e-MANTSHI

A KZNJETCOM Newsletter

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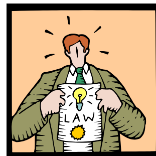
Welcome to the hundredth and sixty fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Director-General of the Department of Home Affairs, has in terms of section 34(1) of the Immigration Act, 2002 (Act No. 13 of 2002), determined Correctional Facilities of the Department of Correctional Services as temporary places of detention of illegal foreigners, for the duration of the period of the national state of disaster as declared in terms of the Disaster Management Act, 2002 (Act No. 57 of 2002), read with its Regulations, pending deportation or transfer to Lindela Holding Facility for purposes of deportation. The notice to this effect was published in Government Gazette no 43292 dated 7 May 2020.

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Recent Court Cases

1. S v Makhetha (R16/2020) [2020] ZAFSHC 94 (14 May 2020)

Any condition of a suspended sentence imposed must be closely related to the crime and it should be stated with so much precision that it does not leave doubt in the mind of the accused as to which conduct is prohibited during the period of suspension.

Mbhele, ADJP

1. This matter was laid before this court on special review at the instance of the Senior Magistrate, Welkom after conducting routine systemic check.

2. The 4 accused who were legally represented pleaded guilty to Contravention of Section 49(1)(a) of the Immigration Act no 13 of 2002.

3. Upon conviction, accused 1 was sentenced to R2000.00 or 60 days imprisonment, half of which is suspended on condition the accused is not convicted of Contravening the Immigration Act 13 of 2002.

4. The Senior Magistrate queries the sentence on the basis that the condition imposed is too wide. I agree with the observation made by the Senior Magistrate.

5. In the matter of R v Cloete 1950 (4) SA 191 (O) the following was said when the court dealt with requirements for suspensive conditions:

"While the words of sec. 360 *(b)* of Act 31 of 1917 are wide and the discretion of the judicial officer should not be lightly interfered with, it does seem that two principles at least should be observed in the imposition of the conditions. The first is that the condition imposed should bear at least some relationship to the circumstances of the crime which is being punished by the imposition of the suspended sentence. It need not be closely related but should be related to it in some degree at least, even though slightly related, and not divorced from it, or remote from it. The second is that the condition be stated with such precision that the convicted person may understand the ambit of the condition."

6. I agree with the above dictum. Any condition imposed must be closely related

to the crime and that it should be stated with so much precision that it does not leave doubt in the mind of the accused as to which conduct is prohibited during the period of suspension. If the condition is too wide and not precise it confuses and poses challenges for the court that may have to consider the alleged violation of the condition imposed.

7. The other relevant factor to consider is reasonableness. The conditions should be devised in such a manner that they do not subject the accused to future unfairness. They should not be too onerous, compliance thereof should be within the accused's control and it should be reasonably possible for the accused to comply with them. See (S v GAIKA 1971 (1) SA 231 (C) at 232 and S v GROBLER 1992 (1) SACR 184 (C) at 185)

8. It is clear from the record that the suspensive conditions set by the magistrate in this matter are too wide and failed to meet the aforementioned requirements. The sentence cannot be upheld in its current form. It ought to be amended.

Order:

1. Conviction is confirmed
2. The sentence imposed by the magistrate is amended as follows:

2.1 The accused is fined Two Thousand Rands (R2000) or sixty days imprisonment half of which is suspended for three (3) years on condition that the accused is not convicted of contravening section 49 (1) (a) of Act 13 of 2002 committed within the period of suspension.

2. Centre for Child Law v Director- General: Department of Home Affairs and Others (CA 319/2018) [2020] ZAECGHC 43 (19 May 2020)

An unmarried father should be allowed to register the birth of his child born out of wedlock under his surname in the absence of the child's mother if he acknowledges his paternity in writing under oath.

Rugunanan, J:

[1] Before us is an appeal, with the leave of the Court *a quo,* in which section 10 of the Births and Death Registration Act [1] ("the Act") is laid at the centre of a challenge to its constitutional validity which Bodlani AJ dismissed in a judgment handed down on 9 July 2018. The appellant is a Law Clinic based in the Law Faculty of the University of Pretoria. It is an institutional applicant and its involvement in this matter stems from acting in the public interest in accordance

[1] Act No. 51 of 1992, as amended

with the Constitution of the Republic of South Africa.[2]

[2] The appellant's participation initially derived from an application in the Court *a quo* where it sought leave to intervene[3] as third applicant in proceedings launched by the third and fourth respondents (as first and second applicants) in which they sought an order[4] reviewing and setting aside the first respondent's refusal to register the birth of their minor child. Since the judgment *a quo* renders sufficient factual context it is unnecessary to elucidate the background to the matter as this appeal concerns a legal issue that arises from the interpretation and implementation of section 10 of the Act.

[3] Referring to the founding papers of the appellant, it is only necessary to state that its involvement in the matter was triggered by the multitude of child cases,[5] all of which are similar to the refusal that confronted the third and fourth respondents. Although the appeal is unopposed it is regrettable that this Court has not had the benefit of submissions from the first and second respondents on an issue affecting vulnerable members of society, more particularly unregistered children born to unmarried fathers.

THE BEST INTERESTS OF THE CHILD

[4] The registration of the birth of a child commences with the act of giving notice of the child's birth.[6] The process culminates in the issuing of a birth certificate[7] reflecting the child's legal name containing a forename and surname, the date of birth and place of birth. Children without birth certificates are "invisible".[8] Their lack of recognition in the civil birth registration system exposes them to the risk of being excluded from the education system and from accessing social assistance and healthcare. They are effectively denied support and assistance considered necessary for their positive growth and development.[9] The numerous child cases,

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[2] Section 38 provides in the relevant part: "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are- (a) …; (b) …; (c) …; (d) anyone acting in the public interest;

[3] Such leave was granted on 29 August 2017

[4] the order was granted on 4 April 2017

[5] Founding affidavit: Anjuli Leila Maistry, Record pages 86-98, paragraphs [32]-[43]

[6] Sections 9 and 10 of Births and Death Registration Act No. 51 of 1992, as amended ("the Act")

[7] See section 9(7) read with section 5 of the Act

[8] and will remain as such notwithstanding acquiring citizenship status in terms of section 2 of the South African Citizenship Act No. 88 of 1995, as amended. The relevant section in the Citizenship Act does not purge section 10 of the BDRA. Where the Citizenship Act does make provision for citizenship by birth, it is still dependant on birth registration.

[9] ***Teddy Bear Clinic for Abused Children and Another v Minister of Justice and Constitutional Development*** *2014 (2) SA 168 (CC) at paragraph [1]*

(among them, those labouring under generational statelessness[10]) in the appellant's papers evokes empathy if one comprehends the extent to which lack of birth registration exacerbates marginalisation and potentially underscores inability to participate in development strategies aimed at socio-economic advancement for the achievement of productive and fulfilling lives. There is undoubtedly a disproportionate severity of such consequences for children from indigent families.

[5] The appellant's case demonstrates that section 10 poses a bar that is discriminatory on the basis of the marital status of the father of a child born out of wedlock. This directly violates the affected father's right to equality in section 9(3) of the Constitution[11] and is tantamount to unlawfully discriminating against him. By extension, the bar has the effect of denying children, with a legitimate claim to a nationality from birth,[12] a birth certificate; and in this manner it discriminates against children born to unmarried fathers on grounds that are arbitrary. A law that engenders discrimination with the potential for consequences of the enormity shown, cannot be said to be in the best interests of a child. This is the normative standard recognised by the Constitution as paramount in every matter concerning a child[13] notwithstanding, in my view, the marital status of the child's parents. This expanded connotation of the best interests standard permits the protection of children in matters extending beyond the realm of the rights enumerated in section 28(1) of the Constitution.[14]

THE ISSUE ON APPEAL

[6] Section 10 of the Act provides: [15]

*"10. **Notice of birth of child born out of wedlock***

(1) Notice of birth of a child born out of wedlock shall be given -

(a) <u>under the surname of the mother</u>; or

(b) <u>at the joint request</u> of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be

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[10] This occurs when an undocumented child, having attained majority, cannot give notice of the birth of his newborn child because he (or she) is undocumented. Thus the cycle of generational statelessness is repeated with the newborn child

[11] Act 108 of 1996, as amended

[12] Section 28(1)(a) of the Constitution

[13] Section 28(2) provides: "A child's best interests are of paramount importance in every matter concerning the child." See also ***S v M (Centre for Child Law as Amicus Curiae)*** *2008 (3) SA 232 (CC) at paragraph [12]*

[14] See ***Minister for Welfare and Population Development v Fitzpatrick and Others*** *2000 (3) SA 422 (CC) at paragraph [17]*

[15] The section was amended by the Births and Deaths Registration Amendment Act 40 of 1996 – Gazette No.17412, dated 5 September 1996. Commencement date: 5 September 1996

the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

(2) Notwithstanding the provisions of subsection (1), the notice of birth may be given under the surname of the mother if the person mentioned in subsection (1)(b), with the consent of the mother, acknowledges himself in writing to be the father of the child and enters particulars regarding himself on upon the notice of birth."
(my own underlining)

[7] In summary, the section makes provision for the notification of the birth of a child born out of wedlock and contemplates three scenarios in which this is achieved, namely:

(i) giving notice under the surname of the mother (section 10(1)(a));

(ii) under the surname of a person who acknowledges himself in writing to be the father but at the joint request of him and the mother (section 10(1)(b)); or

(iii) under the surname of the mother if the person mentioned in section 10(1)(b), with the consent of the mother, acknowledges in writing that he is the father (section 10(2)).

[8] What can be extrapolated from the above is that the notification process for a child born out of wedlock has a dominant preference for the surname of the mother. Moreover, in all three scenarios it is manifest that the involvement of the mother is required whether through presence (section 10(1)(a) and (b)) or by giving her consent (section 10(2)). In its present form **section 10 in its entirety implicitly bars the unmarried father of a child born out of wedlock from giving notice of the child's birth under his surname if the mother is absent.** The limited effect of the reading-in or substitution of wording proposed by the Court *a quo* in section 10(2)[16] did not, as will become evident later in this judgment, expunge the bar presented by section 10. This is the substantial issue in terms of which this appeal is grounded in the appellant's challenge to the constitutionality of the impugned provision.

THE APPROACH OF THE COURT *A QUO*

[9] Mindful of a purposive interpretation that renders a statute constitutionally compliant so that it promotes the spirit, purport and objects of the Bill of Rights, the Court *a quo* had regard to the appropriate prescripts for reading legislation in the context of a constitutional challenge. In summary, courts are enjoined to

[16] i.e. the first "mother" by the word "father"

interpret legislation in conformity with the Constitution so far as this is reasonably possible and subject to the caution that the interpretation should not be unduly strained. [17] While the soundness of these prescripts is not doubted it will become apparent from the ensuing discussion that the Court *a quo* erred in their application. This resulted a strained interpretation of the legislation and effectively did not address the issue.

[10] In dealing with the issue, the starting point for the Court *a quo* was section 9 of the Act. The section (in the form in which it appears in the judgment) provides:[18]

"9. Notice of Birth

(1) In the case of any child born alive anyone of his or her parents or, if neither of his or her parents is able to do so, the person having charge of the child or a person requested to do so by the parents of the said person, shall within 30 days after the birth give notice thereof in the prescribed manner to any person contemplated in section 4.

(2) Subject to the provisions of section 10, the notice of birth referred to in

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[17] ***Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*** *2001 (1) SA 545 (CC) at page 599E*

[18] In its current form the section reads:

"9. **Notice of Birth**

(1) In the case of any child born alive, any one of his or her parents, or if the parents are deceased, any of the prescribed persons, shall, within 30 days after the birth of such child, give notice thereof in the prescribed manner, and in compliance with the prescribed requirements, to any person contemplated in section 4.

(1A) …

(2) Subject to the provisions of section 10, the notice of birth referred to in subsection (1) of this section shall be given under the surname of either the father or the mother of the child concerned or the surnames of both the father and mother joined together as a double barrelled surname.

(3) …

(3A) Where the notice of a birth is given after the expiration of 30 days from the date of birth, the birth shall not be registered, unless the notice of the birth complies with the prescribed requirements for a late registration of birth.

(4) No registration of birth shall be done of a person who dies before notice of his or her birth has been given in terms of subsection (1).

(5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.

(6) No person's birth shall be registered unless a forename and a surname have been assigned to him or her.

(7) The Director-General may on application in the prescribed manner issue a prescribed birth certificate from the population register.

(8) An original birth certificate issued in terms of subsection (7) shall in all courts of law be on the face of it evidence of the particulars set forth therein."

subsection (1) of this section shall be given under the surname of the father of the child concerned.

(3) Where the notice of a birth is given after the expiration of 30 days from the date of the birth, the Director-General may demand that the reasons for the late notice be furnished and that the fingerprints be taken of the person whose notice of birth is given.

(4) No registration of birth shall be done of a person who dies before notice of his birth has been given in terms of subsection (1).

(5) The person to whom notice of birth was given in terms of subsection (1), shall furnish the person who gave that notice with a birth certificate, or an acknowledgement of receipt of the notice of birth in the prescribed form, as the Director-General may determine.

(6) No person's birth shall be registered unless a forename and a surname have been assigned to him."

[11] Having applied the aforementioned prescripts for reading legislation, the reasoning of the Court *a quo* is that nowhere does section 9 indicate that the notification of birth may only be given by married parents. Consequently, any one or both parents of a child enjoys the right to give notice of the child's birth regardless of the parents' marital status. The rationale for advancing this interpretation arose from the wording *"any child born alive"* which meant any child born alive regardless of the marital status of the child's parents. Accordingly, in the opinion of the Court *a quo,* section 9 did not differentiate between married and / or unmarried parents.[19]

[12] Dealing specifically with section 10, this is what the judgment (quoting only where relevant) states:[20]

(my own emphasis is in bold)

"Section 9(6) of the Act which prescribes that no person's birth shall be registered unless a forename and a surname have been assigned to him. Despite the rubric to the section [i.e. section 10]*, section* ***10 of the BDRA does not deal with the notification of a child's birth****. On a proper construction* ***the section deals with the assignment of a surname to a child during the process of notification of their birth, which is dealt with in section 9*** *of the BDRA. An analysis of this section in its current form shows that the first "mother" in subsection (2) was intended to be*

[19] Judgment, paragraphs [24] and [26]
[20] At paragraph [27]

"father". … on their current formulation ***sections 9 and 10 of the BDRA do not forbid unmarried fathers to register the births of their children in the absence of the mother who gave birth to such children. The requirement is that such children must have been born alive, in which event any one of the parents, regardless of their marital status, would be able to give notice of their birth.*** *This interpretation is not only faithful to the actual wording of the statute, it also leaves the statute constitutionally compliant inasmuch as it does not strain the meaning of the words employed therein."*

ANALYSIS

[13] Section 9 regulates the notification of all births by any one of the parents of a child born alive, and incorporates provision to the effect that no person's birth shall be registered unless a forename and a surname has been assigned to that person (*per* section 9(6)). Evident from the reasoning employed by the Court *a quo* is that section 9 heralds section 10 because it does not differentiate between married and unmarried parents. The corollary to such reasoning is that the child of an unmarried father may be notified under the surname of the father. For reasons that will become apparent below, I am unable to agree that the approach charted by the judgment *a quo* cures section 10 of the issue occasioning this appeal. This is because the interpretation of section 9 achieved a strained effect by excluding from consideration that the notification of any child born alive is subject to the provisions of section 10 which deals with the notification of birth of a child born out of wedlock.

[14] What section 9(1) read with section 9(2) seeks to make provision for is that notice of a child's birth should be given immediately upon the birth of the child and not later than 30 days by either parent but *"Subject to the provisions of section 10"*. In the latter respect, the Court *a quo* overlooked the effect specifically of section 9(2).[21] It maintains a distinction between the overall functioning of section 9 and section 10. For clarification, section 9 serves to regulate the notification of all children's births by parents regardless of marital status, whereas section 10 regulates the surname of a child born out of wedlock. Thus section 10 constitutes the mechanism through which the content of the notice in section 9 is fulfilled. Put otherwise, section 10 regulates the surname under which a child born out of wedlock will be notified under section 9. That surname is of paramount importance to a child's identity particularly where the child's mother is absent during the notification process. In its analysis of section 9 and 10, the Court *a quo* did not appreciate this distinction and its importance.

[15] Even though section 9 empowers an unmarried father to give notice of his child's birth, the exercise by an unmarried father of his right under section 9(1) is

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[21] and this includes sub-section (2) as it appears in the amended section 9

(by reason of section 9(2)) contingent on either the mother's presence (as *per* section 10(1)(b) or her consent (*per* section 10(2)). In the latter regard Counsel for the appellant pointed to section 26 of the Children's Act[22] which he correctly submitted did not provide a solution to the hurdle posed by section 10 of the BDRA, since its efficacy is similarly dependent on a mother's consent. In effect, despite an unmarried father being permitted to give notice of his child's birth in terms of section 9, section 10 presents a bar when it comes to notifying the birth of his child under his surname in the mother's absence. Conceivably, such absence (or want of consent) might be occasioned by any number of reasons: the mothers in question are not capable or willing to give their consent either because they are themselves undocumented, or they are unwilling, or perhaps have absconded, or died either during childbirth or later, or are unable to be located.

[16] In addressing the impediment presented by section 10, the judgment *a quo* proposes a substitution of wording i.e. the first *"mother"* in section 10(2) by the word *"father"*. Differently stated, this constitutes a reading-in. The reading-in achieved a limited scope of application, in that, although notice of birth may be given under the surname of the father, section 10(2) still requires the consent of the child's mother (see paragraph 7(iii) above).

[17] In heads of argument counsel for the appellant correctly submitted that the reading-in of the word "*father*" in section 10(2) does not address the provisions of section 10(1) which prescribe that the notice of birth of a child born out of wedlock must be given under the surname of the mother, or at the joint request of a mother under the surname of the father where the father acknowledges paternity.

[18] Clearly, the reading-in exercise proposed by the Court *a quo* is inadequate particularly because it does not pertinently address the fundamental problem that section 10 (in its entirety) does not provide a mechanism for a child born out of wedlock to be notified in the surname of his or her father **where the mother is**

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[22] Act No. 38 of 2005, as amended. The relevant section reads:

26. Person claiming paternity

(1) A person who is not married to the mother of a child and who is or claims to be the biological father of the child may-
- (a) apply for an amendment to be effected to the registration of birth of the child in terms of section 11(4) of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992), identifying him as the father of the child, if the mother consents to such amendment; or
- (b) apply to a court for an order confirming his paternity of the child, if the mother-
  - (i) refuses to consent to such amendment;
  - (ii) is incompetent to give consent due to mental illness;
  - (iii) cannot be located; or
  - (iv) is deceased.

(2) This section does not apply to-
- (a) the biological father of a child conceived through the rape of or incest with the child's mother; or
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.

absent. Somewhat ironically, the Court *a quo* appeared to recognise this bar in Regulation 12(1)[23] which states that *"a notice of birth of a child born out of wedlock shall be made by the mother of the child"*. Considering that the regulation is inextricably interwoven with section 10 and is defective in the same manner, the judgment *a quo* nonetheless reflects a finding that the regulation is unconstitutional because it does not provide for an unmarried father to give notice of his child born out of wedlock in the absence of the child's mother. In its judgment[24] the Court *a quo* corrected the defect in regulation 12(1) to include reference to a child's father. The effect of the inclusion is that notice may be made by either the mother or father of a child born out of wedlock.

[19] Reverting to the Act, to overcome the bar presented by section 10 the appellant has proposed, as indicated by the underlined wording below, that section 10 be deemed to read as follows:

*"10. **Notice of birth of child born out of wedlock***

(1) Notice of birth of a child born out of wedlock shall be given -

(a) under the surname of the mother; or

(b) <u>under the surname of the father where the father is the person giving notice of the child's birth and acknowledges his paternity in writing under oath; or</u>

(c) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged."

[20] The Court *a quo* did not consider the practicality of the remedy proposed by the appellant as an expedient means of removing the bar against unmarried fathers, and by extension, their children. I am minded that the reading-in proposed by the appellant addresses the issue raised in this appeal by (i) removing the impediment confronting unmarried fathers, and (ii) removing the impediment affecting a specific class of children, in this case, children born out of wedlock. Against the background of what has been said in the preceding paragraphs of this judgment, I am satisfied that section 10 of the *BDRA* falls to be declared inconsistent with the Constitution and is invalid to the extent that it does not allow an unmarried father to register the birth of his child in the absence of the child's mother.

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[23] i.e the *Regulations on the Registration of Births and Deaths*, 2014 published in *Government Notice R128 in Government Gazette 37373 dated 26 February 2014. Commencement date: 1 March 2014.*

[24] At paragraph [35]

THE APPROPRIATE REMEDY

[21] Where any law is declared invalid and inconsistent with the Constitution a Court may make an order that is just and equitable [25] and which provides appropriate relief.[26] The appellant's proposal for section 10(1)(b) eliminates wording chosen by the Legislature which has been shown to be constitutionally non-compliant. The choice of reading-in proposed by the appellant serves a legitimate purpose and is premised on *"curing unconstitutionality based on under-inclusiveness"* of the impugned statutory provision *"that unjustifiably infringes the rights of identifiable groups that are excluded from certain benefits".*[27]

[22] I am satisfied that the present is an appropriate circumstance for this Court to adopt the course proposed by the appellant. It is constitutionally permissible for a court to read words into a statute to remedy unconstitutionality.[28] The doctrine of the separation of powers renders me cognisant that a reading-in should not easily be resorted to as it may constitute a possible encroachment onto legislative territory. For this reason, the order below incorporates a suspensive component in recognition of the Legislature's ultimate responsibility for amending legislation or devising other means as a legislative solution[29] while simultaneously ensuring effective redress for an identifiable group of fathers and their children.

[23] In the circumstances the following order issues:

1. The appeal is upheld.

2. It is further ordered in terms of section 172 of the Constitution of South Africa Act No. 108 of 1996, as amended:

2.1 Section 10 Births and Death Registration Act No 51 of 1992, as amended ("the Act") is, with effect from the date of this order, declared invalid and inconsistent with the Constitution to the extent that it does not allow unmarried fathers to give notice of the births of their children under the father's surname in the absence of the mothers of such children.

2.2 To remedy this defect section 10 of the Act shall be deemed to read as though it provides as follows:

"(1) Notice of birth of a child born out of wedlock shall be given:

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[25] Section 172(1)(b) of the Constitution

[26] Section 38 of The Constitution

[27] ***C and Others v Department of Health and Social Development, Gauteng and Others*** *2012 (2) SA208 (CC) at 231B*

[28] ***National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others 2000 (2) SA 1 (CC)*** *at paragraphs [69]-[73]*

[29] ***Gaertner and Others v Minister of Finance and Others*** *2014 (1) SA 442 (CC) at paragraph [84]*

(a) under the surname of the mother; or

(b) under the surname of the father where the father is the person giving notice of the child's birth and acknowledges his paternity in writing under oath;

(c) at the joint request of the mother and of the person who in the presence of the person to whom the notice of birth was given acknowledges himself in writing to be the father of the child and enters the prescribed particulars regarding himself upon the notice of birth, under the surname of the person who has so acknowledged.

2.3 The declaration in paragraphs (2.1 and 2.2) is suspended for 24 (twenty four) months to enable the Legislature opportunity to amend section 10 of the Act or to devise means for ensuring that it is constitutionally compliant.

2.4 This order is referred to the Constitutional Court for confirmation of the order of constitutional invalidity.

From The Legal Journals

Cassim, F & Mabeka, N

"The Africanisation of South African Civil Procedure: The Way Forward".

Journal of Law, Society and Development, Volume 6 Number 1, Nov 2019, p. 1 - 20

Abstract
Civil procedure enforces the rules and provisions of civil law. The law of civil procedure involves the issuing, service and filing of documents to initiate court proceedings in the superior courts and the lower courts. Indeed, notice of legal proceedings is given to every person to ensure compliance with the audi alteram partem maxim ("hear the other side"). There are various rules and legislation that regulate these court proceedings: inter alia, the Superior Courts Act, 2013, Uniform Rules of Court, Constitution Seventeenth Amendment Act, 2012 and the Magistrates' Courts Act of 1944. The rules of court are binding on a court by virtue of their nature. The purpose of these rules is to facilitate inexpensive and efficient legislation.

However, civil procedure does not only depend on statutory provisions and the rules of court. Common law also plays a role. Superior Courts are said to exercise inherent jurisdiction in that their jurisdiction is derived from common law. It is noteworthy that while our rules of court and statutes are largely based on the English law, Roman-Dutch law also has an impact on our procedural law. The question therefore arises: How can our law of civil procedure be transformed to accommodate elements of Africanisation as we are part and parcel of the African continent/diaspora? In this regard, the article examines the origins of Western-based civil procedure, our formal court systems, the impact of the Constitution on traditional civil procedure, the use of dispute-resolution mechanisms in Western legal systems and African culture, an overview of the Traditional Courts Bill of 2012 and the advent of the Traditional Courts Bill of 2017. The article also examines how the contentious Traditional Courts Bills of 2012 and 2017 will transform or complement the law of civil procedure and apply in practice once it is passed into law.

Hurter, E

"The shift from formal civil dispute resolution towards mandatory mediation – a cause for concern?"

Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg, Volume 2020 Number 2, Apr 2020, p. 292 – 307

Schwikkard P J

"The oath : ritual and rationality"

South African Journal of Criminal Justice, Volume 32 Number 3, 2019, p. 357 – 376

Abstract

The administration of an oath, affirmation or admonishment is generally regarded as an indispensable marker of witness reliability in common law jurisdictions. As a result of colonisation, the same approach is entrenched in the South African legal system. This article examines the rule in its postcolonial context, its application, its rationale and its utility in furthering the truth-seeking function of the courts. It concludes with recommendations for law reform.

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

Contributions from the Law School

Rape and Common Purpose

1. Introduction

The legal issue which was raised in the case of *Tshabalala v The State; Ntuli v The State* [2019] ZACC 48 was whether liability can be imputed to applicants by dispensing with the causation requirement in cases of rape where the applicants did not penetrate the victims during the course of a joint criminal enterprise. Including rape under common purpose raises a number of important legal questions as well as constitutional challenges to the doctrine since it is the only remaining example of unprincipled criminal liability in our common law. Some of these constitutional challenges will briefly be highlighted. First, it violates central concepts underlying criminal law and principle of culpability. Second, it violates the principle of proportionality. Third, it infringes the principle of fair labelling. These have to be viewed in light of constitutional mandate that exists: everyone has the right to have their dignity respected, including the accused (s 10 1996 Constitution of South Africa). This is salient in light of the fact that the South African legal system is a system based on personal responsibility. That is, you can only be held responsible for your own conduct (U Kistner "Common Purpose': The Crowd and the Public, Law Critique (2015) 26 accessed on 10 July 2015 at http:link.springer.com/article/10.100072F510978-014-9146-4).

2. Facts

On 20 September 1998, a group of men went on a "well-orchestrated and meticously calculated rampage in the Umthambeka area of Tembisa: invading and robbing nine homes as well as raping eight female occupants. The plan put into action entailed gaining access to the homes by posing as police officers. Seven men were found guilty of housebreaking with intention to rob, four counts of assault with intent to do grievous bodily harm and multiple counts of the common law crime of rape. The rape charges were based on the application of the doctrine of common purpose: where two or more people agree to commit a crime together, liability for the actions which follow is shared by all parties regardless of who participated in the various elements of the offence (para [8]). Judge Mathopo set out the purpose of this doctrine as one which "criminalizes collective criminal conduct and in the process addresses societal need to combat crime committed in the course of joint enterprises".

Spurred on by the success of *Phetoe v S* [2018] ZASCA 20; 2018 (1) SACR 593 (SCA) the other two applicants, Ntuli and Tsahbalala subsequently appealed their convictions and sentences to Constitutional Court. Two amicus curie joined the case

(at para's [16]-[17]). The argument advanced on behalf of the respondent centered around the question of whether a person can be convicted of rape on the basis of common and purpose (par [27]). The majority judgment given by Mathop AJ (concurred by Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhalntla J, Theron J and Victor AJ) court confirmed the High court ruling, rejecting the appellant counsel's argument that the doctrine of common purpose is not applicable (para [64]). Concerning the merits of the applicability of the doctrine of common purpose, the court agreed with the contention raised by both applicants and amicus curie that the instrumentality approach was fundamentally flawed (para [53]). However, the reasons for inapplicability differed. The applicants contended that since instrumentality required the unlawful insertion of the male genitalia into the female genitalia, causal element cannot be imputed to another co-pertretrator (para [33]). In reaching its decision that instrumentality was not essential and that causation could be dispensed with, the court noted approval the respondent's submission, which was confirmed in *Jacobs v S* [2019 ZACC 4; SACR 623 (CC); 2019 (5) BCLR 562 (CC) at para [106] that "the operation of the doctrine does not require each participation to know or foresee in detail, the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence…" (para [39]. Therefore, while rape could be subsumed under the doctrine of common purpose, certain problems still exist. These will now be explored.

3. Problems with doctrine of common purpose

3.1 It violates central concepts underlying criminal law and subsequently principle of culpability

First, subsuming rape under the common purpose doctrine would violate a number of the appellant's rights. These include the right to dignity (s 10), the right to a fair trial which includes the right to be presumed innocent (s 35(3)(h) and the right to freedom and security of person (s 12(1)(b). If the doctrine of common purpose rests on the basis of mandate, it could be suggested that it flows as a result of both agreement on the part of the appellant (which has never been a sufficient condition for liability on its own) and foresight, although the latter is not explicitly mentioned by the courts (S Sisasalana "What's Wrong with Common Purpose" (1999) SACJ 287 288). Sisalana at p. 289 notes this is because:

'…it is more acceptable to hold people liable on the basis of agreement – something they voluntarily entered into – than on foresight, the test for which is well known for its *expost facto* rationalizations.'

Therefore, since dignity is viewed as an "inviolable right", and acknowledges that humans are "moral autonomous agents" who exercise free will in making decisions, it could be argued that joint criminal enterprises which impute liability to all members, rather than focusing on degree of culpability, blur moral distinctions in law, thereby

infringing the principle of intentionability, foreseeability and culpability (Y Davidson The Doctrine of Swart Gevaar to the Doctrine of Common purpose: A constitutional and Principled Challenge to Participation in a Crime LLM UCT (2017) 120). Imputation is an essential component of common purpose since it is not necessary that "each participant know or foresee in detail the exact way in which the unlawful results are brought about" (*Tshabalala* par [39]; nor does he need to have actively participated in the criminal conduct for it to be imputed to the applicants (*Tshabala* [33]); (*Thebus* and Another v S (CCT36/02) para [54]).

3.2 It violates the principle of proportionality

Proportionality is also a factor which courts have only given secondary importance. This can be ascribed to South Africa's high crime rate, as well as the interests of justice, which demand that crime be deterred and prevented (*Tshabala* para [87]. Since the types of crimes committed during collaborative criminal enterprises in furtherance of common purpose, such as are more serious in nature, they carry a penalty clause and require the imposition of minimum sentences (*Tshabalala* para [84]; *Thebus* para [34]; s 51 of the Criminal Law Amendment Act 51 of 1997; 30). The court in *Tshabala* noted this point indicating that "the courts were overly concerned with false convictions which have resulted in low convictions ins sexual matters" (para 84]. However, this statement fails to take into consideration the problematic nature of sentencing. Even in cases where "substantial and compelling circumstances" exist which could limit the individual culpability of the accused and result in a lesser sentence thereby tempering the effect of the doctrine, it is unlikely courts would court would chose such an option in the face of an already existing minimum sentence. (Davidson 32) It is also not clear how the accused's limited participation or legal responsibility informs "aggravating" or "mitigating" factors. This could lead to inconsistent sentencing (Davidson 33), since the courts tend to favour societies interests over that of the offence committed (*S v Trichart* 2014 (2) SACR 245 (GSJ); *S v Tlalae* 2015 (1) SACR 88 (GJ).

3.3 It infringes the principle of fair labelling

Fair labelling is important from a constitutional perspective for two reasons. First, it ensures fairness by requiring that "the stigma attached to the conviction for a particular offence should ultimately correlate with the accused's wrongdoing" (L Jordaan 'The Principle of Fair Labelling and the Definition of the Crime' (2017) *SALJ* 569 572). Burchell notes that "a logical consequence of making the conduct of the perpetrator that of all the other participants in the joint enterprise is that the actus reus of all must be the same" ('Joint Enterprises and Common Purpose: Perspectives in English and South African Criminal Law' (1997) *SACJ* 125 at 126). This is problematic in *Tshabalala* since by labelling the appellant a rapist, it infringes the presumption of innocence (s 35(3)(h) for a number of reasons. First, it alleviates the burden of proving element of causation and further can cause the accused to be convicted despite the existence of reasonable doubt which goes against the

principles of fairness and justice (Burchell *supra* 139). Second, there are alternative forms of liability which are "less intrusive" on the presumption of innocence such as attempt; accomplice liability or even sexual assault (Burchell *supra*). In *Thebus,* the court drew analogies with English law of joint enterprises (*Macklin, Murphy and others* (1839) 2 Lewin 225 ER 1136) in an attempt to impute liability to the accused, and missed an opportunity to charge the accused with accomplice liability, depending on the degree of participation. Had the court done so, it:
'… would give appropriate weight to the degree of a participant's participation in a common purpose in determining both verdict and sentence. It is arguable that the English concept of joint enterprise liability based on finding that participants in a common purpose are accomplices, not co-perpetrators is the correct approach and this approach ought to have been followed by the Constitutional Court in South Africa' (J Burchell *Principles of Criminal Law* 5 ed (2016) 487-488).

4. Conclusion

If blame is to be properly attributed to an accused, then a proper normative foundation for the doctrine of common purpose should exist. It has been argued that two such options exist in our law: that of the utilitarian justification of control or that of mandate as authorization to act. Liability in terms of mandate, it has been argued is problematic since it is important that the rape is specifically excluded from the agreement since if the rape does not form part of what was agreed upon, foresight cannot be reduced to tacit agreement as they are separate concepts Sisalana 289). It can also be suggested that blame should be properly attributable on the basis of an accused's actions or derivatively on the basis of actions which may be properly attributed to him. Therefore, in future cases, to ensure adherence to criminal law principles and upholding of constitutional principles, it is submitted that the accused be convicted of lesser crimes (Davidson 104). Various options exist. One such option already indicated, is that of accomplice liability:

'Where a number of people commit a crime together, each of them have to comply with the definition of the crime in order to qualify as a co-perpetrator. An accomplice, on the other hand, is not perpetrator because he lacks the actus reus (or does not comply with the definition of the proscription of the crime in question). An accomplice is defined as a person who consciously associates himself with the commission of the crime by the perpetrators or co-perpetrators by consciously giving assistance at the commission of the crime or consciously supplying the opportunity, the means or relevant information to the perpetrator which further the commission of the crime. The court further stated that the liability of the accomplice is of an accessory nature and that there can be no question of an accomplice without a perpetrator who has committed the crime' (MC Mare 'The doctrine of common purpose in South African law' 117; S v Williams 1980 (1) SA 60 (A))
In *Thebus*, the Masoneneke J makes reference to joint enterprise to support our common purpose rule but as Burchell has noted:

‘The English rule does not regard participants in a joint enterprise as co-perpetrators by imputing the liability of the actual perpetrator to the participants, but rather regards the participants in joint enterprise as accomplices at most. This latter liability was, in fact, identified by Both JA (who has played such an important role in the development of the common-purpose liability) in Khoza’ Burchell *Principles of Criminal Law* 584)

Further, accomplice liability gives appropriate weight to participation of the accused, especially in light of determination of verdict and sentence.

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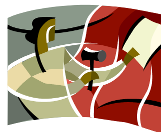

Matters of Interest to Magistrates

Remote justice: South Africa lags behind just when COVID-19 requires it

The contradictory directives that have been issued, and amended and replaced on a regular basis show that the courts and the justice ministry were completely blindsided by the national emergency. In the USA, there was a task team which published “Guidelines for Pandemic: Emergency Preparedness and Planning: A Roadmap for the Courts” way back in 2007. While the Chief Justice, the Honourable Mogoeng Mogoeng, has shown some support for e-justice, it has not gone far enough. Effectively, the courts have shut their doors and ground to a halt except for limited, exceptional, urgent cases. Professor Dr Omphemetse S. Sibanda said that the “courts must remain accessible – even [through] e-courts.” The Chief Justice himself said, initially, that it would be “myopic” to shut the courts down. When later he did, in fact, basically shut the courts down, he added that the heads of the individual courts had a discretion to authorise the hearing of matters through tele-conferencing or video-conferencing or other electronic means, which would obviate physical attendance at court. Sadly, none of the courts have done this. This is somewhat surprising since, in the recent past, there are a number of cases where video-conferencing has been used successfully in South Africa. Other notable jurisdictions

have continued hearing cases remotely. In the UK, the Chief Justice announced that they had put in place videoconferencing facilities to enable cases to proceed by video-conference or similar electronic means. They have also made provision for the public to be able to view those proceedings, in line with the general requirement that court proceedings be public. The Coronavirus Bill, soon to become law, expands on conducting judicial processes remotely in the UK. In the USA, more than a dozen Federal Courts have authorised the use of video and tele-conferencing technology to continue hearing cases. The Coronavirus Aid Relief and Security Act supports this. In Dubai, courts are proceeding remotely. Likewise in India, where evidence by video-conferencing is well established as a means to promote efficiency and access to justice. The Indian courts have developed principles governing remote hearings over a period of about fifteen years. In Australia, the Federal Court is putting in place the technology to enable all hearings to proceed remotely. They are promoting the use of "Microsoft Teams" as the platform for the proceedings, and have published a Dummies Guide to virtual hearings and the use of "Microsoft Teams". They have acknowledged that an obstacle to the 100% roll out of virtual hearings will be that not all people have access to online facilities. This would obviously be a significant problem in South Africa, especially as regards unrepresented litigants. Despite their somewhat dubious human rights record, it must be acknowledged that China is, by far, the international leader in the use of virtual courts. The use of online virtual facilities is encouraged in all courts, and there are regulations governing the conduct of virtual trials which deal with things like identity authentication. Parties and witnesses appearing remotely must show their national identity document and face recognition software is then used to confirm the identity of the court participant.

China has three specialist "internet courts" which deal with internet-related disputes, such as disputes arising out of online shopping transactions, personality rights in cyberspace, cyber-crime and so on. Their mantra is "online disputes tried online." The internet courts use big data, cloud computing, artificial intelligence and block-chain technology to streamline their court processes. The initiative, a global first, has been a big success, showing remarkable efficiency. Everything is overseen by human judges, but virtual judges process the routine, repetitive administrative tasks. For example, a virtual judge will simply record whether there is an objection to the admission of a certain piece of evidence or not. A real judge will decide the question of admissibility, if it is disputed. A big data system collects, collates and analyses information from millions of cases across China. It is updated every five minutes. By the end of 2019, 193 million cases had been collected, and 700 thematic analyses conducted. Block-chain technology generates immutable, time stamped data that can be verified by audit and has been formally recognised by the Supreme People's Court of China as reliably authenticating evidence. In one of the recent South African cases where the high court allowed witnesses to testify via video-link, the judge remarked that South Africa lags behind the rest of the world in not having a legislative framework for remote court proceedings. Professor Dr Omphemetse S. Sibanda criticised the courts for not going "full blast" on e-justice at this time of crisis, and remarked that only "tortoise-steps" were being taken towards this end. While the

COVID-19 global disaster is unprecedented and novel, and is causing incalculable suffering, it provides a valuable opportunity for the justice system to fully embrace and support the use of technology to continue delivering essential services to the people of South Africa. The right to have disputes fairly adjudicated by the courts is a fundamental constitutional right. It can only be limited when there is no other reasonable means of achieving the objective behind the limitation of the right. The health and safety of the court participants could have been achieved by conducting remote hearings. It is unfortunate that this is not being done, however challenging it may be.

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A Last Thought

With apologies to Simon & Garfunkel:
Sounds of Silence

Hello darkness, my old friend
I've come to talk with you again
Because a virus softly creeping
Left its seeds while I was sleeping
And the virus that was planted in my vein
Still remains
Within the sound of silence.

In restless dreams I walked alone
Empty streets, lawns overgrown

'Neath the halo of a street lamp
I turned my collar to the cold and clamped
When my eyes were stabbed by the flash of a neon light
That cried out bright
“Stay home, and be now silent”

And in the naked light I saw
Maybe ten people, not much more
People speaking without talking
People listening without hearing
People writing songs that crowds will never hear
And no one dares
Disturb the sound of silence

"Fools," said I, "You do not know
Silence, like a virus, grows
Hear my words that I might teach you
Don’t touch my arms, don’t even reach you"
But my words, like silent raindrops fell
And echoed in the wells, of silence.

And the people bowed and prayed
To the WHO god they made
And the sign flashed out its warning
In the words that it was forming
And the sign said, "The warnings of the experts are written on Twitter
threads, about how it spreads”
And whispered in the sounds of silence.

By Bouwer van Niekerk and Parveen Munga from “*COVID-19 and the right to freedom of movement“ Without Prejudice, Volume 20 Number 4, May 2020, p. 20 – 22.*