e-MANTSHI

A KZNJETCOM Newsletter

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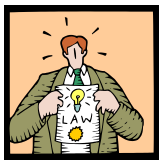
Welcome to the hundredth and seventieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 7,00 percent per annum as from 1 September 2020 for the purposes of section 1(1) of the said Act. The notice appeared in Government Gazette no 43873 dated 6 November 2020. The notice can be accessed here:

https://www.justice.gov.za/legislation/notices/2020/20201106-gg43873rg11191gon1182-RateOfInterest.pdf

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Recent Court Cases

1. M J Vermeulen Inc. v Engelbrecht No and Another (19257/2019) [2020] ZAWCHC 148 (6 November 2020)

Judicial Officers must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.

Binns-Ward J (Baartman J concurring):

[1] This is an unusual case. It concerns an application by the plaintiff, an attorney suing for payment of his fees, to review and set aside the decision, *suo motu*, by the magistrate seized of the trial of the action to recuse himself.

[2] The magistrate, who is the first respondent in the review application, abides the judgment of the court. The defendant in the action, who is the second respondent before us, purported not to oppose the review application, but nevertheless filed written submissions in which he argued, with reference to his view of the merits of the special defence he had taken in the action, that it would be purposeless to review and set aside the magistrate's decision to recuse himself.

[3] The second respondent's argument can be disposed of shortly. We are not concerned in these proceedings with the merits of the case before the magistrate, only with the legal propriety of his recusation from the trial of the action. It would be quite improper for this court, in the context of determining a challenge to the magistrate's recusal at his own instance, to say anything that might anticipate or influence the determination of a matter pending between the parties before the magistrate's court. That much should be axiomatic when it is appreciated that, depending on the determination of the question brought on review, which has nothing to do with the merits of the action, the trial might need to resume before the first respondent.

[4] We were not referred to any precedent directly in point,[1] and the only previous

[1] The applicant's counsel referred us to the judgment in *Newell v Cronje and Another* 1985 (4) SA 692 (E) (per Mullins J, Zietsman J concurring), in which a magistrate's decision, *mero motu*, to recuse himself was reviewed and set aside, but the magistrate's reasons in that matter were concerned with his understanding of the

judgment that I have been able to find dealing with a similar situation in the Southern African jurisprudence is the Namibian High Court's decision in *S v Boois* 2016 JDR 0118 (Nm), in which Masuku AJ (Shivute J concurring) reviewed and set aside a magistrate's decision to recuse himself from a criminal trial. In *Boois*, the magistrate, having convicted the accused, who were legally represented, on their pleas of guilt later bethought himself of the correctness of the convictions and when the accused came up for sentencing after a postponement altered the pleas to pleas of not guilty, in terms of s 113 of the Criminal Procedure Act, stating '*. . . the court shall records (sic) a plea of not guilty i.t.o. S113 of the CPA 51/1977 as amended in respect of all 5 accused persons and their convictions lapses. The court further directs that the prosecution to follow the ordinary course. In addition I subjectively feel that I will not be able to disabuse my mind from the inside information I have about this case, hence I mero motu recuse myself from and direct further that this matter to start de novo before another magistrate.*'

[5] It appears that the magistrate's doubts in *Boois*' case were the product of his own ruminations and not based on anything put before him in the hearing. The High Court described the objectively assessed position as follows at para 14-16:

'… all the accused persons pleaded guilty to the offence based on advice of their legal practitioners, who confirmed that the respective pleas were in accordance with their instructions. In this regard, there was nothing wrong or anomalous with the pleas and consequently, the conviction. It is possible that the accused were found all partaking from the contents of the bottle at a specified place as people are wont to do in some of the places of merriment. There is therefore nothing unusual or queer with the plea in my view. Had some of the accused persons not participated, they would have clearly distanced themselves from the charge by pleading not guilty.

[15] I am of the considered opinion that having allowed the above section to be invoked, having satisfied him or herself that the jurisdictional facts applicable to the above section were extant, it was not open to the learned magistrate to start embarking upon the enquiry that he or she did, resulting in the court entering the plea of not guilty. To that extent, I am of the opinion that the learned magistrate erred. The court was not at liberty, having convicted the accused persons on an informed basis, provided by their legal practitioners, to reopen the issue of the propriety of the convictions. The court was in this particular regard functus officio [and] could not, in the circumstances, properly change the plea.

[16] It is important to note that there were no facts which came to the attention of the learned magistrate, properly or otherwise that may have served to belatedly question the correctness of the plea. In this regard, the accused did not adduce any evidence in mitigation of sentence and during which process new facts may have come to light

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complicating effects of an evidential principle rather than an issue of personal sensitivity, and the case is therefore distinguishable.

and which would have properly served to imperil the correctness or appropriateness of the plea of guilty. In point of fact, it is apparent from the record of proceedings that only oral submission from the bar were made by the legal representatives of the accused persons and there is nothing said therein that would have served to impeach the correctness of the guilty pleas tendered on legal advice, it must be mentioned.

[6] The court considered that the magistrate had been misdirected in the circumstances in altering the accused's pleas. Importantly, and of pertinence to the current case, it also pointed out that even if the pleas had been appropriately altered in terms of s 113, that would not, of itself, afford any reason for the magistrate to recuse himself. It would not give rise to any reasonable apprehension that he would be unable to impartially try the case.

[7] In my respectful opinion, the court in *Boois* summed up the pertinent principles correctly when, with reference to the Constitutional Court's judgment in *The President of the Republic of South Africa v South African Rugby Union and Others* 1999 (4) SA 147 (CC) at para 48, it held (at para 28-30):

[28] Viewed in its entirety, there is, in my view, no sound reason in law why the learned magistrate found himself unfit to continue sitting in the matter, assuming that his decision to enter a plea of not guilty had been correct in the first place. Whilst the decision to recuse oneself, especially mero motu is one of judicial conscience, and must ordinarily be respected, it should, however, have a reasonable basis in law and judicial officers should not be allowed to shirk their duty to sit in matters by unilaterally recusing themselves when there is, objectively speaking, no sound basis in law for doing so. And importantly, the decision to recuse oneself mero motu, must not only be viewed from the subjective position of the judicial officer concerned. There is an important objective assessment that must be carried out and the test in this regard appears to some extent to be a tapestry of both objective and subjective elements.

[29] In this regard, the court, in the *SARFU* judgment said the following at page 177 D:

'At the same time, it must never be forgotten that than an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

It would appear to me that the same applies in cases where judicial officers decide suo motu to recuse themselves. There must be an objectively reasonable basis in law for doing so, quite apart from the judicial officer's subjective and sometimes parochial views and feelings.

[30] If it were otherwise, judicial officers would recuse themselves from hearing matters in respect of which they have some personal aversion, fear or foreboding, under the ruse of subjective reasons which may not be subjected to objective standards of scrutiny and this may yield the administration of justice and the esteem and dignity of the courts a shattering blow in the minds of the public. In that way,

judicial officers may circumvent their duty to sit even in appropriate cases by employing the simple stratagem of recusing themselves suo motu for personal reasons when no objective or reasonable basis for so doing exists in law, logic or even common sense. Willy-nilly recusal on mero motu bases is therefore a practice that we should, as judicial officers, steer clear from like a plague, understanding as we should, that in light of our judicial oaths of office, we have a duty to sit, unless a proper case for recusal is evident or justly apprehended.[2]

[8] With respect, the expression of the principles rehearsed in *Boois* case might have been assisted by a fuller quotation from paragraph 48 of the *SARFU* judgment, for immediately before the passage from *SARFU* quoted in para 29 of *Boois*, the Constitutional Court stated:

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves.[3]

The underlined sentence neatly expresses the point that is applicable in the current matter. The Constitutional Court's judgment in *SARFU* was concerned with the circumstances in which judges of that court might recuse themselves, but the principles enunciated in para 48 of the judgment are applicable to judicial officers at every level of the judiciary; they have a duty to try the cases allocated to them unless there is some principled basis for them to decline to do so.

[9] In the current matter, the magistrate's decision to recuse himself *suo motu* followed on a request by both the plaintiff and the defendant on the sixth day of the trial for clarity as to the court's position on a matter that had been identified, in terms of magistrates' court rule 29(4), for determination as preliminary point, viz. whether it was competent, when the client had requested taxation thereof, for an action claiming payment of an attorneys' fees to be instituted before such taxation had occurred. Both parties felt that the point had not yet been decided, whereas the magistrate, evidently perplexed by the parties' request, appeared to consider that it had. The magistrate adopted the attitude that if the parties were not satisfied with his

2 My only reservation about the passage quoted from the judgment in *Boois* is that I consider that the learned judge should have employed the term '*suo motu*' (of his own accord) where he used the expression '*mero motu*' (according to the merits of the case).

3 My underlining for emphasis.

finding, their remedy was to appeal. That was hardly a satisfactory position to adopt when neither of the adversaries was able to determine from what he had said what the finding on the preliminary point was. What were they to appeal against? And which of them was to be the appellant?

[10] We have not been provided with a transcript of the magistrate's finding on the preliminary point, but one would imagine that if he had upheld the point taken by the defendant, he would not have permitted the trial to continue, for that would have been futile if the action should not have been instituted until after the fees and disbursements that were claimed in it had been taxed. Whatever the magistrate had found, there could be no difficulty with him clarifying his decision in circumstances in which both adversaries professed not to have grasped what it actually was. That is what he should have done in the circumstances. He could not alter his determination, but the jointly held view of the protagonists that its effect was not determinable is, on the face of it, indicative that clarification was required.

[11] As events transpired, the parties to the action continued with the trial before the magistrate without having obtained clarity on the court's finding on the preliminary point. The proceedings were acrimonious, and it is clear that the magistrate perceived that both parties, who were self-represented attorneys, were also treating him with disrespect. He has confirmed as much in a statement filed in this review application. After a luncheon adjournment at the close of a tense session in court, the magistrate returned to court and announced, without prior warning, that he considered that he should recuse himself.

[12] The magistrate's announcement was made in the following terms:

Na middag – tydens middagete moet die Hof eerder sê , het die hof bietjie nagedink oor die verrigtinge soos tot dusver, en die Hof oorweeg dit om te onttrek in die saak. So, julle kan nou in die Hof sê of julle saamstem of nie, en julle kan die Hof toespreek daaroor. Ek kan die saak uitstel vir julle, laat julle die Hof volledig daaroor toespreek, maar op hierdie stadium voel ek, en dit is my persoonlike mening, dat ek my moet onttrek in die saak. So julle moet maar net vir my sê wat is julle gevoel, as julle met my saamstem, dan doen ons dit so. As julle nie saamstem nie, dan gaan ek die saak uitstel, dan kan julle julleself voorberei en die Hof toespreek oor die aangeleentheid, maar ek is nou ongelukkig nou by daardie punt. En die rede hoekom die Hof dit sê is die hele saak in hierdie laaste drie dae, u weet, is dit vir my baie duidelik dat die hof word ook nou persoonlik ingetrek by julle twee se saak. Dit raak nou vir my 'n moeilike situasie, u weet. Gaan ek nou onafhanklik, sonder enige voorveroordele staan aan die einde van die dag omdat ek juis persoonlik ingetrek word hier. So dit is hoekom ek dit sê ek gee elkeen die geleentheid, julle kan maar net vir my sê wat sê julle daarop.

[13] The plaintiff thereupon immediately assured the magistrate that he did not consider that there were any valid grounds for the magistrate to recuse himself. He assured the first respondent that he did not consider that he was in any manner prejudiced or partial in his conduct of the proceedings. The plaintiff highlighted that the costs run up thus far in the conduct of the action were substantial and that the magistrate's recusal would therefore have a substantial financial impact on the parties. He said it would be 'a grave disappointment' (Afrik. *groot teleurstelling*) if the magistrate recused himself.

[14] The defendant echoed the plaintiff's assurance that the parties had no concerns about the propriety of the magistrate presiding in the action. He acknowledged that the trial was a difficult one. He called it a 'distasteful street fight' (Afrik. *onsmaaklike straatgeveg*) between the parties. He adopted the position that whilst he had no reason to object to the magistrate continuing to preside over the trial, he understood the magistrate's discomfiture and therefore would understand if the magistrate withdrew himself from the case. He added that 'ten to one' he would have felt the same as the magistrate had he been in the magistrate's position. The defendant's remarks must be understood as coming from someone who considered that the trial should not have been running in any event because of the preliminary point he had taken about taxation. Significantly, however, the defendant offered no objectively plausible reason in law or principle in support of the magistrate's suggestion that he should *suo motu* recuse himself. All he offered was empathy with the magistrate's personal desire to escape from a messy trial.

[15] The plaintiff then indicated that he did not wish to make any further submissions on the question of the magistrate's possible recusal. He stated that if the magistrate decided to recuse himself he would take the decision on review; adding (inappropriately, but in keeping with the atmosphere in which the proceedings appear to have been conducted) that the issue might perhaps not end there, which the magistrate might quite reasonably have interpreted as a veiled threat of an extrajudicial complaint about the magistrate's conduct. The magistrate treated of the plaintiff's intimation in appropriate terms in the following exchange:

HOF: U staan die oorweging van die Hof teen, maar het niks verder te sê op hierdie stadium nie?
MNR VERMEULEN: Soos die Hof behaag, dit is so, Edelagbare.
HOF: Oor wat u later met die saak gaan doen, is seer sekerlik u goeie reg.
MNR VERMEULEN: Soos dit die Hof behaag.
HOF: Om vir die Hof op hierdie stadium alreeds dit te sê, is volgens my disrespekvol.
MNR VERMEULEN: Soos dit die Hof behaag, Edelagbare.
HOF: Baie dankie.:

[16] The magistrate then proceeded immediately to deliver himself of the following decision:

Aangesien daar geen verdere betoë in hierdie aangeleentheid is nie, is die Hof van oordeel, soos ek reeds gesê het, na – gedurende die middagete, het ek die aangeleentheid oorweeg, nie net die verrigtinge van vandag nie, maar vandat hierdie saak begin het en is hierdie Hof van oordeel op hierdie stadium, sy onafhanklikheid as 't ware aangetas is.

En dit is dan hierdie Hof se bevinding dat die Hof op hierdie stadium onttrek van hierdie verrigtinge.

In the reasons for his decision filed by the first respondent in the current proceedings, he indicated that he had followed the approach adopted by a judge in the Gauteng Division in case no. SS126/18, which was not made available to us, but appears to me to be the matter reported in the law reports as *S v Serame* 2019 (2) SACR 407 (GJ) – a judgment of Grant AJ. In that matter there was actually an application for the judge's recusal. The learned acting judge refused the application, but recused himself nevertheless for his own personal reasons. It appears from para 55-61 of the judgment that the judge recused himself on account of what he perceived to be the disrespectful and unethical conduct of the legal representatives appearing before him. At para 59 of *Serame*, the acting judge said '*These concerns — as they apply to the prosecution and the defence — have made it impossible for me to continue to preside over the matter. The trust I am required and indeed must be able to have in everything said by counsel is irreparably damaged, and, on that basis, I have to recuse myself'*. In my respectful opinion, the judge's concerns did not constitute a proper reason for him to recuse himself, and he was wrong to have done so. It is a presiding officer's duty to exercise effective control over the proceedings and that includes, if necessary, appropriately dealing with misconduct by anyone appearing in them. It is noteworthy that Grant AJ made no reference in his judgment to the principles rehearsed in *SARFU*, and more particularly the sentence in para 48 thereof that I highlighted above

[17] Applying the principles summarised in the introduction to this judgment, there was no basis in law or principle for the magistrate's recusal. His subjective discomfiture about continuing with the trial did not afford a proper basis for him to recuse himself, and his decision to do so for purely personal reasons was arbitrary and objectively unreasonable. It constituted a 'gross irregularity' within the meaning of s 22(c) of the Superior Courts Act 10 of 2013 and is accordingly susceptible to being set aside by this court on review.

[18] The following order will issue accordingly:

1. The decision of the first respondent, *suo motu*, to recuse himself from presiding in the trial of the action in Riversdale magistrate's court case no. 311/2014 is reviewed and set aside.
2. The first respondent is hereby directed to continue with the hearing of the trial

on a date to be arranged by the parties, failing which, to be determined by the clerk of civil court at Riversdale.

3. No order as to costs is made in this application.

2. In re the detention of Ms N December in the Port Alfred Magistrates Court (CA&R 207/2020) [2020] ZAECGHC 129 (24 November 2020)

A judicial officer simply cannot order the detention of a person in such a fashion without having in mind the exact statutory power invoked and without giving the person to be detained an opportunity to address the court in relation to that particular statutory power

Roberson J:

[1] This matter has been sent on review by the senior magistrate, Makhanda, under cover of a very helpful and comprehensive letter.

[2] The review concerns the order by the magistrate Port Alfred, in terms of which Ms N December, a candidate attorney employed by Legal Aid South Africa, was detained in the court cells. It is not clear for how long Ms December was detained but she was released on the same day.

[3] The transcription of the proceedings reflects that on 29 October 2020 the matter of S v Ndiyana was called. The prosecutor placed on record that Ms December was standing in for a Ms Babinya on behalf of the accused, that the matter was on the roll for sentence and that the doctor was present to testify about the extent of the injuries suffered by the complainant. The accused had been convicted of assault with intent to do grievous bodily harm.

[4] Before the doctor was called to testify, Ms December informed the magistrate that she had strict instructions from her manager that she was not to deal with the matter, and that a Ms Ngxitho was the attorney dealing with the matter. Ms December stated that she was at court only to deal with her own part-heard matter and that all other matters were to be postponed. She said she was not familiar with S v Ndiyana and that it would be unethical for her to proceed with the matter. She had not consulted with the accused and if he was sentenced to a custodial sentence, so she stated, there would be serious consequences for her. She was instructed by her manager to request a postponement in order for Ms Ngxitho to be available to appear for the accused.

[5] The magistrate pointed out that the accused had pleaded in February 2020, that he was in custody, and that the matter had been postponed several times for Ms Ngxitho or for, as she put it, legal aid. She further pointed out that Ms Ngxitho had already addressed the court with regard to mitigation of sentence, and that the matter

had not been finalised at that stage because she, the magistrate, had wanted to ascertain the nature of the injuries suffered by the complainant. The magistrate expressed the view that it was not fair to the accused for the matter to be repeatedly postponed when the accused was in custody. All that was required of Ms December, so the magistrate said, was to take instructions from the accused on the nature of the injuries suffered by the complainant.

[6] Ms December repeated that she was subject to the instructions of her manager to which the magistrate replied that the manager did not control the court. Ms December then placed on record that she would not cross-examine the doctor and if the witness was called to testify by the court, she, Ms December would withdraw as the attorney of record. The doctor was then sworn in and Ms December announced that she was withdrawing as attorney of record. The magistrate told her that she needed permission to withdraw and could not withdraw without a valid reason for doing so. The magistrate then led the evidence of the doctor and the prosecutor had no questions for the doctor. Ms December was then called upon and stated that she had withdrawn as attorney of record. The magistrate repeated that Ms December required her permission to withdraw and that she had to provide reasons for such withdrawal. The magistrate said that the reasons already provided were not acceptable. Ms December repeated that she had withdrawn and the magistrate instructed her to take instructions from the accused on the nature of the complainant's injuries. She added:
"Not unless you are disrespecting me, so that I can take it now. It is instructions on injuries sustained, nothing else, nothing more. Not unless you are disrespecting me. So that I can deal with you now."

[7] Ms December said that she was just obeying her manager's instructions. The magistrate then warned her that if she, Ms December, wanted her to take further action, she would do so. Ms December repeated that she had withdrawn for ethical reasons and invited the magistrate to contact her manager. The magistrate responded as follows:
"Ms December, that amounts to disrespecting the court, if you want me to take further instructions, I will do that. Fortunately the act does allow me to do that, if you want me to do that I will do it. I do have powers to deal with somebody who does not have respect for court. If you want me to do that I will."
Ms December then left the matter in the hands of the court.

[8] The magistrate proceeded to warn Ms December to take instructions from the accused and Ms December asked for the matter to stand down so that she could report to her manager. The magistrate said that she did not deal with the manager and was dealing with an attorney. She repeated her instructions to Ms December to take instructions from the accused. Ms December again asked for the matter to stand down so that she could call her manager and said that she was not being disrespectful to the court. The magistrate said:

"I am warning you for the third time. I can take you to the cells if I want, I am warning you for the third time. I am warning you for the third time in the presence of everyone. I am giving you instructions to take instructions on injuries sustained. Before I request the police to take you to the cells. I am talking, you stand up when I am talking. I am going to need the court orderlies to assist me to take you to the cell if you do not comply."

[9] Ms December said that she could not go against the instructions of her manager and was in a difficult position. The magistrate interrupted her and said that the only option she was left with was to take Ms December to the cells for disrespecting the court. Ms December repeated that she had not been disrespectful and that she had already withdrawn as attorney of record. The magistrate again interrupted her and asked that a Mr Ntatse (a police constable) be called to assist her. Ms December again tried to explain her position and was about to say something about Ms Ngxitho when the magistrate interrupted her and told her she was not allowing her to withdraw. Ms December asked to address the court and the magistrate asked for the court orderlies. Ms December said that she had come to the Port Alfred court because her own matter had been rolled to that day and that Ms Ngxitho had been assigned in her place to the Alexandria magistrate's court. The magistrate continued to call for the court orderlies and then remarked that it was strange that Ms December had dealt with other matters and it was only S v Ndiyana that she did not want to deal with. Ms December repeated that she could not disobey her manager's instructions.

[10] The magistrate proceeded as follows:
"For me to give you permission to withdraw as an attorney of record you have to give me reasons. The accused person that you are representing as an officer from the legal aid has been in custody, convicted and it was postponed due to legal aid attorneys, including yourself, all what has to be done, the doctor is here, is to take instructions on the nature of injuries sustained, nothing else, nothing more. Then you are done. If you are telling me that is unethical then you can take me to the magistrates commission, I am giving you permission, because I am also going to take you to the law society as well. If that is injustice, or unethical for someone who has been in custody, everything has been done, it is only injuries sustained. Then let us take it further. Then let us push it, it is clear we have to push it so that there should be clarity. I am talking to you, I am waiting for you, you are not allowed to sit down. What is your response?"
Ms December said she had no response.

[11] The magistrate went on to say:
"Can you please call Constable Ntatse so that they can take her to the cells. And I am not going to be disrespected by you. I am left with an option but to take you to the cells."
Ms December was told that the court orderlies would take her to the cells. The

magistrate then postponed the matter to 5 November 2020.

[12] Ms December was brought back to court the same day and, despite the fact that she had already been detained in the cells, the magistrate proceeded to tell her that what she had done amounted to disrespecting the court and that the court had powers to deal with people who do not respect the court. She again accused Ms December of disrespecting her because she had not proceeded with the Ndiyana matter. She finished up by saying:
"It is only the injuries that were sustained by the accused before I give you a proper sentence. And I requested you to take instructions, just on nature of injuries sustained, nothing else, nothing more. You chose not to. And if the court officials start disrespecting the court, how much more to the members of the public, because if you have got a problem with me you stand the matter down and deal with the court in chambers. I do not think this would ever happen again. Thank you."

[13] In his letter the senior magistrate said that he had asked the magistrate to indicate the statutory provision in terms of which she had ordered the detention of Ms December. In her response to the senior magistrate, after setting out what happened in court leading up to her order, the magistrate said that she had erred by invoking the provisions of s 108 of the Magistrates' Courts Act 32 of 1944 (the MCA) and combining them with s 178 of the Criminal Procedure Act 51 of 1977 (the CPA). She acknowledged that Ms December was not formally charged and convicted in terms of s 108 of the MCA. She stated that Ms December had refused to comply with the court order after being warned several times and said she felt that Legal Aid South Africa could not interfere with her judicial independence and prescribe to her how to conduct her court.

[14] Section 108 of the MCA provides:
"108 Custody and punishment for contempt of court
(1) If any person, whether in custody or not, wilfully insults a judicial officer during his sitting or a clerk or messenger or other officer during his attendance at such sitting, or wilfully interrupts the proceedings of the court or otherwise misbehaves himself in the place where such court is held, he shall (in addition to his liability to being removed and detained as in subsection (3) of section 5 provided) be liable to be sentenced summarily or upon summons to a fine not exceeding R2 000 or in default of payment to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine. In this subsection the word 'court' includes a preparatory examination held under the law relating to criminal procedure.
(2) In any case in which the court commits or fines any person under the provisions of this section, the judicial officer shall without delay transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of his proceedings, and shall also furnish to the party committed a copy of such statement."

[15] Section 178 (2) of the CPA provides:
"178 Arrest of person committing offence in court and removal from court of person disturbing proceedings
(1) Where an offence is committed in the presence of the court, the presiding judge or judicial officer may order the arrest of the offender.
(2) If any person, other than an accused, who is present at criminal proceedings, disturbs the peace or order of the court, the court may order that such person be removed from the court and that he be detained in custody until the rising of the court."

[16] The senior magistrate expressed the view that it was impossible to assign the actions of the magistrate in ordering Ms December's detention to any statutory provision. I agree. A simple reading of both statutory provisions demonstrates that Ms December's conduct was not remotely that which is envisaged in those provisions.

[17] Following her initial response to the senior magistrate, the magistrate submitted the matter to the Registrar for review by a judge. In her covering letter she stated that she had acted in terms of s 178 of the CPA and that the order she made was not appropriate. She said that the conduct of Ms December did not warrant the invocation of s 178, specifically that the conduct did not disturb the peace or order of the court. This is a reference to s 178 (2) of the CPA. The magistrate requested that her order be set aside. Specific reliance on s 178 (2) of the CPA was a change of stance from the magistrate's earlier response to the senior magistrate and in my view was an ex post facto attempt at justification for the order to detain Ms December.

[18] More needs to be said about this matter than merely reviewing and setting aside the magistrate's order for the detention of Ms December. It seems to me that the magistrate was annoyed and frustrated that the trial could not be concluded, and wrongly regarded Ms December's conduct as disrespectful. It is unfortunate that the accused's matter could not be finalised that day. However, if the magistrate had the provisions of s 108 of the MCA or s 178 (2) of the CPA in mind at the time she made her order, with proper consideration she would have realised that Ms December's conduct was not what was envisaged in either of those provisions. Further she was required to warn Ms December of her intention to proceed in terms of the statutory provision she had in mind, in order to give Ms December an opportunity to address her with specific reference to such provision. She did not do so. I am of the view that she vaguely had in mind a power to detain someone until the rising of the court and that is why Ms December was brought back to court, apparently at the end of the court roll.

[19] In my view, in ordering Ms December's detention, the magistrate came very close to acting arbitrarily and ultra vires. She certainly acted precipitately without the

necessary caution required in invoking either of the statutory provisions. At the very least she committed a gross irregularity in her purported application of either provision. It goes without saying that to deprive a person of their liberty, even for a short period, is an extremely serious matter. A judicial officer simply cannot order the detention of a person in such a fashion without having in mind the exact statutory power invoked and without giving the person to be detained an opportunity to address the court in relation to that particular statutory power. This was in my view a serious invasion of Ms December's right to liberty and dignity. The magistrate went even further because when Ms December came back to court after her detention, she continued to accuse Ms December of disrespect. By that time Ms December had served her detention. The whole experience must have been frightening, shocking and humiliating for Ms December.

[20] The following order will issue:
The proceedings on 29 October 2020 in the Magistrate's Court, Port Alfred, during the matter of S v Ndiyana, whereby the magistrate decided that Ms N December was disrespectful to the court, and the order for the detention of Ms December in the court cells, are reviewed and set aside.

From The Legal Journals

Watney, M

"Rising on the tide of crime control: the doctrine of common purpose in perspective."

***Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg, Volume 2020 Number 4,* Oct 2020, p. 623 – 651**

Van Der Linde, D C

"Evidentiary and procedural issues relating to the Prevention of Organised Crime Act."

***South African Law Journal, Volume 137 Number 3*, Sep 2020, p. 501 – 527**

Abstract

This article evaluates the evidentiary and procedural issues brought about by the Prevention of Organised Crime Act 121 of 1998 ('POCA'). The promulgation of POCA has brought about several deviations from established evidentiary and procedural rules that have been developed to protect the accused from an unfair trial by disregarding specific categories of potentially prejudicial evidence. The rationale for deviating from these established principles is to assist in the fight against organised crime by alleviating the state's evidentiary burden by allowing for similar-fact evidence, evidence of prior convictions, and hearsay evidence. The reasons underlying these rules will be considered to establish whether POCA invades these protections against prejudicial evidence and, if so, whether this is constitutionally justifiable or, if not, what remedial steps could be taken. In addition to the aforementioned procedural and evidentiary issues, certain textual anomalies regarding POCA will also be considered.

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

Contributions from the Law School

Combating attacks on emergency workers

One of the pernicious forms of violence in the crime-ridden society that South Africa exemplifies, is the attacks on emergency workers such as fire-fighters, ambulance drivers and paramedics. It is a symptom of our society that those whose jobs are to assist other members of the community, and who therefore are vulnerable due to of necessity being focused on such assistance, rather than the possible need to defend themselves, and who further need to respond to emergency call-outs immediately and without prejudice, should be so targeted. A number of newspaper reports have detailed these incidents. In 2017 the South African Medical Association was quoted as stating that there were more than 200 attacks on emergency medical services since 2012 (Regan Thaw *2 WC ambulance crews attacked in separate incidents* https://ewn.co.za/2017/12/11/2-wc-ambulance-crews-attacked-in-separate-incidents, accessed 20 November 2020). The same report describes how two ambulance crews and paramedics had been attacked and robbed in the Western Cape, as well as an incident where a critically injured child died while the ambulance crew which was

trying to convey him to medical care were held up at gunpoint. In 2018 it was reported that there were at least 56 attacks on emergency services in the Western Cape in that year alone, again, in the context of a report of an assault and robbery of two paramedics (Kaylynn Palm *WC Health Dept condemns latest attack on paramedics crew* https://ewn.co.za/2018/12/11/wc-health-dept-condemns-latest-attack-on-paramedics-crew, accessed 20 November 2020). Further, in 2018 it was reported that 14 firefighters had come under attack in Kraaifontein and Brackenfell in the Western Cape, when their vehicles were stoned and crew members were assaulted (Natalie Malgas *Firefighting crews attacked in separate incidents in CT* https://ewn.co.za/2018/08/27/14-firefighters-attacked-during-separate-incidents-in-ct, accessed 20 November 2020). Just two months ago it was reported that there had to date been 46 attacks on emergency workers in the Western Cape, and that there had been an increase in attacks in the lockdown period. This report further detailed yet another hold-up of paramedics at gunpoint in Cape Town (Keagan Mitchell *Spike in attacks on EMS workers* Sep 19, 2020 *Weekend Argus*).

While the focus in the above reports is on the Western Cape, it is clear that the problem is not confined to that province. In 2006 a colleague and I wrote an analysis of an unreported case from the Natal Provincial Division (*S v Khumalo; S v Zondi; S v Buthelezi* case 219/2004) which involved the hijacking of an ambulance at gunpoint, the holding of the ambulance attendants as prisoners in the back of the vehicle, and the attempt to get the male ambulance attendant to have sexual intercourse with the female attendant at gunpoint (Carnelley and Hoctor 2006 *Obiter* 197).

Understandably, there have been calls from the health workers' union for some time for action to be taken to protect its members. A typical example of such a call is that of Health and Other Services Personnel Trade Union of South Africa spokesperson Kevin Halama, who stated, in the wake of the recent attacks during lockdown in the Western Cape that the government needed to take further steps to protect front-line workers:

"Law enforcement officers must act swiftly to catch the perpetrators and they must receive the harshest possible sentence to caution off further such incidents from reoccurring. It is shocking that front-line workers who are leading the fight against this pandemic must also worry about this senseless crime when entering communities to provide emergency medical assistance." (Mitchell *Weekend Argus* 19/9/20) What can be done? It may be argued that a particular problem of this nature requires a particular, custom-made solution. This is the approach that has been taken in England and Wales. In the Assaults on Emergency Workers (Offences) Act 2018, which provides that certain offences should be regarded as aggravated when perpetrated against emergency workers in the exercise of their duty.

The contents of the Act are as follows. Section 1 applies to the offence of common assault, or battery, that is committed against an emergency worker acting in the exercise of the functions of an emergency worker, and provides that a person guilty of such an offence is liable to imprisonment for a term not exceeding 12 months. In terms of section 1(3) the phrase 'acting in the exercise of the functions of an emergency worker' includes circumstances where the offence takes place at a time

when the person is not at work but is carrying on functions which, if done in work time, would have been in the exercise of functions as an emergency worker. Section 2 explains that in relation to a range of offences, including sexual assault, manslaughter, kidnapping, and various forms of aggravated assault, the fact that the offence was committed against an emergency worker acting in such a capacity (with the same extension as mentioned in relation to section 1(3)) operates as an aggravating factor. Section 3 sets out which persons are regarded as falling within the category of "emergency worker" for the purposes of the legislation: a constable; a person who has the powers of a constable who is otherwise employed for police purposes; a National Crime Agency officer; a prison officer; a person who is employed to act in a corresponding way to a prison officer; a prison custody officer, relating to escort functions; a custody officer, relating to escort functions; a person employed in fire services or fire and rescue services; a person employed in search services or search and rescue services; and a person employed to provide health services related to the National Health Service (NHS). All these functions are further qualified by the fact that they involve face to face interaction with individuals receiving the service or with other members of the public.

It is evident that the legislation seeks to protect a much wider category of 'emergency worker' than simply pertains to the examples referred to earlier from South Africa related to paramedics and firefighters. Nonetheless, this simply reflects the fact that emergency services are not confined to these categories of worker. Certainly, other public order and public service workers have been exposed to violent conduct in the course of their daily activities in South Africa.

This begs the question whether such a legislative solution would adequately extend protection to vulnerable emergency service workers in South Africa? The answer can only be that, in the absence of other measures, and given the crucial need for protecting such workers from such egregious assaults, the legislative solution is worth trying. Other practical solutions such as providing police escorts for emergency vehicles founder on the grounds of practicality and availability of resources. A closing observation is that it is now envisaged to double the maximum sentences for those found guilty of assaulting emergency workers in England and Wales, two years after the Assaults on Emergency Workers (Offences) Act 2018 came into force. Clearly the sanctions have not provided a sufficient deterrent. Thus, if South Africa was to follow a similar legislative route of trying to deter such attacks through heavier sentences, it would be crucial to ensure that the punishment was sufficiently serious, so as to achieve this purpose.

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Matters of Interest to Magistrates

Justice postponed: What causes unreasonable delays in criminal trials?

South Africa (SA) has a widely admired Constitution with a Bill of Rights that embeds human dignity and sets out minutely detailed protections for those arrested on criminal charges (s 35(1)), for those detained and sentenced (s 35(2)) and for criminal accused (s 35(3)).

These provisions came into force at the very time that the administration of justice was beset by considerable challenges in the wake of Apartheid. On the one hand, the new democratic government faced significant challenges to its legitimacy. Though backed by overwhelming democratic support, it had yet to establish its authority. On the other, it faced a crisis of personnel and effective functioning.

In the first years of democracy, a large cadre of skilled detectives left the police force (A Altbeker *The Dirty Work of Democracy: A Year on the Streets with the SAPS* (Johannesburg: Jonathan Ball 2005) at 261). This enervated the service's response, detection and arraignment capacities. That proved to be just one of the problems besetting the new South African Police Service (SAPS), whose dysfunction and inefficiency was, thereafter, exacerbated by a series of disastrous top appointments. Many see this dysfunction culminating in the mass killings at Marikana on 16 August 2012 – the deadliest security force incident in SA since 1976.

A further problem was the enervation of the prosecution service, which started under former President Thabo Mbeki, who suspended the National Director of Public Prosecutions, advocate Vusi Pikoli. Worse followed, in a series of catastrophically malign or inept appointments by former President Jacob Zuma.

With a powerful Bill of Rights on one side, protecting the rights of accused, and insufficient, or insufficiently trained, skilled, or motivated, police and prosecutors on the other, SA became enmeshed in what appeared to be a trap: Process and rights over output, process and rights over product, and process and rights over efficiency.

The allegations of corruption against former President Zuma seem to illuminate the problem. In December 2007, Mr Zuma was arraigned on charges relating to fraud, corruption, money laundering and racketeering arising from multi-billion Rand arms procurement contracts in the late 1990s. Shortly before the general election of April 2009, then Acting National Director of Public Prosecutions, Mokotedi Mpshe, withdrew the charges, but seven years later a Full Bench of the Gauteng Division of the High Court in Pretoria overruled his decision in *Democratic Alliance v Acting National Director of Public Prosecutions and Others (Society for the Protection of our Constitution as* Amicus Curiae*)* [2016] 3 All SA 78 (GP), because Mpshe had 'ignored the importance of the oath of office which demanded of him to act independently and

without fear or favour' (para 92). Dismissing the appeal, the Supreme Court of Appeal (SCA) ruled in *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another v Democratic Alliance and Another* [2017] 4 All SA 726 (SCA) at para 84 that discontinuing the prosecution was 'inimical to the preservation of the integrity of the NPA'. The charges were eventually reinstated on 16 March 2018.

Since then, Mr Zuma's defence has requested, and been granted, a number of postponements, on various bases, and has brought a number of interlocutory applications to defer the trial. In May 2019, his defence contended that he had been unfairly prejudiced by repeated delays and approached the KwaZulu-Natal Division of the High Court for a permanent stay of his prosecution.

Commentators have characterised this defence strategy as a 'Stalingrad strategy'. This involves a well-resourced accused, over a protracted period, postponing or frustrating the trial process. This is done by deploying every possible legal argument and stratagem to thwart the prosecution. Once enough time has passed, it may become possible to contend that delay itself has violated the accused's right to a fair trial, and that a permanent stay should be granted.

Like the military strategy, which seeks victory in the destruction of everything, to the last standing brick, 'Stalingrad' litigation attacks every aspect of the criminal justice system, regardless of collateral damage, with the intention or hope that the prosecution will ultimately surrender. But even without surrender, the attack on rationality, justice and basic fairness leaves the system weaker.

When an accused engineers the delay as primary agent, the right to a fair trial is exploited as a form of 'lawfare', which fundamentally erodes the criminal justice system.

This not a general accusation as to the defence process in South African criminal courts. Most legal practitioners perform their duty conscientiously and to the best of their ability.

The system depends, for its efficient operation, on the active cooperation of all – police, prosecutors, defence and the Bench. It is the duty of the prosecutor as commander of the process (*dominus litis*) to promote this cooperation. Doing this should continue to be part of training.

At the same time, it is the duty of the presiding judicial officer to assist the prosecutor in this – while also promoting efficiency by adhering conscientiously to all available court hours. This, too, should be part of training.

The Criminal Procedure Act 51 of 1977 (CPA) makes provision for the careful identification of issues at the outset, but few prosecutors or judicial officers engage this power properly.

Presiding officers in trial courts should apply the procedural rules justly and fairly, yet firmly – and appellate courts should in their turn encourage this fair but firm conduct. Though presiding judicial officers can achieve much through firm management of trials and parties, in some cases legislative amendments may be essential.

For the criminal justice system to perform its educative, palliative and conflict resolution functions, the public must be able to rely on it to act swiftly. That is the

message that must be ingrained in all who serve it. From every perspective, justice delayed is justice denied.

Everyday dysfunctions and delays

The principle is clear. Expeditious conclusion of criminal proceedings is central to a fair trial. In *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC), the Constitutional Court (CC) set out the principles establishing when delay may warrant permanent stay of prosecution.

Kriegler J stressed that the right to a trial within a reasonable time is designed to protect the accused (who bears the burden of repeated postponements and adjournments) from delayed-prejudice. That need not relate only to the trial itself. It extends to the fact that, while the charges are undetermined, the presumption of innocence may be threadbare protection against the fact that the accused's name and reputation are sullied by the very fact of the charges.

The right to a trial within a reasonable time, the court explained, seeks to mitigate 'the tension between the presumption of innocence and the publicity of trial' by acknowledging that the accused – although presumed innocent – is nevertheless 'punished' – and, when remanded in prison, that punishment is severe (*Sanderson* at para 24).

What is 'a reasonable time'? This is a value judgment by the court. It considers the kind of prejudice suffered, the nature and complexity of the case and the lack of state resources that might have hampered the investigation or prosecution.

Mr Zuma's own case elicited second exposition, when he sought a permanent stay of prosecution on the grounds of unreasonable delay in the start of his trial (*S v Zuma and Another and a related matter* 2020 (2) BCLR 153 (KZD) at para 114). A Full Bench of the High Court dismissed the application. It ruled that the seriousness of the charges outweighed the potential prejudice that Mr Zuma claimed he would suffer if the trial proceeded.

Constant and prejudicial delays can, themselves, thus become grounds of defeasibility of a criminal prosecution. Though protection from unreasonable delays is key to respecting the accused's right to procedural fairness, when a defence lawyer seeks tactical postponements this may pose an insidious threat to justice.

Sanderson (at para 33) warned that an accused who has either sought numerous postponements, or delayed the prosecution in less formal ways, cannot later invoke those very delays. Equally, an accused who has constantly consented to postponements, even if not initiating them, could find it hard to establish delay-prejudice.

Wild and Another v Hoffert NO and Others 1998 (3) SA 695 (CC) echoed this. There, repeated postponements resulted in three years' delay between arrest and trial. Scrutinising each delay, the court concluded that the accused themselves were in part responsible. Permanent stay was refused.

When the defence invokes important rights with the intention – oblique or direct – of thwarting the criminal justice system, abuse of the judicial process supervenes.

Tactics include meritless applications, failing to appear and applying for unnecessary postponements. Sometimes, 'stunt' withdrawals by defence lawyers, or the accused's 'stunt' dismissal of a defence team, feature. To expose these tactics may be difficult, but suspicion often exists that some criminal legal practitioners collude with clients to use supposed unavailability to get postponements.

Weaponisation of the criminal justice process is becoming less unfamiliar. Radovan Krejcir has used various tactics to delay his trials. In November 2013, he was arrested and charged with attempted murder, kidnapping and drug dealing. Following a protracted two-year trial, during which he lodged repeated applications for postponement, he was convicted on all counts.

However, repeated changes in Mr Krejcir's legal team protracted the sentencing process, resulting in a seven-month delay. Finally, Lamont J drew the line (*S v Krejcir and Others* (GJ) (unreported case no SS26/2014, 24-8-2015) (Lamont J)). He refused to allow Mr Krejcir more time to 'consult with his lawyers' after he claimed that his legal practitioner had failed to appear before the court because he was busy with another case.

Eventually, Mr Krejcir was sentenced to 35 years' imprisonment. His attempts to appeal to both the SCA and the CC failed.

Mr Krejcir is, again, on trial in the High Court for murder. Typically, the trial has been in progress since 2015, delayed by bail applications, changes of legal representation, the accused's claims of poor health, conflicts in his legal teams' diaries and various other roadblocks.

Msimeki J has chastised Mr Krejcir for his role in this, and has set strict time limits in dealing with his counsel, recognising the tendency to remove them frequently. Five years later, the murder trial has yet to be concluded.

More recently Gary Porritt and his spouse, Susan Bennett, appear to have invested huge effort and expenditure in preliminary tactics to delay their trial (*S v Porritt and Another* (GJ) (unreported case no SS40/2006, 23-5-2019) (Spilg J)). They face more than 3 000 charges of fraud, racketeering and contravention of the Income Tax Act 58 of 1962, the Companies Act 61 of 1973 and the Stock Exchanges Control Act 1 of 1985. Though they were arrested in 2002 and 2003 respectively, their criminal trial commenced only in September 2016.

Since then the prosecution has proceeded agonisingly slowly. Both accused appear to have intentionally delayed proceedings with applications and appeals that appear to have had little chance of success.

The case has twice reached the SCA. It is now being managed by a third judge, Spilg J, who in response to what he considered stalling tactics withdrew Mr Porritt's bail.

The cost to the system

At present, remand detainees constitute a third of SA's prison population. In April 2020, it was recorded in the Department of Correctional Services report titled 'Reduction of remand detention during lockdown: Briefing of Judicial Inspectorate of Correctional Services' that 4 027 remand detainees had spent more than two years in detention. Backlogs exacerbate an already overcrowded prison system. An over-

burdened criminal justice system threatens the rights of every accused, imposing systemic delay on all.

In *Zanner v Director of Public Prosecutions, Johannesburg* 2006 (2) SACR 45 (SCA) 2006 (2) SACR 45 (SCA) at para 21 the court stressed that:

'[T]he right of an accused to a fair trial requires fairness not only to him, but fairness to the public as represented by the State as well. It must also instil public confidence in the criminal justice system, including those close to the accused, as well as those distressed by the horror of the crime'.

Dysfunction in the criminal justice process thus damages, and undermines the rule of law, by appearing to cast ridicule on the entire legal system.

In part 2, we consider what to do.

Part 2 - Completing the puzzle – Is there a solution to the delay in criminal trials?

In the first part of the article, we considered the delays that dog the South African criminal justice system – some systemic, some lawyer- and accused-instigated. Are there possible fixes?

How to build accountability

The constitutional dispensation introduced important protections for accused and awaiting trial detainees. Calculated deployment of these rights, to thwart or incapacitate process so as to elude just determination, cannot be permissible in a fair and just system.

Some part of the solution must involve the firming up of institutional discipline. Stunt withdrawals and postponements, by the accused, sometimes with their legal practitioner's connivance, must be firmly and justly handled – and presiding judicial officers should be supported up the chain of the judicial hierarchy.

The inherent power of a trial court to manage its roll should entail sufficient authority – supported on appeal – to refuse postponements and to impose appropriate sanctions on errant or negligent legal practitioners.

Change in appellate support for firmer management of trial-court delays may prove pivotal. Appellate courts should consider stronger backing for lower-court judges who refuse postponements they conclude are illicit or designed to frustrate the prosecution.

In addition, the code of conduct for judges and magistrates, and the efforts that the Minister of Justice and Correctional Services has made to regulate and monitor court schedules, are in point.

Enforcing this approach, robustly where justly necessary, will help curb 'stunt' or collusive legal team withdrawals.

California's Rules of Professional Conduct do not allow a defence attorney an automatic right to withdraw from a criminal defence. A withdrawal of representation is permitted only once the attorney has taken 'reasonable steps to avoid reasonably

foreseeable prejudice to the rights of the client, such as giving the client sufficient notice to permit the client to retain other counsel' (The Rules of Professional Conduct at r 1.16(d)).

Fresh approaches may invite reconsidering judicially-enforced protocols and rules applicable when an attorney is permitted to abandon a case. Part VI of the Legal Practice Council's Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities (at para 60.2) prohibits a legal practitioner from deliberately protracting the duration of a case before the court. But to give this rule power, firm enforcement plus penalties for infringement are essential.

Requiring the court's permission before a defence team withdraws may, on the one hand, bulwark an accused against undue prejudice, while, on the other, guard the criminal justice system against 'Stalingrad' tactics.

None of this, in the age-old saying, is for sissies. Trial legal practitioners have the power, when undertaking a defence, to secure advance cover for fees. A later claim of not being paid may have to be approached with scepticism. Justice may, in a suitable case, entail that legal practitioners in private practice be obliged to proceed with a defence even when not remunerated.

Again, the court will have to strike a balance between the interests of the legal practitioner concerned, the possible prejudice to which the accused will be exposed as a result of the proposed withdrawal, and the harm to the rule of law and criminal justice system that suspect or unwarranted tactics inflict.

This will require coordinated change – in professional rules and discipline, in trial-level firmness, and in wise appellate backing.

Time limits to trials

Time limits may, in suitable cases, be placed on the start and finalisation of criminal trials. In many jurisdictions, this is the norm.

In international criminal law, the nature of the offences can easily result in inordinate delays. Time limits become essential.

At the International Criminal Tribunal for the former Yugoslavia (ICTY), presiding judges imposed strict time limits for prosecutors to present their cases (*Assessment and Report of Judge Carmel Agius, President of the ICTY, provided to the Security Council pursuant to para 6 of Security Council resolution 1534 (2004)* S/2017/1001 (2017) at p 74 para 116).

First, the prosecutor had to provide the court with a short summary of every witness's testimony, the time needed for the evidence in chief – and eventually how much time would be needed to present the entire prosecution case.

The court allocated the prosecution specified hours. At the end of each week, the prosecution was informed of how much time it had used and how much it had left.

This also applied to the defence, which was allocated additional time for cross-examination. The presiding judge might, for example, allocate six hours of cross-examination for a specific witness in a multi-accused case, and then leave it to the various counsel to decide how much time and in which order they would cross-examine.

On application, from either prosecution or defence, the court could extend the allocation.

The ICTY dealt with genocide and crimes against humanity – serious contraventions of international humanitarian law. In their nature, these cases took both prosecution and defence months to present (see PM Wald 'The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court' (2001) 5 *Wash. U.J.L. & Pol'y* 87 at 100-102).

Trial time limits have been used in some domestic jurisdictions to eliminate unnecessary trial delays and disruptions (see American Bar Association *Criminal Justice Section Standards*, sd 12-1.2). This innovation forms part of the right to a fair trial. It involves, as in the ICTY, judicial limits to the number of hours each litigant has to present their case. This can help short-circuit unreasonable delay (Constitution s 35(3)(*d*)).

We do not propose holus-bolus importation of ICTY or American rules and principles. In appropriate instances, however, these procedures might be beneficially introduced. This will take hard-driven determination on the part of presiding judicial officers, practitioner bodies and legal practitioners committed to the rule of law. Those less committed may require firm guidance.

Time limitations have been praised for forcing litigants to be more selective in the evidence they choose to present, and have proved critical in securing just, speedy and inexpensive trials (*Tersigni v Wyeth-Ayerst Pharm* 2014 WL 793983 at 1).

They have also been criticised. Critics have warned that time restrictions force courts to assess how to divide trial time between the parties – plus they can be susceptible to inequitable application (NF Engstrom 'The Trouble with Trial Time Limits' (2018) 106 *Georgetown Law Journal* 933 at 972-974). Additionally, severe limits can impair procedural justice by limiting sufficient and meaningful opportunities for participation.

To guard against these drawbacks, time restrictions should be imposed only when, without them, unreasonable delays will result. Moreover, they should be imposed only on consideration of vital factors, including the complexity of the issues, the burden of proof and the nature of the evidence. Allocations should be founded, always, on reasoned justification.

In appropriate cases, it may be beneficial for the presiding officer to receive a summary of the case from the prosecutor, which should include a brief outline of each witness's testimony, the time needed for the evidence in chief and an estimation of the time needed to present the entire prosecution case. This requirement could promote the more efficient management of cases and assist the presiding judicial officer in deciding how trial time should be divided fairly between the parties. This would, by corollary, encourage the prosecution to be better prepared when the trial commences and can help the court's roll planners in drafting the court's schedule.

Paradoxically, time limits may themselves be abused by unscrupulous litigants, who employ excessive objections, unresponsive witnesses and strategically prolonged examinations. Here, as before, courts should be alert to parties who weaponise legal procedure, and take appropriate disciplinary action when needed.

Undue constraints on the prosecution can lead to miscarriages, while undue delay by the defence erodes justice. Because of these pitfalls, trial time limitations undoubtedly demand careful assessment and scrupulous implementation.

That there is no positive law and little practical experience in setting time limitations is a challenge. Perhaps a pilot project may direct certain prosecutions to proceed within strict timelines.

Selecting which categories should be subjected to timelines may be hard. What categories? Rape and murder? Crimes against women and children? Corruption or fraud? Farm attacks? Controversy is certain.

But action is indispensable. Improvement in current delays, and sufficient resources are essential if our high promises to ourselves are to be fulfilled.

Conclusion

For any legal system to work efficiently, all involved must exhibit propriety, ethics and honesty. Sometimes this is not enough. Our suggestions attempt to identify some procedural innovations that can be considered in appropriate cases for better management of the trial process.

It has been more than two decades since South Africa became a constitutional democracy and enacted sweeping criminal justice reforms. Our criminal justice system has reached legal maturity. But it is creaking badly. And it is time for us to do something about it.

A broad view demands rigorous evaluation of how legal practitioners, professional bodies, presiding and appellate judges can properly help realise hard-won constitutional protections.

Reforms that promote and enhance the accountability of defence legal practitioners should equip judges at all levels of the court hierarchy with important bulwarks against actors who mobilise constitutional rights to undermine a system designed to protect the weak and the defenceless.

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A Last Thought

‘Firstly, the prosecutor cannot become, as it were, an extension of the media. The prosecutor must act independently of the media. That is to say, he or she must not base his or her decision on media reports or opinions or sentiments expressed in the media, nor in exercising his or her discretion may he or she yield to or be influenced by pressure placed on the prosecuting authority by the media or the public as expressed through the media. Besides political and judicial interference, the prosecutorial discretion to institute and stop criminal proceedings must also be free from "*public*" interference. Surrounding publicity may result in a prosecutor being reluctant to withdraw a case notwithstanding that he or she has personal doubts concerning the guilt of the accused, because by doing so he or she runs the risk of being perceived in the public domain as soft, fearful and lacking the skills to win the difficult case. Where a case generates media attention, there may be "enhanced pressure" upon the prosecutor to obtain a conviction. A prosecutor may prefer a particular charge or a more serious charge against an accused which is not supported by the prima facie evidence as per the case docket, where he or she is driven by a media frenzy attendant upon the case (because of its high-profile or notorious nature or because it involves shocking facts) or by an outcry from society (or community outrage) as expressed through the media in its various forms, including social media, especially as to what the outcome of the case ought to be. The prosecutor may thereby hope to obtain a conviction which is not supported by the evidence and to gain an increased or a more severe sentence than what the facts of the case warrant and thus to be seen in the media as a champion of "justice" who satisfied the public's baying for justice and the maximum or harshest possible punishment (ie who did what the public expected). The prosecutor may simply lose his or her objectivity on account of hostile or adverse pre-trial publicity when exercising his or her discretion, instead of devoting himself or herself to the facts of the case.’

D W N Broughton ‘The South African Prosecutor in the Face of Adverse Pre-Trial Publicity’ (2020) 23 *PER/PELJ* 1 at 11-12.