied every time a judicial officer decides to impose a fine, that interpretation is not correct as it is not consonant with the cardinal principle established that the sentence must be individualised and must fit the particular accused, the nature of the crime and the interests of society. Although *Permall* did retain the residual discretion at para 12 of the judgment and emphasised that a judicial officer ought not to impose a sentence that is disproportionate. For purposes of clarity, where a fine would be considered of which payment must be enforced by a term of imprisonment, such sentence of imprisonment for any period must be within the limits of the jurisdiction of the court or extended jurisdiction as prescribed by any law which would be applicable.
[9] It is perhaps important to emphasise that a uniform term of imprisonment as an alternative should not necessarily follow a particular fine that a magistrate has determined or *vice versa*, mechanically. A sentence to be imposed is within the discretion of the trial court.
[10] Although no formula should be followed, fines should be consistent so as to create certainty, depending on the circumstances of each offender, the seriousness of the crime and interests of society.
[11] It is established that the magistrate is not obliged to apply the ratio, and must consider all relevant factors in order to meet justice as the circumstances of the case dictates. When it comes to the relationship between a fine and a period of

imprisonment, it is impossible to generalise. The particular and material facts and circumstances of the case are relevant considerations. We accordingly agree with the *dicta* set out in various cases, *S v Wana* 1990 (2) SA 877 at 879F-G; *S v Kapeng* 1992 (1) SACR 596 (O) at 600f-h and *S v Hayes* 2001 (1) SACR 545 (SE) at 546a-b.

[12] Proportionality is a key consideration in sentencing. Whilst the relationship between the fine and the period of imprisonment may be relevant for determination, regard must be had to the crime, the criminal and the interests of society.

[13] In this case, previous convictions of the accused weighed very heavily with the trial court and more specifically that there were only 38 days between the last day of his conviction and sentence and the offence for which the magistrate convicted him. We agree with the magistrate that the accused had previous convictions for similar offences and that previous sentences seem not to have deterred him. However labeling it a "*continuous, lengthy, extensive and habitual criminal conduct*" may be an overstatement.

[14] The suspended sentence was imposed in 2011 and accused was next convicted in 2018 for a similar offence. It is not clear how the convictions on 16 July and 23 August 2018 respectively were found to relate to a deterrent sentence which "*hang like a figurative sword of Damocles*", when the 5 year term had ended in 2016.

[15] The continued possession of drugs in contravention of the legislation, the number of units found on the accused and the amount of money found on his person, could explain why he did not desist from possession of drugs. These are relevant factors in the evaluation of an appropriate sentence. A fine may not have had any effect on the accused in the past.

[16] The accused may have no assets; it can be assumed that the term of imprisonment would ultimately constitute the primary means of punishment imposed under the circumstances. This is fortified by the fact that it does not appear that the accused was informed of nor afforded an opportunity to pay a deferred fine.

[17] It would have therefore been appropriate for a probation officer's report to be procured, having regard to the circumstances of the accused and in particular an investigation into reasons for the continued drug possession. In view of the fact that the accused may have served most of his sentence, it may not be appropriate in this case to set aside the sentence and remit it for the purposes of the probation officer's report. It remains for the court to confirm the proceedings, particularly because the sentence does not appear to be shockingly inappropriate.

[18] The result is to confirm the proceedings as being in accordance with justice.

From The Legal Journals

Marumoagae, C & Tshehla, B

"Right to bail? Odds stacked against the accused person in South African bail law."

SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 2019, VOL. 35, NO. 3, 257–273

Abstract
The Constitution of the Republic of South Africa, 1996 makes provision for the right to bail, which can only be granted when it is in the interests of justice. The Criminal Procedure Act (CPA) 85 of 1997 amended the Criminal Procedure Act 51 of 1977 in order to bring it in line with the Constitution by setting out the procedure to be followed in bail applications. In reality, however, the provisions of this statute have made it difficult for accused persons to be released on bail. This is particularly glaring in respect of Schedule 6 offences, where accused persons must adduce evidence to convince the court that there are exceptional circumstances that justify their release on bail. In this article, we outline the purpose and justification of bail, as well as the framework of s 60(11) of the CPA, with a focus on the notion of exceptional circumstances. We argue that, read with the requirement that the accused must adduce evidence in bail applications, the net effect of the current bail process is that accused persons are unjustifiably disadvantaged, and their right to bail, as set out in the Constitution, is hampered. We recommend that accused persons be entitled to the contents of the docket at the bail application stage.

Klaaren, J

"What does justice cost in South Africa? A research method towards affordable legal services"

SOUTH AFRICAN JOURNAL ON HUMAN RIGHTS 2019, VOL. 35, NO. 3, 274–287

Abstract
Access to justice is not a reality for most South Africans. While it is not the only factor, a significant part of this situation is due to the high cost of legal services. This article outlines and justifies a research method to assess legal costs for the South African and other populations. The proposed research method divides the population into three bands based on economic resources: the poor, the wealthy, and those in between. In each of these three bands, the article preliminarily surveys the costs currently pertaining to legal services in civil justice matters in South Africa.

Van Heerden, C M & Coetzee, H

"Unintentionally Trapped by Debt Review: Procedural Inadequacies in the National Credit Act, 34 of 2005 relating to withdrawal from the Debt Review Process."

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

Abstract

The debt review procedure in terms of the National Credit Act 34 of 2005 is functioning relatively well and benefits both consumers and credit providers. This is despite its somewhat scarce procedural prescriptions, which result in difficulties from time to time. In this respect, a recent procedural challenge has appeared, namely that of consumers who voluntary enter the debt procedure, but who later want to withdraw therefrom – thus, before the procedure has reached its ordinary conclusion, on the basis that their financial situation has improved to the extent that they are no longer over-indebted. The fact that the National Credit Act does not provide for such an exit has led to procedural uncertainty and diverging court decisions. In this article, the relevant legislative provisions (or lack thereof), court and National Consumer Tribunal judgements, regulations, forms, guidelines and explanatory notes are considered to determine whether it is competent for consumers to withdraw from the debt review procedure before it has reached its normal conclusion. Not only provisions in the National Credit Act are considered, but also general civil procedure to contemplate all possibilities in searching for an answer to this procedural difficulty.

The article can be downloaded here:
https://journals.assaf.org.za/index.php/per/article/view/6966/9658

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

Contributions from the Law School

The admissibility of a child's evidence in court – new developments?

Every person is presumed to be both a competent, and a compellable witness. But there are exceptions to this general rule. One of them being in respect of the child witness. A child is not presumed to be competent to testify.

There is a three-fold test for establishing a child's competence. First, the child must have sufficient intelligence to be able to record events and store them accurately in their memory. Second, the child must be able to communicate effectively, which means being able to understand questions put to them, and to formulate rational answers thereto. The third requirement to establish a child's competency to testify is that the child must be able to distinguish between truth and lies.

A competent child must then be sworn in. A child who does not understand the nature and import of the oath or affirmation may be admonished to tell the truth. It has to be established that the child does not understand the oath, for the admonishment to be properly administered in place of the oath.

If the child has not been properly found to be competent, and/or not properly been found to qualify for the admonishment, and/or if the admonishment was not properly administered; any testimony given by that child is inadmissible.

Where a conviction is based on the inadmissible evidence of a child witness, the conviction will be set aside by a higher court.

In the early years of South Africa's democracy, there were distinct phases in establishing a child witness as able to give admissible evidence. In other words – showing that the child was competent and then properly swearing her in.

First, there would have to be a formal enquiry into competence. In practice, the court would usually engage with the child on the question of the difference between truth and lies – and in the process of that exchange, it would be able to evaluate whether the child was competent or not because the child would, at the same time as dealing with truth/lies, be showing her level of maturity.

The truth/lies question is where a major source of difficulty revealed itself.

Questioning a child requires a special skill – more especially so in the atmosphere of a court room. And many magistrates lacked that special skill utterly. There are many earlier cases where magistrates questioned the child on the difference between truth and lies in a manner that would probably leave a philosophy student confused. In many of those cases – the case did not even get off the ground because the child was unable to demonstrate the theoretical understanding of truth and falsehood that the court was looking for.

A turning point came with the seminal CC case of Director of Public Prosecutions, Tvl vs various respondents, including the Minister of Justice and Constitutional Development. It was decided in 2009. The case was all about issues pertaining to the child witness in the criminal justice system, and it dealt, amongst others, with the issue of establishing whether the child understands the concepts of truth and falsehood. This is what the CC said, at para 164 per Ngcobo J:

"The practice followed in courts is for the judicial officer to question the child in order to determine whether the child understands what it means to speak the truth … some of these questions are very theoretical and seek to determine the child's understanding of the abstract concepts of truth and falsehood. The questioning may at times be very confusing and even terrifying for a child. The result is that the judicial officer may be left with the impression that the child does not understand what it means to speak the truth and then disqualify the child from giving evidence. Yet with skilful questioning, that child may be able to convey in his or her own child language … that he or she understands what it means to speak the truth …the child may not know the intellectual concepts of truth or falsehood, but will understand what it means to be required to relate what happened and nothing else."

Fast forward 10 years to the 2019 case of *S v Dlamini*, decided in the PMB High court. The case was an appeal against the conviction of the appellant of the rape of a 6 year old girl, who was 10 at the time she testified before the lower court. One of the grounds of the appeal was that the magistrate had not properly established her competence and had not properly admonished her.

Masipa J, in the High Court, found that although there had not been strict proper compliance with the requirements, what the magistrate had done was sufficient for the child to be found a competent witness who could give admissible evidence.

So what did the magistrate do?

In order to establish whether the child understood the difference between truth and lies, the magistrate, noting that the child was wearing a pink jacket, simply asked her whether it would be true to say that she was wearing a white jacket. The child replied that it would not be the truth, but rather a lie. She was then asked whether it was good to lie, and she replied that it was not. She was asked whether it was a good thing to tell the truth, and she agreed that it was. She was then told that the court expected her to tell the truth in respect of what she saw, and not what she heard from others, which she agreed to. She was then warned that she must tell the truth and she proceeded to testify. That is all. No technicality, no complicated procedures. And the PMB High court found that that was sufficient to establish that the child understood the difference between truth and lies for the purposes of being allowed to testify, and that she had been properly sworn in by way of the admonishment. Beautiful in its simplicity, and exactly in line with the approach suggested by the CC in 2009. I said earlier that the High Court had found that the magistrate had made a mistake – but that it was not sufficient to invalidate the child's testimony. The mistake was that the magistrate proceeded to administer the admonishment (warning the child to tell the truth) without having established whether the child understood the

nature and import of the oath or affirmation. Strictly speaking, the child can only be admonished if this has been established.

There is another case, also decided in the PMB High court, which I would like to refer to now. It's the case of *S v Sangweni*, decided a couple of months after the *Dlamini* case in 2019. The case is a reminder that although the courts are taking a more flexible approach to establishing the competency of a child witness, it is still necessary to establish that the child understands the difference between truth and lies in order for them to be allowed to testify. In the 2009 CC case, this was also emphasised, with the CC saying the following:

"The reason for … [a witness] to be admonished to speak the truth is to ensure that the evidence given is reliable. Knowledge that a child knows and understands what it means to tell the truth gives the assurance that the evidence can be relied upon. It is in fact a pre-condition for admonishing a child to tell the truth that the child can comprehend what it means to tell the truth. The evidence of a child who does not understand what it means to tell the truth is not reliable. It would undermine the accused's right to a fair trial were such evidence to be admitted … The risk of conviction based on unreliable evidence is too great to permit a child who does not understand what it means to tell the truth to testify… ."

In the *Sangweni* case, the appellant was appealing against his conviction and sentence of life imprisonment for the rape of a girl who was 9 at the time of the rape, and 13 when she testified. The appeal was based on the contention that the child's evidence, on which he had been convicted, was in fact inadmissible. This time, unlike in *Dlamini's* case, the magistrate had enquired into whether she understood the oath. The child said that she knew the oath but that she did not understand the consequences of taking it. This was sufficient for the magistrate to admonish the child, instead of administering the oath. But remember, the pre-condition for the admonishment is that the child must understand the difference between truth and falsehood. The magistrate simply asked her whether she understood the difference between truth and lies. She replied that she did. The High Court held that this was not sufficient to establish that she understood what it meant to tell the truth, that it was important to tell the truth, and that it was wrong to tell lies. Accordingly, her evidence was inadmissible, and, since there was no other evidence to support the conviction, the conviction was set aside.

Now, while I have been showing that there has been a change – an improvement - in the manner in which the competency of a child witness is established in court, I am not suggesting that the situation is necessarily ideal. In the CC case I referred to, it was argued that the competency test for children should be abolished altogether. The argument was that even a child who cannot show that they understand the difference between truth and lies may still be able to provide reliable evidence to the court. This argument is in line with international psychological research of a very high calibre which suggests that there is little correlation between a showing an understanding of the difference between truth and lies and actual truth telling. It is interesting to note that psychological research shows that children begin lying at around 3 years old, and that very shortly afterwards a moral appreciation that it is wrong to lie follows.

Now, a 3 year old is very likely to have difficulty communicating to the court that they understand the difference between truth and falsehood – even with the most skilful questioning. Further note that a very young child may demonstrate to the court what happened to them, by way of gestures, or with the assistance of anatomically correct dolls. This compensates for the immaturity of the child's ability to verbally articulate events. It would however be difficult for a child to show an understanding of the difference between truth and lies in such a manner.

The psychological research therefore suggests that the competency test should not be a requirement for a child to give admissible evidence. Interestingly, it does however support the retention of the admonishment. The research shows that a child's truth telling behaviour increases after they have promised to tell the truth; and that when they lie after having promised to tell the truth, it is easier to establish that they have lied when they are questioned.

In the 20019 CC case I referred to, the CC rejected the argument that the competency test should be abolished, finding that it was necessary to ensure reliable evidence so as to safeguard against false convictions. The CC also found that it made no sense to get a child to promise to tell the truth when they had not been able to demonstrate an understanding of truthfulness and falsehood.

This has not been the approach everywhere. In Canada, for example, there have been significant reforms to the law relating to child competence, in response to the very clear psychological research I described above.

In Canada, the position now is that a person under fourteen is presumed to have the necessary capacity to testify. In other words, they are presumed to be competent. Their evidence will be received if they are able to understand and respond to questions, and this ability will be presumed unless the opposing party can prove that they cannot. The new law says that a child under 14 shall not be required to take an oath or make an affirmation. The new law retains the admonishment, in accordance with the psychological research I mentioned. It says that before a witness under 14 will be allowed to testify they must promise to tell the truth. It goes on however to provide that they may not be questioned on their understanding of the nature of the promise to tell the truth for the purposes of the admissibility of their evidence.

The position in Canada is thus very different from South African law. The problematic issue of having to check whether the child understands the oath or affirmation before simply asking them to promise to tell the truth is gone in Canada. Likewise the fraught requirement that the child must demonstrate an understanding of the difference between truth and lies.

So – I would suggest that law reform in South Africa is still required. The psychological research is compelling and extensive. It clearly supports the abolition of the competency test – the most problematic aspect being the truth/lie distinction. The research was available to the CC in 2009, but it did not persuade the CC. The question of children and truth telling is still a hot research topic – and since 2009 there have been even more studies and meta-studies supporting the abolition of the competency test. But now that the CC, the apex court of SA, has spoken out so clearly on the issue, the reform cannot be made on an incremental basis by the

courts. It will take legislative amendment to effect the abolition of the competency test. The approach of Canada is a good example of the form the amendment might take.

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Matters of Interest to Magistrates

REASONED CRITICISM OF COURTS HOLDS THE JUDICIARY ACCOUNTABLE, QUESTIONING THE INTEGRITY OF JUDGES DOES NOT

By Prof Pierre De Vos from his blog *Constitutionally speaking*

South African courts are likely to hand down several politically significant judgments in 2020. This will include cases involving Public Protector Busisiwe Mkhwebane and former President Jacob Zuma. No doubt, these judgments will provoke harsh criticism from those who do not like the outcome. There is normally nothing wrong with criticism – even harsh criticism – of court judgments. But when does harsh criticism tip over into contempt of court?

In 2011 my colleague Jaco Barnard-Naude and myself published a scathing critique of the majority judgment of the Constitutional Court in *Le Roux v Dey* in the *South African Law Journal.* The case dealt with two schoolboys who had pasted the faces of the headmaster and deputy headmaster of their school onto a picture of two naked men, sitting next to each other on a couch, seemingly pleasuring themselves. We particularly objected to the fact that acting Constitutional Court justice Brand (for the majority) interpreted the picture as follows:

[T]he vision created is one of two promiscuous men who allowed themselves to be photographed in what can only be described as a situation of sexual immorality,

which would be embarrassing and disgraceful to the ordinary members of society.

How, we asked, could the judge conclude that two people being sexually intimate with each other are necessarily promiscuous and are involved in "sexual immorality"? We argued that the judge must unknowingly have relied on a heteronormative assumption about same-sex sexuality – an assumption that same-sex sexuality is immoral and that people who engage in same-sex sexual activity simply are promiscuous. (We did not engage with what, to my mind is, the prudish assumption that promiscuity is always a bad thing.)

Those who read law journal articles will know that such harsh (but reasoned) criticism of court judgments is not unusual. It is part of one's job as an academic to analyse and, where appropriate, to criticise the reasoning employed in court judgments. Such criticism will not amount to contempt of court.

However, had we suggested that the judge was instructed by his church (assuming that he belongs to one) to argue in the way he did, or that he was bribed to do so, we would surely have opened ourselves up to a contempt of court charge. (We would also, rightly, have been ridiculed by our peers for indulging in bizarre conspiracy theories.)

To understand this distinction between harsh but acceptable criticism of court judgments and judges, on the one hand, and impermissible criticism that amounts to contempt of court, on the other, it is helpful to turn to the definitive Constitutional Court judgment of *S v Mamabolo*.

Unlawful criticism of courts, court judgments, and judges is prohibited by the rather quaintly named crime of "scandalising the court", which is one form of contempt of court. In *Mamabolo* the Constitutional Court pointed out that the crime of scandalising the court must be interpreted narrowly to prevent an impermissible limitation on the right to freedom of expression.

The crime of "scandalising the court" is *not* aimed at protecting the dignity of the individual judicial officer (something the Public Protector seems to be unaware of). Rather, it is aimed at protecting the integrity of the administration of justice. Quoting from the Zimbabwean Supreme Court judgment of *In re: Chinamasa,* the court explained:

The recognition given to this form of contempt is not to protect the tender and hurt feelings of the judge or to grant him [sic] 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.

Reasoned criticism of courts, court judgments, and judges does not undermine public confidence in the judiciary. Such criticism does the opposite, serving as a mechanism to hold the judiciary accountable. Judges are unelected and they are therefore not directly held accountable by voters. But as the Constitutional Court pointed out in *Mamabolo:*

[U]ltimately, such free and frank debate about judicial proceedings serves more than one vital public purpose. Self-evidently such informed and vocal public scrutiny promotes impartiality, accessibility and effectiveness, three of the important aspirational attributes prescribed for the judiciary by the Constitution. However, such vocal public scrutiny performs another important constitutional function. It constitutes a democratic check on the judiciary. The judiciary exercises public power and it is right that there be an appropriate check on such power.

It is for this reason that the crime of scandalising the court does not concern itself with remarks that merely question the competence of a judge or the correctness of a decision. It is when someone questions the integrity of the courts, or of an individual judicial officer, that the crime of scandalising the court may come into play. As the court stated in *Mamabolo:*

Because of the grave implications of a loss of public confidence in the integrity of its judges, public comment calculated to bring that about has always been regarded with considerable disfavour. No one expects the courts to be infallible. They are after all human institutions. But what is expected is honesty. Therefore the crime of scandalising is particularly concerned with the publication of comments reflecting adversely on the integrity of the judicial process or its officers.

In another passage in the same judgment, the Constitutional Court stated that the nature and purpose of scandalising the court have probably nowhere been more clearly described than in the following passage:

…any publications or words which tend, or are calculated, to bring the administration of justice into contempt, amount to a contempt of Court. Now, nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open Court.

Whether a particular remark will tend to or is calculated to bring the administration of justice into contempt will depend on many factors. Each case will have to be judged in the context of its own peculiar circumstances, which include:

what was said or done; what its meaning and import were or were likely to have been understood to be; who the author was; when and where it happened; to whom it was directed; at whom or what is was aimed; what triggered the action; what the underlying motivating factors were; who witnessed it; what effect, if any, it had on such audience; what the consequences were or were likely to have been.

A politician who attempts to discredit a judgment he or she finds politically inconvenient by accusing the judge of being a “paid agent of white monopoly capital” or “of knowingly allowing himself to be manipulated by the Marxist ANC”, will be in trouble. But I suspect a twitter user who accuses a judge of acting in a patronising manner towards an advocate in court because the advocate is black, or a woman, or gay or lesbian, may well be safe.

In the former case, the politician is deliberately attacking the integrity and honesty of the judge to try and discredit the judgment, which is not permitted. In the latter case, the twitter user is expressing an opinion, based on what he or she has witnessed during televised court proceedings, not calling into question the honesty and sincerity of the judge. However, the twitter user in my example may arguably be in trouble if he or she states as fact that the judge is racist, sexist or homophobic and continues that the judge is deliberately favouring the white over the black litigant, the male over the female litigant, or the straight over the gay or lesbian litigant because of the judge’s alleged racism, sexism or homophobia.

The latter example illustrates that it will not always be easy to distinguish between remarks that scandalises the court, on the one hand, and remarks that may be misguided or intemperate but would not rise to the level of scandalising the court. Context will be all important.

What is clear is that a person will not be guilty of scandalising the court just because his or her criticism of a judgment or a judge is uninformed, misguided, or plainly wrong. One does not commit a crime merely because you are an uninformed idiot, who is criticising a judgment merely because it does not confirm your opinion or (in some cases) the opinion the leaders of your political party told you to have.
That said, just because you have a right to say something does not mean it is right to say it. While uninformed criticism of a court judgment by people who have not bothered to read the judgement they are criticising may not usually amount to the crime of scandalising the court, such criticism has little value and can profitably be ignored. If you wish to play your part in holding the judiciary accountable, you will have to do some work and will have to familiarise yourself with the arguments of the judgment you are criticising.

(The above blogpost was posted on 7 January 2020 on the blog *Constitutionally Speaking* by Prof Pierre De Vos).

A Last Thought

"Some of the answers received from the candidates were quite shocking to say the least, especially regarding sexual offences-related cases. In recent months there has been much controversy regarding gender-based violence and femicide, especially after the Uyinene Mrwetyana case. Uyinene Mrwetyana was a 19 year-old University of Cape Town student, who was abducted, raped and slain in August 2019. Mrwetyana's death has come to symbolise the plight of the country's many woman and children against gender-based violence and femicide. Given such recent events regarding gender-based violence and femicide one would expect that the people sitting on the bench and administering justice would know the law and be able to apply it accordingly.

However, this proved not to be the case. During the interviews, it became apparent that some candidates, who are already magistrates, did not know what the minimum sentence in rape cases is, in general, and in rape cases involving children, in particular. The candidates did not know what circumstances cannot be considered substantial and compelling circumstances in order to deviate from minimum sentences in rape cases. Some of the candidates also did not know what rights are to be explained to the victim of rape after the sentencing of the offender.

We can only wonder whether the lack of knowledge displayed by some of the candidates during the interview proceedings was only the tip of the iceberg."

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