e-MANTSHI

A KZNJETCOM Newsletter

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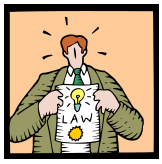
Welcome to the hundredth and sixty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. Under section 1(2)(b) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), the Minister of Justice and Correctional Services, has published a rate of interest of 9,75 percent per annum as from 1 March 2020 for the purposes of section 1(1) of the said Act. The notice to this effect was published in Government Gazette no 43146 dated 27 March 2020. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2020/20200327-gg43146-GoN397-RateOfInterest.pdf

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Recent Court Cases

1. *Nohour and Another v Minister of Justice and Constitutional Development* (1136/2018) [2020] ZASCA 27 (26 March 2020)

A Public prosecutor is obligated to inform the court if a state witness has deviated in a material respect from the statement he made which is in the police docket.

Dlodlo JA (Petse DP and Van der Merwe JA concurring):

[1] The appellants, Mr Vishnu Nohour and Mr Neville Michael Charlos, together with three others were tried on charges of kidnaping and rape of one RM in the Durban Regional Court. They raised the defence that they had consensual sex with the complainant whom they described as a prostitute. The complainant denied that she had consented to the sexual intercourse or that she was a prostitute. The trial ended on 8 April 1994 when the appellants were convicted. They unsuccessfully appealed against the conviction in the KwaZulu-Natal High Court. The high court, upon dismissing the appeal proceeded to increase their sentences to an effective period of 7 years' imprisonment.

[2] The appellants' applied and were granted leave to appeal by the high court to this Court. The appeal was against both conviction and sentence. On 13 May 2003, this Court set aside the appellants' conviction and sentence. By that time, consequent upon conviction, the appellants had served a term of imprisonment from 19 March 1998 until 23 November 2001 and from 19 March 1998 until 28 September 2012 respectively.

[3] One Ms Monique Holzen was at all material times an employees of the Department of Justice and Constitutional Development (Department). She was the State Prosecutrix in the trial. It is common cause that at all material times, she acted within the course and scope of her employment by the Department.

[4] In the particulars of claim in the court a quo, it is averred that in the course of the criminal trial Ms Holzen omitted to disclose facts within her knowledge to the appellants and the regional court. Those facts she withheld were:

(a) that the complainant (RM) had admitted to the investigating officer that she was a prostitute;
(b) that the investigating officer had witnessed the complainant soliciting and plying her trade as a prostitute; and
(c) that the complainant's sworn statement which, in accordance with the practice at the time was not in possession of the appellants or their legal representatives, materially differed from her evidence in court.

[5] In acting as Ms Holzen did, the appellants alleged that she breached her common law duty to disclose to the defence any material deviation between the evidence given by the complainant and the contents, statements and information in the docket. The appellants alleged that had the aforementioned information been disclosed by the prosecutor, they would have been acquitted of charges against them. The contention by the appellants is that the withheld information was critical in their defence of consensual sex with the complainant

[6] According to the appellants as the prosecutor acted with the object to secure a conviction against them she had the necessary *animus uniuriandi*, that is, the intention to injure. In the alternative the appellants pleaded that the prosecutor acted negligently. The appellants pleaded that as a consequence of wrongful conviction they were imprisoned for various periods described above. They were thereafter subjected to stringent parole conditions which restricted their rights and freedoms until their appeals succeeded. They were unable to be employed in the time they were in prison and consequently they suffered loss of earnings. They alleged to have suffered loss of amenities of life, loss of freedom of movement and loss of opportunities to interact with family and friends. They averred to have suffered depression from which they continue to suffer. They claimed specified amounts of money representing general damages, past loss of earnings etc. Save for the special plea of prescription, the respondent unhelpfully pleaded a bare denial of each and every averment made by the appellants. The special plea is not before us. It was dismissed by the high court.

[7] The trial proceeded only on the issue of liability. The appellants denied that they raped the complainant. The high court found that all the essentials of the cause of action had been established by the evidence advanced save for the issue of causation and damages. The high court found that the appellants failed to discharge the onus of proving causation. Put differently, the appellants failed to prove that they would not have been convicted but for the irregularity committed by the prosecutor. Another finding made by the high court was that the state was not obliged to compensate the appellants on the basis of the 'ex turpi' principle.

[8] This Court is called to make a determination whether the appellants would have been acquitted if the prosecutor had discharged her common-law obligations and disclosed to the defence material deviations between the complainant's evidence

and the contents of the docket. Additionally, perhaps, a finding is called for whether the high court was correct in finding that the *ex turpi causa* maxim applied to the factual matrix of this matter.

[9] The duty to disclose the apparent deviations by a witness from the statement made, existed in this country even prior to the advent of the present constitutional dispensation. Nowadays the constitutional values are also relevant in determining the legal convictions of the community.[1] In *R v Steyn*,[2] this Court laid down a firm rule of practice in terms of which a public prosecutor is obligated to inform the court if a state witness has deviated in a material respect from the statement he made which is in the police docket. This rule also required that the State shall furnish to the defence a copy of such statement in order that it be used during the cross-examination of the relevant witness. The prosecutor indeed had a legal duty to disclose material discrepancies as aforementioned.

[10] The information that the prosecutor should have disclosed in terms of the aforesaid duty was concisely set out by Heher JA in this Court's judgment in the following terms.[3]

'9. The statement made by the complainant to the police and the contents of the investigation diary were only brought to the attention of the appellant and his legal advisers in 1998 after initial appeal had been dismissed;

10. In the police statement apparently signed by the complainant, she is reported as follows:

"On 1993-02-12 at about 23:15 I was walking with my sister (Hlewye Mkhize) down Innes Road. To visit a friend who lives in Innes Road but I am unable to give address at this stage…. I was screaming and four black males came to my rescue. A fight broke between the unknown black males and the Asian males. . . The black male who I informed that I was raped left the scene of the Asian males whilst I stood by the roadside". . .

'11. The appellant testified that towards the latter part of the time which he and the other accused spent with the complainant in the park they became aware of the noise in the vicinity including a gunshot. When they were hurriedly settling accounts with the still naked complainant two black men ran into the park and confronted him he panicked and fled. He heard what sounded like a fight going on behind him. (Accused 2 testified that, indeed such fight took place involving him, accused 3 and the black men.)

12. In the investigation diary the investigating officer, Murugan, made the following relevant entries:

"93/05/14. . . The complainant was traced and served with J32 . . . According to the complainant, the person mentioned in her statement H Mkhize is not in fact her sister but a fellow prostitute . . . tried to get hold of this prostitute but she kept avoiding me . . .

13. In the affidavit which supported the application to re-open the case the investigating officer confirmed that conversation which he had with the complainant on 14 May 1993 and added that the source of his knowledge that she was a practising prostitute was not only that conversation but his own observation of her while she was engaged in soliciting.'"

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[1] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 396G-J.

[2] *R v Steyn* 1954 (1) SA 324 (A).

[3] *Myendra Naidoo v The State* Case no. 504/2002, unreported judgment of this Court.

The conduct of the prosecutrix in withholding these material matters from the trial court and the defence was most certainly gross.

[11] If the prosecutor concerned acted deliberately in omitting or failing to disclose the aforementioned discrepancies to the court and to the defence, the requirement of *animus iniuriandi* would be established. On the other hand, if the prosecutor acted negligently, then liability can only arise where the circumstances give rise to a legal duty to avoid negligently causing harm. The principles applicable to liability for negligent omission were correctly formulated by Nugent JA in the following terms:[4]

'A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability – it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this Court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it, "namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it.'

[12] Negligence is a discrete element of delict by omission. It must, however, be considered in the light of all the evidence and submissions regarding the issues of causation and wrongfulness. The test for negligence in *Kruger v Coetzee*[5] has been followed since its formulation by Holmes JA. The Constitutional Court confirmed the test in *Steenkamp NO v Provincial Tender Board, Eastern Cape.*[6] The test is that negligence is established if:

'(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing his patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.'

The formulation of the test in *Kruger v Coetzee* has been extended under our Constitution. It now includes reasonable precautions to be taken by public servants when discharging their constitutional obligations.

[13] This Court, explaining the test which courts apply to determine the element of wrongfulness for the purpose of establishing liability, stated the following in *Van Eeden v Minister of Safety and Security*; [7]

'An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value

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[4] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at 441E-442B.

[5] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G.

[6] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC) para 39. See also the judgment by Langa CJ in *NM and Others v Smith and Others (Freedom of Expression Institute as Amicus Curiae)* [2007] ZACC 6; 2007 (5) SA 250 (CC) at 100.

[7] *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) at 395H-396BE-G.

judgment placed, inter alia, upon its perceptions of the legal convictions of the community and on consideration of policy. The question whether a legal duty exist in a particular case is thus a conclusion of law pending on a consideration of all the circumstances of the case and in the interplay of the many factors which have to be considered.'
The approach adopted by our courts whether the omission should be regarded as unlawful is an open and flexible one. The court have played a policy making role.[8]

[14] Wrongfulness is an essential element in delict.[9] The Constitutional Court held in this regard that the element of wrongfulness acts 'as a brake on liability' and that conduct is not to be regarded as wrongful if public or legal policy considerations determine that it would be 'undesirable and overly burdensome to impose liability'.[10] In *Le Roux and Others v Dey*,[11] the Constitutional Court confirmed that the criterion of wrongfulness depends on a judicial determination as to whether it would be reasonable to impose liability on the defendants, which reasonableness has nothing to do with the reasonableness of the defendant's conduct or omissions. Therefore, even if it were to be found that there was negligence herein, the mere fact of such negligence may not make the omission wrongful. In order to prevent the 'chilling effect' that delictual liability in such cases may have on the functioning of public servants, such proportionality exercise must be duly carried out and the requirements of foreseeability and the proximity of harm to the action or omission complained of, should be judicially evaluated.[12]

[15] As it had been said, the court a quo found that the elements of fault and wrongfulness had been proved. What remained was proof of factual and legal causation. As far as factual causation is concerned the *sine qua non* test applies.[13] Legal causation entails an enquiry into whether the alleged wrongful act (wrongful omission to disclose deviations) is sufficiently closely linked to the harm for legal liability to ensue. Generally, a wrongdoer is not liable for harm that is too remote from the conduct alleged or harm that was not foreseeable.[14] Remoteness of damage operates along with the requirement of wrongfulness as a measure of judicial control in respect of the imposition of delictual liability. It, therefore operates as a 'long stop' in cases where most right-minded people will regard the imposition of liability in a particular case as untenable despite the presence of all other elements of delictual liability.[15]

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[8] Id at 396E-F.
[9] *Stedall and Another v Aspeling and Another* [2017] ZASCA 172; 2018 (2) SA 75 (SCA) para 11.
[10] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* 2015 (1) SA 1 (CC).
[11] *Le Roux and Others v Dey* [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.
[12] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 49.
[13] See *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) paras 41 and 74.
[14] *De Klerk v Minister of Police* [2019] ZACC 32; 2019 (12) BCLR 1425 (CC) para 24 and cases cited there (majority judgment).
[15] *De Klerk* supra para 27 and cases cited there (It is to be noted though that the Constitutional Court did not pronounce on the relationship between wrongfulness and legal causation of the same delict).

[16] Legal causation is resolved with reference to public policy. For that reason, the elements of legal causation and wrongfulness will frequently overlap. They nevertheless, remain conceptually distinct.[16] The result is that even if conduct is found to have been wrongful (or even negligent, for that matter), a court may still find, for other reasons of public policy, the harm flowing therefrom to have been too remote for the imposition of delictual liability. The traditional tests for determining legal causation (reasonable foreseeability, adequate causation, proximity of the harm etc.) remain relevant as subsidiary determinants. These traditional tests should be applied in a flexible manner. They should be tested against considerations of public policy as infused with constitutional values.[17] Insofar as legal causation is concerned, every matter must be determined on its own facts. The consideration of legal causation or wrongfulness, public policy considerations, infused with the norms of our constitutional dispensation dictate that even if the prosecutor suffered from negligent omission, legal liability may ensue if the harm was foreseeable and is not too remote.

[17] Whether an act or omission is the proximate cause of harm depends on the conclusion drawn from the available facts and the relevant probabilities. Similarly, the conclusion as to whether a causal link exist between the wrongdoer's conduct and the harm alleged is drawn from the facts, the evidence before court and the relevant probabilities in the circumstances. In *Minister of Police v Skosana*,[18] this Court expressed itself regarding the test for factual causation in the following terms:

'Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question whether the negligent act or omission in question caused or materially contributed to . . . the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part.'

The general principle of the law of delict is that loss is recoverable only if it was factually caused by a defendant's wrongful and culpable conduct. One purpose of the law of delict is to encourage those who commit delict to admit their liability and to pay damages to their victims without the need for lengthy, divisive and prohibitive expensive litigation.[19]

[18] Factual causation in delict is also determined by applying the but–for test. This test asks whether, for defendant's negligent conduct, the plaintiff's harm would not have occurred.[20] The but-for test requires the court mentally to eliminate or think

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[16] *De Klerk* para 28 and cases cited there.
[17] *De Klerk* paras 30, 31 and 47.
[18] *Minister of Police v Skosana* 1997 (1) SA 31 (A) at 34E-34H.
[19] See Alistair Price 'Factual causation after Lee' (2014) 131 *SALJ* 491 at 491.v
[20] See *Minister of Police v Skosana* 1997 (1) SA 31 (A); *Simon & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A).

away as much of the defendant's conduct as was unreasonable, and to ask hypothetically whether the plaintiff would still have suffered the harm had the defendant acted reasonably. If the harm would have 'not' been suffered factual causation is established; if the harm 'would' have occurred anyway, the required causal link is absent. Courts exercised common sense when applying this test.[21] Nugent JA, in *Van Duivenboden*, held that the first enquiry is whether the wrongful conduct was a factual cause of the loss. The second is whether in law it ought to be regarded as a cause. The same test was formulated slightly differently by Corbett CJ in *International Shipping*[22] as follows:

'The first is a factual one and it relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as "factual causation". The enquiry as to factual causation is generally conducted by applying the so-called "but-for test", which is designed to determine whether a postulated cause can be identified as *causa sine qua non* of the loss in question. In order to apply this test one must make hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

In other words, the test of the factual causation is simply whether the relevant act of omission was a necessary condition (*conditio sine qua non*) of the event in question.

[19] A brief summary of the evidence presented by the prosecution before the regional court is necessary. This under normal circumstances would not have been necessary because the appeal before us concerns a delictual claim. But the criminal proceedings herein are foundational to this appeal. The complainant testified before the regional court that she was walking down Innes Road with her sister when a motor vehicle occupied by the appellants and their companions stopped. The occupants of the vehicle alighted and one of them called out 'hey, come here.' the complainant and her sister ignored that call. Then suddenly the appellants and their companions started chasing her. She told the trial magistrate that she ran into a foyer of a block of flats situated not far from the intersection with Umgeni Road. A locked

[21] See *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SAC) para 25; *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 33.
[22] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 9A0 700E-J.

inner door prevented any further escape for the complainant. It was there that one of the attackers (accused 2) caught her, slapped her and he accused her of robbing his brother. Accused 2 claimed that he was a policeman effecting an arrest of the complainant. It is so that no police appointment certificate was exhibited to her. The complainant was lifted off the ground and she was carried despite her muffled scream to the waiting vehicle, which at that stage was occupied by accused 1. Her mouth was gagged by someone's hand, preventing her scream from having any effect. All the occupants of the vehicle, who were initially in the vehicle (including the two appellants), were then again in the vehicle. The complainant was forced into the back seat between accused 3 and 5. She testified that en route she was assaulted by at least accused 3 and 5. Accused 5 undressed his jacket and it was then used to cover her head. The vehicle stopped at the grounds described by the complainant as being dark and secluded. She was pulled out from the vehicle. En route to the corner behind a precast wall, accused 2 threatened the complainant saying that he would shoot her if she makes noise.

[20] She testified, in the magistrate court, that she believed that she would indeed had been shot because during the journey something resembling a gun had been pointed at her temple. She added though that she never managed to identify what she perceived was the firearm because she believed there was a firearm and that she would be shot, she calculated in deciding whether to flee through the hole in the wall or not. She was, in any event, further hampered by an injured knee sustained during a fall in the initial flight into the foyer. She testified how she was forcibly undressed and instructed to lie down. She exhibited some reluctance to comply but was forcefully 'dropped' to the ground. This was followed by sexual intercourse by accused 2 in two positions after which he whistled for accused 3, 4 and 5. At a point two accused persons would hold her whilst one of them was vaginally penetrating her. At one stage one of the assailants placed his penis into her mouth. There was a stage when there was a jostling for sexual intercourse with her by all accused. In her evidence they all had sexual intercourse with her against her will. She never consented. She testified that it was even possible that some of her assailants had sexual intercourse with her more than once.

[21] When she heard voices of people conversing and laughing, emanating from the direction of the road, she cried out and this led to the termination of the assault upon her. She testified that this caused the accused persons to flee the scene. She thereupon fled naked through the hole in the wall. She met up with a man, later on established to be Msomi, to whom she reported, 'Indians are raping me'. Msomi referred her to a woman nearby for assistance. When this lady realised how naked the complainant was, she gave her an oversized jersey to hide her nakedness and suggested that they go into a room. The complainant who was still fearful, declined and they hid rather in the garden. They remained there until satisfied that those calling her were in the company of the police. The complainant was conveyed to the police station after pointing out the scene of rape and her statement was taken. The

complainant was subjected to grilling cross-examination by the accused's' legal representative. Her evidence was unshaken by that cross-examination. Importantly she denied the version of the accused that they had sexual intercourse with her with her consent. She denied further that she was a prostitute. Dr Vawda, on examining the complainant, concluded that sexual intercourse most probably took place. He confirmed as well that the complainant's left knee had suffered abrasions. The complainant also told the magistrate that she suffered abdominal pain particularly to the groin and also in the legs. Additionally, she stated that her vagina bled during the attack.

[22] Mr Michael Msomi and Mr Sipho Hadebe testified for the State. Hadebe, was together with Msomi when they heard a female crying at about 00h30. Both exited the room to investigate. They stood about 20 meters from the boundary wall to the park in order to discern the direction of the cry. A naked complainant appeared from the gap in the wall. She was 'crying excessively'. She reported that she had been raped by five men. She was referred to a lady living nearby for some clothing to cover her nakedness. Msomi was still trying to see what he could do there at the scene of rape when he came across accused 1 putting on his trousers whilst his underwear was just above his knees. When Msomi was grabbing accused 1, the other accused persons appeared from the trees and prevented Msomi from grabbing accused 1. Msomi was hit by accused 3 in the face despite the fact that he produced his appointment certificate in an endeavour to identify himself. The evidence is that then all the accused persons fled towards the motor vehicle. Msomi had already recorded the registration number of the motor vehicle before it drove away with the accused persons.

[23] Whilst Msomi and Hadebe were conversing the vehicle returned. The occupants disembarked. Msomi realised he was in danger as the group of accused advanced towards him after disembarking from their motor vehicle. Msomi fled and accused 3 gave chase. Msomi outran accused 3 and he telephoned the charge office from his residence. He requested that they contact radio control and send reinforcements. The flying squad responded promptly. That is how the accused were arrested. The occupants of the accused vehicle had already attacked and injured Hadebe. He told the court that when accused vehicle returned, its occupants alighted, struck and stabbed him on the head, cheekbone and left kidney. Hadebe was rushed to hospital by the police. Msomi recalled that when he was in the company of a female constable a search revealed the complainant and her good Samaritan hiding amongst some shrubbery. On being interviewed by the female constable, the complainant pointed out some of her property in the accused vehicle. At the scene complainant's shoe, brassier and a knife were discovered.

[24] The claim by the appellants that if the information contained in the docket had been made available to them they would have used it such that they would have been acquitted goes too far. In the first instance it is unknown what explanation would

have been given by the complainant on why in her oral testimony she disputed the assertion that she was a prostitute when it appears that in her police statement she had so stated. The appellants are in no position to say that their cross-examination in this regard would have yielded the result they contend for. The trial magistrate would still have a duty to evaluate her evidence. It is of significance that the magistrate was made aware that the complainant was alleged to be a prostitute. The prosecution in addressing the court did tell the court so. Consequently, the magistrate remarked as follows:

'There have been allegations that the complainant was a lady of ill-repute and of course you would have the court believe, as you have throughout this trial that she had offered herself to you for reward. Even if that be the case she is still entitled to the protection of the law.'

It appears from this statement that, in evaluating the complainant's evidence, the trial magistrate took into account that she might have been a prostitute.

[25] The evidence of the complainant did not stand alone. When she screamed excessively on being sexually assaulted this attracted the attention of Msomi and Hadebe whose evidence forms part of the summary above. The defence of the appellants was that the sexual intercourse was consensual and that the complainant was a prostitute. The complainant suffered abrasions on her left knee. This militates against consensual sexual intercourse. The appellants' testified that the complainant was either lying on her back or was seated when sexual intercourse took place. The injury she sustained is unlikely to have occurred if sexual intercourse took place with her consent. Only one of the complainant's shoes was found in the appellants' motor vehicle together with her brassier as stated in the summary of evidence above. A police officer found her 'hysterical – hiding in the shrubbery' with a woman (the good Samaritan) who was comforting her. The difficulty for the appellants is that all of the above is not reconcilable with consensual sex, whether for reward or otherwise. The aforegoing is independent of the prosecutor's omission to disclose statements indicating the complainant as a prostitute. How in these circumstances could the prosecutor's omission be a factual cause of the appellants' conviction?

[26] Turning to the case presented by the appellants before the high court, no evidence exists as to what the response of the complainant would have been, for instance, had she been confronted by way of cross-examination as to why, having admitted this fact to the investigating officer, she denied that she was a prostitute in her viva voce evidence before the trial court. It might well be that there was a compelling and an understandable explanation for this. Nobody knows. One could only speculate on this score. Having responded in whatever manner she would have chosen, nobody knows for a fact how the presiding magistrate would have found in the evaluation of the complainant's evidence. Again one can only speculate. However, courts work on the basis of evidence from which facts are established and not conjecture. It remains speculation, as well, on the part of the appellants to advance an argument that had the prosecutor disclosed to the defence the content of

the complainant's statement contained in the docket, cross-examination on that score of the complainant would have resulted in their acquittal. There is no factual basis for such an argument. Nobody knows how the magistrate would have decided. It is not uncommon for instance that the witnesses' statements are different from the viva voce evidence. Witnesses often explain such differences satisfactorily whenever confronted on such differences. But, as already indicated, the trial magistrate had due regard to the fact that the complainant might have been a prostitute when he evaluated the evidence presented before him in its totality. The appellants bore the onus of proving all requirements for delict including factual causation on a balance of probabilities.

[27] The magistrate made the following observations concerning the complainant:
'The complainant subjected to a lengthy and repetitive questioning on three appearances held up well, exhibiting natural and expected moments of tearfulness from time to time.' The magistrate expressed himself as follows regarding the evidence by other witnesses:
'The court can find no suggestions of untruthfulness in the unified version of Msomi and Hadebe, both independent witnesses, that their attention was drawn by the plaintiff cry for help which sounded to have enacted from the complainant.' The magistrate observed further:
'Arguing for the conviction for all as charged on count one on the basis of common purpose, and of accused 2 to 5 on count two, also as charged, the prosecutrix seemed to think that the probabilities favoured the finding that the complainant was indeed the prostitute, a fact she (the complainant) vehemently denied, but pointed out that even if this was so no significant damage to the prosecution case would inevitably follow.'
Even though the prosecutrix omitted to disclose to the defence the fact that the complainant admitted in her police statement that she was a prostitute, the same prosecutrix did inform the trial magistrate about this. This may not have been at appropriate stage of the criminal hearing, but the fact is, the magistrate was made aware of this. He expressed his views about this. The submission that the appellants would never have been convicted but for the prosecutor's non-disclosure lacks substance. There are no facts established by evidence advanced that support the assertion that they would have been acquitted but for the omission by the prosecution. They failed the test for factual causation which is the *condition sine qua non*. The appellants have thus failed to produce evidence that the prosecutor's conduct 'caused or materially contributed to' the harm suffered. The wrongful act on the part of the prosecution has not been proved to be linked sufficiently closely or directly to the loss alleged to have been suffered by the appellants. There is no causal link proved. The appeal must clearly fail. The *ex turpi causa non oritur actio* maxim, accepting that it is part of our law, had no application on the facts of this case. But having regard to the conclusion to which I have come, nothing more need be said about it.

[28] In the result, the following order is made:
'The appeal is dismissed with costs including the costs of two counsel where so employed.'

From The Legal Journals

Maharaj, S

"The role of expert evidence in the defence of provocation and emotional stress in South Africa."

Obiter, Volume 40 Number 3, 2019, p. 21 - 47

Abstract
The provocation defence has emerged as one of the most contentious defences in modern times and has remained that way for many years in jurisdictions such as South Africa, England and Canada. In South Africa, the courts have struggled in deciding what role, if any, provocation should occupy in criminal law. This dynamic approach arises from the psychological or principle-based approach to criminal liability. Provocation and emotional stress are powerful emotions. In South Africa, the criminal law recognises that these emotions may impact criminal liability by causing a temporary loss of criminal capacity. The three notorious acquittals in S v Nursingh, S v Arnold and S v Moses created controversy for the defence. In an attempt to bring clarity to this area of the law and to calm public outrage the court in Eadie effected fundamental changes in the form of a policy brake on the principles underpinning the defence. Unfortunately, this brought more confusion to the defence. However, it is submitted that the uncertain role of expert evidence in relation to this defence has arguably been a source of the problems encountered in the application of this defence. A measure of uncertainty exists regarding what, if any, the role of expert evidence plays in cases involving non-pathological incapacity due to provocation. Reform and development is needed to formulate a new approach not only to provide clarity but also to ensure improved functioning of the defence. The rules governing expert opinion evidence in respect of the defence of non-pathological incapacity are in need of review and legislative intervention.

Ndou, M M

"The powers of the court in terms of section 7(2) of the Domestic Violence Act 116 of 1998 - *KS v AM* 2018 (1) SACR 240 (GJ)."

Obiter, Volume 40 Number 3, 2019, p. 241 – 251

Du Toit, P G

"A Note on Sentencing Practices for the Offence of the Unlawful Possession of Semi-Automatic Firearms."

***PER* / *PELJ* 2020(23)**

Abstract

Violent crimes in South Africa are often accompanied by the possession or use of semi-automatic firearms. The Criminal Law Amendment Act 105 of 1997 (the CLA) provides for the imposition of minimum sentences for certain firearms-related offences. The question whether the minimum sentencing regime actually applies to the offence of the unlawful possession of a semi-automatic firearm has led to a number of conflicting judicial decisions by different High Courts. This note discusses the statutory interpretation challenges the courts had to grapple with regarding the interplay between the CLA and South Africa's successive pieces of firearms legislation. The Supreme Court of Appeal ultimately found that the offence of the unlawful possession of a semi-automatic firearm must indeed be met with the prescribed minimum sentence. The recent sentencing practices of South African courts in respect of the unlawful possession of semi-automatic firearms within the framework of the CLA are analysed. From the investigation it is evident that courts are more likely to impose the minimum sentence in cases where the accused is also convicted of other serious offences such as murder and robbery. In such cases little attention is given to the firearm-related offences as the courts are more concerned with the cumulative effect of the sentences imposed on different counts. In cases where the accused is convicted of the stand-alone offence of the unlawful possession of a semiautomatic firearm, the courts are nevertheless taking an increasingly unsympathetic stance towards offenders, and terms of imprisonment in the range of 7 to 10 years are commonly imposed. In addition to the accused's personal circumstances, one of the most important factors in deciding on an appropriate sentence is the explanation of how the unlawful possession came about. It seems that the judicial sentiment increasingly does not support the view that the possession of an unlicensed firearm should be treated as serious only if the weapon has been used for the commission of a serious crime.

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Contributions from the Law School

The Child Rape Epidemic: Practical steps needed to be taken to protect child victims from secondary trauma by the criminal justice system: An urgent call to all magistrates.

In the case of *S v Vilakazi* 2009 (1) SACR 552 (SCA) the SCA observed that the crime of rape was notoriously under reported and that it was also notorious that relatively few offenders were caught and convicted. This is all the more so with child rape and related crimes, which have become an epidemic in South Africa. Indeed, in 2007 scholars published an article entitled The Child Rape Epidemic (S Cox, G Andrade,D Lungelow, W Schloetelburg, H Rode "The Child Rape Epidemic" (2007) 97 *SA Medical Journal* 950). In the case of *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 (2) SACR 567 SCA, the SCA also observed that the emergence of a trend of rapes involving young children was becoming endemic in South Africa. In the case of *S v Skepe* 2019 (2) SACR 349 (ECP) the court acknowledged the difficulties in prosecuting the crime of rape and acknowledged that child rape had become endemic. In the case of *S v M* 2020 (1) SACR 241 (WCC) the court observed that the epidemic of rape in South Africa has not abated. In the latter case, the court went further than simply decrying the difficulty in successfully prosecuting child rape, and saying that secondary victimization of the complainant must be avoided. It provided specific practical guidance as to how this might actually be achieved. What follows is a discussion of this very important case.

In the case of *S v M* 2020 (1) SACR 241 (WCC) the appellant had been convicted in a magistrates' court of attempted rape and was sentenced to eight years imprisonment. The complainant was the appellant's eleven year old biological daughter. She had commenced her evidence via CCTV but soon thereafter became distraught and could not continue. The cases was then postponed. And thereafter it was postponed for a further twenty times. Eventually the complainant's mother refused to assist in getting the complainant to court. While the trial was continuing, the complainant spent time in the presence of the accused, as he then was, at her mother's house. The complainant never completed her evidence in chief, and was not cross examined. However, the evidence of the first reporter, and the medical practitioner who completed the J-88, together with unchallenged evidence that the appellant's DNA was found on the complainant's underwear was sufficient to make out a prima facie case, albeit based on circumstantial evidence. The appellant did not testify, and had conceded that the complainant had been sexually assaulted. The state's prima facie case therefore hardened into conclusive proof, and the appellant was convicted. His appeal against conviction and sentence failed.

The court then proceeded to comment on the significant manner in which the criminal justice system had failed the complainant. The court set out the statutes and procedures which were in place to protect the interests of the child complainant so as to avoid, as far as possible, the secondary trauma of the complainant. First, there is the Constitution which mandates that he best interests of the child are paramount in s 28 (2). Then there is the Children's Act 38 of 2005, and the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. And finally the National Policy Framework Management of Sexual Offences Matters, 2012. The court was aghast at the manner in which the complainant was subjected to the grinding effects of the criminal justice system despite the legislative framework, and policy guidelines purporting to alleviate this.

The court commented that the complainant's evidence was never completed and so each one of her appearance was an exercise in futility and served no good purpose. The court said:

"One can only imagine what each attendance at court required of this child. Not only would she have been compelled to relive the assault on each occasion in preparing herself to give evidence on each occasion, but she would also have endured the hardships of getting to court utilizing the public transport system and then waiting to give her evidence of her assault (para [51])."

The court was also sympathetic to the plight of the child's mother, saying that she would likely have had to be away from her work and the complainant would have had to have absented herself from school. The court observed that it was "small wonder that the complainant's mother eventually refused to co-operate and failed to return with her daughter to court to complete her evidence (para [52])."

The court was critical of the fact that the child had not been protected from coming into contact with the accused during the trial (para [53]), as well as the fact that it appeared that no social worker or therapist had been assigned to the complainant, either to assist her with the trial itself or to provide trauma-counselling of any sort. Both such interventions would clearly have been necessary and the court held that trauma-counselling would still be required after the trial (para [54]).

The court concluded that there had been a significant failure of the criminal justice system to take proper care of the complainant as required by law (at para [55]).

The court acknowledged the budgetary constraints in respect of service delivery but held that where the legislature has made specific provision for certain minimum standards to be maintained there could be no excuse for not doing so (at para [56]).

After setting out the legal and policy framework in some detail, the court turned to examining on a practical level what could and should have been done differently in the case before it.

As regards the complainant coming into contact with the accused at her mother's house during the trial, the court held that proper bail conditions should have been imposed to protect the complainant from this (para [76]).

Next the court commented on the number of times the complainant had to appear at court, saying that it was indicative of a system that is not effectively geared towards preventing, or at the very least reducing as far as possible, the 'secondary victimization and traumatisation' of the child victim (para [77]).The court held that:

"Practically speaking, it should be possible to arrange matters so that notice could be given in advance of the fact that the trial will not be proceeding on a particular day. If a delay is due to the accused, he should be required to provide advance notice so that the complainant and witnesses do not attend court for no purpose. The giving of advance notice could either be ordered specifically or could be a condition of bail, so as to avoid unnecessarily traumatising his alleged victim. Where the court or court officers occasion a delay, the same courtesy should be extended to the other parties and witnesses, in advance. This would go some way to avoiding unnecessary attendances at court (para [78])."

The court suggested further that the role players could be given dates in advance and warned to attend.

The court also noted that other witnesses were also inconvenienced, only being required to give evidence on their third appearance (para [81]). The court noted the danger to the successful completion of the case this posed.

Then the court commented on how to alleviate the burden of getting to court "for those victims without adequate means, or those who have to rely on an inadequate public-transport system." The court said that either the police or the social-welfare staff could be tasked with arranging for them to be collected from their homes and transported to court (para [80]).

Finally, the court held that "Effective case-management procedures would go a long way to reducing the number of postponements, the number of required attendances by all concerned, and to reducing the length of trials in general (para [82])."

On the social welfare level, the court commented that relatively simple precautions and procedures would go some way towards reducing the anxiety and trauma likely to be experienced by the child complainant as a consequence of the court proceedings. For example, the court said, there should be "Early involvement of the

Department of Social Services to appoint a social worker to assess the child complainant's circumstances and to provide trauma-counselling and assistance (para [84.1]).” Also, the investigating officer or the appointed social worker should make prior arrangements to assist the complainant and her custodian to travel to court from their home on the morning of the hearing so as to shield them from the difficulties and costs occasioned by having to utilise an unreliable public-transport system (para [84.2]). Further, counselling should be provided to the child complainant's non-offending parent on methods to assist the child — specifically, in this instance, guidance about the advisability of putting her daughter into a situation where she would meet with her father during the trial (para [84.3]. Lastly, continued trauma-counselling after the completion of the trial for a reasonable period of time should be provided for the child complainant (para [84.4]).

The court noted that in the case before them there was no indication that any assistance was provided to the complainant or her mother by social-services or court support staff except to a limited extent when evidence was actually being led. Counselling should have been provided, and the court ordered that it should still be provided to the child complainant for the foreseeable future, saying that it would amount to a failure of the system, should she be left without counselling after the events that befell her (para [85]). The court said that it could not emphasise enough the importance of the relevant welfare structures receiving notification about the victim and her circumstances and thereafter of stepping in to provide assistance and counselling for the complainant. The court ordered that a qualified social worker be appointed and that the head of the Department of Social Development in the province report back to the court, in writing, within six weeks, confirming that counselling had commenced and on its progress (para [90]). It also ordered that a copy of the judgement be delivered to the Director-General: Justice and Constitutional Development; The National Commissioner of the South African Police; The Director-General: Social Development; The Director-General: Health; The National Director of Public Prosecutions; the Chief Magistrate, Wynberg Magistrates’ court; and the Chief Prosecutor, Wynberg Regional Court.

This is a robust judgement, which is long overdue. It is to be welcomed. For far too long courts have either been insensitive to the plight of witnesses in the criminal justice system, especially child complainants, or they have simply expressed the need to avoid secondary victimization in general, non-specific terms. This judgement provides firm, practical guidance. No doubt scarcity of resources will be a challenge, but, as the court says, where the legislature has prescribed certain minimum standards there is no choice. South Africa has Rolls Royce laws and policies, but implementation has been very problematic. Hopefully this judgement will usher in a time of greater alignment between the lofty ideals in the law and the practical reality in the courtroom. The judgement was widely disseminated to those in power, but it is every magistrate’s duty (legal and moral) to see that it is given effect to in their courtrooms.

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Matters of Interest to Magistrates

Understanding 'emergency monetary relief' in the Domestic Violence Act

Domestic violence is a brutal onslaught against constitutional values and the fundamental right to freedom and security of the person. In *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), Sachs J poignantly held at para 11: 'What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished'.

Accordingly, the Domestic Violence Act 116 of 1998 (the Act) serves important objectives. It must be understood against the backdrop of its social context and legal purpose. In terms of the Act's preamble, it aims 'to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide'. It does so by providing for interim and final protection orders under ss 5 and 6 respectively, and by creating a mechanism in s 8 for their enforcement through arrest. To bolster the efficacy of this protection, s 7(7) prohibits a court from refusing a protection order, or other competent relief, 'merely on the grounds that other legal remedies are available to the complainant'.

In *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality,* Amicus Curiae*)* 2006 (2) SA 289 (CC), the minutiae of the Act's scheme were outlined at paras 20 – 31. The Act is geared to 'emergency situations' (para 38). In terms of s 4, a 'complainant' in a 'domestic relationship' with a respondent may, by way of affidavit, apply to 'court' for a 'protection order' owing to the commission of an act of 'domestic violence' by the respondent. In this context, 'complainant', 'court', 'domestic relationship', 'domestic violence' and 'protection order' bear their meanings in s 1 of the Act.

In terms of s 5(1), the court must expeditiously apply its mind to an application for interim relief ('as soon as is reasonably possible consider an application') and, to this end, may 'consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings'. Under

s 5(2), the court must issue an interim protection order if 'satisfied that there is *prima facie* evidence that –

(*a*) the respondent is committing, or has committed an act of domestic violence; and

(*b*) undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued immediately'.

For the legal meaning and effect of 'satisfied', see *Breitenbach v Fiat SA (Edms) Bpk* 1976 (2) SA 226 (T) at 228A-B; *Income Tax Case no 1470* (1989) 52 SATC 88 (T) at 92; *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC) at para 41.

Section 5(2) is couched in peremptory terms. The duty on a court operates despite a respondent's *audi alteram partem* rights not being respected. For the distinction between directory and peremptory provisions (see *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para 13; and *MY Summit One: Farocean Marine (Pty) Ltd v Malacca Holdings Ltd* 2005 (1) SA 428 (SCA) at 439C).

When issuing an interim protection order, a court must prohibit the respondent from performing any act listed in s 7(1). Under s 7(2), it may also impose conditions. Although the Act is not prescriptive as to the nature of the conditions, it provides that a condition must be such that it is 'reasonably necessary to protect and provide for the safety, health or well-being of the complainant'. This includes, *inter alia*, the seizure of a firearm or dangerous weapon in the respondent's possession or control. Under s 7(3), if a court prohibits a respondent from entering a residence shared with the complainant under s 7(1)(*c*), it may also oblige the former to discharge the rent or mortgage payments pertaining to such residence but only after 'having regard to the financial needs and resources of the complainant and the respondent'.

Under s 5(3), an interim protection order must be served on the respondent in the manner prescribed by ministerial regulation issued under s 19 of the Act. Under s 5(6), an interim protection order 'shall have no force and effect until it has been served'. On the return date, a court may discharge the interim protection order or may issue a final protection order under s 6 with or without conditions or obligations under ss 7(2) and (3) respectively (see *Omar* (*op cit*) at para 38).

Section 7(4) reads: 'The court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the complainant *and* the respondent, and such order has the effect of a civil judgment of a magistrate's court' (my italics). The conjunction 'and' has the effect that the power in s 7(4) cannot be exercised with reference only to the needs and means of one party (but both) (see *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) at para 50). Section 7(4) is also couched in permissive language. A court has discretion ('may order') whether to grant the relief concerned. For the circumstances when 'may' can have the effect of 'shall' (see *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at paras 14 – 16).

In the context of s 7(4), 'emergency monetary relief' bears its meaning as defined in s 1, namely, 'compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including –

(*a*) loss of earnings;

(*b*) medical and dental expenses;
(*c*) relocation and accommodation expenses; or
(*d*) household necessities'.

Thus, emergency monetary relief is compensatory in nature. 'Including' is a word of extension; its effect is that the losses listed are not a *numerus clausus* (see *S v Dzukuda and Others*; *S v Tshilo* 2000 (4) SA 1078 (CC) at para 9). The complainant bears the burden to show a causal nexus ('as a result') between the commission of an act of domestic violence by a respondent and the incurrence of a present (not future) loss. By parity of reasoning with that in *Narodien v Andrews* 2002 (3) SA 500 (C), emergency monetary relief cannot be granted as a 'stand-alone' order. It is relief ancillary to a protection order prohibiting the performance of an act mentioned in s 7(1).

The questions arising are:

- Can emergency monetary relief be granted in an interim protection order?
- Also, in the light that orders under s 7(4) have the same effect as a civil judgment, would the granting thereof under s 5 without prior notice of the proceedings unjustifiably limit a respondent's right of access to court under s 34 of the Constitution?

In law, interim orders are, generally, not appealable (see *Machele and Others v Mailula and Others* 2010 (2) SA 257 (CC) at paras 21 – 22). An interim protection order under s 5 of the Act is not appealable. To challenge such order, a respondent can appear on the return date and, under s 6(2) of the Act, oppose the granting of final relief; alternatively, the respondent can, under s 5(5), anticipate the return date. Since an interim protection order is not appealable and an order under s 7(4) is appealable, it appears that emergency monetary relief is not relief competent to be granted on an interim basis under s 5 of the Act. The compensatory nature of such relief reinforces this view.

A further consideration that appears to militate against the granting of emergency monetary relief under s 5, as opposed to s 6 of the Act, is that interim protection orders are, generally and for good reason, granted without prior notice to a respondent. In *Omar* (*op cit*) the constitutionality of this practice was upheld. The crux of the court's reasoning in rejecting the appellant's challenge on the basis of his s 34 fundamental right of access to court, is that 'notice to the respondent – the very source of the threat of violence – would defeat the object of protection for the complainant'. While this justification holds true for protective relief contemplated in s 7(1) of the Act, as regards possible future violence being perpetrated against the complainant by the respondent who becomes aware of the court application, it would not, I submit, hold true for compensatory relief under s 7(4). Such relief is not designed to, nor does it, protect a complainant against future harm from a respondent. Rather, it seeks to compensate for financial losses already suffered.

A further consideration favouring the view that relief under s 7(4) may accompany orders under s 6 but not necessarily those under s 5 of the Act, is that emergency monetary relief is enforceable by a writ of execution. This is so unless its operation is suspended by agreement *inter partes*, or by a court on application. Its operation is not

suspended by a respondent anticipating a return date or appearing on a return date to oppose final protective relief. As stated above, s 7(4) orders are, *ex lege*, final in effect. Thus, there is nothing to oppose in relation thereto. A respondent would either have to appeal or review such order under s 16, or apply to have it set aside under s 10 of the Act on 'good cause' (for the meaning of 'good cause', see *Silber v Ozen Wholesalers (Pty) Ltd* 1954 (2) SA 345 (A) at 352 – 353).

I submit that the approach contended for here accords, with the directive in s 39(2) of the Constitution, namely, legislative interpretation through the prism of the 'spirit, purport and objects of the Bill of Rights' (see F Moosa 'Understanding the "spirit, purport and objects" of South Africa's Bill of Rights' (2018) 4 *HSOA Journal of Forensic, Legal and Investigative Sciences* at 1). My approach balances, on the one hand, the rights of victims of domestic violence to compensation suffered by reason of such violence and, on the other, the *audi alteram partem*, fair trial rights of a respondent engrained in s 34 of the Constitution, which ought to be respected before a final judgment for compensatory relief is granted.

The word 'emergency' in 'emergency monetary relief' suggests that the legislature viewed compensatory relief under s 7(4) as urgent and ought to be available to a complainant on an expedited basis. This apparent intention ought to be given effect to, but in a manner that does not unduly limit a respondent's fundamental rights to fair judicial proceedings.

Applications under s 7(4) must be fast-tracked. In practice, this may be difficult, particularly in busy domestic violence courts with congested court rolls, large case backlogs, and few magistrates. A suggested approach may be the following: Under s 6(2), applications under the Act can be decided on affidavit. Oral evidence is not compulsory. If an interim protection order is granted under ss 5(2) read with 7(1), two return dates can then be issued. A longer one for the main relief and a shorter one for the emergency monetary relief. As part of the interim protection order, the court may then direct the respondent to file an answering affidavit in relation to the s 7(4) claim within a truncated time period. It may also direct that a complainant can file a reply within a specified period. On the shorter return date, the court can then, on affidavit, determine whether a complainant is entitled to compensation and, if so, the quantum thereof. Brief submissions can also be received from the parties or their representatives, as occurs in High Courts for r 43 applications.

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A Last Thought

"Because the (Covid-19 lockdown) Regulations are not as precise as they could have been, there is a danger that members of the SAPS who are required to enforce these regulations will enforce the regulations in an arbitrary and overzealous manner. There is also a danger that unscrupulous and corrupt members of the SAPS will "invent" rules that they will use to extract bribes from unsuspecting members of the public.

Furthermore, there is a danger that some members of the public will try to exploit uncertainty about the regulations to circumvent them. I fear that some entitled South Africans may lack a sense of solidarity and may try to avoid the inconvenience that inevitably accompany the lockdown by evading restrictions. While the Regulations provide for such individuals to be arrested and prosecuted, this is more effective when there is reasonable legal certainty about what conduct is prohibited and what permitted.

What is required from all of us – both those who police and enforce the lockdown and those of us who need to adhere to the lockdown rules – is to act in good faith and with a sense of solidarity in the knowledge that it is only if we embrace the spirit of the Regulations and avoid leaving our houses unless it is absolutely necessary to do so that the lockdown will be effective."

As per Prof Pierre De Vos on his blog *Constitutionally Speaking* on 26 March 2020.