e-MANTSHI

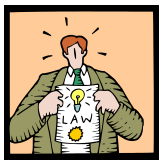
A KZNJETCOM Newsletter

August 2020: Issue 167

Welcome to the hundredth and sixty seventh 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 Rules Board for Courts of Law has amended the rules regulating the conduct of the proceedings of the Magistrates Courts of South Africa. The amendments relates to Table A and B of Annexure 2 and also Table C of the Rules and deals with amendments to the tariff's that can be charged. The notice to this effect was published in Government Gazette no 43592 dated 7 August 2020. The amended rules come into operation on the 11th of September 2020. The amendment can be accessed here at page 32:

https://www.justice.gov.za/legislation/notices/2020/20200807-gg43592rg11156gon858_0-RulesBoard-SCArules.pdf

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Recent Court Cases

1. S v Thobela (130/2019) [2020] ZAGPJHC 64 (2020 (2) SACR 222 (GJ)

1. Where a globular sentence exceeds the court's jurisdiction in respect of one of the offences it is an incompetent sentence.
2. An enquiry into the fitness of an accused to possess a firearm in terms of s 103(2) of Act 60 of 2000 must be held, even if the accused has previously been declared unfit to possess a firearm.

Carelse J:

INTRODUCTION

[1] The accused, a 34 year old male was charged with two common law offences, namely count 1, theft and count 2 malicious injury to property and the statutory offence of contravening section 1(1)(a) or (b) read with sections 1(1A), 1(2) of the Trespass Act 6 of 1959 Act 6 of 1959 ("the Trespass Act").

[2] The accused was legally represented. On 21 November 2019 the accused pleaded not guilty to all counts and after the hearing of evidence he was convicted on all three counts. All three counts were taken together for the purposes of sentence and the accused was sentenced to an effective term of three (3) years' direct imprisonment without the option of a fine.

[3] During the judicial quality assurance inspection additional magistrate Mr W.J.J Schutte sent the matter on special review to the High Court in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 on the basis that the sentence imposed was not competent and no enquiry was held in terms of section 103 of the Firearms Control Act 60 of 2000 ("the Firearms Control Act").

[4] I am required to determine two issues arising from this matter. I am very grateful for the submissions that were made by both the Office of the Director of Public Prosecutions: Johannesburg and the Magistrate.
The first issue - was the taking of the offences together for purposes of sentence and the resultant sentence of three years' imprisonment, competent in law?

[5] Section 6 of the Trespass Act provides for a penalty of:

"2. Penalties- Any person convicted of an offence under section 1 shall be liable to a fine not exceeding R2000, 00 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. . . "

[6] In *S v Rantla* 2018 (1) SACR 1 (SCA) at page 4 *Bosielo JA* stated:

> "It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See S v Young 1977(1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer based on the peculiar facts of the case."

[7] In *S v Young* 1977(1) SA 602 (A) at 610 E Trollip JA stated that:

> "That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 56 of 1956. Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused."

[8] Courts have often regarded the practice of imposing globular sentences as undesirable and it has been stated over and over again that the practice of imposing globular sentences must be reserved for exceptional circumstances. However, the mere practice thereof is not a misdirection *per se* warranting interference. It is desirable that each separate offence should be punished separately. [1]

[9] The sentence of three years' imprisonment for trespassing is not competent because it exceeds the maximum period of two years' imprisonment prescribed in terms of section 6 of The Trespass Act. Where counts are taken together for the purposes of sentence and a court imposes a sentence that is competent on two common law offences, but incompetent on the statutory offence, such a globular sentence is a nullity. [2] More so, the three offences which the magistrate took together for the purposes of sentence are subject to different sentencing regimes~~,~~ The sentencing regime for common law offences in the district court is regulated by Section 92(1)(a) and (b) of the Magistrates' Court Act 32 of 1944 which reads as follows:

> *"92 Limits of jurisdiction in the matter of punishments. - (1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence -*

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[1] S v Kruger 2012(1) SACR 369 (SCA) ; Director of Prosecutions, Transvaal v Philllips 2013(1) SACR 107 (SCA) par 27

[2] See S v Hayman 1988(1) SA 831 (NC)

> *(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division,… "*.
> *(b)* by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts referred to in paragraph (a).

[10] The maximum term of imprisonment that a district court may impose for a common law offence may not exceed three years' imprisonment. The fine that may be imposed by a district court is presently an amount not exceeding R120 000 (See Government Notice 217 in Government Gazette 37477 of 27 March 2014, effective from 1 February 2013). This is the first 'law' that then restricts the lower courts in so far as limiting the amount of the fine it may impose.
On the other hand a contravention of the s 6 of The Trespass Act carries a maximum sentence of two years' imprisonment alternatively a fine not exceeding R2000,00 or both.

[11] If the magistrate was minded to ameliorate the effective period of imprisonment, he ought to have imposed separate sentences and ordered the sentences to run concurrently in terms of section 280(2) of the Criminal Procedure Act.

[12] In my view, having regard to the aforegoing, the sentence of three years' imprisonment that was imposed in respect of the statutory offence is a nullity and stands to be set aside with an order remitting the matter to the magistrate for the sentence to be imposed afresh. This would give effect to the *audi alteram partem* rule.

The second issue - Does section 103 of the Firearms Control Act 60 of 2000 apply?

[13] In terms of section 103(1)(g), unless the court determines otherwise a person becomes unfit to possess a firearm if convicted of an offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine. Therefore, a person is *ex lege* (by operation of the law) automatically declared unfit to possess a firearm. In *S v Lukwe 2005 (2) SACR 578 (W) at page 580a-d,* Borchers J, in the context of a conviction of Theft where a term of imprisonment was wholly suspended held that:

> "The conviction and sentence imposed bring the matter within the ambit of s103(1) of the Firearms Control Act 60 of 2000, which reads as follows:
> 'Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of -

(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.

In my view, the sentence of 12 months' imprisonment falls within these provisions despite the fact that it was wholly suspended.")

[14] Section 103(2) of the Firearms Control Act applies to cases where the convicted person does not fall into the categories listed in subsection 1, but falls into categories listed in schedule 2 of the Act. Schedule 2 includes the offences of high treason; sedition; malicious damage to property; entering premises with the intent to commit an offence under either the common law or a statutory provision; culpable homicide; and extortion. This subsection gives the court a discretion to decide whether to declare a person unfit to possess a firearm.

[15] It is therefore clear that once an accused person is convicted of an offence involving dishonesty, for example, theft as in the present matter and sentenced to imprisonment without the option of a fine, whether suspended or not, he is automatically declared unfit to possess a firearm, unless the court determines otherwise. In the present matter, the magistrate did not hold an enquiry to determine otherwise because the accused was previously declared unfit to possess a firearm. The state submits that the magistrate correctly held that there was no need to hold an enquiry since the accused person was previously found unfit to possess a firearm.

[16] The magistrate on the other hand disagrees and made the following submissions:

"1. The DPP argues that an enquiry in terms of section 103 Act 60 of 2000 was obsolete as the accused had already been declared to be unfit to possess a firearm. I respectfully disagree. The SAP 69 record of previous convictions does not indicate if the matter of the previous conviction is the subject of a pending appeal or review. Furthermore, the accused could have obtained a firearm since the last search was conducted, or relocated, which necessitates a new search to be conducted. The aim of Act 60 of 2000 is to regulate firearm ownership and to promote a safe society. It is therefore desirable that all these measures be taken to achieve the purpose of the Act.

2. In a scenario where section 103(1) finds application the effect of the absence of a court order to the contrary, is that the accused is unfit to possess a firearm. As such the court is compelled to inform the Registrar in writing of the conviction, determination or declaration in terms of section 103(3) of the Act. A magistrate cannot, with respect, neglect to comply. To further add to this supposition section 103(4) compels a court, unless a determination that a person is not unfit to possess a firearm has been made, to issue an order for the immediate search for and seizure of the items as listed in the subsections. As the

order (or lack thereof with the consequent unfitness as per section 103(1) is an adverse order, the accused needs to be informed. The requirement compelling the issuing of a search order calls upon the court to make an order to that effect, and it follows then that a court should at the very least inform the accused that such an adverse consequence has befallen him or her.

3. It is submitted that an accused becomes unfit to possess a firearm with regards to each count that attract the operation of section 103(1) . As such, whenever an accused has been convicted of more than one offence that attracts the operation of section 103(1) or 103(2), an enquiry should in principle be conducted in relation to each of the offences respectively. This is so as the Act does not provide for any exclusions or qualifications. It is also prudent to deal with each offence as any one or more convictions may be set aside, nullifying any ancillary orders or determinations emanating from such a conviction.
4. Section 103(2), albeit dealing with serious offences, also provides for a compulsory enquiry for offences that are less serious than those listed in section 103(1), i.e. offences of dishonesty where an accused was not sentenced to imprisonment without the option of a fine. If an enquiry in terms of section 103(2) is compulsory for a less serious offence than one in terms of section 103(1), an interpretation that leads to a conclusion that an enquiry in terms of section 103(1) is not compulsory, leads to an absurdity.
5. Section 103 does not provide for an exclusion to the effect that an enquiry is to be conducted “unless an accused has already been found to be unfit to possess a firearm”. The order of unfitness has a minimum life span of five years in terms of section 103(4)(6) of the Act.
6. Section 103(1) allows for an arbitrary consequence of unfitness. As soon as the jurisdictional have been met to trigger section 103(1) a person becomes unfit to possess a firearm. The Act provides for an insurance policy, so to speak , by allowing for judicial oversight in the phrase “unless a court orders otherwise”. By not embarking on an enquiry a magistrate neglects his or her duty of judicial oversight. To further reinforce the argument, by not embarking on an enquiry the court effectively blocks an accused of access to the court by not affording the Accused the opportunity to persuade the court to make an order to the contrary.
7. A further aspect that needs to be considered is that the conviction on count 1 activates the operation of section 103(1). The situation with counts 2 and 3 is somewhat different. Section 103(1) does not refer to malicious injury to property or trespassing. Section 103(2) by means of Schedule 2 does however refer to malicious damage to property and the entering of any premises with the intent to commit an offence. For purposes of count 2 and 3 it is submitted that the magistrate was

compelled to conduct an enquiry in terms of section 103(2) requiring a different approach than what is required by section 103(1).

8. In *S v Mkhonza 2010 (SACR) 602 (KZP) at par 22* the court states with reference to section 103(1) that there is an obligation on the court to consider properly whether the statutory disqualification should remain in place. It goes even further by stating that the courts should not adopt a 'supine' approach. And further on in par 23 the court states clearly that where a court convicts an accused of an offence falling under section 103(1) it is nonetheless seized with the question whether it ought to order otherwise."

[17] There is no information before me whether or not the accused has appealed any of his previous convictions. If so, and the appeals have not been finalised by the time this matter is finalised, or it has and the accused succeeds with his appeal and the sentence which included the determination that he is unfit to possess a firearm is set aside, the accused would be prejudiced if he is not given an opportunity to address the court or make submissions in this respect.

[18] In the unreported case of *Godfrey Kagiso Motau, Review 36/2018* of the North West Division of the High Court, Mahikeng, handed down 0n 30 January 2019, Petersen AJ, stated as follows at paragraph 25:

> "The learned district magistrate submits that the record was transcribed incorrectly and should have reflected that he did not hold an enquiry as the accused had previously been declared unfit to possess a firearm. In my view, the basis for this submission does not accord with the purport of the legislation. The accused may have been declared unfit to possess a firearm previously but that does not mean no enquiry should be held when further convictions calling for an enquiry materialise. The Firearms Control Act has no provision supporting the view of the learned district magistrate. The declaration of unfitness to possess a firearm remains in place for a period of 5 years' and not indefinitely. In terms of section 103(6) of Act 60 of 2000 which provides: "Subject to section 9(3)*(b)* and after a period of five years calculated from the date of the decision leading to the status of unfitness to possess a firearm, the person who has become or been declared unfit to possess a firearm may apply for a new competency certificate, licence, authorisation or permit in accordance with the provisions of this Act. It is therefore imperative that an enquiry be held as required by section 103(1) or (2) of the Firearms Control Act on each occasion an accused is convicted."

I agree with the reasoning of Petersen AJ in *Motau* and the submissions of the Magistrate.

[19] In my view and as a general rule the approach proposed by Borchers J at page 580f-581a of *Lukwe* should apply on each occasion an accused is convicted:

> "... Where the matter is governed by s103(1), the accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The legislation does not expressly require the court to hold an enquiry into the accused's fitness, but, in my view, particularly where an accused is unrepresented, the court should draw the accused's attention to the provisions of s 103(1) and invite him, if he wishes to do so, to place facts before the court to enable the court to determine that he is indeed fit to possess a firearm…"

[20] In the result I make the following order.

1. The globular sentence of three years' imprisonment is set aside.
2. The matter is remitted to the magistrate to sentence the accused afresh.
3. The provisions of section 103 of the Firearms Control Act 60 of 2000, as may be applicable, upon reconsideration of sentence, must be complied with.

2. S v Josephs (1059/2019) [2020] ZAWCHC 81 (19 August 2020)

A sentence of correctional supervision imposed in terms of section 276(1)(h) of the CPA is *not* subject to review.

Henney, J:

[1] This matter was sent on automatic review by the magistrate at Bredasdorp, purportedly in terms of the provisions of section 302(1) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The accused, who was not legally represented, had been correctly convicted on two counts of contravening section 37 of the General Law Amendment Act 62 of 1955, and one count of housebreaking with the intent to steal and theft.

[2] All three charges were taken together for sentence, and a sentence of two years' correctional supervision was passed upon the accused in terms of section 276(1)(h) of the CPA, subject to the usual conditions, such as house detention, community service, and attendance at substance abuse, anger management, and life skills programmes.

[3] I queried why the magistrate had sent the matter on automatic review because it seemed to me that the sentence that had been imposed did not render the case subject to such review.

[4] The magistrate replied as follows: "*The accused being unrepresented were sentenced in terms of the provisions of Section 276(1)(h) of Act 51 of 1977 to a term of correctional supervision. Due to the term imposed exceeding the limit as set out in Section 302(1) of the CPA 51/1977 I was of the opinion that the case be sent on review. I was further reminded by the learned author of Hiemstra's Criminal Procedure at 30-17 that 'If the sentence exceeds the limit, it is reviewable.'*"

[5] The reply made it evident that the magistrate was not aware of the fact that the sentence of correctional supervision imposed in terms of section 276(1)(h) of the CPA is *not* subject to review in terms of section 302 of the CPA. In the circumstances I could have merely returned the matter with a note. On reflection, however, I decided that it might be helpful to clarify the position in a judgment that might be instructive and helpful to magistrates generally.

[6] The procedure of automatic review has been part of our legal system for over a hundred years. Whilst it is not clear how the procedure originated, it has been said that the first reference to it was in sections 47 and 48 of Act No. 20 of 1856 (Cape Colony), which provided that in any case in which a magistrate sentenced a person upon conviction to imprisonment for a period exceeding one month, or to a fine exceeding £5, or to receive lashes, he was required to send the record by the next available post to the registrar of the Supreme Court. The proceedings were then laid before a judge and, if he found them to be in accordance with real and substantial justice, he issued a certificate to that effect, thereby confirming the proceedings.[3] A summary of the history of the various legislative provisions dealing with automatic reviews in South Africa prior to the enactment of section 302 of the CPA is also to be found in *S v Mafikokoane; S v Mokhuane* 1991 (1) SACR 597 (O), from page 599.

[7] Section 276(1)(h) of the CPA provides for correctional supervision as one of the punishments which a sentencing court can impose on a convicted person. The imposition of the punishment is permitted subject to the other provisions of the CPA and any other law, and of the common law. Sections 276 (1)(b), (c), (d), (e) and (j) by contrast are all custodial punishments. With the exception of s 276(1)(e), which relates to 'committal to any institution established by law', they all involve *imprisonment*.

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[3] SALJ Vol 79 (1962) at 267, where a memorandum submitted by two judges of the then Transvaal Provincial Division to De Wet JP is reproduced with the permission of the Judge President and authors under the title: "*On The System of Automatic Review and The Punishment of Crime.*"

[8] "*Correctional supervision"* is defined in section 1 of the CPA as "*a community based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Service Act, 1998, and the regulations made under that Act …*" (own underlining). The term is defined in Correctional Services Act 111 of 1998 as meaning "*compulsory work for a community organisation or other compulsory work of value to the community, performed without payment*". A person sentenced to correctional supervision in terms of s 276(1)(h) is a person subject to "community corrections" within the meaning of that term in the Correctional Services Act; see section 51(1)(a) of the Act. The objectives of "community corrections" are set out in section 50 of the Correctional Services Act. Section 50(1)(a) of the Act provides: "*The objectives of community corrections are-(i) to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner*" (own underlining). The conditions of correctional supervision may include 'house detention' (section 52(1)(a)), which means that the sentenced person is restricted to his dwelling for a stipulated period on a daily basis (section 59), but that is not imprisonment or detention in custody even if it has been acknowledged in some judgments as having a similar effect to incarceration.

[9] Section 302(1)(a) of the CPA provides:

> *Any sentence imposed by a magistrate's court-*
>
> *(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191 (2)(j) of the Children's Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;*
>
> *(ii) which, in the case of a fine, exceeds the amount 17 determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i),*
>
> *shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.*

Subsection (3) makes the provisions of s 302(1) applicable only with reference to a sentence imposed on an accused person who was not assisted by a legal adviser.

[10] It is apparent from the statutory provisions to which I have referred that correctional supervision is not a sentence of imprisonment. It is a non-custodial sentence which is imposed upon an accused person under strict conditions, such as house arrest, community service, rehabilitation and compulsory attendance of programs in relation, inter alia, to combatting drug and alcohol abuse. In *S v R* 1993

(1) SACR 209 (A), Kriegler AJA held in relation to the provision of correctional supervision as a sentencing option that the legislature has clearly distinguished between two types of offenders, viz, those who ought to be removed from society by means of **imprisonment,** and those, although deserving of punishment, that should not be so removed from society. See also *S v Grobler* 2015 (2) SACR 210 (SCA). This is clearly what the magistrate had in mind when he then imposed a sentence of correctional supervision when he said the following during the sentencing proceedings: *"Die beamptes is van mening dat u 'n kans moet gegun moet word; dat u liewer u vonnis buite in die gemeenskap moet uitdien, as wat u in die tronk in is."*[4] He further stated: "*Die oorweging van korrektiewe toesig – baie keer dan is die idee, maar dit is nie so 'n ernstige straf nie. Maar om iemand te beperk tot sy huis en vir hom te sê jy mag net sekere plekke na toe gaan, sekere tye mag jy na toe gaan (sic), word geag dieselfde effek te hê as wat 'n person in die tronk is."*[5]

[11] The sentence imposed by the magistrate was therefore not one that was subject to review in terms of the provisions of section 302(1) of the CPA.

[12] The matter is therefore remitted back to the Magistrate's Court, Bredasdorp, for the attention of the magistrate, whereafter it is still to be dealt with by the clerk of the court for further filing thereof. The Registrar of this court is furthermore, directed to submit a copy of this judgment to the Chief Executive Officer of the South African Judicial Education Institute, for distribution thereof to magistrates.

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[4] Loosely translated: *"The officials are of the view that you should be given a chance, that you should rather serve a non-custodial sentence in the community than go to prison."*

[5] Again, loosely translated: *"The consideration of correctional supervision for many would not be such a serious punishment. But to restrict someone to his house and to order that he may only go to certain places at certain times, may have the same effect of a person being incarcerated."*

From The Legal Journals

Mujuzi, J D

Electricity theft in South Africa: examining the need to clarify the offence and pursue private prosecution?

OBITER 2020 78

Abstract
Electricity theft is one of the challenges with which South African government-owned power-distribution company Eskom is grappling. Eskom has lost billions of rands in annual revenue owing to electricity theft. Different strategies are in place to combat electricity theft. However, in South Africa, electricity theft is not a statutory offence. This contrasts with the approach adopted in countries such as China, Canada, India, Australia and New Zealand, where legislation provides for such an offence. Although electricity theft is not a statutory offence, prosecutors would like electricity thieves to be punished. In this context, there are conflicting High Court decisions on whether electricity theft is a common-law offence or indeed an offence at all. The purposes of this article are: to highlight the problem of electricity theft in South Africa and the conflicting jurisprudence from the High Court on whether electricity theft is an offence; to recommend that Parliament amend legislation to criminalise electricity theft specifically; and also to empower Eskom to institute prosecutions against those who are alleged to have stolen electricity

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

Contributions from the Law School

With great power comes great responsibility - Contempt of Court *in facie curiae*

Section 108 of the Magistrates Court Act, 32 of 1944 gives the Magistrate's Court the power to invoke summary proceedings for contempt where the contempt is committed *in facie curiae*. The question of whether or not this power is constitutional was discussed in S v Lavhengwa[6]. Here, the court held that punishing contempt of court *in facie curiae* was not unconstitutional, but cautioned that it would not always be advisable to resort to such summary proceedings in all cases. This note will discuss the power of the court in relation to contempt of court in facie curiae from a procedural fairness perspective, in consideration of the decisions in S v Sakhekile James[7] and S v Meiring[8]

Power of the court in terms of s108 of the Magistrate's Court Act:
Section 108 of the Magistrates Court Act criminalizes and punishes contemptuous behavior, intended to violate the dignity, repute or authority of the court, both inside and outside of the court room. This article focuses on contempt of court *in facie curiae* only[9], and will not examine contempt of court *ex facie curiae*. This is also because magistrate's courts do not have inherent jurisdiction in relation to this crime, and are limited in that they may only invoke such summary proceedings for contempt of court *in facie curiae*.[10]

S108(1) states that 'If any person, whether in custody or not, willfully insults a judicial officer during his sitting or a clerk or a messenger or other officer during his attendance at such sitting, or willfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall…. Be liable to be sentenced summarily or upon summons to a fine not exceeding or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine.'

For our purposes, this article will consider:

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[6] 1996 (2) SACR 453 (W)
[7] 2018
[8] 2019 (1) SACR 227 (GJ)
[9] In relation to criminal contempt
[10] 1962 2 SA 457 (N) 459; *S v Nene* 1963 3 All SA 238 (N); 1963 3 SA 58 (N) 59–60. A magistrate's court does, however, have jurisdiction to hear a charge of the common-law crime of contempt of court committed *ex facie curiae* brought before it by way of summons.

1. What type of behavior amounts to contempt of court *in facie curiae*
2. What does *in facie curiae* mean?
3. Procedural fairness

Unusual characteristics of the crime:
When compared to other crimes, contempt of court has some rather unusual features, most notably in relation to procedure, and is deemed drastic in that in cases of contempt of court *in facie curiae*, the presiding officer (judge or magistrate) may summarily convict an offender without him or her being formally indicted.[11] In practical terms, this means that when contemptuous behavior occurs in court and in the magistrate's presence, he or she can summarily convict and punish the offender. It is understandably why such power is essential – it is necessary to uphold the dignity, repute and authority of the court in a prompt, albeit drastic fashion, in circumstances where failure to do so in an immediate fashion will result in *inter alia*, an obstruction of justice. Courts are however cautioned to use this power with great care and circumspection, not least because the atmosphere is emotionally charged, but also because in the circumstances, the magistrate is acting as prosecutor, witness and judge[12].

Schreiner JA stated in *R v Silber*[13] that 'The power to commit summarily for contempt in *facie curiae* is essential to the proper administration of justice . . . But it is important that the power should be used with caution for, although in exercising it the judicial officer is protecting his office rather than himself, the facts that he is personally involved and that the party affected is given less than the usual opportunity of defending himself make it necessary to restrict the summary procedure to cases where the due administration of justice clearly requires it. There are many forms of contempt in *facie curiae* which require prompt and drastic action to preserve the court's dignity and the due carrying out of its functions.'

That being said, the question of whether or not the crime of contempt of court *in facie curiae* was a constitutional violation of a perpetrators rights was considered in *S v Lavhengwa*[14] which ruled that it was not. The court did however emphasize the need to properly warn and inform an accused person, and to afford them the opportunity to defend themselves – offering reasons as to why he or she should not be convicted.

Contemptuous behaviour, *in facie curiae* and proper procedure:
We'll deal with procedure first:

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[11] R v Foye & Carlin (1886) 2 BAC 121 125; R v Kaplan (1893) 10 SC 259 263; Makiwame v Die Afrikaanse Pers Bpk 1957 2 All SA 337 (W); 1957 2 SA 560 (W) 562H; Afrikaanse Pers-Publikasie (Edms) Bpk v Mbeki 1964 4 All SA 296 (A); 1964 4 SA 618 (A) 626F; S v Van Niekerk 1972 4 All SA 67 (A); 1972 3 SA 711 (A) 720A; S v Van Staden 1973 1 All SA 260 (SWA); 1973 1 SA 70 (SWA) 76.
[12] Duffey v Munnik and Another 1957 (4) SA 390 (T) at 391F
[13] 1952 2 SA 475 (A) at 480 F
[14] 1996 2 SACR 453 (W)

Let us turn to the case of *S v Sakhekile James*[15], a matter which was brought on automatic review to the Eastern Cape High Court. The matter for consideration was whether the magistrate was correct in convicting the accused of contempt of court.
The court began by examining the transcripts from the court a quo, which revealed that the accused's behavior was indeed disrespectful and disruptive, on several occasions, culminating in a conviction for contempt of court:
"I would like to inform the Honourable Judge that (the) accused started to disrespect the court at page 43 where he made (a) noise in court. He was uncontrollable (and) hitting (the) Court Orderlies. His demeanour in court was bad. He did not hear (the) Magistrate at page 64. (He) said that he will not appeal. Fuck off appeal (rights)."[16]

The review court noted that the atmosphere was indeed tense and tensions continued to escalate. During all of these incidents, the magistrate urged the accused to 'behave', reminding him several times that 'this was a court of law'. The review court agreed that the accused's behavior was indeed contemptuous stating that in the present case the accused may well have behaved unacceptably and cocked a snoot at the decorum of the court by resisting instructions or requests from the court staff'[17], but nonetheless, the review court proceeded to overturn his conviction in the following terms:
'This approach, of placing a premium on the accused's right to a fair trial, even where the contemptuous behaviour seems outrightly offensive and constitutes a disruption to court proceedings, was adopted by this division in *S v Phomadi*. The court held that section 108 (1) did not expressly authorize a summary procedure in the narrow sense, i.e. that a conviction could follow without the accused being afforded the opportunity of being heard. The *audi alteram partem* still applied and an accused person had to be afforded the opportunity to give evidence, and call witnesses, both with respect to conviction and sentence.'[18]

The court emphasised deference to the *audi alteram partem* rule, referring extensively and with approval to the decision in *S v Nyalambisa*[19] stating that 'It is trite that the *audi alteram partem* principle of natural justice does apply to the summary procedure set out in s 108(1); that the offender must be informed of the contempt of court the magistrate believes he has committed, and that he must be afforded an opportunity to deny or explain his actions'[20]

Turning to *Lavhengwa*, the review court noted that 'the court in *Lavhengwa* stressed that the safeguards of the rules of natural justice must, however, be complied with. The court noted though that in the summary procedure the essentials of the charge

[15] 2018
[16] At para 5
[17] 2018 at para 20
[18] 2018 at para 21
[19] 1993 3 All SA 678 Tk
[20] Sikakhela at para 15

were always well known and frequently obvious to the accused but that where the circumstances indicate that the accused might not be aware of the facts underpinning the charge, there was a duty on the magistrate to inform the accused.'

From the transcripts, it became evident that the Magistrate failed to follow the procedural guidelines for the exercise of the power created in s108 of the Magistrate's Court Act, enumerated in *Lavhengwa*[21], finding ultimately that the conviction could not stand because 'it appears that he (the accused) was not given proper prior warning of the implications thereof or given an opportunity to explain himself before he was summarily convicted.'[22]

The second issue: has contempt happened in the face of the court:
Let us turn to the case of *S v Meiring*[23]. The accused was convicted of contempt of court *in facie curiae* under the following circumstances: His matter had been postponed for the third time (through no fault of his own) and on hearing this, he left the dock muttering under his breath in exasperation. At paragraph 5 of the judgement, the events were describes as: 'He gave expression to his frustrations. Meiring used the word "Fuck" once, perhaps twice. The Prosecutor claimed to have

[21] At para 19 of Sakakhile, and 495 C of Lavhengwa: '1. The magistrate should first carefully consider whether he/she should resort to the normal procedure of referring the matter to the Attorney-General or the summary procedure. Considerations which would become important at this stage are whether or not he can disregard the accused's conduct as unimportant (S v Nel (supra at 749G)) or merely stupid and not wilfully contumacious (R v Silber (supra at 483 E)) or whether the matter can be disposed of by merely removing the accused from the court (Duffey v Munnik (supra at 395 E)) or whether the conduct is insulting or insolent in its nature towards the magistrate personally. In the instances mentioned above it would be better to take evasive action (such as e.g. the removal of the accused from the court or an adjournment or requesting an apology from the accused or reporting him to his professional body if the accused is a practitioner) which would obviate the necessity to embark upon a trial under s 108 (1) or to take the normal route of referring the matter to the Attorney-General rather than resorting to the summary procedure.
2. If, however, the circumstances are such that the summary procedure is called for (e.g, in cases of disobedience to rulings, interruption of the proceedings etc.) he should warn the accused of his intention to proceed with a summary trial under the provisions of s 108 (1) of the Magistrate's Courts Act. Depending on the accused's prior knowledge of the contents of s 108 (1), it would be advisable for the magistrate to read out the section to the accused so as to inform him of the provisions thereof and thus inform the accused of the nature of the offence with which he is being charged.
3. The magistrate must then proceed to inform the accused of the latter's conduct which in his view contravened s 108 (1) and which of the three categories mentioned in section 108 (1) his conduct is alleged to have transgressed.
4. The magistrate thereafter should inform the accused of his constitutional rights as set out in s 25 (3) of the Constitution and enquire from the accused whether he wishes to remain silent, testify, give an explanation or call witnesses. If theaccused is a lay person he should be afforded the right to obtain legal representation should he wish to do so, subject to such time and feasibility constraints as may seem reasonable in the circumstances of the case. Depending on the decision of the accused, the magistrate should then afford the accused full opportunity to exercise his rights in order to ensure that his constitutional rights are not infringed nor that the rules of natural justice are transgressed.
5. After the accused has been given an opportunity to exercise these rights the magistrate should then weigh up all the circumstances, evidence and arguments and convict the accused only if the facts before him prove beyond a reasonable doubt that the accused wilfully contravened any of the offences mentioned in s 108 (1)."
[22] Sikakhela at para 15
[23] 2019 (1) SACR 227 (GJ)

heard Meiring say “this country is fucked”, which Meiring did not admit to saying. The prosecutor later in cross-examination declared that this was an act of disrespect not only to the court but to the country. Meiring admitted using foul language after he had heard it announced that the case was postponed yet again. He apologised at once, and repeatedly apologised.’ He was then detained in the cells. The high court drew the deduction that this was done out of spite (and left open the question of whether or not Meiring could possibly raise a civil claim against such behaviour).

A hearing for contempt of court *in facie curiae* commenced. Meiring was subjected to rigorous cross examination, but he did offer an explanation for his utterance. Regardless, he was found guilty and fined R5000 or three months imprisonment[24]. This amount was in excess of the statutorily prescribed amount of R2000. The High Court offered this in response: ‘The judgment is quite manifestly an utter misdirection. A point to emphasise, is that not only does the magistrate impose a sentence two and half times the maximum jurisdiction, but he imposes a fine of R5000, an objectively large sum, on a man who had told him he is already under financial stress. The judgment is a disgrace’[25] and further that ‘It is plain that the magistrate was unacquainted, not only with section 108 of the Magistrates’ Court Act, but also with the case law.’[26] The court then proceeded to explain what contempt of court in facie curiae is and when it occurs. Considering the evidence presented to it, the High court summarised the facts as follows:

‘ This was a once-off occurrence triggered by the third postponement of a relatively insignificant case;

• The conduct was clearly not aimed at the presiding officer or the court as such;

• The accused was immediately repentant and apologized profusely and repeatedly;

• The conduct had no effect on any court proceedings or on the capacity of the judiciary to fulfil its role;

• The court was not in session when the conduct occurred, there was therefore no need for swift intervention (*Mamabolo*, at para 52);

• The conduct was the result of frustration with the repeated postponement of the case;

• The court’s findings that there is no justification for the conduct is, at the very least, questionable;

• The fairness of the proceedings is likewise questionable, as the presiding officer had even before the beginning of the enquiry suggested to the prosecutor that he should apply that the accused’s bail be cancelled and also made comments beforehand giving the impression that he had pre-judged the matter.

• The offending conduct was not really likely to damage the administration of justice.’[27]

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[24] At para 12
[25] At para 13
[26] At para 14
[27] At para 15

The court took pains to emphasise that a court should consider context and should 'guard against being unduly overzealous' in its quest to uphold the dignity of the court.
In its final summation, the review court overturned both the conviction and the sentencing of Meiring and directed that the NPA and the Magistrate's Commission educate its officers regarding procedures and appropriateness of contempt of court *in facie curiae.*

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Matters of Interest to Magistrates

Does the Magistrates' Courts' lack of jurisdiction obstruct the constitutional right of access to justice?

In my opinion, access to justice, as a result of the magistrates' courts' lack of jurisdiction to adjudicate the application procedure, is obstructed in two ways – first, there are significant cost and time-delay implications for the applicant; and second, the presiding officers invariably do not interpret the law with regard to the magistrate's court's jurisdiction. The high court has inherent jurisdiction to adjudicate all matters unless specifically excluded. The magistrate's court, as a creature of statute, has no jurisdiction to adjudicate a matter, unless the Magistrate's Courts Act, or any other legislation, makes provision for it. In terms of s46 of the Magistrate's Court Act (32 of 1944), the magistrate's court cannot adjudicate certain actions, for example, the validity or interpretation of a will, decree of perpetual silence or claims for specific performance where no alternative claim for payment of damages is sought. Sections 29 to 32 of the Act make provision for claims which the magistrates' court may adjudicate. It is important to note that in terms of s30(1), regarding orders for

interdicts and mandament van spolie, the magistrate may not grant an order for the performance of a positive or negative contractual obligation when there is no alternative claim for damages. The Act does thus not make provision for the court to adjudicate these applications, even though, according to the preamble of the Act, its purpose is to 'enhance access to justice by conferring jurisdiction on Courts for regional divisions which are distributed throughout the national territory to deal with certain civil matters.'

In *Mokoena v Minister of Law and Order* 1991 (3) SA 187 (T), an urgent application was heard in the magistrate's court, but was taken on appeal, as it was argued that the magistrate's court did not have jurisdiction to adjudicate the matter. The appeal was upheld. This was, unfortunately, not the last time that an appeal was successfully upheld. In *Minister of Safety and Security and Another v Bosman* (A725/2007, 4261/2007) [2008] ZAWCHC 30; 2010 (2) SA 148 (C) (4 June 2008) an urgent application was brought for condonation of the late service of the notice in terms of s3(4)(a) of the Institution of Legal Proceedings against Certain Organs of State Act (40 of 2002). The appeal was successful. The court held that due to lack of jurisdiction, the magistrate erred in entertaining the application. Likewise, in *Van Rensburg Pathologists Incorporated v Rampana* (A70/2013) [2013] ZAFSHC 191 (19 December 2013), the court held that the application made in the magistrate's court had to be considered null and void, and further stated that urgent application proceedings should have been instituted in the high court.

In the unreported case of *Kinetsu (Kintetsu World Express South Africa (Pty) Ltd v LCD Consultants CC, Aveng Trident Steel (Pty) Ltd v Steel Plate and Piping (Pty) Ltd, Trident Speciality Steel v Ngobozane* (11741/13, 13043/13, 14213/13) [2013] ZAGPJHC 241 (2 October 2013), the monetary jurisdiction fell within the magistrates' court's jurisdiction, but the application was brought in the high court. The presiding officer stated that applicants should be discouraged from bringing applications to the high court as it amounts to abuse when the magistrate's courts have the necessary monetary jurisdiction. The court further stated that litigants are entitled to have reasonable access to justice as provided for in the Constitution and that the costs resulting from high court procedure are prohibitive to this right. Although this was an unreported case, the court agreed that the magistrates' courts' lack of jurisdiction to adjudicate the application procedure obstructs the constitutional right of access to justice.

More recently, in 2018, in *Nedbank Limited v Thobejane* [2018] 4 All SA 694 (GP), the court once again supported the notion that the magistrates' courts' lack of jurisdiction to adjudicate application procedures obstructs the constitutional right of access to justice. The court ordered that, as of 2 February 2019, applications where the monetary value claimed is within the jurisdiction of the magistrates' courts' jurisdiction, and in line with s34 of the Constitution, the magistrates' court should have jurisdiction, unless the high court has granted leave to hear the matter in the high court. It was further ordered that a high court is entitled to transfer a matter mero motu to another court, i.e. magistrates' courts, if it is in the interest of justice to do so. The court further stated that enrolling applications in the high court places a heavy

burden on the courts, even when the court has an obligation to ensure justice for everyone. It also referred to *Barkhuizen v Napier* 2007 (5) SA 323 (CC) and quoted: '[O]ur democratic order requires an orderly and fair resolution of disputes by Courts or other independent and impartial tribunals. This is fundamental to the stability of an orderly society. It is indeed vital to a society that, like ours, is founded on the rule of law. Section 34 gives expression to this foundational value by guaranteeing to everyone the right to seek the assistance of a Court . . . . Section 34 therefore not only reflects the foundational values that underlie our constitutional order, it also constitutes public policy.'

This case law leaves applicants who wish to approach the court in a difficult position. Do they risk enrolling their matter at the magistrate's court, when the monetary value of the claim falls within the court's jurisdiction, with the added risk that the respondent will be able to appeal to the high court, or do they approach the high court and risk the presiding officer not entertaining the matter? Unfortunately, the practical implications are that applicants' legal costs, in most circumstances, will exceed the value of their claim due to the invariable application of the magistrates' courts' jurisdiction, leaving their constitutional right of access to justice disregarded.

Although recently the courts seem to agree with the notion that the magistrates' courts' lack of jurisdiction to adjudicate the application procedure obstructs the constitutional right of access to justice, there are still hurdles to overcome to ensure true access to justice. South African courts recognise that the plaintiff (or applicant) is the dominus litus and has the right to choose the court in which it wants to institute its action. However, the courts do not recognise the doctrine of forum non conveniens, and are not entitled to decline to hear cases properly brought before them when they exercise their jurisdiction. As the legislation stands, applicants who bring their application to the high court cannot be refused because the magistrate's court lacks the necessary jurisdiction, nor can a magistrate's court adjudicate an application for the same reason.

In my view, the Magistrate's Court Act should be amended to grant the court jurisdiction to adjudicate applications if the claim amount falls within the monetary jurisdiction of the court. This will not only lighten the burden placed on the over-burdened high court rolls but it will also increase the efficiency of the magistrate's court and promote access to justice. In the meantime, a directive should be issued to all presiding officers to interpret the jurisdiction of the magistrate's court uniformly. This will ensure that all are treated equally before the court.

In the Canadian Supreme Court case of *BCGEU v British Columbia (Attorney General)* [1988] 2 SCR 214, the court stated that '[t]here cannot be a rule of law without access [to justice], otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice'. This is currently the unfortunate position in South African courts. Presiding officers invariably consider the magistrates' courts' jurisdiction without proper reference to the relevant legislation. A formal amendment to the Act needs to be effected so that there is consistency in the application of the law and access to justice for all, which will bring in the Act in line with s34 of the Constitution. An amendment would also be in line

with international policy, as the courts appear to agree that there must be efficient access to independent courts with the power to enforce the law, which is timely and affordable.

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(The above article first appeared in *Without Prejudice*, Volume 20 Number 7, Aug 2020, p. 35 – 36).

A Last Thought

7 2 SYSTEMIC INEFFICIENCY IN THE COURTS

The day to day practices at the lower courts were of concern for many students. Comments such as: “Upon arriving at the magistrates’ court at 8.00, I noticed that queues of people had already started to form and it was getting more and more crowded as the time passed by. An hour had passed and neither I nor the people waiting were seen to yet. All that we were met with was a locked door and an occasional ‘wait outside’ if anyone tried to knock on the door. This was alarming to me... vulnerable members of society will not feel comfortable to reach out for help at a legal institution if they are treated in this way. I noticed that they appeared to be intimidated by the employees, attorneys and magistrates ... being treated disrespectfully in the process.” At the Cape Town magistrates’ courts Participant 17 observed: “there were lines of people waiting outside court with one lawyer representing a large number of clients”, while another student noted that “overcrowded courts are the greatest barrier to accessing justice” - there are consequent knock-on effects such as delays and increased fees. This type of inefficiency and poor quality service to citizens is not formally documented anywhere, but impacts significantly on the ability of the vulnerable to access justice.

A recurrent theme in many of the student reports was the poor administrative systems, lost files and delays leading to litigants not having adequate representation on the date of their case. At the Knysna district court a student reported: “Court A was saturated with nothing but postponements. Whether it was due to outstanding

dockets, acquiring representation or further investigation, the look of frustration on the defendants' faces were evident."

Students reported that most criminal cases were postponed: "One trial was postponed due to a lost docket...the state prosecutor pointed out the problems of an inefficient docket system for cases, which resulted in postponements and innocent individuals spending more time behind bars." At the Wynberg magistrates' court, the following were observed: "court started late"; "postponements on the basis that there was insufficient evidence on the day such as witnesses not showing up". Participant 24 stated: "it (court) started very late reflecting inefficiency with regard to time. Hours later, postponements took place in the court and it was revealed that there is inadequate administration as many cases were overlooked because the demand of cases far outweighed the supply of court officials available to deal with them. During my court visit many cases were postponed due to the maladministration on behalf of the court. "Clerical errors made by the court, such as lost case files were common. On the upper floors (of the Wynberg courts) piles of cases littered the corridors. Poor management and the excessive volume of cases contributed to the disorder". "The administration in the lower courts is slack and often leads to events such as misfiling, numerous documentation errors were discovered." Participant 36 commented: "the administration in the courts is very inefficient and because the judicial services still need to catch up in terms of technology, everything was written down and this is prone to human error." The sense of chaos, poor management and under-resourcing of personnel at the lower courts creates an alienating and inaccessible system for those attempting to have their disputes resolved there.

Another category of inefficiencies raised issues of the facilities at the courts: microphones in the Durban courts were not working; and in Knysna, faulty microphones and open doors prevented the magistrate from hearing the witness testimony, causing delays and repetitive questioning during the proceedings. Poor signage resulted in litigants and witnesses being confused about which courts to attend. Language and communication barriers were also noted by many students. These day to day realities to which litigants are exposed impede the functioning of the courts and engender mistrust of the system."

From "Access to justice for all: a reality or unfulfilled expectations?" By Lesley Greenbaum *De Jure Law Journal* Volume 53 2020 pp 259-260