e-MANTSHI

A KZNJETCOM Newsletter

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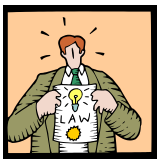
Welcome to the hundredth and sixty sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. A *Victim Support Services Bill* 2019 has been published for public comment. The notice to this effect was published in Government Gazette no 43528 dated 17 July 2020. The purpose of the Bill is to provide a statutory framework for the promotion and upholding of the rights of victims of violent crime; to prevent secondary victimisation of people by providing protection,response, care and support and re-integration programmes; to provide a framework for integrated and multi-disciplinary co-ordination of victim empowerment and support; to provide for designation and registration of victim empowerment and support services centres and service providers; to provide for the development and implementation of victim empowerment services norms and minimum standards; to provide for the specific roles and responsibilities of relevant departments and other stakeholders; and to provide for matters connected therewith. The Bill can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202007/43528gon791.pdf

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Recent Court Cases

1. *Van der Walt v S* [2020] ZACC 19 (21 July 2020)

A trial court must be asked clearly and timeously to consider and rule on the admissability of evidence. This cannot be done for the first time at the end of the trial.

Madlanga J (Mogoeng CJ, Froneman J, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the High Court of South Africa, Mpumalanga Division (functioning as the Gauteng Division, Pretoria), sitting at Mbombela on circuit. That Court dismissed an appeal against a judgment and order on conviction and sentence handed down by the eMalahleni (Witbank) Regional Court.

Background

[2] In 2016 the applicant, Dr Danie Van der Walt, an obstetrician and gynaecologist practising in the Witbank area, was convicted by the Regional Court of culpable homicide. The basis was that he acted negligently in the care of his patient, the late Ms Pamela Noni Daweti, after she had given birth, and that this negligence caused her death. He was sentenced to five years' imprisonment. He unsuccessfully appealed to the High Court against conviction and sentence. The Supreme Court of Appeal refused special leave to appeal.

In this Court

[3] Before us the applicant seeks leave to appeal against conviction and sentence. Regarding conviction, he contends that the Regional Court handled the trial in a manner that infringed his fair trial rights, in particular, his right as an accused to adduce and challenge evidence, protected under section 35(3)(i) of the Constitution. On sentence, he submits that the sentence is "shockingly inappropriate" and thus constitutes an infringement of section 12(1)(a) of the Constitution.

[4] The fair trial challenge is based on three grounds. First, the Regional Magistrate decided the admissibility of various pieces of evidence for the first time in

the judgment on conviction. This meant that, when the applicant elected not to testify, he did so without knowing the full ambit of the case against him.

[5] The applicant explains that the State's evidence comprised the evidence of three witnesses and a number of exhibits. He assumed that each exhibit (with the exception of those whose admissibility he contested) was admitted in evidence as it was handed up. To the applicant's surprise, the Regional Magistrate pronounced on the admissibility of all the exhibits only at the stage of handing down judgment on conviction. The Regional Magistrate admitted some exhibits but not others. The crux of the applicant's complaint is that the non-admission of some of the exhibits meant that the evidence elicited through cross-examination on them was also rejected. And he came to know this only at the stage of conviction. He submits that this is at odds with this Court's judgment in Molimi where it was held that "[t]he right of the accused at all important stages to know the ambit of the case [she or he] has to meet goes to the heart of a fair trial".

[6] Second, the applicant complains that, in addition to relying on the evidence of Dr Titus, an obstetrician and gynaecologist who was called as an expert witness by the State, the Regional Magistrate conducted her own research and – in reaching her decision – relied on medical textbooks not referred to in testimony. The applicant contends that, because these textbooks were not presented as evidence, he was denied an opportunity to challenge them and adduce controverting evidence. This constituted a contravention of his fair trial right protected by section 35(3)(i) of the Constitution.

[7] Third, he submits that he was convicted of culpable homicide "without there being any evidence as to an essential element of that offence: causation".

[8] On sentence, the applicant submits that a doctor convicted of culpable homicide arising from professional negligence cannot be treated like, for example, a driver whose negligent driving resulted in someone's death. He contends that in society doctors play the special role of providing access to health care services, a right enshrined in section 27(1)(a) of the Constitution. Thus "[a] just approach to sentencing in these circumstances requires that a sentence of imprisonment be imposed only in the most serious cases of negligence", which degree must be determined in accordance with the views of the medical profession.

[9] On the first point, the State responds that once the applicant had contested the admissibility of certain exhibits, "the Magistrate interrogated the admission of all other exhibits applying legal requirements for admission". The Regional Magistrate's findings, continues the response, "appear to have been correct". The State maintains that the applicant was also aware that adverse consequences follow a failure to testify, in that "the prima facie case of the State would be left to speak for itself". In addition, the State submits that this issue was raised on appeal before the High

Court. It also makes the point that the High Court did take into account the evidence that the applicant is claiming was effectively rejected as a result of the rejection of certain exhibits. Having done so, that Court correctly came to the conclusion that – even with that evidence – the State had nevertheless proved its case beyond a reasonable doubt. Thus the evidence elicited through cross-examination on the rejected exhibits would have made no difference to the outcome. The State further contends that Molimi is not comparable to this matter as its facts are distinguishable.

[10] On the second point, the State submits that the Regional Magistrate's references to the literature that was not proven in testimony "merely fit in with the factual evidence of the [expert] witness", Dr Titus, and that it is this evidence which was the basis of the finding of guilt. Further, even if the medical literature had not been considered, this would not have made a difference to the applicant's case. Given that the applicant elected not to testify or tender any evidence, the expert testimony of Dr Titus was not disputed and thus constituted prima facie evidence of the applicant's negligent conduct.

[11] Regarding the third and final point on conviction, the State submits that the evidence of Dr Titus was sufficient in establishing causation, and that the correct test was applied.

[12] In relation to sentence, the State submits that the trial court exercised its discretion properly and, therefore, there is no basis for upsetting the sentence.

[13] On 2 January 2020, this Court issued directions calling upon the parties to file written submissions on whether:
(a) the Regional Magistrate's pronouncement at the stage of the judgment on conviction, on the admissibility of the exhibits, infringed the applicant's right to a fair trial in terms of section 35(3) of the Constitution; and
(b) on the assumption that the Regional Magistrate did rely on medical literature that was not introduced to the Court in testimony, that reliance infringed the applicant's right to a fair trial, in particular the right to adduce and challenge evidence protected by section 35(3)(i) of the Constitution.

[14] We have elected to decide this matter without an oral hearing.

Jurisdiction and leave to appeal
[15] The pronouncement on admissibility at the stage of the judgment on conviction and reliance on medical literature not proved in testimony implicate the right to a fair trial, in particular, the right to adduce and challenge evidence. The right to a fair trial "embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force". In this sense, it is broader and more context-based than pre-constitutional notions of trial fairness, which were based on non-compliance with formalities.

However, this is not to say that all procedural irregularities are sufficiently serious as to constitute an infringement of the constitutional right to a fair trial. The Constitution requires all courts hearing criminal trials or criminal appeals to give content to "notions of basic fairness and justice". In doing so, they must determine what types of irregularities are sufficiently serious to undermine an accused's fair trial rights. The question is: is the irregularity sufficiently serious as to undermine basic notions of trial fairness and justice? Based on this jurisprudence, the irregularities alleged by the applicant in this matter appear to be of a nature that – in a constitutionally impermissible manner – vitiated the fairness of the trial. That engages our jurisdiction.

[16] Also, there is some degree of merit in the arguments advanced by the applicant. As to public importance, a determination of these issues is likely to serve as guidance to other courts, to the benefit of many accused persons who appear before them. It is thus in the interests of justice to grant leave to appeal on the attack that the applicant was denied a fair trial.

[17] With regard to causation, it seems to me that that the applicant merely takes issue with the sufficiency of the evidence of Dr Titus in establishing that aspect of the State's case. Also, this complaint does no more than to contest the application of settled principles on causation. That does not engage our jurisdiction, and will not be considered further.

[18] In the application for leave to appeal against sentence, reliance is placed only on constitutional jurisdiction. This application does not engage our jurisdiction. This Court in Bogaards held that "absent any other constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was an irregularity; there must also be a failure of justice." The notion that doctors must receive special penal treatment lest section 12(1) of the Constitution be infringed is without basis. I see no reason for an exception to be made where doctors are found, by competent courts, to be guilty of causing the death of people they were entrusted to care for.

[19] The applicant calls in aid section 27(1)(a) of the Constitution, the right of access to health care. This he does to advance the contention that doctors play an important societal role in providing this access. Therefore, continues the argument, this should be a weighty factor in sentencing them for the negligent killing of their patients. He goes so far as to use the jarring analogy of drivers who kill people as a result of the negligent driving of cars. He says the drivers are deserving of harsher sentences than doctors who kill whilst providing medical care. Well, the law demands of experts, including doctors, a higher standard of care where the conduct complained of relates to their area of expertise. In the words of Olivier JA in Mukheiber:

"In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary lay person, and the Court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs."

[20] The gut-wrenching truth is that those that die at the hands of doctors who act negligently are terminally denied that all important right, the right to life. For me then, it is a no-brainer which way the scale must tilt. There is simply no reason why the Bogaards principle should not apply.

[21] So, leave to appeal against sentence falls to be refused.

Fair trial

[22] The importance of respect for the right to a fair trial was highlighted by Nkabinde J who had this to say in Molimi:

"[T]he right to a fair trial . . . 'has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime.' . . . More importantly, proceedings in which little or no respect is accorded to the fair trial rights of the accused have the potential to undermine the fundamental adversarial nature of judicial proceedings and may threaten their legitimacy."

[23] An accused is not at liberty to demand the most favourable possible treatment under the guise of the fair trial right. A court's assessment of fairness requires a substance over form approach. The State correctly submits that the question is accordingly whether the Regional Magistrate committed irregularities or deviated from the rules of procedure aimed at a fair trial, and if so, whether they were of the kind to render the trial unfair. Zuma is of assistance on the nature of irregularities that render a trial unfair in a constitutionally impermissible manner. Kentridge AJ held:

"The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the sub-section. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman; S v Mthwana 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a court of criminal appeal in South Africa was to enquire—
'whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.
A court of appeal, it was said (at 377),
'does not enquire whether the trial was fair in accordance with "notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the

basis of all civilised systems of criminal administration".'
That was an authoritative statement of the law before 27th April 1994. Since that date section 25(3) has required criminal trials to be conducted in accordance with just those 'notions of basic fairness and justice'. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions."

[24] I next deal with the applicant's complaints in the light of all the jurisprudence discussed above.

Admissibility
[25] Both parties accept that the Regional Magistrate pronounced on the admissibility of exhibits after the applicant had closed his case. This was when she handed down judgment on the question of guilt. Undeniably, a timeous ruling on the admissibility of evidence is crucial. It sheds light on what evidence a court may take into consideration and may even give an indication as to how much weight may be accorded to it. This enables an accused to make an informed decision on whether to close her or his case without adducing evidence or, where she or he does testify or adduce evidence, to adduce further evidence to controvert specific aspects of evidentiary material. Without a timeous ruling on all evidence that bears relevance to the verdict, an accused may be caught unawares at a stage when she or he can no longer do anything. Ndhlovu is quite instructive. It concerned the admissibility of hearsay evidence through the court's exercise of discretion under section 3(1)(c) of the Law of Evidence Amendment Act. Of importance was the stage at which: the prosecution must apply for the court's exercise of discretion on whether to admit hearsay evidence; and, the court must rule on the admissibility of that evidence. That, of course, is apposite to our context. Cameron JA tells us this:

"[A]n accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution must before closing its case clearly signal its intention to invoke the provisions of the Act, and the trial judge must before the State closes its case rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."

[26] This Court in Molimi approved of the Ndhlovu approach, holding that "[a] timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings is . . . a procedural safeguard" and that—

"when a ruling on admissibility is made at the end of the case, the accused will be left in a state of uncertainty as to the case he is expected to meet and may be placed in a precarious situation of having to choose whether to adduce or challenge evidence.
. . .
In order for it to be said that the applicant had a fair trial, he must first have known

what the case against him was."

[27] There is no question that the applicant was ambushed by the late pronouncement on the admissibility of the exhibits. Is this of no consequence as was suggested by the prosecution? It will be recalled that the prosecution makes the point that the High Court, in fact, did take into account evidence elicited through cross-examination on some of the exhibits. The applicant's complaint is that this evidence was effectively rejected as a result of the rejection of the affected exhibits. The prosecution opines that, having taken that evidence into account, the High Court correctly came to the conclusion that – even with that evidence – the State had still proved its case beyond reasonable doubt. Thus, argues the prosecution, the evidence elicited through cross-examination on the rejected exhibits would have made no difference to the outcome.

[28] Of course, this misses the point. It fails to address a crucial issue, and that is this. The admission and rejection of evidence at the right time may influence the decision whether to close one's case without tendering any evidence. Nor can one ever guess with any degree of accuracy what impact evidence – if tendered – might have had on the outcome. The "no difference" argument is thus misconceived. It calls to mind the famous words of Megarry J in John v Rees:

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change."

[29] In similar vein in Qwelane this Court held:

"[T]he 'no difference' approach is generally anathema. Courts resist accepting that the right to a hearing disappears when it is unlikely to affect the outcome. This was elucidated in Zenzile:
'It is trite . . . that the fact that an errant employee may have little or nothing to urge in his own defence is a factor alien to the inquiry whether he is entitled to a prior hearing. Wade Administrative Law 6th ed puts the matter thus at 533-4:
'Procedural objections are often raised by unmeritorious parties. Judges may then be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudged unfairly.'"

[30] Although said in the context of a fair hearing in administrative law, the application of this principle is equally – if not more – called for in a criminal trial. I am thus persuaded by the applicant's argument that his fair trial right was violated by the pronouncement on the admissibility of exhibits at the stage of deciding his guilt. Put

differently, the late admission of exhibits constitutes an irregularity of a nature that vitiated the trial in a constitutionally impermissible manner.

Medical literature

[31] It is a principle of the law of evidence that an expert witness may rely on information in a textbook only if the following requirements stated in Menday are met: "[F]irstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field."

[32] The State explains that the medical literature was provided by the expert assessor to confirm the evidence of Dr Titus, in the same way that a court may refer to case law or academic sources in a judgment. The literature thus did not introduce new or different evidence; it merely confirmed the evidence of the expert witness. The applicant counters this by submitting that the judgment makes plain that the Regional Magistrate did rely on the literature. He draws attention to the fact that it appears from the judgment that, in assessing which opinions in the testimony of Dr Titus ought to be accepted, the Regional Magistrate was guided by whether those opinions accorded with the medical literature. As a result, notes the applicant, the Regional Magistrate rejected some of those opinions because they were not supported by the medical literature. The applicant argues that, therefore, the medical literature played some role in persuading the Regional Magistrate that guilt had been established beyond reasonable doubt. Thus, concludes the applicant, the Menday requirements must be met. I agree.

[33] To the extent that, on this issue as well, the State took the view that the use of the textbooks made no difference to the decision on guilt, I can do no better than yet again to refer to Qwelane and John v Rees. Whether the applicant would have been able to challenge the textbook evidence successfully is not the question. The relevant question is whether the applicant had the opportunity to challenge the textbook evidence. The applicant was plainly denied that opportunity. Likewise, not knowing that such evidence would be relied upon, he was denied the opportunity – if so minded – to adduce controverting evidence. The right to challenge evidence requires that the accused must know what evidence is properly before the court. In the applicant's case, the medical literature relied upon was never adduced at all. This goes to the heart of a fair trial.

[34] The reliance on unproved medical literature thus infringed the applicant's section 35(3)(i) right. Like the late admission of exhibits, this constitutes an irregularity of a nature that vitiated the trial in a constitutionally impermissible manner.

Remedy

[35] In the circumstances, the applicant's conviction must therefore be set aside.

The concomitant effect of this is that the sentence must also fall away. It could be argued that, if the sentence automatically falls away, as it does, it was not necessary to determine the application for leave to appeal against sentence. Ordinarily that is so. But the relief that I propose makes it prudent to avert the same argument being raised if the applicant were again convicted and a sentence that he considers excessive were imposed.

[36] On the powers of a court of appeal, section 322(1)(c) of the Criminal Procedure Act provides that "[i]n the case of an appeal against a conviction or of any question of law reserved, the court of appeal may . . . make such other order as justice may require".

[37] The applicant's conviction is not set aside on the merits. That is, it is not set aside on the basis that the applicant's guilt was not proved beyond a reasonable doubt. It is set aside on the basis that the Regional Magistrate committed irregularities whose nature was such that the applicant's fair trial right was infringed. A conviction under those circumstances cannot stand. Because the conviction is not set aside on the merits, justice requires that the matter be referred to the Director of Public Prosecutions, Mpumalanga, to decide whether the applicant should be re-arraigned. In the event that the applicant is re-arraigned, the ensuing trial must be before a different Regional Magistrate.

From The Legal Journals

Bekink, M

"The appointment of a competent person as intermediary in terms of section 170A of the Criminal Procedure Act 51 of 1977."

Manie, L

"The limiting effect of *Daffy v Daffy* 2013 1 SACR 42 (SCA)."

***Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg*, Volume 2020 Number 3, Jul 2020, p. 596 - 604**

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

Contributions from the Law School

A refresher, and discussion of recent cases on intermediaries in criminal proceedings involving children

The case of *SL Ramontja v S* case number CAF04/2005 North West Division, Mahikeng High Court 13 February 2020 was an appeal against the conviction on two counts of the rape of two nine year old girls. The basis of the appeal was that the trial court did not properly appoint an intermediary for them in terms of s 170A of the Criminal Procedure Act 51 of 1977.

In the court a quo, the prosecutor asked the magistrate whether he could lead the state's witnesses through an intermediary without obtaining a desirability report. The magistrate asked the defence if he had any objection to this, and he replied that he did not. The intermediary was then asked to take her seat and to start by giving the name of the child witness. She did not introduce herself. When the second child testified, the court just asked the two children to swop places in the playroom and then asked the intermediary for the second child's name.

The irregularities included the following. First, the court did not establish whether the children would be subjected to undue stress and suffering were they to testify in open court (See Bekink "Defining the phrase 'undue mental stress and suffering' in terms of s 170A, CPA" 2014 *CARSA* 39). The 'undue stress and suffering' requirement is a precondition for appointing an intermediary in terms of s 170A (1) of the Criminal Procedure Act 51 of 1977. Second, the court did not establish that the intermediary

was a competent person to be appointed as such (Section 170A (1) of the Criminal Procedure Act 51 of 1977 read with *S v Booi* 2005 (1) SACR 599 (BD)). Neither the intermediary's name, nor her experience or qualifications were established or recorded by the court. Lastly, the intermediary also has to be sworn in (*S v Booi* (supra)) and there was no evidence that the intermediary was sworn in in any manner.

The appeal court held that the trial court had a duty to satisfy itself as to the competence of the intermediary (at para [9]) and that the intermediary should have been required to undertake to convey the general purport of the questions to the child witnesses. It held that since this was not done, the evidence of the two complainants was not properly before the court and could not be taken into account (at para [10]). There was thus no evidence on which to sustain the conviction, which was duly set aside (at para [12]).

The appeal court did not mention the trial court's failure to establish whether the children would be subjected to undue stress and suffering by testifying in open court. This may have been because of the case of *S v Peyani* 2014 (2) SACR 127 (GP) where the court held that it could take into account that the accused's representative has no objection to the appointment of the intermediary and therefore infer that he is of the view that the child witnesses would be subject to undue stress and suffering by testifying in open court. In any event, this aspect did not play a role in the appeal court's decision that there was misdirection by the trial court which vitiated the complainants' evidence (See also *S v Stefaans* 1999 (1) SACR 182 (C). But compare *S v Booi* (supra) and *Kerkhoff v Minister of Justice and Constitutional Development* 2011 (2) SACR 109 (GP)).

In the cases of *Director of Public Prosecutions, North Gauteng, Pretoria v Makhubula* (GP case no A 91/2014 6 August 2014) and *Director of Public Prosecutions v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) the courts emphasized the importance of an enquiry into whether the complainant would be subjected to undue stress and suffering if an intermediary was not appointed. These decisions have been criticized and for a long time many scholars have argued that the appointment of an intermediary should be automatic, unless there is a special reason not to appoint one (Muller and Tait 'Little witnesses: A Suggestion for Improving the Lot of Children in Court' 1999 *THRHR* 241; Schwikkard 'The Abused Child: A Few Rules of Evidence Considered' 1996 *Acta Juridica* 148; Muller 'An Inquisitorial Approach to the Evidence of Children' 2001 *Crime Research in South Africa* 1 ; Bekink 'The Protection of Child Victims and Witnesses in a Post Constitutional Criminal Justice System with Specific Reference to the Role of the Intermediary: A Comparative Approach' Doctoral Thesis UNISA November 2016 , Matthias and Zaal 'Intermediaries" 2011 *International Journal of Children's Rights* 251; Freedman 'Recent Cases: Constitutional Law' 2010 *SACJ* 299.)

As regards the failure to swear the intermediary in, there is authority to the effect that this does not necessarily amount to an irregularity causing a failure of justice (*S v Motaung* 2007 (2) SACR 476 (SE), *S v QN* 2012 (1) SACR 380 (KZP). See also *S v Booi* (supra), *K v Regional Magistrate* 1996 (1) SACR 434 (E), Whitear-Nel

'Intermediaries appointed in terms of s 170A of the CPA: new developments?' 2006 *SACJ* 334 and Bekink 'Section 170A (1), CPA: do intermediaries need to be sworn in or not?' 2013 *THRHR* 285).

While the record should show that the intermediary was competent to be appointed (*S v T* 2000 (2) SCR 658 (Ck); *S v Bongani* 2001 (1) SACR 670 (C); S v Booi (supra) and Whitear-Nel (supra)), section 170A (5) is relevant where the intermediary was appointed in good faith but was not competent to be so appointed. It provides as follows:

'(5) (a) No oath, affirmation or admonition which has been administered through an intermediary in terms of section 165 shall be invalid and no evidence which has been presented through an intermediary shall be inadmissible solely on account of the fact that such intermediary was not competent to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), at the time when such oath, affirmation or admonition was administered or such evidence was presented.

(b) If in any proceedings it appears to a court that an oath, affirmation or admonition was administered or that evidence has been presented through an intermediary who was appointed in good faith but, at the time of such appointment was not qualified to be appointed as an intermediary in terms of a regulation referred to in subsection (4) (a), the court must make a finding as to the validity of that oath, affirmation or admonition or the admissibility of that evidence, as the case may be, with due regard to-

(i) the reason why the intermediary concerned was not qualified to be appointed as an intermediary, and the likelihood that the reason concerned will affect the reliability of the evidence so presented adversely;

(ii) the mental stress or suffering which the witness, in respect of whom that intermediary was appointed, will be exposed to if that evidence is to be presented anew, whether by the witness in person or through another intermediary; and

(iii) the likelihood that real and substantial justice will be impaired if that evidence is admitted.'

Section 170A (5) of the Criminal Procedure Act 51 of 1977 is clearly a provision to safeguard against the failure of justice owing to technical non-compliance with the rules. For an example of a case which was saved by s 170A (5) see *S v SN* 2012 (2) SACR 317 (GNP). But see also *S v Booi* (supra) where the court held that s 170A (5) only finds application where the intermediary has been appointed, but the appointment is invalid. In the instant case it is arguable that the intermediary was never appointed in the first place because the court's intention was never articulated on record. On the other hand, it could be said that the intention was formed by virtue of the fact that the intermediary was directed to provide the complainants' names, and that the failure to formally record the appointment on the record was a technical error which ought not vitiate the evidence of the complainants. New evidence as to the intermediaries competence could be provided and if it transpired that they were not appointable, then s 170A (5) could be applied.

This was the sort of approach, favouring substance over form, followed in the case of *ZF v S* case number AR 764/2014 KwaZulu-Natal High Court 22 October 2015,

where although the appointment of the intermediary was improper (the witness was not a child as provided for in s170A, Criminal Procedure Act 51 of 1977), the court found that this irregularity did not vitiate her evidence because the testimony given was still that of the complainant and the accused had a fair trial and was able to adduce and challenge evidence. I would have preferred to see this approach followed in the case under discussion. I do not think it was in the interests of justice to vitiate the evidence of the two nine year old complainants because of what really amounted to technical errors regarding the appointment of the intermediary, and where there was authority for treating the errors as non-fatal to the proceedings.

Ms N J Whitear-Nel
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

The language Courts use in intimate violence cases matters

[1] The honorable Justice Khampepe *in Tshabalala v The State; Ntuli v The State [2019] ZACC 48* dispelled the notion that rape is committed by sexually deviant monsters with no self-control. Court processes and specifically sentencing are communicative processes. The use of words like 'fondling' or 'caressing' in the trial and sentencing context implicitly characterizes the offender's conduct as erotic or affectionate, instead of as an inherently violent assault. Such language is misleading and risks normalizing the very conduct the Court is meant to condemn. The use of such language undermines the legislator's objective of communicating that the use of children specifically as sexual objects for the gratification of adults is wrongful. Instead of acknowledging the harm done to victims, such language re-victimizes victims by disguising and obscuring the violence, pain, and trauma that they experienced.

[2] In Jones v S (A206/09) [2010] ZAWCHC 384 (30 April 2010) paragraph 68 the Court said "*The fact of the matter remains that, upon the clear evidence of the appellant, she expressly conveyed to the appellant, on every occasion (subsequent to the events at the Grand Parade) when he fondled her, that he should not do so'.* The Oxford Dictionary defines fondling as somebody/something to touch and move your hand gently over somebody/something, especially in a sexual way, or to show

love. The word fondle is not synonymous with a charge of sexual assault in such a context. A similar example is *M v S (A130/2017) [2017] ZAFSHC 159 (14 September 2017)* where the Court said in paragraph two '*there were multiple incidents of rape and breast fondling'.* In H v S (A496/08) [2009] ZAGPPHC 170 (14 August 2009) the Court said in paragraph12 'He *continued to caress her private parts'*. The complainant was eleven (11) years old. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 defines such conduct as a sexual assault not fondling or caressing. In Venter v The State (A611/11) [2018] ZAGPPHC 615 (9 March 2018) paragraph37" *In her evidence in chief she testified that sometimes he fondled the vagina and sometimes would put his finger into her vagina".*

[3] Recently in the Pietermaritzburg High Court in a judgment delivered on the 19th June 2020 *in S.v. Nhlakanipho Mfeka and Hiram Ncube* case number158/2020 a remark was made in paragraph twelve 'There *was no physical harm on the victim and also no signs of trauma or psychological effect. It* is incumbent upon Courts to set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders. Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. Courts need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important. It is vital judicial officers shift their focus on sexual propriety to sexual integrity to enable them to place greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honor, chastity, or bodily integrity. This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, may often be more pervasive and permanent in its effect than any physical harm.

[4] It is important that Courts do not mischaracterize the true nature of violence in intimate relationships in sentencing submissions and decisions. The mischaracterization of the true nature of these crimes risks normalizing the very conduct the Court is meant to condemn. It is important judicial officers understand the mischaracterizing of sexual crimes specifically through inappropriate languages undermines the legislator's objective of communicating the seriousness of such crimes. Instead of acknowledging the harm done to victims, such language re-victimizes victims by disguising and obscuring the violence, pain, and trauma that they experienced. Judicial officers often characterized domestic violence as a "loss of control" or describe perpetrators as motivated by innocent intentions such as "jealousy." This type of language masks the true dynamics of domestic violence as an

attempt to maintain power and control, motivated by a perpetrators' belief that he is entitled to possess or control his partner.

[5] In the 18th century, a judge named Francis Buller said that a man is entitled to beat his wife with a stick "no thicker than his thumb". Laws do not jump out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as due to her any "punishment" that was meted out for failing to please her husband. These notions are rooted in the sinful nature of man, which turns male headship into domination and female submission into manipulation. The use of words such as loss of control is an attempt to explain and provide reasons for the offender's conduct rather than to focus on the accountability of the perpetrator. It provides substance to the old notion of the right to discipline rather than focusing upon the acceptance of responsibility of the offender. Courts are papering over the cracks by not focusing on the offender.

[6] Courts regularly attributed violence "to a relationship" rather than to the perpetrator, by using terms such as "violent relationship", "turbulent relationship", or "rocky relationship". Given that the vast majority of cases of intimate partner murders involve a clear primary domestic violence victim and a primary domestic violence abuser, this mutualizing language is inaccurate and places inappropriate blame on the victim. Courts subtly blame victims for the violence perpetrated against them by references to such irrelevant things as the offence having arisen out of a "toxic, dysfunctional or violent relationship". Such comments suggest that but for the nature of the relationship; the offender would not have been violent towards the victim. This subtly, but clearly, places part of the blame for the violence upon the victim. It ignores who is responsible for the violence. In *Kekana v The State (629/13) [2014] ZACSA 158 (1 October 2014)* it was argued that the accused was in a turbulent relationship with the deceased where lack of trust played a major role; he felt abused and belittled by the deceased and when his clothes were packed in a bag in the dining room he felt provoked and snapped. The Court found that the relationship was a turbulent one characterized by accusations of infidelity. The Court found that the callous and heartless attitude in not checking the condition of the deceased was clear proof of his lack of remorse

[7] The use of phrases as "family tiffs or lover's disputes" is simply not appropriate in the context of domestic violence. The Oxford Dictionary defines the word tiffs as a petty quarrel, especially one between friends or lovers. The same Dictionary defines the word dispute as to question whether something is true or legally or officially acceptable. The use of such phrases lessens the liability of the offender and does not reflect the harm caused by domestic violence. Those concepts diminish culpability by suggesting that it is 'only a domestic incident' or by excusing the offender on the basis that he or she is 'not normally violent. It is one of the factors that allow domestic abuse to continue unnoticed for lengthy periods. An offender's good character

concerning conduct outside the crimes should generally be of no relevance where there is a proven pattern of behavior in the domestic context. These are serious crimes physically and mentally damaging wives, husbands, partners, and children. Courts must convey publicly that victims of domestic violence are neither atypical nor surprising in a male-dominated society. Courts tend to place domestic violence victim's in boxes and more so perpetrators of domestic violence. Focusing upon the relationship rather than the perpetrator enhances the level of tolerance that the abused person develops. It causes the abused person to seek answers in his or her behavior and heightens in most cases already a lack of self-esteem.

[8] Courts often reflect problematic stereotypes about how 'proper' victims should behave. The use of words such as the victim was too young and inexperienced to appreciate the danger posed by an abusive partner and 'if *she knew better* 'she would have ended the relationship are indicative of invoked stereotyping. These portrayals reinforce stereotyping women specifically instead of focusing on the victim's experience and the value of their lives. Courts ignore the dynamics of power and control central to domestic violence as well as the risks associated with leaving a relationship. It is important for Courts in sentencing processes, in considering the context in intimate violence cases, not to overemphasize such explanations as anger, loss of control, jealously, alcohol or drug impairment, as mitigating factors. Emphasizing these types of factors diverts a Court's attention from the real issue: the responsibility of the offender for the violence inflicted and for his behavior. In S *v Arnold 1985(3) SA 256 (C)* the Court found that the accused was indeed upset about the events before the incident. Courts must hold perpetrators accountable for their brutal and violent conduct rather than to focus on their anger, loss of control, jealousy, and alcohol or drug impairment.

Desmond Francke – Additional Magistrate, Ladysmith (KZN)

A Last Thought

"The conduct of judicial officers are guided by the Code of Judicial Conduct adopted in terms of section 12 of the Judicial Service Commission Act. In terms of section 14(4)(b) of the Act anyone can lay a complaint against a judge for a wilful or grossly negligent breach of any of the provisions of the Code. The aim of the Code is to safeguard the independence and integrity of the judiciary and the authority of the courts. Judges should therefore not do or say something that may bring the judiciary into disrepute or unduly politicise the courts. Judges should also not do or say anything that may require them to recuse themselves from a case because of a reasonable apprehension that the judge may be biased in a specific case.

The Code requires judges to show restraint when commenting on legal matters or on specific court judgments. To this end article 11(1)(f) of the Code prohibits judges from public criticism of another judge or another branch of the judiciary "unless it is germane to judicial proceedings before the judge concerned, or to scholarly presentation that is made for the purpose of advancing the study of law". Article 11(2) further states that:

A judge may participate in public debate on matters pertaining to legal subjects, the judiciary, or the administration of justice, but does not express views in a manner which may undermine the standing and integrity of the judiciary.

Judges are therefore allowed to give public lectures or take part in scholarly debate on *legal subjects, the judiciary and the administration of justice*, as long as they do this with the necessary restraint. When a judge engages on such topics, it is best to avoid the use of emotive or conspiratorial language and personal score-settling. Moderation, circumspection and diplomacy is required. Judges who comment on legal subjects, the judiciary or the administration of justice might not always be able to avoid political controversy. For example, if the government of the day flouts the Rule of Law, a lecture by a judge defending the Rule of Law may stir up political controversy. There is nothing in the Code that prevents a judge from doing so, as long as the judge shows restraint in his or her comments.

Judges do not have the same leeway regarding comments and conduct not directly related to their judicial duties. To safeguard the independence and impartiality of the judiciary, article 12(1) of the Code of Conduct prohibits a judge from belonging to any political party or secret organization and from using or lending the prestige of the judicial office to advance the private interests of the judge or of others.

The latter provision raises difficult questions. For example, a judge who uses the influence and prestige of his or her office to promote the interest of a particular

church by acting as a lay preacher in that church, or a judge who lends his or her judicial prestige to a television talk show that may advance the commercial interest of the particular media company, may arguably fall on the wrong side of the Code. But the judge may well successfully argue that the advancement of this other private interest is incidental to the activity and not its main aim and that he or she is therefore not acting against the spirit of the Code of Conduct.

Far clearer is the prohibition contained in article 12(1)(b) which prohibits a judge from becoming "involved in any political controversy or activity" unless "it is necessary for the discharge of judicial office". This prohibition does not apply to comments or debates on *legal subjects, the judiciary and the administration of justice*, but rather to actions, comments and debates about other potentially controversial political matters.

When writing a judgment, a judge is entitled to criticise one of the parties (even if this party is a political leader or other controversial political figure and the criticism will spark political controversy), to criticise a government policy that is being considered by the court, or to criticise the actions of officials of another branch of government.

But once that judge takes off his or her robes and enters the wider world, that judge should refrain from making politically controversial statements. (But this metaphor may be faulty, as a judge cannot fully shed his or her robes; a judge's private conduct may well impact on the integrity and authority of the courts.) Expressing support for a specific foreign government or state, attacking the political opinions of other public figures, or making other political statements not linked to legal subjects, the judiciary and the administration of justice may get that judge into trouble. The Code does not make an exception for politically controversial statements motivated by sincere religious convictions."

As Per Prof Pierre De Vos on his blog *Constitutionally Speaking* on 30 June 2020 under the heading *Mogoeng and Israel: judicial code of conduct warns judges against becoming "involved in any political controversy"*