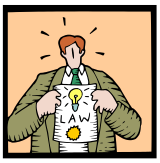
e-MANTSHI

A KZNJETCOM Newsletter

June 2020: Issue 165

Welcome to the hundredth and sixty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Home Affairs has issued amended directions in terms of the Disaster Management Act, Act no. 57 of 2002 on 10 June 2020 in Government Gazette no 43420. One of the amended directions which are of importance for magistrates is Direction 19 which reads as follows:

EXTENSION OF VALIDITY PERIOD OF ASYLUM SEEKER PERMIT AND REFUGEE STATUS
An asylum seeker permit lawfully issued in terms of section 22 of the Refugees Act, 1998 (Act No. 130 of 1998) and a refugee status granted in terms of section 24 of the Refugees Act, 1998, which expired from 15 March 2020, or is to expire or which status was to be withdrawn during the period of the national state of disaster, is deemed to have been extended up to and including 31 July 2020.

2. The Child Justice Amendment Act, 2019 Act 28 of 2019 was published on 4 June 2020 in Government Gazette no 43402. The purpose of the Act is to amend the Child Justice Act, 2008, so as to amend a definition; to further regulate the minimum age of criminal capacity; to further regulate the provisions relating to the decision to prosecute a child who is 12 years or older but under the age of 14 years; to further regulate the proof of criminal capacity; to further regulate the assessment report by the probation officer; to further regulate the factors to be considered by a prosecutor when diverting a matter before a preliminary inquiry; to further regulate the factors to be considered by an inquiry magistrate when diverting a matter at a preliminary inquiry; to further regulate the orders that may be made at the preliminary inquiry; to amend wording in order to facilitate the interpretation of a phrase; and to further regulate the factors to be considered by a judicial officer when diverting a matter in a child justice court; and to provide for matters connected therewith. The Gazette can be accessed here:
http://pmg-assets.s3-website-eu-west-1.amazonaws.com/43402_4-6-2020_ChildJusticeAmendmentAct28of2019.pdf

3. Under section 115 of the Protection of Personal Information Act, 2013 (Act No. 4 of 2013), the president has determined (a) 1 July 2020 as the date on which— (i) sections 2 to 38; (ii) sections 55 to 109; (iii) section 111; and (iv) section 114(1), (2) and (3); and (b) 30 June 2021 as the date on which sections 110 and 114(4), of the said Act shall commence. The notice to this effect was published in Government Gazette no 43461 dated 22 June 2020. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2020/20200622-gg43461-rg11136-pr21-POPIAsections.pdf

4. 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, have published a rate of interest of 8,75 percent per annum as from 1 May 2020 for the purposes of section 1(1) of the said Act. The notice to this effect was published in Government Gazette no 43475 dated 26 June 2020.

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Recent Court Cases

1. S v Tshefu (33/2019) [2020] ZAECBHC 4; 2020 (1) SACR 525 (ECB) (20 February 2020)

An application for compensation cannot be brought except with the complicity and express authorization of the "injured person" contemplated in section 300 (1) of the Criminal Procedure Act 51 of 1977.

Hartle J

[1] The accused was convicted in the Zwelitsha Magistrate's Court on two counts of assault common pursuant to which he was sentenced to pay a fine, alternatively serve a period of direct imprisonment. The sentence was wholly suspended for a period of five years on condition that he is not convicted of assault committed during the period of suspension.

[2] Additionally, and evidently at the prompting of the prosecutor during his address on sentence, the court also made a compensation order pursuant to the provisions of section 300 of the Criminal Procedure Act, No. 51 of 1977 ("CPA") ostensibly aimed at reimbursing one of the complainants for a door that was damaged in the scuffle giving rise to the assault charges.

[3] The order reads as follows:

> "(The accused person is to) pay a fine of R2000-00 (two thousand) or six (6) months direct imprisonment in default of payment, wholly suspended for a period of five (5) years on condition that the accused person is not convicted of assault committed during the period of suspension. In terms of Sec. 300 of the Criminal Procedure Act, No. 51 of 1977, the accused person is ordered to compensate complainant Zikho Nojaholo (in) a sum of R800 for damaged door within 30 days from today payable at the clerk of the court at Zwelitsha Magistrate's Court."

[4] All arising from the same incident, the accused had been charged with two counts of assault (counts 2 and 3), and one count of malicious injury to property (count 1). The chief allegation in the latter respect is that he had, with the necessary intent to injure one Bulumko Nojaholo in her property, damaged a kitchen door belonging to her.

[5] Assisted by his legal representative the accused pleaded guilty to the assault charges, but not guilty to the first count of malicious injury to property. In a written statement tendered by his legal representative in terms of the provisions of section 112 (1)(b) of the CPA, he admitted assaulting both women, the complainant in count 2, Ms. Lelethu Nojaholo, with an open hand, and Ms. Zikho Nojaholo, the complainant in count 3, by pushing her. The circumstances under which the offences were said to have been committed are outlined in the statement as follows:

> "The offence happened under the following circumstances. On the day in question, I was at the tavern and both complainants were there. I had an argument with the complainant, Lelethu, and out of anger, I slapped her with an open hand. The argument started when I asked her about her ex-boyfriend who was at the tavern. Her cousin intervened, Zikho Nojaholo, and I pushed her and she fell on the door and it broke, and the door broke."

[6] The state accepted the plea and led no evidence on the charge of malicious injury to property, pursuant to which the accused was correctly acquitted in this respect. The magistrate was however satisfied that a conviction on counts 2 and 3 (assault common) was justified and duly convicted the accused in this respect.

[7] There are no considerations that militate against this finding and it is apposite that these convictions be confirmed.

[8] I also find no basis to interfere with the sentence itself. In pleading the State's case for aggravation of sentence during the sentence proceedings, the prosecutor correctly highlighted the gravity of domestic violence and the abuse of women generally, ironically in a period leading up to women's month when traditionally in our country the cause of women to be free from violence is elevated and championed. In my view the sentence imposed by the magistrate on the two counts of assault (taken together for such purposes) is appropriate and reasonable in all the circumstances.

[9] However, it is the adjunct to the sentence constituting the purported compensation order that is clearly not in accordance with justice.[1]

[10] Despite the accused not having been convicted of the first count of malicious injury to property, the prosecutor was insistent on making an issue of the broken door. The following excerpt from his address is of relevance to appreciate the apparent basis upon which he believed a compensation order should additionally be made, evidently on the assumption that there was a connection between one of the assault convictions and the damage to the door at the tavern:[2]

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[1] A compensation order is a "resultant order" as contemplated in section 309 (1)(a) of the CPA, and is therefore both appealable and subject to review in terms of section 304 (2)(c)(ii) of the CPA.

[2] Section 300 (1) of the CPA requires that the damage must be caused as a direct result of the commission of the offence of which the accused was convicted. (See also S v Crane 1994 (2) SACR 197 (c) at 210 b – h.) The offence of malicious injury to property of which the accused was acquitted would therefore be irrelevant for such purposes. The prosecutor correctly sought to daw a connection between one of the assault convictions and the damaged door, but it appears to have been assumed by the magistrate that Zikho Nojaholo was the "injured person" for purposes of section 300 of the CPA. Without expressing a conclusive opinion on whether another person's consequential loss, which may have had its origin in one of the offences of which the accused was convicted, or whether Zikho's loss occasioned by having to compensate another person and causing a loss of patrimony to herself in the process, falls to be covered by the kind of damage or loss of property (including money) contemplated

"The accused person, Your Worship, furthermore, as a result of his actions on the day in question; it is correct that I have not led any evidence in respect of the count of malicious injury to property. And I will address the Court and say that in that instance I would have had difficulty proving the intent of the accused person to damage the property, that is the door. *However*, *Your Worship, as a result of the actions of the accused person on the day in question that the door ended up being damaged. Had the accused person not pushed Zikho on the day in question, that door would not have been damaged.* The mere name of the charge malicious injury to property, the word malicious indicates a vindictive, intent full and a purposeful, willful action to maliciously damage something. Something I cannot stand before this Court, and lie and say that it was the intention of the accused person. The sole intention of the accused person on the day in question was to assault those two girls."
(Emphasis added.)

[11] As for the court's powers in this respect; the basis upon which he believed the compensatory order should be made; and the amount of compensation he thought should be ordered, he made the following submissions:

"I then considered and read the provisions of Section 300, Your Worship, which is a compensatory order that can be granted by the Court. Now a Magistrate's Court, which is a lower Court, has the right to grant a compensatory order. We have already heard that the applicant or the accused person before Court would be in the position to pay a fine of R500.00. Now the damage to the door, for example, because there are no medical bills, there are no medical costs, for example is in the region of about R800,00, R800,00 to R1 000.00. Now if the Court … (intervenes)
COURT: How much?
PROSECUTOR: R800.00 to R1 000.00, Your Worship. Should the Court consider this to be a proper sentence, whatever money that the Court, if the Court was going to consider a sentence of a fine with the option of imprisonment, whatever money that the Court would have considered to be suitable for a fine, can in this instance be directed as a compensatory order for the two complainants. And should the Court go the route of a compensatory order, the accused person can then be given time by which the said payment should be made failing which, imprisonment is an option."

[12] Evidently, he appeared to believe that the court's discretion could be invoked in a vacuum, without regard to the necessary jurisdictional requirements postulated by section 300 (1) of the CPA, alternatively imagined that the grounds

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by section 300, it bears noting that this jurisdictional basis for the invocation of the section was not contemplated with much acuity at all in the proceedings under review.

put forward by him brought the matter within the purview of the section. It is however a trite principle that the court's jurisdiction to invoke the section and to exercise the discretion conferred on it thereby arises only if there is a conviction of an offence that causes damage to or loss of property (including money) belonging to some other person ("the injured person"), and that injured person has made application to be compensated for such damage or has instructed the prosecutor to make such application on his behalf.[3] (The latter happenstance should obviously occur first as without a formal application initiating the enquiry under section 300 the question of liability to compensate does not arise.) The court's discretion to award compensation to the injured person, limited to a sum of R300 000.00 in the magistrate's court,[4] only comes to the fore once these jurisdictional bases exist.

[13] Most significantly, the prosecutor made the above submissions ostensibly without the input or support of any of the complainants. There was no introspection into the supposed basis for the accused's liability to the women he had assaulted to reimburse either of them for damage to a broken door at a tavern (as opposed to the person to whom the damaged door was alleged in the charge sheet to have belonged) arising from his convictions.[5] In reality, the prosecutor failed to even identity an "injured person" in the whole scenario let alone establish a close causal connection between the damage and the offences of which the accused was convicted other than to assert that the "end result of (the accused's) actions was in a broken door" and the nature of the assaults was "such that even a door is going to get broken in the process". He appears further to have been under the mistaken impression that it was the accused's offer to pay a fine which fixed his liability to make restitution on this basis. The extent of the supposed quantum for the damage was reduced to some guesswork and give or take what the accused said he could afford to pay if a fine were imposed. Additionally, by his suggestion that the accused should be given time to pay or failing which imprisonment might then be an option, he appears either to have conflated the concepts of punishment and compensation, or to have misconceived of the true nature of a compensation order which, by virtue of it having the effect of a civil judgment of the magistrate's court,[6] would certainly not attract imprisonment[7] neither an extended time limit for payment.[8]

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[3] S v King 2014 JDR 2727 (ECG) at paras 6 – 8.

[4] See section 300 (1)(a) of the CPA read with GNR 62 of 30 January 2013 (GG 36111) regarding the cap on the Magistrate's Court jurisdiction in respect of the amount of compensation that it can order to be paid.

[5] One should carefully consider who the "injured person" is as contemplated in section 300. See Hiemstra's Criminal Procedure at 29-3.

[6] See section 300 (3) of the CPA.

[7] Being in the nature of a civil order, it can only be enforced by levying execution, and not by way of criminal procedure measures, such as imprisonment. If the payment of compensation (on terms) is ordered in the context of a suspended sentence, however, and the accused fails to meet a condition of the suspension, he may be incarcerated for failing to pay the compensation timeously or at all in terms of the sentence imposed, but this is not civil imprisonment for debt which the Constitutional Court, in

[14] The magistrate should have queried the supposed basis for a compensation order. Instead, and ostensibly without any prior warning that an enquiry under section 300 was now underway or with any real regard to the *audi alteram partem* principle, which applies just as strongly in a section 300 enquiry as it does in a civil lawsuit,[9] she casually asked the accused's legal representative to address her with regard to the state's "application" (sic) that the court make an order that the accused pay towards the damages of R500.00 or "whatever amount (it would) deem fit for those damages".[10] No enquiry was made to establish if the accused accepted or denied liability or if his legal representative recognised that a proper application was before the court. No proof of the damage or the extent thereof was put up. Despite repeating that "the complainant" had previously rejected the accused's offer of payment for the door during mediation proceedings, and drawing to the attention of the court that the value of replacing the door was unknown to the accused (thus clearly questioning the professed quantum of the damage), he however repeated the accused's willingness to pay R800.00 provided the latter be allowed time to collect it and pay it over later. Without further ado the compensation order was thereupon granted.

[15] On 27 December 2019[11] a reviewing judge, relying on the authority of S v King,[12] raised a query whether it was not the prerogative of the complainant rather than the prosecutor to apply for compensation after conviction and pointed out

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Coetzee v Government of the Republic of South Africa; Matiso and Others v Commanding Officer, PE Prison, & Others 1995 (4) SA 631 (CC), held to be unconstitutional. See also S v Medell 1977 (1) SACR 682 c at 686 f – 687 j.

[8] Time limits are not embedded in civil judgments for debt. Instead they are immediately payable and executable (S v Medell *supra*, at 687 a – b), although in practice extensions for the payment of civil orders of the magistrate's court can and are often given. Such extensions would however have to be with the consent of the injured person (S v Nyathi 1978 (4) SA 26 (T) at 27A). Time periods can indeed be imposed in situations where the payment of compensation is a condition of the suspension of a sentence. This is perfectly permissible, but within the context of such a suspended sentence, which is an entirely different kind of situation. (See S v Tlame 1982 (4) SA 319 (B) at 320 H – 321 A and S v Bepela 1978 (2) SA 22 (B) at 24 G).

[9] S v Maelane 1978 (3) SA 528 (T); S v Msiza 1979 (4) SA 473 (T) at 475 F – G.

[10] The accused's legal representative ought certainly to have been apprised if there was a proper application for compensation before the court which it was constrained to consider. In that event he should then have been informed of the exact case the accused had to meet and have been afforded an opportunity to address the court thereon and to lead evidence on the accused's behalf. The amount of compensation can also only be established through proper evidence and is not something that is left to the surmise or whim of the court. In S v Sekhalo 1999 (1) SACR 67 (W) at 70 d – e, the court correctly observed that when ordering compensation (albeit in that instance as a condition of a suspended sentence), it is necessary that the court establish with "some certainty" the actual amount lost by the aggrieved person. In S v Mape 1972 (1) SA 754 (EC) the court noted at 755 A that the amount to be awarded must be proved on the evidence in the same way as it would have been done in a civil trial claiming such compensation and that the court is concerned with actual, not speculative, losses. The magistrate can in any event only deem "fit" a *proven amount* assuming a basis exists in the first place for her to determine the compensation as provided for in section 300 (2) of the CPA.

[11] There is no explanation for the lengthy lapse in-between the date of conviction (1 July 2019) and the review record reaching the Registrar only in December 2019. By this time the accused would no doubt have paid the compensatory award, rendering the value of a review illusory in the circumstances.

[12] King *supra*, delivered on 11 December 2014 by Brooks AJ as he then was.

that in this instance the prosecutor had not at any stage suggested that he was acting on the complainant's instructions. In response the magistrate conceded that it was inappropriate to have granted the compensation order under those circumstances and that it should be set aside, whilst yet justifying her decision on the basis of the willingness of the accused to pay for the damaged door.

[16] This is however a flawed approach as the accused's readiness to pay is not what establishes the jurisdictional basis for the court's discretion to be invoked in terms of the provisions of section 300 of the CPA.[13]

[17] As indicated above, one of the prerequisites (*sina qua non*) before an award of compensation can be made is that there must be an *application* after the conviction *which emanates from the injured person.* Where the prosecutor brings the application, *it must be clear that he is acting on the instructions of the injured person*.[14]

[18] This is evident from the express provisions of section 300 (1) of the CPA:

> "Where a person is convicted by a superior court, a regional court or a magistrate's court of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, *upon the application of the injured person* or *of the prosecutor acting on the instructions of the injured person* forthwith award the injured person compensation for such damage or loss …" *(Emphasis added.)*

[19] In this instance there was no semblance of any application for compensation by either of the complainants or the woman to whom the broken door ostensibly belonged. To the contrary, the assault victims had seemingly rejected the notion that some form of restorative justice as a viable alternative sentencing option was a suitable pursuit of justice for the unwarranted attack upon them, insisting instead on the full might of a criminal prosecution and the penal consequences that would flow therefrom. In such circumstances the prosecutor could not have claimed to have any instructions from any of them and therefore did not have the authority to ask the court to make a compensation order. The court itself has no powers *mero*

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[13] His affordability to immediately pay the award is however an important indicator of whether the court should exercise its discretion to grant such an order should it be asked for. If he cannot, it would render the order futile as the injured person would be unable to forthwith levy execution in respect of the civil judgment. (S v Bepela *supra*; S v Baloyi 1981 (2) SA 227 (T) and Hiemstra *supra* at 28-2.)

[14] S v King *Supra* at para [7]; R v Mkize 1961 (2) SA 769 (D); S v Nkholise 1967 (3) SA 163 (E); S v Du Plessis 1969 (1) SA 72 (N); S v Fanie 1970 (2) SA 609 (E); S v Polman 1973 (3) SA 21 (C); S v Dunywa 1973 (3) SA 869 (E);S v Claassens en 'n ander 1973 (4) SA 300 (O); S v Makhae en 'n ander 1974 (1) SA 578 (O); S v Vanmali & another 1975 (1) SA 17 (N); S v Bepela *supra*; S v Msiza *supra* at 475 B - E.

motu to make such an order.[15] The magistrate simply did not consider the question whether any jurisdictional basis existed for the court to make the order, and must have realized in any event that the process could not have met with the support of any of the complainants given the information placed before her that financial restitution was not an option for them. As a result the compensation order was issued arbitrarily and falls to be set aside.

[20] An application for compensation cannot be brought except with the complicity and express authorization of the "injured person" contemplated in section 300 (1) of the CPA. This is because, under subsection (5), a compensation order affects his/her civil law claim which is exclusively his/hers to pursue in the forum of choice. In terms of subsections 5 (a) and (b), unless such person renounces a compensation award made by the court (even where he/she has asked to be compensated through the medium of the criminal proceedings), the result is that a separate civil suit for that party to recover damages for the injury in respect of which the award was made is precluded. It follows therefore that the injured person's interests are paramount in a section 300 process lest his/her right to claim damages arising from the injury flowing from the offence of which the accused has been convicted are unwittingly forfeited in terms of subsection 5(b), not immediately, but within sixty days after the date on which the award is granted.[16]

[21] The requirement of a formal "application for compensation" by an "injured person" is also absolutely necessary so that the accused, who stands in the place of a defendant for such purposes, knows that he has a case to meet and what exactly that case is.[17] In this unique scenario, where a determination of liability and compensation intrudes in a criminal court,[18] it is imperative that the accused

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[15] S v Medell, *supra*, at 685 j; S v King *supra*, at pars 6 – 8; Hiemstra *supra* 29-3; Du Toit *et al* Commentary on the Criminal Proceedings Act 29-2; and Terblanche's Guide to Sentencing at footnote 3, page 462.

[16] The person in whose favour the award has been made has sixty days in terms of subsection 5 (a) to renounce the award or to repay it if he/she has already received payment thereof, failing which he/she is taken, in terms of subsection 5 (b), to have accepted the civil judgment as constituting the final word on his/her claim for financial restitution.

[17] An "application" presupposes a formal request to the court for compensation to be paid in terms of section 300 of the CPA.

[18] The section 300 process has been referred to as a "convenient means of recovering a debt without having to institute a civil action". Stow v Regional Magistrate, Port Elizabeth 2017 (2) SACR 9ECG) 96 at 115 b. Terblanche, A Guide to Sentencing in South Africa, at page 462, observes that during such a procedure, the court should rid itself of its role as criminal court and adopt the role of a civil court. The process is somewhat anomalous to most prosecutors and judicial officers in the district courts who tend to specialize in criminal procedure. (Terblanche *supra* (at 462) suggests that it is a salutary approach for such officers to avoid this procedure especially since a criminal court is not an ideal forum to resolve potential complications brought about by private law and civil procedure and to rather make use of the option provided by section 297 of the CPA, namely to impose compensation as part of the punishment, as a supplementary condition to the sentence.) This is more so the case where complicated civil law questions are in issue, where pleadings cannot be dispensed with because the issues require definition or where comprehensive evidence has to be led. (S v Lombaard 1997 (1) SACR 80 (T) at 83 g – j. Hiemstra *supra* at 29-3 also observes that a criminal court is not the

is advised by the court, after conviction, that it is considering such an order and of the basis therefor.

[22] In S v Rensburg[19] the court explains why this is necessary, and what is required to be conveyed to the convicted accused when a compensation order is under contemplation:

> "In the application for compensation for damages in terms of section 357 (1) of the Criminal Procedure Act, 56 of 1955,[20] a magistrate is, according to the wording of the section, dealing with a civil claim in a criminal case. He must decide it without the usual pleadings. For this reason, it is necessary that a magistrate should indicate that he is considering such an order. They parties must be given the opportunity of addressing him and, should they so desire, of giving evidence relating to the application. The usual assessment of the amount of compensation applies in these cases just as in civil cases."[21]

[23] The guidance offered in S v Van Rensburg,[22] underscored by the earlier judgment in R v Gamiet,[23] is that after conviction,[24] assuming there is a formal application for compensation[25] and that - at least on the face of it, a proper *nexus* exists between the offence of which the accused has been convicted and the damage giving rise to the compensation claimed, the court should firstly direct the accused's mind to the question of compensation. Such notice that an award is under consideration must in fairness to the accused be given early enough to enable him to meaningfully defend the injured person's claim.[26]

[24] The court is obliged to refer the accused to any evidence on the record that may be relevant to the issues of liability and compensation to be determined by it pursuant to the provisions of section 300 (2) of the CPA.[27]

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appropriate forum for the resolution of complicated damage issues. The suggestion is that compensation, whether in terms of section 300 or by means of suspended conditions, should be limited to cases where the determination of damages is "simple, uncontested and relatively clear".

[19] 1974 (2) SA (T) 243 at 244 G.

[20] This section under the 1955 CPA is similar to section 300 under the present CPA.

[21] This excerpt is extracted from the English headnote of the judgment. See also S v Majola [2005] JOL 13633 (E).

[22] *Supra* at 244 H – 245 A.

[23] 1929 K.P.A 540 at 541. See also S v Baadjies 1977 (3) SA 61 (E) at 63.

[24] The compensation enquiry only begins after conviction.

[25] This assumes that the injured person has consciously elected to pursue his/her civil claim for compensation through the medium of the criminal proceedings.

[26] Du Toit *supra* at 29-3

[27] If there are already facts in the evidence which are relevant to compensation, there is no need to repeat them, but the accused ought to be made aware of the evidence that tends to support the applicant's application for compensation as how else will he/she be able to meaningfully defend the claim without such an indication, absent formal pleadings in which the applicant's claim in this respect would customarily be particularized?

[25] The injured person should be allowed an opportunity to prove his/her damages by further evidence either upon affidavit or given by him/her orally.[28] The accused should be allowed to interrogate the claim and in the event of oral testimony being adduced to cross examine the applicant or his/her witnesses.[29]

[26] The accused must thereupon be given an opportunity to meet or counter the applicant's evidence especially if he/she maintains that the damage is less than that contended for by the latter.

[27] The accused should also be given an opportunity to address the court before judgment not only on the issues of liability and compensation, but also as to his ability or affordability to meet payment of the order that will be taken to be a civil judgment.[30]

[28] All relevant facts must be obtained before an award can be made.[31]

[29] It would appear from the manner in which the court summarily determined the question of the accused's liability to pay compensation to a complainant (who was not even identified as the "injured person"), and its guestimate of the amount of compensation under the circumstances, that its dealing with the purported civil claim fell woefully short of the established procedures required in a section 300 enquiry. The award is rendered assailable for this reason as well.

[30] In the result I make the following order:

> The convictions on counts 2 and 3 as well as the sentence imposed (in respect of both charges taken together for purposes of sentencing) are confirmed, provided that the adjunct to the order purporting to constitute a compensatory award is set aside.

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[28] Section 300 (2) of the CPA.

[29] Applying the *audi alteram partem* principle, these are rights properly afforded to parties in a civil lawsuit.

[30] This is because a section 300 order proper, being in the nature of a civil judgment, is immediately payable and should not be granted if the accused is not possessed of the means to pay it or does not have sufficient executable assets to cover the damages and costs of execution. (S v Bepela *supra*; S v Baloyi *supra*. Hiemstra *supra* notes at 29-2 that an order which cannot be executed is not only futile but also prejudices the injured person because civil proceedings are forfeited in terms of section 300 (5)(b) of the CPA.

[31] See the guidelines noted by Du Toit *supra* at 29-3 in this respect.

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

From The Legal Journals

Cameron, E

"The crisis of criminal justice in South Africa."

South African Law Journal, Volume 137 Number 1, 2020, p. 32 – 71

Abstract
This article investigates the crisis of criminal justice in South Africa. The article demonstrates through statistical analysis how South Africa's prisons are not places of rehabilitation but overcrowded penal institutions. The reasons for this are investigated, these lying primarily in South Africa's broken history, in the inefficiencies of coherent decision-making in our political leadership, our dismaying lack of institutional competence and the chimera that minimum sentencing legislation can somehow solve the problem, diverting us from finding more efficient solutions. A variety of potential solutions are then proposed with a view to ameliorating the crisis, inter alia from abolishing minimum sentences, to a revision of bail laws and practices, to the identification and adoption of numerous other restorative justice approaches and approaches previously recommended (but not implemented) by the South African Law Reform Commission.

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 semi-automatic 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

Road rage

Road rage has been increasingly associated with violent conduct on South African roads in recent times, and has featured in both the media and jurisprudence in this regard (see, e.g. S v Eadie 2002 (1) SACR 663 (SCA); S v Thusi 2003 JDR 0027 (T); S v Sheppard 2003 JDR 0649 (W); S v Ntshasa 2011 (2) SACR 269 (FB); S v Grigor 2012 JDR 0912 (SCA); S v Ngobeni [2014] ZASCA 59). The concerns about this development are aptly summarised by Kuny AJ in S v Sheppard at 11:

'Unfortunately it seems that crimes of this nature [violent assault following a road traffic collision] have become more prevalent, and there has crept into our courts and into the newspapers the term "road rage". There have been an increasing number of instances reported in the media of so-called "road rage" in which persons involved in motor accidents who believe that it is their right to inflict immediate and in some cases, severe punishment on the person or persons who have been involved in the accident simply because they have been angered by the driver of the other vehicle. People have died as a result of this type of unlawful conduct and the court is entitled to take cognisance of this and must send a clear message to the public that this so-called road rage cannot and will not be tolerated and will be visited with severe punishment.'

Some years ago, in the context of the discussion of the notorious case of S v Eadie (at that stage in relation to the judgment in the court a quo, reported at S v Eadie (1) 2001 (1) SACR 172 (C)) I sought to define the phenomenon of road rage as follows:

'Whilst the exact ambit of the term is rendered somewhat vague by misuse, it is clear that road rage is a product of the confluence of a number of factors—aggression, increasing frustration, the feeling of power associated with driving—which converge to create a cauldron of stressful conditions.'

This definition has found acceptance in the cases of S v Eadie (SCA) at para [68] and S v Ntshasa at para [13]. N Faith Crash: The Limits of Car Safety (1997) 125 cites the American Automobile Association statement that '[w]e may very well discover that personal frustration, anger and testosterone are the most dangerous drugs on the highway'. There are clear and inherent dangers of driving a vehicle on the road (as Beck CJ stated in S v Mncunza 1990 (2) SACR 96 (Tk) at 98a-b, 'the driver of a motor vehicle is in charge of an instrument that is as lethal as a firearm if it is not handled with proper care'), but the prospect of being visited by a violent response from another driver, as a result of violating the perceived sanctity of his private sphere, may add exponentially to the stress associated with driving. This sense of violation may be closely associated with the powerful and pervasive aspect of human territoriality, which has been defined as a set of behaviours which one exhibits, based on perceived ownership of physical space, which serve important motives and needs, and include occupying an area, personalizing it, and in some cases defending it (P

Bell et al Environmental Psychology (1978) 169, see generally SV Hoctor ‘Human territoriality and criminality’ (2002) 23(1) Obiter 132). It seems that the subjective experience of occupation or ownership of a car not only creates a feeling of distinctiveness and control over the car, it is also instrumental in fostering a sense of attachment and pride which forms part of the composition of the self-identity (H Viljoen et al Environmental Psychology: An Introduction (1987) 133, who remark in this regard that '...it is commonly assumed that cars are an extension to the egos of some men').

The psychological aspects of driving are noteworthy. Indeed, as psychologist Dr Steve Stradling of the Driver Behaviour Research Group at Manchester University has said in an interview (cited by Faith op cit 126-127):

‘It may just be that there’s something about the car, that these aren’t just people who are driving as they live. Certainly, there are some people who get exercised when they’re off the road and attempt to exact retribution but it looks as if there are also some people who are mild-mannered and polite and forgiving when they’re out of their car and maybe there’s something about being in the car that brings down barriers, perhaps because there’s a poor communication system. If you do something bad there aren’t easy ways to say you’re sorry and if two of the wrong sorts of people get involved in this kind of traffic conflict, then it can escalate.’

When it is acknowledged that road travel is frequently rendered inherently stressful by factors such as road design, traffic conditions, noise, heat and air pollution (Viljoen et al op cit 239), it is perhaps unsurprising, given this combination of factors, that road rage is so prevalent.

Road rage has typically manifested in unlawful violent conduct in the wake of a collision, following the negligent driving of the victim of the assault, at the hands of the enraged protagonist. However the fault of the victim has ranged from apparently deliberately engaging in provocative conduct (as in Eadie) to doing no more than driving slowly because of mechanical problems (as in Thusi). As may be expected, road rage has never founded a defence to criminal liability as such, and so the consideration of road rage by the court invariably occurs in the sentencing phase of the trial. Here the courts have consistently not allowed the phenomenon of road rage to ameliorate the sentence handed down for the violent crime. As was stated in the sentencing on a murder conviction in S v Sehlako (1999 (1) SACR 67 (W) at 72b-c):

‘Each and every person who drives a vehicle can expect to be involved in a collision at some or other time. It is wholly unacceptable that such a person, even if he is the cause of such collision, can be executed on the scene by the other driver. In my view even where an accused's personal circumstances are extremely favourable ... they must yield to society's legitimate demand that its members be entitled to drive the roads without risk of being murdered by other irate drivers’.

No doubt the members of the community have an interest in the road rage phenomenon, having at one time or another experienced 'the anger, the belligerency or the potential violence from irate road users' (S v Thusi at para [14]). However, this is not to say that the courts will not take into account the factors associated with road rage. In the Ntshasa case, the court considered an appeal against a sentence of life imprisonment for murder following an incident of road rage where the appellant cold-bloodedly shot dead the victim in her vehicle after a collision. The appellant had not been provoked or threatened, and the collision was due to his own inattentiveness and negligence (at para [2]). On the face of it, the facts of the case were therefore entirely adverse to the appellant. Nevertheless, the appeal court held that the trial court had failed to take into account that the appellant had acted impulsively, flowing from extreme anger (at para [11]). The court considered other stressors in the appellant's life at the time of the violence, such as the fact that he had just been fired from his employment, and, significantly in the light of the psychological basis underlying road rage sketched above, the fact that his 'prized possession, the bakkie' was damaged (at para [13]). The court noted the appellant's particular affection for his vehicle on the basis of 'the things he had fitted in it' and perhaps that he was relying on the vehicle for generating income, and that it was not insured. The appeal court therefore concluded that the trial court had overlooked 'the fact that this was a typical road-rage incident', and thus had imposed a 'shockingly inappropriate' sentence (at para [14]), and altered the sentence to 23 years' imprisonment. Nevertheless, the court, noting the brutal nature of the crime involving the execution of an innocent, defenceless victim, cited (ibid) the overarching policy concerns that must inevitably govern such cases of road rage, from the SCA case of Eadie at 693h:

'The message that must reach society is that consciously giving in to one's anger or to other emotions and endangering the lives of motorists or other members of society will not be tolerated and will be met with the full force of the law'.

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Matters of Interest to Magistrates

Remote commissioning of affidavits: Who can commission them and how is it done?

South Africa's (SA's) legal system depends significantly on evidence being supplied by affidavits. Deponents are, however, not always based in SA and may be unable to attend to commissioning through the overseas processes available to them, take for example, the client who is on a cruise, working remotely, or in a rural country without consular assistance or in quarantine, self-isolation, or subjected to government-imposed lockdown. New laws can certainly simplify this conundrum. The question nevertheless remains whether they do so sufficiently to allow a commissioner based in SA to commission a document remotely, through a video call?

Domestically, Commissioners of Oaths (commissioners) draw their authority from the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 (the Act), either by appointment or *ex officio*.

In GN903 *GG*19033/10-7-1988 the minister published a list of *ex officio* commissioners within SA. Naturally, legal professionals are included. The regulation specifically list the various Acts in terms of which legal practitioners are admitted as being sufficient grounds to be considered as *ex officio* commissioners. It must be noted that GN903 does not include legal practitioners admitted in terms of the Legal Practice Act 28 of 2014. Indeed, it remains to be seen whether the powers of a commissioner vests in such legal practitioners – a question not considered for purposes of this article.

The Act does acknowledge that from time to time, certain office holders outside of SA may be authorised as a commissioner while overseas (GN R1872 *GG*7215/12-9-1980). The minister declared that various office holders, in countries outside of SA, shall in that country, have the powers of a commissioner. These offices are prolix and sometimes slightly bizarre. The list includes the head of a South African diplomatic or consular mission, an officer of the South African Defence Force, the leader of the South African National Antarctic Expedition or the weather station on Gough Island, and the Senior Administrative Officer of the Technical Services Division of the South African Embassy in Paris. Thankfully, the list ends with 'any person who exercises in a state to which independence has been granted by law a legal profession equivalent to that of an attorney, notary or conveyancer in the Republic'. Clearly, a foreign legal professional based overseas may commission a document in that jurisdiction for use in SA, but in practice many non-English speaking legal practitioners are wary of doing this, sometimes being prohibited from doing so without translation (a costly exercise). This alternative is, therefore, only partially workable in practice.

What is clear is that while there are many *ex officio* commissioners in SA, there are few readily available overseas-based office holders who can exercise this function. Rule 63 provides some relief by allowing a document to be authenticated by certain office holders. Authentication, however, is distinct from commissioning – when

applied to a document, authentication is the verification of any signature thereon. The rule goes on to list diplomatic and government office holders who are recognised as being suitable for authenticating documents (such as senior diplomats of the United Kingdom (UK) posted abroad, however, practice reveals that such diplomats often refuse to authenticate or commission documents for anyone other than citizens of the UK). The catch-all provision of the rule is, therefore, useful, subs 4 states: 'Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document.'

How exactly an oath is to be administered is covered in GN R1258 *GG*3619/21-7-1972, which states the commissioning procedure. This procedure, which should be trite to all commissioners but is often not adhered to (an example is the loose practice often followed by South African Police Service), is to ask the deponent –

- if they know and understand the content of the declaration (to which the answer must be 'yes');
- whether the deponent has any objection to taking the prescribed oath or affirmation (this answer to be in the negative); and
- whether the deponent considers the oath or affirmation to be binding on their conscience (again, to be answered 'yes').

At this point the commissioner asks the deponent to recite the words pertaining to either the oath/affirmation, and then the regulation requires that 'the deponent shall sign the declaration in the *presence* of the Commissioner of Oaths' (our italics). It is in this particular section, with the emphasis on 'presence', that is important in the following discussion. Following this process, the commissioner applies the certificate, signature, name and business address, as well as the designation and the area for which the commissioner holds the office, if appointed *ex officio.* As is practice, the deponent's identity should be evidenced to the commissioner by providing an acceptable identity document.

In *Gulyas v Minister of Law and Order* [1986] 4 All SA 357 (C), Baker J equated 'in the presence of' to be analogous to 'within eyeshot'. We submit that the reason for a commissioner and the deponent to be within eyeshot of one another is for the commissioner to ascertain the identity of the deponent by examining the identity document provided and comparing it to the deponent, and to ensure that the correct papers are properly deposed to.

The Electronic Communications and Transactions Act 25 of 2002 (ECTA) makes provision for data messages (which includes, *inter alia*, any data generated, sent, received or stored) to be used in legal proceedings and in many sections upholds the evidentiary value of data messages. In s 11, '[i]nformation is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message' and in

s 12 '[a] requirement in law that a document or information must be in writing is met if the document or information is –

(*a*) in the form of a data message; and

(*b*) accessible in a manner usable for subsequent reference'.

The admissibility and evidential weight of a data message is encapsulated in s 15, which holds that in legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message. A court must have regard to the reliability of the manner in which the data was generated, stored or communicated, and the manner of the integrity of the maintenance of the data message, and the manner in which the originator was identified. Courts are also required to take any other relevant factor into account.

The certifying of electronic documents as originals is further clarified in s 14. This provision states that the originality requirement is met if the integrity of the original, from the time of generation to its final form as a data message, if the data has remained complete and unaltered, except for –

- any changes, which arise in the normal course of communication, storage, and display;
- the purpose for which the information was generated; and
- with regard to all relevant circumstances.

This is addressed further in s 18(2), which allows a certified copy to be made of an electronic document, which is subsequently printed out.

What emerges is that courts have a broad discretion to examine data messages, which are used for evidence, and that the mere electronic nature of that evidence should not be grounds to diminish the probative value of the evidence.

The notarisation, acknowledgement and certification of documents by means of an advanced electronic signature is explicitly addressed in s 18 of ECTA. While progressive, the concept of an advanced electronic signature falls outside the scope of this article.

Is there a reasonably practical, simple solution available, given the raft of legislation and regulations in play, or must a foreign-based client go to significant costs and efforts to attain what should be a simple and freely available service domestically? It is clear that the only difference between commissioning an affidavit in person, and commissioning an affidavit remotely, is that in the latter scenario, the commissioner and the deponent are not strictly 'in the [physical] presence' of one another, as required by the regulations in GN R1258 (*op cit*). However, the term 'in the presence of' has been interpreted not to be the same as 'physically present with one another', but rather as being presented in such a manner so as to allow the parties to see one another. For example, s 158 of the Criminal Procedure Act 51 of 1977 (CPA) requires that witness evidence be given 'in the presence of the accused'. Further, the CPA states that evidence can also be adduced by way of closed-circuit TV, arguably expanding on the 'in the presence of' provision. In the commissioning setting, an interpretation of the commissioning legislation and regulations would have to give effect to the dominant purpose of the 'in the presence of' provision, namely that the commissioner has eyeshot of the deponent (which is achievable by a video link). Naturally, there are risks associated with this – what if the identity document is forged, and that such forgery (which might be readily ascertainable in person) is undetectable over video? This is surely a risk to the legal practitioner. That being so,

commissioners are rarely, if ever, trained to spot forged documents and could very easily be duped by a reasonable imitation, even if examining the identity document and viewing the deponent in person.

There is a useful catch-all provision in ECTA at s 15(4) which states that '[a] data message made by a person in the ordinary course of business … certified to be correct by an officer in the service of such person, is on its mere production in any … [legal proceedings], admissible in evidence against any person and rebuttable proof of the facts contained'. If the identity of the deponent is doubted by the court or an opponent, it is clearly open to rebut the presumption in this section.

In *Uramin (Incorporated in British Columbia) t/a Areva Resources Southern Africa v Perie* 2017 (1) SA 236 (GJ), Satchwell J allowed the use of video link to lead evidence in a civil matter from witnesses who were abroad. It is, therefore, suggested that substantial compliance with the Uniform Rules of Court can be achieved, as well as complying with the relevant legislation and regulations, for a legal practitioner to undertake the following steps to commission a client's affidavit by remote means. These steps were taken in the 2016 case of *Elchin Mammadov and Vugar Dadashov v Jan Stefanus Stander and Three Others* (GP) (unreported case no 100608/15), and condonation was granted by Mavundla J.

- Transmit the affidavit to the deponent by e-mail, which the deponent then prints.
- The deponent evidences their identity by means of a suitable document shown to the commissioner over video technology.
- Once the deponent's identity is confirmed, the commissioner applies the questions from GN R1258 (*op cit*) and if the answers are all appropriate, applies the oath or affirmation.
- The deponent then signs and initials where needed, scans the document (or photographs and sends by, for example, WhatsApp) – whereupon it becomes a data message, and sends it back to the commissioner who then prints it, checks to confirm that the document sent by the deponent matches the document sent to the deponent, and if so, counter-initials and signs where required.

It would be prudent for the commissioner to confirm to the court by means of an affidavit that data integrity was maintained, setting out these steps and any others taken, and to provide reasons for the court to grant condonation, should such be required.

If the legislated options are available to a deponent to commission a document, then these should be used. Alternatively, recognised foreign-office officers can, in theory, be called on, but in reality these officers tend to be confined by one of many possible constraints. Given the global environment, which many legal practitioners find their clients, a pragmatic, technology-driven, and expedient solution, such as has been described, should be employed.

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A Last Thought

[30] Clearly what determines whether or not the record needs to be reconstructed is not the presence of indecipherables but whether they render the trial unfair in that it is impossible to determine with any degree of accuracy what that witness said or did not say. After all, the fairness of the trial cannot be determined without reference to whether what the witness said is clearly captured in the record so that the accused is put in a position of putting his own countervailing evidence. The critical issue is that the fairness of the trial is to be the determining factor. Therefore, each case must obviously be determined on its own facts. Those facts include the effect of the indecipherables to the overall comprehension of the evidence and consequently the ability or otherwise of the accused to challenge it.

As per Jolwana J in S v Rulwa and Another (CC22/2018) [2020] ZAECMHC 23 (19 June 2020)