e-MANTSHI

A KZNJETCOM Newsletter

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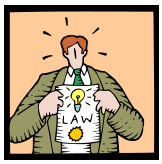
Welcome to the hundredth and sixty ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP.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



New Legislation

1. Under section 1(2)(b) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), the Minister of Justice and Correctional Services, has published a rate of interest of 7,25 percent per annum as from 1 July 2020 for the purposes of section 1(1) of the said Act. The notice appeared in Government Gazette no 43781 dated 9 October 2020. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2020/20201009-gg43781rg11184gon1067-InterestRates.pdf

2. The Rules Board for Courts of Law has in terms of section 6 of the Rules Board for Courts of Law Act (107/1985) amended the rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa with the approval of the Minister of Justice and Correctional Services. The notice to this effect was published

in Government Gazette no 43856 dated 30 October 2020. The amended rules 5, 33,76,84,86 and amendment of parts of Table A and annexure 3 will come into operation on 1 December 2020.

3. The Minister of Justice and Correctional Services has appointed places within each regional division for the holding of a court for the adjudication of certain civil disputes and magisterial districts, sub-districts and areas in respect which such shall exercise jurisdiction. The notice to this effect was published in Government Gazette no 43861 dated 30 October 2020.

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Recent Court Cases

1. Makaphela and Others v Acting Regional Court Magistrate Mr Dumani and Others (816/18) [2019] ZAECBHC 22; 2020 (2) SACR 427 (ECB)

Magistrates are not employees of the State and the Minister of Justice does not have control and supervisory powers over magistrates therefore the Minister cannot be held vicariously liable for the action of a magistrate.

The Court:

[1] This is an application for the review of the decision of the Zwelitsha Acting Regional Court Magistrate (first respondent), who refused to recuse himself from a criminal case (number RCZ112/2015). The first and fourth respondents did not oppose the application but are opposing a costs order only. The matter came before us on 1 August 2019. Due to the urgency with which we regarded the matter on that day we made the following order:

'1. The applicants' failure to bring this review application timeously is condoned.

2. The first respondent's decision not to recuse himself as a presiding officer in the part-heard criminal matter in the Zwelitsha Regional Court under case no. RCZ 112/2015 is reviewed and set aside.

3. The trial in the matter mentioned in paragraph 2 above is directed to start de

novo before another Regional Magistrate.

4. *The issue of costs is reserved.*
5. *The first respondent is invited to show cause (in writing) within two weeks of the date of this order, why he should not be directed to pay the costs of this application in his personal capacity.*
6. *Reasons for this order and any costs order which may follow, are reserved pending the response from the first respondent.'*

[2] The first respondent has filed an affidavit in accordance with paragraph 5 of our order in an attempt to persuade us not to mulct him with a costs order *de bonis propriis*. The applicants filed an opposing affidavit.

[3] Before dealing with the affidavit of the first respondent it is necessary to briefly set out the background to the review. The applicants together with seven other accused stood trial in the Zwelitsha regional court before the first respondent under case number RCZ 112/2015 on various charges of fraud, corruption and money laundering. They all pleaded not guilty to the charges. After various postponements, the trial commenced on 20 February 2017. The first witness for the State was called to give evidence.

[4] On 11 June 2018, while the State was still busy leading its first witness, the erstwhile accused number 7 decided to change her plea of not guilty to one of guilty. On 21 June 2018 the first respondent proceeded with the case and accepted her plea explanation in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 {"the Act"). In the plea explanation she implicated her co-accused in the commission of the offences with which they had been charged.

[5] In the premises she was allocated a new case number to be tried separately from her co-accused. On that same day the first respondent, having satisfied himself of the correctness of the guilty plea, convicted and sentenced her accordingly. Thereafter the prosecutor applied for and was granted a separation of trials. The remaining accused were remanded to 13 August 2018.

[6] On that day the matter did not proceed but was rolled over to 14 August 2018. On 14 August 2018 the first respondent wanted to continue with the matter as if nothing had happened. Defence counsel on behalf of accused number 6 (the first applicant) applied for his recusal. This application was supported by all the defence counsel including the prosecutor. The first respondent nevertheless dismissed the application to recuse himself. Thereafter the parties applied for the matter to be adjourned as they wanted to take his decision on review. The matter was then adjourned pending the finalisation of this review application.

[7] As indicated earlier, at the hearing of the review before us all the parties were *ad idem* that the magistrate ought to have recused himself (correctly in our view) and

that the review application should accordingly succeed. It was on that basis that we made the order mentioned in paragraph 1 above. It is therefore not strictly necessary to deal with the merits of the recusal except where it has a bearing on the costs occasioned by the review application. The only issue to be decided then is the costs of this application.

[8] It is evident that the first respondent adopted an intransigent attitude in his refusal to recuse himself from presiding over the trial of the remaining accused. He filed an answering affidavit in which he merely stated that he was not opposing the review application but would abide the decision of this court. He further submitted that he had acted in his official capacity in the discharge of his duties and had committed no irregularity. Except to say that there was no magistrate available, he did not take the opportunity to explain why he refused to recuse himself.

[9] The obligation to give reasons for a decision fulfils a variety of functions. Reasons serve to ensure accountability. They inform the person affected by the decision as to the justification thereof. Reasons enable the person affected to determine whether he or she should abide the decision or take steps to have it corrected or set aside. Baxter: Administrative Law at 228 puts it thus:
'In the first place a duty to give reasons entails a duty to rationalize the decision. Reasons therefore help to structure the exercise of discretion, and the necessity of explaining why a decision is reached and requires one to address one's mind to the decisional referents which ought to be taken into account. Secondly, furnishing reasons satisfies an important desire on the part of the affected individual to know why a decision was reached. This is not only fair - it is also conducive to public confidence in the administrative decision-making process. Thirdly - and probably a major reason for the reluctance to give reasons - rational criticism of a decision may only be made when the reasons for it are known…'[1] [footnotes omitted].

[10] We further gave him an opportunity to give us reasons why the State should be saddled with the costs of this application. He contended that when he refused the application for recusal he was exercising his discretion. He argued that he exercised this discretion in terms of section 157 of the Act. He reasoned that previously it had been held that a judicial officer who took a plea of guilty should not continue with the remaining accused who pleaded not guilty because he will no longer be free from prejudice. He argued that this view was rejected by the Appellate Division which held that the magistrate is a trained judicial officer.

[11] It must be assumed that the discretion alluded to by the first respondent relates to a separation of trials because this is what section 157 is about. The Court has a discretion, in terms of s 157 of the Act, to order a separation of trials. In

[1] See also Nkondo and Others v Minister of Law and Order and Another; Gumede and Others v Minister of Law and Order and Another; Minister of Law and Order v Gumede and Others 1986 (2) SA 756 (A) at 772I - J

exercising its discretion under that section, the trial court has to weigh up the prejudice likely to be caused to the applicant by a refusal to separate, against the prejudice likely to be suffered by the other accused, or the State, if the trials are separated and then to decide whether or not, in the interests of justice, a separation of trials should be ordered. [2]

[12] Section 157 of the Act has nothing to do with whether or not the magistrate should recuse himself from the case. If the first respondent had in mind the provisions of this section when he refused to recuse himself that was an error on his part.

[13] After the first respondent had filed his affidavit in relation to costs we invited the parties including the first respondent to submit heads of argument. Heads of argument were duly filed on behalf of the first respondent and the applicants. The cases to which the first respondent had referred as Appellate Division cases in his explanatory affidavit are presumably R v T 1953 (2) SA 479 (A) and R v D and Another 1953 (4) SA 384 (A). The correctness of these decisions was doubted in SACCAWU and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC) especially in the light of the Constitution.

[14] In his affidavit the first respondent seems to have relied on his training as a judicial officer as one who knows that he must decide the case on the basis of the evidence before him. The *dictum* in S v Somciza 1990 (1) SA 361 (A) at 365J is apposite: Friedman AJA said:
'*However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate.*'

In the circumstances of this case the first respondent ought to have realised that his conduct would not be in keeping with the spirit of our Constitution. The perception that the accused would not receive a fair trial where the same magistrate had convicted their co-accused who had implicated them was unavoidable. This was properly submitted in argument by all the legal representatives and particularly by the State prosecutor.

[15] The applicants have argued that we should draw an inference that the first respondent was acting with mala fides when he refused the recusal application. It has been submitted that the fact that first respondent looked for another magistrate to continue with the trial is an indication that he knew that it was not proper for him to continue with the rest of the accused. With this knowledge, so the argument ran, he nevertheless persisted with his conduct and resisted all attempts to facilitate his recusal. The applicants accordingly contend that the first respondent should be

[2] S v Ntuli and Others 1978 (2) SA 69 (A) at 73F-G

ordered to pay the costs of the review *de bonis propriis* on an attorney and client scale. In the alternative, they contend that the first and the fourth respondents should be ordered to pay punitive costs jointly and severally, the one paying the other to be absolved.

[16] In respect of a *de bonis propriis* costs order the applicants rely in the main on constitutional court authority decided in the context of the conduct of public officials. The argument is attractive but loses sight of the fact that magistrates are not viewed in the same light as other public officials who discharge public duties. Furthermore in the notice of motion the applicants did not pray for a punitive cost order. Differently put, the argument in support of a punitive costs order has not been motivated in the founding affidavit.

[17] The first respondent, on the other hand contends that he has immunity against actions for damages when he is performing his official duties unless malice can be shown. He claims that he has not acted maliciously as he had no direct or indirect interest in the matter. The common law rule is that a successful party is entitled to costs. However costs are not ordinarily awarded against a party acting in his official capacity unless it can be shown that he was actuated by malice or is guilty of grossly improper conduct.[3]

[18] In the present matter the only explanation by the first respondent is that he exercised his discretion. In this regard he erred. Recusal has nothing to do with discretion. It involves a reasonable apprehension on the part of the litigant that the judicial officer may not bring about an impartial mind in the adjudication of the matter and therefore a perception that he may not receive a fair trial.

[19] On the facts of this case the question is whether an inference can be drawn that the first respondent was actuated by malice when he refused to recuse himself. That is possible but it is not the only inference that can be drawn from his conduct. It is possible that this was a genuine mistake in the interpretation of the law, albeit that the first respondent does not pertinently state that he relied on cases of the then Appellate Division. His conduct may be regarded as reprehensible especially in the light of the fact that all the parties were *ad idem* that he should recuse himself from the matter. He was alive to the existence of evidence against the applicants from what was contained in the section 112(2) statement of accused number 7. His persistence in continuing with the matter is a source of grave concern. Be that as it may, we are of the view that malice has not been shown. Nor is this a case where the magistrate ought to be mulcted with costs *de bonis propriis.* We will deal with why we say this in due course.

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[3] Regional Magistrate Du Preez v Walker 1976 (4) SA 849 (A) at 853D and 855F; Cooper NO v First National Bank of SA Ltd 2001 (3) SA 705 (SCA) at para [37]; Darries v Sheriff, Magistrate's Court, Wynberg, and Another 1998 (3) SA 34 (SCA) at 44I/J - 45A/B; Swartbooi and Others v Brink and Others 2006 (1) SA 203 (CC) para.7; Magistrate Pangarker v Botha and Another 2015 (1) SA 503 (SCA) para. 39.

[20] The next question is whether the State should be saddled with costs. The applicants argue, in the alternative, that the first respondent and the State should pay the costs of the application jointly and severally the one paying the other to be absolved. In Du Preez[4] it was said:

'*There is no justification for saddling the State with liability for costs where the action of a judicial officer in his capacity as such has been corrected or set aside on review. Costs are not awarded against the State when on appeal a magistrate's judgment is set aside because he is in error as to the law or in his findings of fact. It would be surprising if, in the event of the same result being achieved on review, the State were to be held responsible for the successful applicant's costs. Moreover it is inappropriate that the Court's displeasure with the conduct of an appellant should result in an order mulcting in costs the State which was neither a party to the suit nor responsible for the judicial officer's actions. There is no room in such a case for the application of the doctrine of respondeat superior*.'

[21] The decision of the Supreme Court of Appeal in Du Preez is binding on us unless it is distinguishable from the present matter. We are not able to find that it is. This is not a civil matter. If the applicants had continued the case to finality and the applicants were thereafter successful on review or on appeal, the result would not have been any different to the numerous criminal convictions which are set aside on appeal or review on a regular basis, without concomitant costs orders against the State and/or presiding officers. However, civil matters are on a different footing. For one, the State, which is by implication a party to all criminal proceedings, is not a party to the proceedings in a civil matter. We refer by way of example to *Ntuli v Zulu*[5] where Jappie J dealt with the categories of cases where costs can be awarded against judicial officers, acting in their judicial capacities. In that matter the court made a cost order against the magistrate in her official capacity having found that she had not acted *mala fide* or with manifest bias, in which case a *de bonis propriis* order against her may have been justified.

[22] As we see it, the matter before us is on all fours with the facts in *Motata v Nair NO and Another*[6]. In that matter the accused had applied to the High Court for the review and setting aside of the decision by the magistrate presiding over his criminal trial wherein the magistrate had determined that, for purposes of a *voir dire* into the authenticity and admissibility of certain video clips, the State was entitled to play the recordings and a transcript in order to enable the court to determine their admissibility. The accused brought his application on the basis that the magistrate's decision allegedly constituted a gross irregularity which was severely prejudicial to

[4] Footnote 3 at 856A.
[5] 2005 (3) SA 49 KZN
[6] 2009 (2) SA 575 TPD

him in the conduct of his defence, inasmuch as the recordings might be self-incriminating, and therefore interfered with his constitutional right to a fair trial. Although the reviewing court ultimately found in the magistrate's favour and referred the matter back to the trial court to be finalised, the principle enunciated in that matter is equally applicable to the one before us and is stated thus in the judgment of Hancke J and Pickering J:

'[*44] Applicant originally sought an order for costs against such of the respondents as opposed the application. This in turn led Mr Van Zyl to seek an order for costs against applicant in the event of the application being dismissed. Having regard to the fact that this is a criminal matter in which an accused is not usually saddled with costs, we are of the view that it is not appropriate to make any order as to costs. Cilliers The Law of Costs 3 ed paras 12.19 - 12.24.'*

[23] There is one last issue which calls for comment. The applicants seem to rely on the unreported case of Tsotetsi v The Honourable Magistrate Delize Smith and Another (23969/2015) [2016] ZAGP JHC 329 (29 November 2016) for the contention that liability for costs on the part of the fourth respondent can be based on vicarious liability. In that matter Van der Linde J approved a finding by Van Der Merwe AJ in Minister of Safety and Security and Others v Van der Walt and Another[7] where it was held that magistrates are employees of the Minister of Justice. This aspect was left open on appeal in Minister of Safety and Security and Others v Van der Walt and Another[8] save to mention that the Appeal Court reiterated that a conclusion that the Minister is vicariously liable based on a finding that magistrates are "employed" by the Minister, ignores the well-established principle that magistrates, when they act in the course and scope of their judicial functions, enjoy, like all judicial officers, a status of judicial independence when they perform these judicial functions and in so doing, form part of the judicial branch of government.[9]

[24] Lest we be understood to agree with the finding by Van der Linde J, let us clarify: We do not agree that magistrates are employees of the State. Magistrates do not fall within the category of public servants employed in terms of the Public Service Act Proclamation No. 103 of 1993. They do not fall under the Department of Justice and Correctional Services. The fact that they are appointed by the Minister of Justice by virtue of the provisions of section 9 of the Magistrates' Courts Act 32 of 1944, does not detract from the fact they are not his employees. In terms of section 10 of the Act, the Minister can only appoint them on the recommendation of the Magistrates' Commission just like the President who appoints judges on the recommendation of the Judicial Service Commission. The Minister does not have control and supervisory powers over magistrates. He cannot direct and control them in the execution of their

[7] [2011] ZAGPJHC 15 (25 January 2011)
[8] [2015] 1 ALL SA 658 (SCA)
[9] At para 20

judicial duties. The Constitution provides that: '*The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*'[10] Consequently the control element by the Minister over magistrates is lacking.

[25] Furthermore, the Constitutional court has ruled that magistrates are not employees but they are judicial officers.[11] We are accordingly of the respectful view that the cases relied upon by the applicants defining magistrates as employees of the Minister of Justice are, to that extent, incorrect.

[25] In the result there shall be no order as to costs.

2. Oosthuizen v Magistrate for the District of Hermanus and Others (8633/2020) [2020] ZAWCHC 138 (29 October 2020)

In issuing a search warrant requisite particularity is absent not only when the relevant provision governing a statutory offence is not identified, but also when the wrong provision is identified or when confusion is created by the description of the suspected offence.

Norton AJ

[1] On 21 May 2020 the Magistrate for the District of Hermanus (the Magistrate) issued a search warrant in terms of s 21 read with s 20 of the Criminal Procedure Act 51 of 1977 (the CPA) authorising the third respondent, Captain Rossouw of the South African Police Services (the SAPS), to enter and search identified premises in Gansbaai and to seize articles including cannabis and cannabis oil.

[2] In execution of the warrant the premises of the applicant were searched on the same day. A range of articles were seized and the applicant was arrested on charges of dealing in cannabis, alternatively possession of cannabis in contravention of ss 5(b) and 4(b) respectively of the Drugs and Drug Trafficking Act 140 of 1992 (the Drugs Act).

[3] The applicant on 10 July 2020 instituted this application in which he seeks the setting aside of the warrant on an urgent basis. He does so on a range of grounds pertaining to the issue of the warrant and its terms.

[4] The Magistrate, who is cited as the first respondent in the application, did not oppose the application or file an affidavit setting out his version, but delivered notice of his intention to abide the decision of the court. The application was opposed by the second to fourth respondents, referred to in what follows as 'the respondents'.

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[10] Section 165(2) of the Constitution Act, 1996.

[11] Van Rooyen & others v The State & others (General Council of the Bar intervening) 2002 (5) SA 246 (CC) para 139

The law governing search warrants

[5] Section 20 of the CPA empowers the State to seize any article –

'(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence, whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence, whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.'

[6] Subject to ss 22, 24, and 25 of the CPA (which are not applicable on the facts in this matter), an article referred to in s 20 may be seized only by virtue of a search warrant issued –

'(a) by a magistrate or justice, if it appears to such magistrate or justice from information on oath that there are reasonable grounds for believing that any such article is in the possession or under the control of or upon any person or upon or at any premises within his area of jurisdiction; or

(b) by a judge or judicial officer presiding at criminal proceedings, if it appears to such judge or judicial officer that any such article in the possession or under the control of any person or upon or at any premises is required in evidence at such proceedings.'

[7] Provisions for the issue and execution of search warrants implicate two conflicting sets of interests: the State's constitutionally mandated task of investigating and prosecuting crime, and individuals' constitutional rights of privacy and dignity (*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC) para 54).

[8] The individual rights which are at stake are protected by a range of safeguards from the time that a search warrant is sought up to the time that articles seized in terms of a search warrant are relied upon as evidence in a criminal trial.

'First, a judicial officer will exercise his or her discretion to authorise the search in a way which provides protection for the individual's right to privacy. Second, once the decision to issue the search warrant has been made, the judicial officer will ensure that the warrant is not too general nor overbroad, and that its terms are reasonably clear. At the third stage, the right to privacy may still be vindicated by a reviewing court, which can strike down overly broad warrants and order the return of objects which were seized in terms thereof. Finally, the criminal trial must be fair, and an accused person is entitled to object to any evidence or conduct that may render the trial unfair' (*Thint (Pty) Ltd v National Director of Public Prosecutions and Others: Zuma v National Director of Public Prosecutions and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC) para 78).

[9] In *Minister of Safety and Security v Van der Merwe and Others* 2011 (5) SA 61 (CC) Mogoeng J (as he then was), on behalf of a unanimous Constitutional Court, outlined the requirements for a valid warrant and the guidelines to be observed by a court considering the validity of a warrant as follows:

'[55] [A] valid warrant is one that, in a reasonably intelligible manner:

(a) states the statutory provision in terms of which it is issued;
(b) identifies the searcher;
(c) clearly mentions the authority it confers upon the searcher;
(d) identifies the person, container or premises to be searched;
(e) describes the article to be searched for and seized, with sufficient particularity; and
(f) specifies the offence which triggered the criminal investigation and names the suspected offender.
[56] In addition, the guidelines to be observed by a court considering the validity of the warrants include the following:
(a) the person issuing the warrant must have authority and jurisdiction;
(b) the person authorising the warrant must satisfy herself that the affidavit contains sufficient information on the existence of the jurisdictional facts;
(c) the terms of the warrant must be neither vague nor overbroad;
(d) a warrant must be reasonably intelligible to both the searcher and the searched person;
(e) the court must always consider the validity of the warrants with a jealous regard for the searched person's constitutional rights; and
(f) the terms of the warrant must be construed with reasonable strictness.'
[10] The test for 'reasonable intelligibility' is an objective one. A warrant must, on its face and at the time of its issue, be 'reasonably capable of being understood by the reasonably well-informed person who understands the relevant empowering legislation and the nature of the offences under investigation' (*Thint*, paras 153 and 162).

The pertinent provisions of the Drugs Act
[11] Sections 4 and 5 of the Drugs Act (which proscribe, respectively, the possession of and dealing in specified substances) distinguish between three different categories of substances:
(a) a 'dependence-producing substance' (defined as meaning 'any substance or any plant from which a substance can be manufactured included in Part 1 of Schedule 2');
(b) an 'undesirable dependence-producing substance' (defined as meaning 'any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2'); and
(c) a 'dangerous dependence-producing substance' (defined as meaning 'any substance or plant from which a substance can be manufactured included in Part II of Schedule 2').
[12] Part III of Schedule 2 lists 'Cannabis (dagga), the whole plant or any product thereof' as an 'undesirable dependence-producing substance'.
[13] The possession of –
(a) any dependence-producing substance is prohibited by s 4(a) of the Drugs Act; and
(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance is prohibited by s 4(b) of the Drugs Act.

[14] The possession of cannabis or any product of it is therefore prohibited by s 4(b) of the Drugs Act, subject to the exceptions set out in sub-paragraphs (i) to (vii), sub-section (vii) being the exception read in by the Constitutional Court in *Minister of Justice and Constitutional Development and Others v Prince; National Director of Public Prosecutions and Others v Rubin; National Director of Public Prosecutions and Others v Acton and Others* 2018 (6) SA 393 (CC) para 105 where cannabis is possessed or used by an adult in private for his or her personal consumption in private.

[15] Dealing in –

(a) any dependence-producing substance is prohibited by s 5(a) of the Drugs Act; and

(b) any dangerous dependence-producing substance or any undesirable dependence-producing substance is prohibited by s 5(b) of the Drugs Act.

[16] Dealing in cannabis, which includes cultivating cannabis or manufacturing a product of it (see definition of 'deal in' in s 1(1) of the Drugs Act, read with Part III of Schedule 2) is therefore prohibited by s 5(b) of the Drugs Act.

The warrant under review

[17] The warrant issued by the Magistrate on 21 May 2020 (on a *pro forma* search warrant form) identified Captain Rossouw of the SAPS as the member in charge of the search and seizure operation.

[18] The address of the premises at which the search was authorised was identified as '61 Marine Drive, Danger Point, Kleinbaai, Gansbaai'.

[19] The 'suspected offence' was described in part III of the warrant as:

'Contravention of section 4(a) and 5(a) of the [Drugs Act]
Dealing in Cannabis and Cannabis Oil (Dronabinol)'.

[20] The articles to be seized were described as 'Cannabis and Cannabis Oil and items as per Annexure 2', with the items listed in Annexure 2 to the supporting affidavit of Captain Rossouw being:

· All dagga/cannabis plants and plant material.
· All dagga/cannabis oils.
· All equipment used in the extraction of dagga/cannabis oils.
· All equipment used to cultivate dagga/cannabis.
· All electronic equipment which include cell phones, desktop computers, laptops and iPads.
· All documentation that provide evidence to the crime committed.'

[21] The warrant recorded that it appeared to the Magistrate from information on oath that there were reasonable grounds to believe that there was 'Cannabis and Cannabis Oil' which (a) was concerned in the suspected commission of the offence mentioned in part III; (b) was on reasonable grounds believed to be concerned in the suspected commission of the offence mentioned in part III; (c) may afford evidence of the suspected commission of the offence mentioned in part III; and (d) was on reasonable grounds believed to be intended to be used in the commission of the offence mentioned in part III.

[22] The information before the Magistrate when he issued the warrant was contained in two affidavits. The first was an affidavit by the third respondent, Captain Rossouw of the SAPS Directorate for Priority Crime Investigation, South African Narcotics Enforcement Bureau, in which he explained that his unit's investigations entail the dismantling of drug and dagga or cannabis laboratories and investigations of drug and dagga or cannabis manufacturing and distribution.

[23] Captain Rossouw stated that on 12 May 2020 he received information from a reliable source that cannabis was being cultivated in an organised manner (by means of hydroponic processes under nets) and cannabis oils were being extracted from cannabis plants (by means of pressure cookers or kettles in a bunker) on a smallholding at 61 Marine Drive, Danger Point, Kleinbaai, Gansbaai (the property).

[24] He had asked Captain Rautenbach, the Detective Commander at SAPS Gansbaai, to confirm that the address existed and to 'do observation' at the property to confirm whether there was a cannabis cultivation plantation and a bunker on the property.

[25] On 20 May 2020 Captain Rautenbach informed him that he had done observation at the property and confirmed that there was a cannabis plantation under nets as well as 'a kind of bunker' and a house on the property. Captain Rautenbach also advised him that he had obtained photographs and video footage from the observation.

[26] Captain Rossouw stated in his affidavit that 'the cultivation of dagga/cannabis and manufacturing of dagga/cannabis oils is a criminal offence in terms of the [Drugs Act] section 5(a)' and that the items to be seized could prove that 'an offence in terms of the [Drugs Act] section 5(a) Dealing in dependence producing substance and section 4(b) Possession of dependence producing substance was committed'.

[27] Captain Rossouw named eight police officers, including himself, who he said would 'take part in the search' at the property. In Annexure 1 to Captain Rossouw's affidavit, under the heading 'Particulars of members who will execute the search warrant', the names of the same eight police officers were listed, along with the words 'Any other SAPS members that can be of assistance during the search'. Annexure 2 to Captain Rossouw's affidavit listed the articles to be seized in the search.

[28] The second affidavit before the Magistrate was deposed to by the fourth respondent, Captain Rautenbach, on 21 May 2020. He stated that on 15 May 2020 he had received a request from Captain Rossouw to observe a property where cannabis was apparently being cultivated. On 20 May 2020 at around 17h30 he observed the property, a smallholding situated at 61 Marine Drive, Danger Point, Kleinbaai, Gansbaai. He said:

'During the observation it was found that it appears that dagga is being cultivated in a hothouse situated on the northern side of the smallholding at the back. I took photos of the property. I also noticed that there is a structure at the back of the property which consists of an underground and a surface level. There are even stairs which provide access to the structure…I also took photos and video of the structure. In my opinion and experience in the police it did indeed appear that the property satisfies the information which exists and that dagga or drugs are indeed being cultivated.'

[29] He stated further that he had informed Captain Rossouw of what he had observed and handed over the photos he had taken on 21 May 2020.
[30] Captain Rossouw executed the warrant at 13h20 on 21 May 2020. In an affidavit deposed to on 25 May 2020 he stated that the following articles were seized during the search of the property: (a) one iPhone; (b) one Apple laptop; (c) one tablet device; (d) approximately 2 kg of loose cannabis; (e) five small cannabis trees; (f) four 5-litre plastic containers of Glycerine; (g) one 25-litre container of Glycerine; (h) fourteen 25-litre plastic cans containing Ethanol; and (i) three 25-litre and four 5-litre plastic containers containing liquid which is possible cannabis plant material and Ethanol.
[31] On the same day Captain Rossouw arrested the applicant on a charge of dealing in cannabis, alternatively possession of cannabis.

Grounds on which the warrant is challenged
[32] A range of grounds for the setting aside of the warrant were advanced in the applicant's founding affidavit. Those grounds were supplemented with new grounds raised in his replying affidavit, the heads of argument filed on his behalf, and in oral argument by his counsel.
[33] Having filed a founding affidavit of 28 pages and a further ten pages of annexures, the applicant filed a replying affidavit which ran to 83 pages, with a further 51 pages of annexures. For reasons which I set out below, there are compelling grounds on which the replying affidavit might be struck out in its entirety as an abuse of the process of this court. The respondents have brought an application for the striking out of only the new grounds of review introduced in the replying affidavit.
[34] In circumstances in which the respondents have provisionally provided a response to the new grounds raised in the replying affidavit, and in the interests of ventilating all the issues in a matter which concerns fundamental constitutional rights, I have decided to allow the replying affidavit and consider the grounds raised in it. My disapproval of the applicant's conduct will be reflected in the costs order which I make.
[35] I have also considered one of the grounds raised for the first time in the applicant's heads of argument and one of the grounds raised for the first time in oral argument on behalf of the applicant. I do so on the basis that in each case the ground requires the application of the relevant legal principles to the undisputed contents of the warrant and has been addressed in argument by the respondents, and its consideration does not therefore occasion prejudice to the respondents which cannot be addressed by an appropriate costs order (see *Minister van Wet en Order v Matshoba* 1990 (1) SA 280 (A) 285E-F).
[36] The principal grounds relied on by the applicant are, first, that the objective jurisdictional facts for the issue of the warrant were not present; and second, that the warrant is vague, overbroad and not reasonably intelligible. An overarching ground relied on by the applicant is that the Magistrate failed to apply his mind properly to the issue of the warrant.
[37] As a threshold point, the applicant contends that the Magistrate's failure to

depose to an affidavit means that the allegation that he failed to apply his mind stands unchallenged and must be accepted. There is no merit in this submission.
[38] It is regrettable that the Magistrate, as an accountable decisionmaker, did not furnish this court with an explanation of how he reached his decision to issue the warrant, but it does not follow that the applicant has therefore established that the Magistrate failed to apply his mind (see *Grammaticus (Pty) Ltd v Minister of Police NO and Others* [2017] ZAGPPHC 342 (22 March 2017) para 26). The determination whether the Magistrate applied his mind is not a subjective one, based on the Magistrate's own 'say so', but an objective one, based on the warrant and the information which was before the Magistrate when he issued the warrant.

The ground based on the absence of objective jurisdictional facts
[39] A court reviewing the issue of a warrant must be satisfied that the objective jurisdictional acts for the issue of the warrant were present. The jurisdictional facts required by ss 20 and 21 of the CPA are reasonable grounds for believing that an article which (a) is concerned in; (b) may afford evidence of; or (c) is intended to be used in the commission or suspected commission of an offence, is on the premises to be searched.
[40] The applicant contends that the affidavits of Captain Rossouw and Captain Rautenbach do not disclose information on the basis of which the warrant could validly be issued.
[41] It is evident from the affidavits, however, that Captain Rossouw had been furnished with information from what he regarded as a reliable source that cannabis was being cultivated in an organised manner, and cannabis oils were being extracted on the property, and Captain Rautenbach was able to confirm (from his observations and with photographs) that there were structures on the property conforming to the structures which had been described to Captain Rossouw as the locus of (a) the cultivation of cannabis; and (b) the manufacture of cannabis products.
[42] I am satisfied that the affidavits contained sufficient information to satisfy the Magistrate that the objective jurisdictional facts for the issue of a warrant - the existence of reasonable grounds for believing that articles involved in the cultivation and possession of cannabis and the manufacture of cannabis products, as proscribed by ss 4(b) and 5(b) of the Drugs Act - were present.

Grounds based on vagueness, overbreadth and lack of reasonable intelligibility
[43] The applicant contends that the warrant fails to meet one or more of these standards on the grounds that it (a) does not specify a period of validity; (b) refers to the incorrect provisions of the Drugs Act and incorrectly refers to the substance 'Dronabinol'; (c) specifies the wrong address for the property; (d) authorises the execution of the warrant by named police officials as well as 'any other SAPS member that can be of assistance during search'; and (e) permits the seizure of 'all electronic equipment'.

Period of validity

[44] The warrant contains no date, next to the words 'warrant valid until', on which the warrant would 'expire'. On the face of it, this renders the warrant overbroad in its duration.

[45] Section 21(3)(b) of the CPA, however, provides that a search warrant

'shall be of force until it is executed or is cancelled by the person who issued it or, if such person is not available, by a person with like authority.'

[46] Commenting on this provision in *Hiemstra's Criminal Procedure* (May 2020, 2-7) Kruger suggests that an issuing authority should issue a warrant for a specified period only, or withdraw it of its own accord after a reasonable period, as otherwise a warrant constitutes 'an excessively far-reaching encroachment upon the privacy of the individual'.

[47] The specification of an expiry date for a warrant would plainly be a salutary practice, but it is not one commanded by the CPA. Since in this case the warrant was executed on the same day on which it was issued, it is not possible to say that the Magistrate would not have cancelled the warrant – as contemplated in s 21(3)(b) of the CPA – if it was not executed within a reasonable period of time. This attack on the warrant must therefore fail.

Reference to incorrect provisions of the Drugs Act

[48] In Part III of the warrant, under the heading 'Description of suspected offence', the following is stated:

'Contravention of section 4(a) and 5(a) of the [Drugs Act]
Dealing in Cannabis and Cannabis Oil (Dronabinol)'

[49] This description of the suspected offences gives rise to at least three concerns. The first is that ss 4(a) and 5(a) of the Drugs Act do not proscribe any conduct in respect of cannabis. The second is that reference is made to dronabinol, which is an altogether different substance to cannabis. The third is that Part III of the warrant is in conflict with Captain Rossouw's affidavit, which records his reliance on ss 4(b) and 5(a) of the Drugs Act, and makes no reference to dronabinol.

[50] The provisions of the Drugs Act which proscribe possession of, and dealing in, cannabis are ss 4(b) and 5(b) respectively. The warrant however identifies as the suspected offences contravention of ss 4(a) and 4(b) which, respectively, proscribe possession of and dealing in entirely different substances.

[51] Part III of the warrant does make reference to 'Cannabis and Cannabis Oil', but includes in parentheses after these words, a reference to 'Dronabinol'. Dronabinol is a substance which is (a) listed as a dangerous dependence-producing substance in Part II of Schedule 2 to the Drugs Act; and (b) expressly excluded from the reference to cannabis in Part III to Schedule 2:

'Cannabis (dagga), the whole plant or any portion or product thereof, except dronabinol [(-)-transdelta-9-tetrahydrocannabinol].'

[52] Captain Rossouw's affidavit also erroneously identifies s 5(a) of the Drugs Act as the provision which prohibits the cultivation of cannabis and the manufacture of cannabis oil, while correctly identifying s 4(b) as the provision which prohibits the

possession of cannabis. The affidavit makes no reference to dronabinol.

[53] The reference to provisions of the Drugs Act which are not applicable to the substances identified, and the unexplained reference to dronabinol, create confusion and uncertainty in respect of a pivotal issue: the suspected offences which underpin the required jurisdictional facts.

[54] In *Goqwana v Minister of Safety NO and Others* 2016 (1) SACR 384 (SCA) the Supreme Court of Appeal (per Willis JA) observed that it is 'ordinarily desirable' that when dealing with a statutory offence, as opposed to a common law crime,

'the warrant should pertinently refer to *the specific statute and the section or subsection thereof* in order to enable the person in charge of the premises to be searched (assisted, if needs be, by his or her lawyer) and also the police official authorised in terms of the search warrant *to know precisely that for which the search has been authorised*' (para 29). (Emphasis added).

[55] Willis JA went on to say:

'The need for particularity in a warrant, especially where one is dealing with statutory offences, is salutary. This should present no difficulty in practice because search warrants are issued by magistrates who are trained and experienced in law (para 29).

[56] In *Powell NO & Others v Van der Merwe NO & Others* 2005 (5) SA 62 (SCA) para 59 Cameron JA (as he then was) stated:

'It is no cure for an over-broad warrant to say that the subject of the search knew or ought to have known what was being looked for: the warrant must itself specify its object, and must do so intelligibly and narrowly within the bounds of the empowering statute'.

[57] In my view the requisite particularity is absent not only when the relevant provision governing a statutory offence is not identified, but also when the wrong provision is identified or when confusion is created by the description of the suspected offence.

[58] In this instance, a person reading the warrant would not know whether the suspected offence at the core of the search and seizure authorisation relates to the substances listed in Part I, II or III of Schedule 2 to the Drugs Act, or even to the substances in all three Parts.

[59] The errors in the description of the suspected offence not only render the warrant invalid on the grounds of vagueness and a lack of reasonable intelligibility, but also evidence the Magistrate's failure to apply his mind properly in issuing the warrant. As Willis JA noted in *Goqwana:*

'A search warrant is not some kind of mere "interdepartmental correspondence" or "note". It is, as its very name suggests, a substantive weapon in the armoury of the State. It embodies awesome powers as well as formidable consequences. It must be issued with care, after careful scrutiny by a magistrate or justice, and not reflexively upon a mere "checklist approach"' (para 30).

The wrong address

[60] The ground advanced most forcefully in the applicant's affidavits is that the address identified in the warrant – 61 Marine Drive, Danger Point, Kleinbaai,

Gansbaai – does not exist. In making this argument, the applicant highlights trivial differences between the various iterations of the address in the warrant and the affidavits of Captain Rossouw and Captain Rautenbach, and avers that the correct address of the property is 23 Marine Drive, Birkenhead.

[61] On the respondents' version (which must in terms of the *Plascon- Evans* rule prevail, but is in any event not disputed by the applicant) the property which was searched in execution of the warrant is in the town called Gansbaai, in a street called Marine Drive, and at a location the physical entrance to which is clearly marked with the number '61'. The address was identified in the warrant with sufficient precision for the police officials executing the search to have found their way to the applicant's property.

[62] The Supreme Court of Appeal in *Polonyfis v Minister of Police and Others* 2012 (1) SACR 57 (SCA) para 16 accepted that the requirement in s 21(2) of the CPA that a warrant shall authorise a police official 'to enter and search any premises identified in the warrant',

'means no more than that the warrant should intelligibly describe the premises to be searched so that the official who is authorised to conduct the search is able to identify it.'

[63] Noting that '[a]bsolute perfection in description is not required', Cachalia JA held that 'a technically wrong address does not invalidate a warrant if it otherwise describes the premises with sufficient particularity so that the police can ascertain and identify the place to be searched'.

[64] Thus, even if the address in the warrant had been technically wrong (which I find not to be the case), the fact that the police officials executing the warrant were able to ascertain the property which was intended to be searched, would mean that this attack on the warrant must fail.

The authorised police officials

[65] The applicant contends that the warrant is impermissibly broad in that Annexure 1 to Captain Rossouw's affidavit contains not only the names of eight police officers who would execute the search, but also the words 'Any other SAPS member that can be of assistance during the search'.

[66] This contention runs up against the decision of the Supreme Court of Appeal in *Goqwana,* where the Court considered the validity of a search warrant which was addressed simply to 'the Station Commander', without naming the Station Commander or the relevant police station. Observing that on a plain reading of ss 21(2) and 25(1) of the CPA, it is clear that 'an identified police officer should be named and should act throughout' (para 22), and that it would normally be the investigating officer who conducts a search in terms of s 25 of the CPA (para 25), Willis JA said:

'The interpretation that the police official should be named in the search warrant acts as a safeguard against abuse so that when the warrant is executed, a person at the premises to be searched can ask not only for the police official to produce his or her police identity card but also to demonstrate the reference to him or herself in the

warrant itself. This interpretation also reinforces the principle of accountability, more especially as it will ordinarily be the investigating officer who applies to the magistrate for a search warrant, leading to the search itself' (para 25).

[67] Pertinently, Willis JA went on to say:

'Of course, *the circumstances will very often require that the investigating officer be assisted by other police officials*. It remains salutary, however, that *at least one police official responsible for the search should pertinently be identified* in the actual search warrant' (para 25). (Emphasis added)

[68] The warrant under review pertinently identified Captain Rossouw as the police official responsible for the search, and identified a further seven police officials who would execute the search. The reference to other SAPS members who might be of assistance during the search does not render the warrant vague or overbroad.

The articles to be seized

[69] Finally, there is the question of the articles which Captain Rossouw was authorised to seize. These included a category of articles described as: 'All electronic equipment which include cell phones, desktop computers, laptops and iPads'.

[70] This category of articles is strikingly broad. While the description 'all electronic equipment' is arguably narrowed by the reference to specific types of electronic devices, the warrant does not distinguish between the electronic devices themselves and any material or information stored on them, let alone identify the material to be seized as material which might have a bearing on the suspected offence.

[71] It is readily apparent that the respondents did not anticipate that the electronic devices themselves would furnish evidence (as, for example, instruments or products) of the suspected offences. It was the information stored on the electronic devices which was the focus of this part of the warrant, and the respondents were accordingly required to identify that information as precisely as possible in order to limit the inroads upon the applicant's privacy which would follow from a 'general ransacking' of his electronic devices.

[72] The scope of the privacy risks posed by the search and seizure of electronic communication devices is significant. In *Riley v California* 573 U.S. 373 (2014) the United States Supreme Court considered the question whether the police may search the cell phone of an arrested person without a warrant. Chief Justice Roberts made the following observations regarding the volume and quality of personal information contained on cell phones, most of which are applicable also to personal computers:

'The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information – an address, a note, a prescription, a bank statement, a video – that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labelled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in

his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone' (p 18).

'Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns – perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building' (pp 19-20).

'Mobile application software on a cell phone, or "Apps", offer a range of tools for managing detailed information about all aspects of a person's life… The average smart phone user has installed 33 Apps, which together can form a revealing montage of the user's life' (p 20).

'Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is' (pp 20-21).

[73] In *Craig Smith and Associates v Minister of Home Affairs and Others* [2015] BCLR 81 (WCC) this court set aside as overbroad a warrant which permitted the seizure, among other things, of 'any computers including laptops and external hard drives'. Davis J, questioning whether it could possibly be that all the information on the applicants' computers constituted part of the search, found that the warrant failed to describe the articles to be searched with sufficient particularity, 'certainly insofar as the open-ended reference to "computers" is concerned' (para 94).

[74] In *R v Khan* 2005 CanLII 63749 (ON SC) the Ontario Superior Court of Justice held that a generic description of the items to be seized (including 'all computer related equipment and peripherals') left the executing officers 'entirely without guidance, either from the description of the offence or from any words limiting the various categories, as to how they might ascertain the relevance to the specific offence being investigated of anything they might find' (para 53), and 'led to warrants that essentially purported to authorise a search and seizure without limit'(para 56).

[75] What was required, in my view, was for the warrant, first, to specify that the object of the search (under this category of articles) would be material stored on the electronic devices, and second, to identify the relevant material by its connection to the suspected offences, and with reference to the types of electronically stored material (such as accounting records, invoices, correspondence, photographs or videos) which might evidence activities related to the suspected offences. This is the only way in which the police officers conducting the search would be able to distinguish between the electronically stored material subject to seizure, and material not subject to seizure.

[76] The nexus between the articles to be seized and the suspected offence (which is pertinently required by s 20 of the CPA) is not established by a reference elsewhere in the warrant to the suspected offence (*Cine Films (Pty) Ltd and Others v Commissioner of Police and Others* 1972 (2) SA 254 (A) 267F).
[77] The conclusion reached in *Cine Films* is apposite in this matter. After considering a part of a warrant issued in terms of s 42(1) of the CPA (as it was then) which directed seizure of 'all stock books, stock sheets, invoices, invoice books, consignment notes, all correspondence, film catalogues', Muller JA said the following:
'A reading of the warrants issued in the present case leads me to the irresistible conclusion that the magistrate either intended that *all documents of the kind mentioned in the warrants should be seized*, irrespective of whether some of them might or might not afford evidence of a contravention of the Copyright Act, *in which case he would have exceeded the powers conferred on him* by sec. 42 (1) of the [now repealed] Criminal Procedure Act [56 of 1955], or he did not so intend, *in which case he could not, in framing the terms of the warrants, have properly applied his mind to the matter*. In either case his act or omission would have the effect of permitting an unlawful seizure and, in the respects in which and to the extent to which such was permitted, the warrants in question must be held to be invalid (268C-D). (Emphasis added)
[78] On the same reasoning, the impermissible breadth of the category of 'all electronic equipment' in this case demonstrates that the Magistrate exceeded his powers under s 21(a) read with s 20 of the CPA or failed to apply his mind properly in issuing the warrant.
[79] Three articles falling into the category of 'all electronic equipment' were seized during the search of the applicant's property: an iPhone, a laptop and a tablet. I enquired during argument whether these articles had been returned to the applicant, and counsel for the respondents subsequently indicated that the respondents tendered the return of the laptop and the tablet, but required the iPhone for evidential purposes. Before the conclusion of argument, I was advised that a mirror image of the iPhone had been obtained, and the respondents tendered return of the iPhone. I return to these articles below when I deal with the issue of a preservation order.
[80] The question of when an electronic device may be removed from the searched premises in order to conduct an off-premises search for the electronically stored material which has been identified, is not an issue before me. I consider however that it would be appropriate, if it is anticipated that an off-premises search of electronic devices will be required, that the basis for such a search be laid in the affidavits supporting the application for a search warrant (see United States Department of Justice, *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations,* 2009, pp 76-79).

Conclusion on validity
[81] I find that the warrant falls to be set aside on the grounds that (a) it does not indicate with reasonable intelligibility or the required specificity the nature of the

suspected offences; and (b) it provides for the seizure of an impermissibly broad category of articles falling within the description 'all electronic equipment which include cell phones, desktop computers, laptops and iPads.'

(The above judgment has been edited. The full judgment can be accessed here: http://www.saflii.org/za/cases/ZAWCHC/2020/138.html).

From The Legal Journals

Mahmoud, R F & Bellengère, A H

"A social service? A case for accomplishing substituted service via WhatsApp in South Africa."

***South African Law Journal,* Volume 137 Number 3, Sep 2020, p. 371 – 389**

Abstract

The amendment of the Uniform Rules of Court to include service by electronic mail has raised the interesting question of service through electronic media other than electronic mail. Recent developments have partially answered this question with regard to substituted service via Facebook. However, it is still a relatively novel concept and has not yet been extended to WhatsApp in South Africa. This note examines the criteria employed in determining the likelihood of accomplishing substituted service via WhatsApp. First, the principles underlying substituted service are examined, followed by an assessment of the impact and reach of social media platforms, a summary of the initial moves to incorporate them into South African procedural law, and a description of the technical attributes of WhatsApp. Several judgments from around the world, tentatively embracing service via WhatsApp, are then discussed, followed by an assessment of the standards that need to be met in order to ensure effective service, and the factors that a court needs to consider when faced with such a request. The note concludes that a reasonable degree of certainty that service can be achieved by WhatsApp exists, and that it could therefore be an effective medium for substituted service.

Ntlama, N

"Gender-based violence ignites the re-emergence of public opinion on the exercise of judicial authority."

2020 De Jure Law Journal 286

Abstract

South Africa is highly celebrated for its commitment to the promotion of human rights. This has also fostered "rights consciousness" among the citizenry which has become of essence for the advancement of the rights of women who had long been in the "legal cold". However, the significance of the "rights concepts" is marred by the extreme levels of gender-based violence against women. The effect of crimes suffered by women raises questions about South Africa's post-apartheid system of governance and the promotion of the rule of law, which is founded on human rights. With South Africa's history, it is assumed that law has the potential to transform societies in ensuring the fulfilment of rights as envisaged in many national, regional and international instruments. Against this background, this paper focuses on the recent shocking wave of the extreme levels of gender-based violence against women experienced in South Africa with the resultant consequence of the agitation of the public on the independence of the judiciary. Whilst it acknowledges the limitations of the law and the challenges faced by women, it argues against public opinion that seem to wither the democratic character of the state relating to the functioning of the judiciary. It also argues that public opinion waters down the assumption about the capacity of the law in generating social change. In addition, the confidence in the judiciary cannot be replaced by invidious philosophies that appear to compromise the independence of the judiciary as envisaged in the doctrine of separation of powers. The argument advanced herein is limited to the rationality of the calls by further raising a question whether safeguarding independence and impartiality of the judiciary should be outweighed by public outrage on gender-based violence. It also does not profess to provide an expert analysis of the interrelationship between law and social change because of the complexities that exists between these areas. Overall, the paper acknowledges and shares the concerns by the public on the elimination of gender-based violence; however, it refuses the indirect consequence of public opinion on the trampling of judicial authority

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

Contributions from the Law School

Consistency in sentencing – same sentences for different crime seriousness

It is often said about the minimum sentence scheme in the Criminal Law Amendment Act 105 of 1997 that its main aim is to ensure consistency in sentencing or, put in another way, to reduce disparities in sentences (cf *S v Montgomery* 2000 (2) SACR 318 (N) at 322*i-j*). In this contribution, I reflect on this argument. Under the minimum sentences scheme, the same sentence is usually imposed for the same crime, while these crimes might actually show a great variation in seriousness. The related question is whether, when the same sentence has been imposed in different cases, this necessarily indicates that the crimes were equally serious. Finally, the argument is made that, even with the minimum sentences, judicial officers still bear the responsibility to consider the seriousness of the crime in each individual case.

Especially in its original form, when the minimum sentences were ostensibly to be a temporary measure (cf *S v Mabunda* 2013 (2) SACR 161 (SCA) at para [4]; KS Baehr (2008) 20 *Yale JL & Feminism* 213 at 224), it is unlikely that consistency was the main objective of the scheme (*S v Zitha* 1999 (2) SACR 404 (W) at 409; *S v Blaauw* 1999 (2) SACR 295 (W) at 303). However, as the scheme's failure as a deterrent became ever clearer, so the support for consistency as its main aim has gained prominence. Increasingly, commentators and courts focus on the dictum in *S v Malgas* 2001 (1) SACR 469 (SCA) at para [8], that the courts should visit offenders with a *consistent* response, when it comes to the crimes identified in the Act (cf, e g, *S v Matyityi* 2011 (1) SACR 40 (SCA) at para [53] ('predictable outcomes … [are] foundational to the rule of law'); *S v Scholtz* 2018 (2) SACR 526 (SCA) at para [197]).

The claim that the minimum sentences ensure consistency in sentencing, begs the question what is meant by 'consistency'. One answer is that sentences are consistent when the same sentence is imposed for the same crime. This *is* the case with the minimum sentences legislation, as is easily explained with an example. Here the example of robbery is used. Item 2 in Part II of Schedule 2 to the Act prescribes a minimum of 15 years' imprisonment for robbery '(*a*) when there are aggravating circumstances; or (*b*) involving the taking of a motor vehicle'. Sentences for such robberies would be consistent, according to this argument, when they generally amount to 15 years' imprisonment. Naturally, since the prescribed sentence is a *minimum* of 15 years, longer terms may be imposed but, as is shown below, this

happens relatively rarely (regional courts may impose up to 5 years more than the prescribed minimum – proviso to s 51(2)).

To get a better sense of the kinds of robberies involved, it is necessary to have a closer look at Item 2. Our courts have generally, and without much discussion, accepted that the phrase 'aggravating circumstances' means the same as in the definition provided in the Criminal Procedure Act 51 of 1977 (s 1). Such robbery involves the 'wielding of a firearm or any other dangerous weapon' or the infliction or threat of 'grievous bodily harm'. In other words, Item 2 is limited to robbery when committed with a dangerous weapon (including a firearm) or when serious bodily injury is inflicted or threatened (cf *S v Fortune* 2014 (2) SACR 178 (WCC) at para [11]). The reference to the taking of a motor vehicle is clearly aimed at so-called hijackings. The next question is, how equal are these robberies regarding their seriousness? In my view, they are by no means necessarily of similar seriousness, as is explained next.

The legislation makes no distinction based on the danger posed by the weapon – it prescribes the same sentence for a blunt knife with a blade a few centimetres long in the hands of 60 kg weakling, and a fully-loaded AK47 in the hands of a marksman or an organised gang of professional criminals. The same sentence is also prescribed regardless of the value of the property placed at risk by the robbery. For example, the vehicle taken could be an unroadworthy piece of scrap metal, or a supercar worth many millions; or the vehicle could be the victim's only means of transport, or just part of a rich man's car collection.

Even under the minimum sentences regime, judicial officers are expected to give effect to these differences in crime seriousness in their sentences. This is clear from the seminal case, *S v Malgas* 2001 (1) SACR 469 (SCA). After stressing that the minimum sentences should be taken seriously and must always be the point of departure, the court noted that the prescribed sentences focus on the 'objective gravity of the offences' (at para [8]), without considering the personal circumstances of the offenders. To compensate for this one-sided approach, courts have to determine whether 'the particular circumstances of the case require a different sentence to be imposed' (at para [14]), and these circumstances include 'all factors traditionally taken into account in sentencing . . . none is excluded at the outset from consideration in the sentencing process' (at paras [9], [25.F]).

Indications are, however, that the sentences actually imposed for these robberies are very similar, with little individualisation. In other words, the prescribed minimum sentences have become not only the point of departure, but also the 'point of arrival', so to speak, of the sentences imposed. The *Juta Online Sentencing* database shows that, since 2013, the majority (56%) of sentences imposed for aggravated robbery have been for a period of 15 years' imprisonment (this figure is likely to be higher, since it does not include cases tried and finalised in regional courts). DJ Joubert *Die misdaad roof in die Suid-Afrikaanse reg* (2008) unpublished LLD (Unisa) at 168 also concluded that courts do not readily depart from the prescribed minimum sentences for robbery.

The concern that the same sentences are imposed for crimes that are not similarly serious, is borne out by the reality of sentences imposed. In *S v Davids* 2016 JDR 1864 (ECM) the appellant (D), a man of 27 years old and the breadwinner of his family, was with a friend when they encountered the victim. After a brief conversation, D took out a knife and threatened the victim, in the process obtaining the victim's cell phone. D pleaded guilty to robbery and admitted threatening the victim with the knife, as the relevant 'aggravating circumstances'. The trial court found no substantial and compelling circumstances to be present and imposed the prescribed sentence of 15 years' imprisonment. The same sentence was imposed on the two appellants in *S v Mxolisi* 2018 JDR 0586 (GJ). They (and their co-accused) had firearms when they perpetrated a typical bank robbery, taking R332 000 in the process. Another case in which the prescribed sentence was imposed, is *S v Mahlamuza* 2014 JDR 2551 (SCA). This was a so-called farm attack by a gang of five people, amongst them the two appellants. The group had at least a revolver and a knife amongst them. Their attack on the elderly farmer and his wife left these victims with bruises and a few lacerations. As the police arrived while the robbery was taking place, no property was removed and the judgment contains no mention of the value of the property threatened by the robbery. It is safe to say that, in the absence of the minimum sentences, these robberies would have resulted in very different sentences. The *Mxolisi* and *Mahlamuza* cases are simply far more serious than the *Davids* matter. That the sentences were equal means there was no predictable (cf *Matyityi* at para [53]) or consistent response (cf *Malgas* at para [8]) in all these cases.

The conclusion in the previous paragraph presupposes that, when the same sentence is imposed on different criminals, this necessarily means that their crimes were of equal seriousness. Is this a valid hypothesis? When one considers that it is a fundamental principle that the sentence should 'fit the crime', such a conclusion appears to be virtually inescapable. The principle is not that punishment should *normally* or *usually* fit the crime or should do so in most instances. In other words, our law has not developed any exceptions to the principle; it does not allow for instances where the punishment does *not* have to fit the crime. This means that every time a court imposes a sentence of 15 years' imprisonment, this sentence must be a fitting response to the seriousness of the crime *in that case*, at least roughly so (because sentencing is not an exact science).

In *S v Scholtz* 2018 (2) SACR 526 (SCA) at para [197], the court reiterated that, in respect of the minimum sentences, 'the legislature intended there to be a severe, standardised and consistent response where offenders commit' the offences that are included in the legislation. This quote is based on *Malgas* at para [8], which is worth quoting in full:

'…the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it. But that did not mean that all other considerations were to be ignored.'

It continues with the dicta quoted above (from paras [9], [25.F]), that courts should still have regard to 'all factors traditionally taken into account in sentencing . . . none is excluded at the outset from consideration in the sentencing process'. This part of the judgment was accepted by the Constitutional Court in *S v M (Centre for Child Law as* Amicus Curiae) 2007 (2) SACR 539 (CC) at para [10] as once again subscribing to the triad of *Zinn*.

As a general proposition, it is constitutionally acceptable for the legislature to declare that, *as a point of departure*, 15 year's imprisonment reflects the seriousness of the crime of robbery with aggravating circumstances (cf *S v Dodo* 2001 (1) SACR 594 (CC)). However, courts cannot mechanically impose these sentences. I previously noted how differently the law (and justice) operate when the legislature imposes sentences, rather than the courts, and I think this is worth repeating (cf SS Terblanche 'Twenty years of Constitutional Court judgments: What lessons are there about sentencing?' (2017) 20 *PELJ* at 26-28 – footnotes excluded):

'Courts … have to carefully individualise their sentences by considering all the factors relevant to the matter, in particular those mitigating or aggravating the crime and those that affect the culpability of the offender. To this end courts are endowed with a wide discretion, because every case is unique and the sentence has to cater for each important unique feature of the case. The resultant sentences also typically show that crime seriousness is properly reflected, not in a graph of four bars [the legislation effectively contains just four sentences], but in a line that starts close to zero and smoothly rises to cater for even small increases in gravity. When the sentencing discretion is left with the courts, they impose sentences, … ranging from "detention until the rising of the court" through correctional supervision and totally suspended sentences, to imprisonment of every imaginable duration … The courts also have to explain why they impose a specific sentence, and how they decided on the duration of the sentence. This requirement "has long been recognised", and is demanded by the interests of justice,… None of these considerations are satisfied when legislation prescribes sentences without giving reasons and without any explanation for the periods of imprisonment it prescribes.'

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Matters of Interest to Magistrates

WHY THERE IS A REAL NEED TO STRENGTHEN THE INDEPENDENCE OF THE NPA

In recent weeks the National Prosecuting Authority (NPA) finally began arresting and charging high profile, politically-connected, individuals allegedly involved in state-capture and other tender-related corruption. As a result, politically motivated attacks on the NPA (as well as on the Hawks) have intensified, presumably on the assumption that if you cannot refute the allegations of wrongdoing against you, the best way to defend yourself is to smear those pursuing justice. In this highly charged environment, strengthening the independence of the NPA by insulating it from attempts to interfere in its work, becomes imperative.

Earlier this month National Director of Public Prosecutions (NDPP) Shamila Batohi told parliament's portfolio committee on justice that the agency wanted to be moved from under the umbrella of the justice department so that it can operate more like a chapter 9 institution (like the public protector or the auditor-general) to ensure its independence.

Perhaps misunderstanding the principle involved (and wrongly conflating the government with the state), some commentators raised concerns about this proposal, arguing that the NPA prosecutes on behalf of the government and cannot operate separate from it, and that it would become too powerful and unaccountable if it is administratively and financially independent from the department of justice.

Let me try to explain why these commentators are wrong.

There is no dispute that the Constitution guarantees the independence of the NPA. The Constitutional Court has affirmed on several occasions (notably in the *First Certification* judgment) that section 179(4) of the Constitution provides a constitutional guarantee of independence for the NPA. However, in the early years after the adoption of the Constitution there were considerable confusion and disagreement about the nature of the NPA's independence.

This confusion may have arisen because many democracies provide for political oversight over the prosecution authority. This is because part of any elected government's mandate is to implement policies to reduce crime, which means that the government of the day must have some influence over the prosecutorial priorities of the prosecution service. A government may have promised its voters that it would pay special attention to the prosecution of corruption or gender-based violence, and it should therefore have the ability to set priorities for the prosecution service to help it deliver on such an electoral promise.

Thus, in the USA the attorney- general (a political appointee serving in the cabinet) supervises and controls prosecutions under the federal criminal laws. The integrity of this system often relies on unwritten rules and long established norms to avoid abuse and to prevent political interference. When a politically appointed attorney-general goes rogue, the integrity of this system is compromised. This has recently happened in the US, as William Barr (Donald Trump's attorney general) has shamelessly abused his position to try and protect Donald Trump and his allies from the consequences of their criminality.

The South African Constitution provides an elegant solution to this problem, vigorously safeguarding the independence of the NPA, while creating mechanisms that allow the minister of justice to influence the prosecutorial priorities of the NPA and remain informed about the NPA's work. Thus section 179(5)(a) of the Constitution provides that the NDPP must determine, with the concurrence of the minister of justice, "and after consulting the Directors of Public Prosecutions, prosecution policy, which must be observed in the prosecution process". This allows the government to influence the broad prosecution priorities of the NPA, while prohibiting it from influencing specific prosecutorial decisions.

Section 179(6) of the Constitution further provides that the minister of justice "must exercise final responsibility over the prosecuting authority". In 2009 the Supreme Court of Appeal (SCA) held in *National Director of Public Prosecutions v Zuma* that this provision does not allow the minister to instruct the NPA to interfere with prosecutorial decisions. It merely allows the minister "to be kept informed in respect of all prosecutions initiated or to be initiated which might arouse public interest or involve important aspects of legal or prosecutorial authority."

The SCA also confirmed that it is "non-contentious… that the NPA must not be led by political considerations and that ministerial responsibility over the NPA does not imply a right to interfere with a decision to prosecute". In 2012, the Constitutional Court reaffirmed this principle in *Democratic Alliance v President of South Africa and Others* where it stated:

The office [of the NPA] must be non-political and non-partisan and is closely related to the function of the judiciary broadly to achieve justice and is located at the core of delivering criminal justice.

The statement that the office of the NPA is closely related to the function of the judiciary is important as it suggest that the constitutionally protected independence of the NPA requires more than a prohibition on direct political interference in prosecutorial decisions. The institutional independence of the NPA must also be safeguarded to protect the NPA from indirect interference. Institutional independence is threatened when the security of tenure of the NDPP is not sufficiently protected (this is currently of grave concern in South Africa), and when the financial and administrative independence of the NPA is not sufficiently protected.

This is because a lack of such independence would allow the government of the day to "punish" the NPA for going after politically powerful criminals, by cutting its budget or by interfering in the administration of the NPA to weaken its ability to do its job efficiently. It would, for example, allow an unscrupulous government to put pressure

on the NPA to cease certain prosecutions on the ground that it amounts to wasteful expenditure, while claiming that it is not interfering in the independence of the NPA, but merely ensuring that it uses its resources efficiently.

Considering the independence of chapter 9 institutions, the Constitutional Court confirmed the importance of safeguarding the institutional independence of bodies whose independence is guaranteed in the Constitution. Thus, in *Independent Electoral Commission v Langeberg Municipality* it held that while chapter 9 bodies are organs of state as defined in section 239 of the Constitution, these institutions cannot be said to be a department or an administration within the national sphere of government over which Cabinet exercises authority. While these institutions are state institutions, they are independent from the government.

And in *NNP v Minister of Home Affairs* the Constitutional Court held that for these institutions to operate independently and for them to fulfil their respective tasks without fear, favour or prejudice, the administrative independence of these institutions should be safeguarded. This implies that these institutions must have control over those matters that are directly connected with their functions under the Constitution and the relevant legislation.

Moving the NPA from under the umbrella of the justice department would remove any doubt about its administrative independence and would bring it in line with the position of chapter 9 institutions. In any event, both chapter 9 institutions (in terms of section 181(5) of the Constitution) and the NPA (in terms of section 35 of the NPA Act) are accountable to the National Assembly – not to the relevant minister or a DG. This underscores the fact that these bodies are independent from the government and government departments and not under its authority, nor accountable to it. Moving the NPA from under the umbrella of the justice department would therefore bring the actual position on accountability in line with what the Act provides for.

Moreover, the fact that the NPA remains accountable to the NA puts paid to the argument that the NPA will become all powerful because it will not be accountable to anyone if it is not accountable to the minister and DG of justice. The NPA, it must be said, is also accountable to the courts, who can review and set aside its irrational decisions – as the courts often did during the Zuma years in which the NPA was politically captured.

While such a move to enhance its institutional independence is needed, it will unfortunately not be sufficient to safeguard the independence of the NPA, as the *National Prosecuting Authority Act* does not at present adequately protect the security of tenure of the NDPP. The Act currently allows for the removal of the NDPP for misconduct; on account of continued ill-health; on account of incapacity to carry out his or her duties of office efficiently; or on account thereof that he or she is no longer a fit and proper person to hold the office concerned after an inquiry had been held.

But few of the procedural safeguards that apply to the removal of chapter 9 office bearers apply to the removal of the NDPP, leaving the process open to abuse. The President decides whether to start the process of removal of the NDPP and appoints an inquiry to kickstart the process. But there is no requirement that the person

conducting the inquiry must be impartial or independent. Furthermore, it is not clear on what basis the inquiry (which can be headed by anyone selected by the President – including a fellow party member) or President or Parliament will be entitled to decide that the NDPP is no longer a fit and proper person.

As the removal of Vusi Pikoli as NDPP illustrated, the removal process can be misused by an unscrupulous President to undermine the independence of the NPA in an attempt to stop the prosecution of the President's political or business allies or to punish the NDPP for not toeing the party line. This can be done by using the threat of removal to place pressure on an NDPP or a Director to comply with unlawful "requests" or directives from the executive. The President and the majority party in the NA could also easily ensure that the NDPP is removed on vague and trumped-up charges when he or she makes decisions that go against the interests of the President or the governing political party.

At the time of writing it is unclear how influential the criminal elements within the governing party are. (These are the elements who – in the coming months – are potentially facing arrest and prosecution by the NPA.) It is also not clear how serious the threat to the independence of the NPA currently is. But whether the power of the politically connected crooks is waning or not, the need to strengthen the institutional independence of the NPA remains urgent. After all, the political pressures to curb the independence of the NPA is only likely to increase as prosecutions are ramped up.

(The above article written by Prof Pierre De Vos was published on his blog *Constitutionally Speaking* on 21 October 2020).

A Last Thought

AI (Artificial Intelligence) Harnessed to Predict and Apprehend Criminals

Another company, Faception, in Tel Aviv created a program that purports to determine whether someone is a criminal—only by looking at a face. The camera does not simply run the photo of a person against a criminal database: based on the premise that facial features reveal personality traits (called 'physiognomy'), the program reads a face and assigns the probability of criminal intent. In one demonstration, the program achieved ninety per cent accuracy. New AI software is being used in Japan to monitor the body language of shoppers for signs that they are planning to steal. This software, developed by Japanese company Vaak, differs from similar products that match faces to criminal records. Instead, VaakEye uses algorithms to analyse footage from security cameras to spot fidgeting, restlessness and other body-language cues that could be suspicious, and then alerts shop employees about potential thieves via an app…

AI Technology in the Courtroom?

What about the role of this technology as evidence in the courtroom? Would it be too prejudicial to show the fact-finder that AI software determined that an accused is a criminal? What if, instead, prosecutors used the technology during trial to buttress their arguments? In closing address, for example, the prosecutor might argue: 'Based on all the eye-witness testimony, along with the determination that the accused, considering his facial features, has an 80% likelihood of having committed the crime charged, you should find the accused guilty.' These types of arguments could be commonplace in the future, yet there currently is no regulatory framework in place to regulate these technologies in the circumstances discussed above. Clarity is needed from lawmakers and regulators regarding who will ultimately decide the circumstances in which the use of this technology will be appropriate or desirable as a matter of public policy.

Per W Gravett in an article "The Dark Side of Artificial Intelligence: Challenges for the Legal System" *Southern African Public Law* Volume 35 no 1 2020