e-MANTSHI

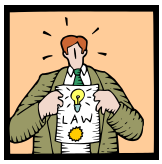
A KZNJETCOM Newsletter

April 2021: Issue 173

Welcome to the hundredth and seventy third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1.The Department of Justice and Constitutional Development invites interested parties to submit written comments on the proposed draft Regulations relating to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (the draft Regulations). See Government Gazette no 44479 dated 23 April 2021.

Section 32(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) enshrines the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any rights. Section 32(2) of the Constitution provides that "national legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state".

The Promotion of Access to Information Act, 2000 (Act No. 2 of 2000) (PAIA) was enacted in response to the above-mentioned constitutional mandate, and most of the provisions came into force in March 2001. Since its enactment, PAIA was mainly amended by, inter alia, section 110 of the Protection of Personal Information Act,

2013 (Act No. 4 of 2013) (POPIA). The remaining sections of POPIA will, in accordance with Proclamation No. R.21 of 2020, come into operation on 30 June 2021.
The amendments to PAIA are bringing the provisions of PAIA in line with similar provisions in POPIA, which result in the fact that the Regulations already promulgated in terms of PAIA must also be brought in line with the regulations promulgated in terms of POPIA. To prevent confusion, it was deemed appropriate to repeal the existing regulations and repromulgate it together with the proposed amendments.
A copy of the draft Regulations is available on the website of the Department at http://www.justice.gov.za
The comments on the draft Regulations must be submitted to Ms A Van der Walt, on or before 17 May 2021 at email address: alvanderwalt@justice.gov.za

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Recent Court Cases

1. Pedro v S (A236/2020) [2021] ZAWCHC 64 (15 April 2021)

In considering an appropriate sentence under section 35 of the Road Traffic Act 93 of 1996 consequent to the commission of an offence in terms of s 65(1), an interpretation of the words 'circumstances relating to the offence' in section 35(3) is to include a consideration of the circumstances of the offender and the interests of the community.

Lekhuleni AJ:

INTRODUCTION

[1] This matter came to this court by way of an appeal from the decision of the Magistrate's Court, Oudtshoorn. The appellant, Mr Selwin Pedro was convicted of contravening section 65(2)(a) of the National Road Traffic Act 93 of 1996 ("the NR TA") in that on 22 November 2018 and at or near Dysselsdorp, on a public road in the district of Oudtshoorn he drove a motor vehicle, namely a BMW bearing

registration number FFY […] while the concentration of alcohol in his blood was 0,19 g per 100 ml in excess of the limit of 0,05 per 100 ml as stated in section 65(2)(a) of NRTA.

FACTUAL BACKGROUND

[2] The matter served before the court below on 25 July 2019. The appellant was legally represented by Ms. L. Prinsloo, a local attorney. After the charge was put to him, the appellant pleaded guilty. A statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 (" the CPA ") was read into the record and was handed in as an Exhibit. The said statement was confirmed by the appellant. As usual, the State accepted the appellant's plea. The appellant was subsequently convicted as charged.

[3] The State proved a number of previous convictions against the appellant including a previous conviction for drunken driving in terms of section 65(1)(a) committed on 30 November 2015. Ms Prinsloo made substantive submissions regarding the appellant's personal circumstances and even called the appellant to testify in mitigation of sentence in terms of section 35(3) of the NRTA on why the court should not suspend his drivers' licence.

[4] In his testimony, the appellant informed the court that he had held the driving licence for 21 years and he required his licence for work and also for personal use. He testified that he needed his licence to travel from Belhar, Cape Town where he lived to Dysselsdorp where he worked and also to Port Elizabeth where his daughter was based. On being questioned by the court, he stated that quite often he worked after hours and if there was something that happened on site after hours, he was called to attend to it and to give a report to the employer. He also testified that when he was required to visit the site after hours, there was no public transport available at that time.

[5] What could be gleaned from the statement in terms of section 212(2) of the CPA are the facts relating to the offence. A day before he was arrested, the appellant drank a few beers with his friends at his house. His neighbour asked him to fetch her husband who was standing next to a clinic. It was during the night at 23h00. The neighbour informed him that it was dangerous for her husband to walk at that time of the day and the appellant then drove to fetch his neighbour. After he picked him up, and on his way home, the appellant heard the siren of a police vehicle driving behind him. He was stopped and the police observed that he was drunk and they arrested him. He was then taken to the hospital where a blood sample was extracted from him. He was then arrested and charged with drunken driving.

[6] In mitigation of sentence, Ms Prinsloo addressed the court ex parte and advised the court that the appellant was 51 years old and was divorced. She informed the

court that the appellant had a girlfriend with whom he was in a relationship for the past three years. She also stated that the appellant had three children from his marriage. Two of them were 26 years old and the last born daughter was 20 years old and studied in Port Elizabeth. The daughter was dependent upon him. The appellant passed matric and has a diploma. He had been employed at that time at Grinaker-LTA as a Safety Officer for the previous thirteen years and earned a gross income of R21000 per month.

[7] The magistrate sentenced the appellant to a fine of R12000 or 18 months imprisonment of which R6000 or nine months' imprisonment was suspended for a period of five years on condition that the appellant was not found guilty of contravening section 65(1) and 65(2) of the NRTA committed during the period of suspension. In addition, the appellant's driver's licence was suspended for a period of five years as from 25 July 2019. In terms of section 103 of the Firearms Control Act 60 of 2000, the court did not declare the appellant unfit to possess a firearm.

[8] The appellant applied in the court a quo for leave to appeal only against that part of the sentence which related to the suspension of his driving licence. The application for leave to appeal was refused by the magistrate. However, on 17 August 2020 this court on petition (per Bozalek and Francis AJ) granted leave to appeal on that aspect. In granting leave to appeal, the court noted that there were conflicting decisions in this division on the interpretation of section 35 of the NRTA. The court also proposed that a full bench of three judges be constituted to hear the appeal. In essence, it is this order that the appellant seeks to impugn. The sentiments that were raised by the court that granted the petition will be addressed later in our judgment.

PRINCIPAL SUBMISSIONS BY THE PARTIES

[9] At the hearing of this appeal, Adv. C. Prinsloo appeared pro bono on behalf of the appellant and the court would like to thank him in this regard. He contended on behalf of the appellant that the magistrate erred in failing to consider the personal circumstances of the accused together with the circumstances relating to the offence when he made the licence suspension order. He argued that the court a quo overlooked the decision of this court in State v Lourens 2016 (2) SACR 624 (WCC) in which it was held that in considering a suspension order in terms of section 35 of the NRTA the court has to give sufficient weight to the elements of the well-known triad principle as stated in S v Zinn 1969 (2) SA 537 (A). Counsel pointed out to this Court that pursuant to the suspension of his licence, the appellant had lost his employment.

[10] Ms Van Wyk, who appeared for the State, argued that the appellant was not a first offender. She submitted that the appellant was convicted of drunken driving in 2015 and that the court a quo was correct in its order suspending the appellant's licence. She implored the court to dismiss the appeal and to confirm the order of the

trial court.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[11] Section 35 of the NRTA was among other provisions of the NRTA that were amended with effect from 20 November 2010 by the National Road Traffic Amendment Act 64 of 2008. The amendment of section 35 reads as follows:

"(1) Subject to subsection 3, every driving licence or every licence and permit of any person convicted of an offence referred to in -

(a) section 61(1)(a),(b) or (c), in the case of the death of or serious injury to a person;

(aA) section 59(4), in the case of a conviction for an offence, where-

(i) a speed in excess of 30 kilometres per hour over the prescribed general speed limit in an urban area was recorded; or

(ii) a speed in excess of 40 kilometres per hour over the prescribed general speed limit outside an urban area or on a freeway was recorded;

(b) section 63(1), if the court finds that the offence was committed by driving recklessly;

(c) section 65(1), (2) or (5),

where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of -

(i) a first offence, for a period of at least six months;

(ii) a second offence, for a period of at least five years;

(iii) a third or subsequent offence, for a period of at least ten years, calculated from the date of the sentence.

(2) Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the period mentioned in paragraphs (i) to (iii), inclusive, of subsection

(1) calculated from the date of the sentence, from obtaining a learner's licence or driving licence or a licence and permit.

(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied, after the presentation of evidence under oath, that circumstances relating to the offence exist which do not justify the suspension or disqualification referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may consider fit.

(4) A court convicting any person of an offence referred to in subsection (1) shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3), to the notice of such person.

(5) The provisions of section 36 shall with the necessary changes apply to the suspension of a driving licence or a licence and permit in terms of this section

[12] As it will appear more fully hereunder, this section has been the subject of considerable debate in this court. The debate can roughly be divided into two schools of thought, both in terms of the reasoning and the outcome. The one school adopts what I would term a more literal and a narrow interpretation of section 35(3) to the effect that in determining whether a non-suspension order was justified, the law-maker has now limited factors which may be taken into account exclusively to 'circumstances relating to the offence'. This is typified by the following passage in S v Greet 2014 (1) SACR 74 (WCC) at para 11 where Rogers J (Saldanha J concurring) stated:

"There was evidence in the present matter that the appellant required his driving licence for work purposes and might lose his job if the licence was suspended. He had a four year old child in respect of whom he paid maintenance of R500 per month. He also testified that he drank only on weekends and that subsequent to the incident he had given up alcohol altogether. He was, furthermore, a first offender. Whatever the relevance of these circumstances might be, if the court were considering a suspension in terms of section 34(1), they cannot in my view be regarded as circumstances relating to the offence as contemplated in the amended section 35(3), i.e. circumstances relating to the fact that on 30 July 2011 the appellant drove a vehicle in Church Street, Vanrhynsdorp, at a time when the alcohol in the blood exceeded the limit specified in s 65(2}(a)."

[13] The very same court adopted an identical approach in State v De Bruin WCHC Ref 141270 (Unreported judgment of 29 January 2015). In that case, the court went on to say that the amendments made to section 35 of the NRTA with effect from 20 November 2010 have the consequence that, whereas previously there was no limit on the circumstances to be taken into account, they are now restricted to those relating to the offence itself, and unless a particular circumstance can properly and rationally be said to relate to the offence, it must be left out of account. In S v Tokhwe

[2017] ZAWCHC 26 (22 March 2017) Rogers J, in a matter which came before the court by way of automatic review, acknowledged the difference of opinion on this section in this Division and stated that he adhered to the views he expressed in the two cases discussed above. The Presiding Judge in this matter (who agreed with Rogers J in the Tokhwe matter) expressly declined to deal with the difference of opinion as the issue had not been argued before that court.

[14] The second school of thought in this Division adopts a wider interpretation of the section and applies a purposive approach to sentencing. This school has observed that both the circumstances pertaining to the commission of the offence as well as the factors relevant to the sentence, both mitigating and aggravating, must be considered conjunctively when a suspension order is considered. This is the approach adopted in Lourens (supra) by Savage J (Henney J concurring) who opined that imposing a sentence is an action that requires the court to work purposively at finding the most appropriate sentence in a manner which accords with an accused's fair trial rights embodied in section 35 of the Constitution.

[15] Her Ladyship reasoned that this approach is buttressed by the views expressed decades ago in State v Zinn (supra) at 540G, that in sentencing, the personal circumstances of the accused are to be considered together with, inter alia, society's demand for retribution, which must be carefully balanced. Her Ladyship went on to state that:

"[17] For all of these reasons, the view I take of the matter is that, in considering an appropriate sentence under section 35 consequent to the commission of an offence in terms of s 65(1), an interpretation of the words 'circumstances relating to the offence' in section 35(3) is to include a consideration of the circumstances of the offender and the interests of the community."

[16] It must be stressed that a number of subsequent Full Court decisions pronounced in this division have disagreed with the narrow approach adopted in S v Greet and S v De Bruin and supported the view expressed in Lourens. For instance, in S v Muller (Case A241/18 - Unreported Judgment of 16 November 2018) Cloete J (Parker J concurring) agreed with the reasoning and finding of the Full Court in Lourens. In that court's view, the section 35(3) enquiry indeed forms an integral part of the determination of an appropriate sentence.

[17] However, Cloete J lamented the uncertainty on the difference of opinion that has led to the most unsatisfactory result that lower courts are left in the dark as to which authority they are bound by. Meanwhile in S v Brink 2018 (2) SACR 6 (WCC) Davis AJ (Allie J concurring) and in S v Stockenstroom Case no. A24/2018 (Unreported decision of 09 March 2018) Thulare AJ (Bozalek J concurring) found that the circumstances relating to the offence in terms of section 35 are not limited in this manner but include traditional sentencing factors, such as the personal

circumstances of the accused.

[18] In my view, this difference of opinion is caused by the interpretation of section 35(3) of the NRTA, in particular whether this section limits the power of the court to only consider the circumstances relating to the offence or to consider the triad applicable in sentencing proceedings when giving consideration to an order of suspension in terms of section 35(3). In my opinion, the appropriate place to begin with is giving content and meaning to this provision, and for this court to consider the constitutional and jurisprudential principles that govern the task of statutory interpretation.

[19] Our Constitution requires a purposive approach to statutory interpretation - See National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (1) BCLR 39 (CC) at para 24; Daniels v Campbell NO and Others [2004] ZACC 14; 2004 (7) BCLR 735 (CC) at paras 22-23. The starting point should be section 39(2) of the Constitution which provides that:

"When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[20] In Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079 (CC) at para 22, the Constitutional Court interpreted this provision to mean, inter alia, that the Constitution requires judicial officers to read legislation, where possible, in ways which give effect to its fundamental values and in conformity with the Constitution.

[21] In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others [2004] ZACC 15; 2004 (7) BCLR 687 (CC) at para 91, Ngcobo J stated:

"The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39(2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights."

[22] A contextual or purposive reading of a statute must remain faithful to the actual wording of the statute. A contextual interpretation must be sufficiently clear to accord with the rule of law. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law - See Bertie van Zyl (Pty) Ltd and Another v Minister of Safety and Security 2010 (2) SA 181 (CC) at para 22. Mindful of the imperative to read and interpret legislation purposively in conformity with section 39(2) of the Constitution, I turn to consider the question whether, properly construed, section 35(3) of the NRTA limits the power of the court when

considering a cancellation or a suspension order in terms of section 35(1) of the NRTA to confine itself exclusively to the circumstances pertaining to the offence to the exclusion of other factors relevant in sentencing.

[23] In my view, the provisions of section 35(3) of the NRTA must be examined together with the other subsections of section 35 and not in isolation. Section 35(1) lists various offences under the Act which attract a mandatory minimum sentence of six months in the case of a first offence, five years in the case of a second offence, and ten years in the case of a third or subsequent offence. When one considers all the offences listed in the NRTA it is apparent that the offences listed in section 35(1) are the most serious offences - See S v Brink 2018 (2) SACR 6 (WCC) at para 32. In the absence of circumstances mentioned in section 35(3) the court is bound to impose the minimum licence suspension envisaged in that section. Section 35(4) makes it mandatory for a court convicting any person of an offence referred to in subsection (1) before imposing sentence, to bring the provisions of subsection (1) or (2) (i.e. the possibility of a suspension of licence as the case may be), to the attention of the accused. (''emphasis added '')

[24] Gleaned from the plain reading of this section in its entirety, it is clear that the imposition of sentence and the order of cancellation or suspension of a driving licence must be considered together. This view is supported by the fact that the suspension of a driving licence is punitive in nature. The sentence that a court may impose in terms of section 276 of the CPA must have due regard to the punitive nature of a suspension order that may be ordered as a result of an offence committed under section 65 of the NRTA.

[25] In other words, in imposing an appropriate sentence for a contravention of section 65(1) or (2) of the NRTA, the court must give sufficient weight to all relevant circumstances including aggravating and mitigating factors as well the circumstances relating to the offence envisaged in section 35(3) of the NRTA. Accordingly, the court may, having regard to the nature of the offence, the public interest, the personal circumstance of the accused as well as the effect of the suspension order on the offender, decide on the appropriate sentence and the period of suspension (if necessary), of the driving licence.

[26] In my opinion, this is what is intended by section 35(3) and (4). However, before a sentence is imposed, the accused must be informed of the right to present evidence under oath as to why the suspension order in terms of section 35(1) should not take effect. In my considered view, this is a procedural requirement that this Court may not overlook. More importantly, in considering the cancellation or suspension of a driver's licence, a court enjoys an unfettered discretion and should apply the facts before it in conformity with what the section stipulates.

[27] The presentation of evidence in mitigationof sentence envisaged by section 274

of the CPA and the presentation of evidence in terms of section 35(3) are intended to arm a court with sufficient information in respect of the offence and the offender so as to enable it to exercise the sentence discretion properly. In the exercise of that discretion, the court is bound by the general principles of sentencing as enunciated in S v Samuels 2011 (1) SACR 9 (SCA) where the Supreme Court of Appeal stated:

'[91] It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never served by too harsh or too lenient a sentence.

[28] Furthermore, it is well established in our law that a provision such as section 35 of the NRTA which provides for the suspension of a driving licence serves two purposes, namely, to punish the offender and to protect the public. See S v Van Rensburg 1967 (2) SA 291 (C) and S v Markman 1972 (3) SA 650 (AD) at 6550 . The cancellation or the suspension of a driver's licence has far reaching consequences inter alia, the deprivation of an individual of the right to drive on a public road.

[29] In my judgment, it must be assumed that when the legislature introduced the amendment of section 35(3) in terms of the NRTA, the legislature was aware of the general principles of sentencing espoused above as well as the dual purpose of section 35. The legislature must at least prima facie be taken to have intended that an order of suspension or cancellation was to serve the purpose indicated in this decision, namely, that of protecting the public and of punishment. Furthermore, the legislature must have been aware that it is trite that courts have to consider the triad and the applicable principles of sentencing when imposing a punishment. In my view, if the legislature intended the courts to consider the circumstances relating to the offence as the sole consideration for the cancellation or suspension order, the legislature would have expressly stated so.

[30] It is worth noting that from the reading of section 35(4), a court is bound to inform an accused person before the imposition of sentence of the possibility of a suspension order being made. In my opinion, it is obvious from this provision that the general principles applicable in sentence proceedings find application in cases involving a contravention of section 65(1) or 65(2). In addition, the factors that the court has to consider in passing sentence and in making the punitive suspension order in terms of section 35(3) are so inextricably imbricated that they cannot be separated or dealt with disjunctively.

[31] One of the noticeable innovations of the 2010 amendment of section 35(3) of the

NRTA is the presentation of evidence under oath in order to determine if circumstances relating to the offence exist which do not justify the suspension of a driving licence. The court can only consider these circumstances after convicting an offender and during sentence proceedings. The evidence in terms of section 35(3) of the NRTA must be presented during the presentation of evidence in mitigation of sentence. In my view, the evidence in terms of section 35(3) cannot be heard disjunctively with the evidence in mitigation of sentence in terms of section 274 of the CPA.

[32] Section 274 provides that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. Section 274(2) provides that the accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court. The circumstance relating to the offence as well as all relevant factors that have been placed before the court must be considered by the court conjunctively after the presentation of evidence in terms of section 35(3) of the NRTA read with section 274 of the CPA in determining whether an order of suspension or cancellation has to be ordered.

[33] It must be stressed that the introduction of section 35(3) in my view was intended to test under oath and through cross-examination the veracity of the circumstances relating to the offence during evidence in respect of sentence. It was not intended to be considered in isolation or on a piecemeal basis in passing sentence. This provision was introduced so that the court can be placed in a better position to make an informed decision whether a suspension order is appropriate or not.

[34] In my view, therefore, the suggestion that the introduction of section 35(3) was aimed at limiting the unfettered discretion of the court to the factors relating to the offence when considering an order in terms of section 35(3) is, with respect, incorrect and in conflict with the plain reading of the Act, in particular the provisions of section 35(4).

[35] More importantly, if one has regard to the unfettered discretion conferred upon a court by section 35(3) as to the length of time for which a court can suspend the licence, it becomes apparent that the discretion of the court is not limited to the circumstance relating to the offence. It is also apparent that the court's discretion is not restrained by the circumstances relating to the offence in determining the period of suspension. For instance, a court may convict an accused person for a contravention of section 65(1) or (2) of the NRTA and still find that notwithstanding the fact that the accused is not a first offender, his/her personal circumstances justify that a shorter period of suspension should be ordered.

[36] In other words, the court must of necessity not lose sight of the effect a suspension order may in certain circumstances have on the offender. In doing so, it

must consider the personal circumstances of the accused. The court cannot therefore look at the circumstances relating to the offence in isolation and turn a blind eye to the personal circumstances of the accused. Such an approach, with respect, would most likely lead to a failure or a miscarriage of justice.

[37] Sentencing is about achieving the right balance between the crime, the offender and the interests of the community - S v Zinn (supra) at 540 G-H. In S v Banda 1991 (2) SA 352 (BG) at 355A Friedman J, as he then was, noted with admirable brevity that 'the elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others.' In my opinion, a suspension or a cancellation order constitutes a significant part of punishment and it is obligatory for a court to consider all relevant facts before it makes such an order.

[38] If I correctly understand the approach of the first school of thought that professes the narrow interpretation of section 35(3), it suggests that a court should only consider the circumstances relating to the offence and simply ignore the severity and the adverse effect of the order of suspension on the offender. From a contextual reading of section 35 it cannot be said that this was the intention of the legislature. In my view, this approach is with respect erroneous.

[39] In S v Markman (supra) at 656A-B, the Appellate Division, as it then was, found that the suspension or cancellation of a driver's licence for negligent driving, even where the driving of vehicles is not the accused's vocation, can in itself cause appreciable, sometimes even severe hardship, since the motor car has become an essential part of our modern way of living. The court noted that ordinarily, therefore, it ought not to be lightly ordered, and that it should not be ordered without prior enquiry by the court into how it will affect the accused in his or her particular circumstances. I am aware that this case was decided before the 2010 amendments. However, in my view, the principle enunciated in this decision holds sway to date.

[40] The enquiry as to how the suspension of the licence would affect the offender cannot be diligently conducted unless all the personal circumstances of the accused are placed before court for consideration. The court would not be in a position to know the impact of a suspension order on the offender if the enquiry is only limited to the circumstances relating to the offence. In other words, a suspension of a driving licence is an ingredient which has to be taken into account by a court when imposing sentence. It must not be dissociated from all the other factors and dealt with in isolation or on a piecemeal basis. As this very case demonstrates, the taking away of an accused's driving licence is a severe punishment that quite often impacts on his livelihood and that of his family and dependants.

[41] To this end, I respectfully agree with the views expressed by Savage J in S v Lourens that a plain reading of the words 'circumstances relating to the offence' in the amended section 35(3) includes a consideration of the personal circumstances of the offender and the interest of the community so as to allow the sentencing court to impose a sentence dispassionately on consideration of all relevant factors traditionally relevant to sentencing.

[42] In conclusion on this point, I take the view that for all intents and purposes, in considering a suspension order under section 35 based on the conviction for an offence in terms of section 65(1) and (2), an interpretation of the words 'circumstances relating to the offence' in section 35(3), should include a consideration of the circumstances of the offender and the interest of the community as was stated in the Zinn case. I also find that the narrow interpretation accorded by the court in S v Greef and S v De Bruin is likely to lead to an injustice and is in conflict with the long established sentencing principles entrenched in our law discussed above.

[43] Reverting to the present matter, it is evident that the trial court considered the provisions of section 35(3) and applied the narrow approach applied in the Greef matter. The magistrate failed to take into account the personal circumstances of the accused at all. The trial court failed to consider the fact that the accused often worked late and that he required his driver's licence for his work.

[44] As I have said, at the hearing of this appeal, the Court was informed that pursuant to the impugned suspension order, the appellant lost his employment. It is indubitable that the suspension of the appellant's driving licence has had a deleterious effect on the appellant and his livelihood. The trial court failed to take into account the fact that the appellant was not involved in an accident. The trial court failed to consider the fact that the appellant had few drinks with his friend and his neighbour asked him to fetch her husband who was at a corner next to a clinic nearby. It was unsafe for the husband of the neighbour to walk home. The road was not busy and it was late at night in a remote country town.

[45] In my view, the court a quo over-emphasized the fact that the appellant was a second offender and that he did not learn from his previous indiscretions. This is borne out by the interaction between the appellant and the court during the section 35(3) enquiry. On a conspectus of all the evidence, I am of the opinion that a suspension of the appellant's driving licence for a period of five years under these circumstances was grossly disproportionate to what could be considered fair and reasonable in the circumstances of this case. In my judgment, a suspension order for a shorter period should have been ordered.

ORDER

[46] In the result, I would propose that the appeal be upheld and the order

suspending the appellant's driving licence for five years be set aside and be replaced with the following order:

"In terms of section 35(3) of the NRTA, the accused's driving licence is suspended for a period of eighteen months. The period of suspension will be antedated from the date of sentence, 25 July 2019".

From The Legal Journals

Nortje, A, Tredoux, C G & Vredeveldt, A

“Eyewitness identification of multiple perpetrators.”

(2020) 33 SACJ 348

Abstract
To date, research and South African case law has largely ignored the memory burden experienced by witnesses to multiple-perpetrator crimes and failed to address the challenges that arise when administering identification parades for such crimes. Empirical research suggests that eyewitnesses to multiple-perpetrator crimes achieve low identification accuracy, which worsens with the addition of each perpetrator to be identified. Witnesses to multiple-perpetrator crimes also experience a unique memory task of matching criminal actions to perpetrators. Preliminary empirical evidence suggests witnesses perform poorly at this task. Although some international research documents the difficulties that officers experience when conducting identification parades, there is little evidence of how South African officers administer parades in the field. This article presents empirical evidence from a sample of detectives in the Western Cape showing that in-field administration of parades for multiple-perpetrator crimes are not uniform, and officers risk conducting parades that would not be considered ‘fair’. The article concludes that the current South African guidelines may profitably be revised, so that difficulties associated with administering parades for multiple-perpetrator crimes are alleviated.

Strode, A & Badul, C

"Forms to capture child consent to surgical procedures: Time to focus on function rather than form."

South African Journal of Bioethics & Law 2021;14(1):20-23

Abstract

It is uncontroversial that no form of treatment, including a surgical operation, can be undertaken without the consent of the patient/proxy. The Children's Act deals expressly with consent to 'surgical operations' on children. Section 129 creates a framework based on the principles of child participation and protection. Nevertheless, obtaining consent from children remains complex: firstly, children are legal minors and have limited capacity to act independently. Secondly, there may be risks or longer-term consequences of surgery that distinguish it from medical treatment. Third, a child's capacity to understand risks is not static: it evolves with age, and limited tools exist to access capacity. Fourth, there are at least three parties to the consent procedure – the child, the parent/guardian and the medical practitioner, all of whom may have different interests. Fifth, in some instances there is the added complication of child parents who need to provide consent for their own child. This article aims to provide guidance to surgeons and other medical practitioners performing surgery on children. It does this through setting out the legal norms relating to child consent to an operation. It critically examines the pro forma consent forms (forms 34 and 35) found in the regulations issued in terms of the Children's Act that are to be used to document the consent process, and identifies key gaps and weaknesses. It concludes with recommendations for the adaptation of these forms through the use of a checklist to ensure that all the requirements for valid consent are documented, protecting children and medical practitioners.

This article can be downloaded here:
http://www.sajbl.org.za/index.php/sajbl/article/view/666/661

Birkholtz, M A

"Spousal contributions in debt review referrals to the magistrates' courts in terms of the National Credit Act 34 of 2005"

(2021) 84.1 *THRHR* 68.

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

Contributions from the Law School

Section 309B (5), Criminal Procedure Act (new evidence after conviction): a novel procedure in the magistrates' courts on which the high court gave some guidance: *S v Lottering* (2020 (2) SACR 629 (WCC))

The appellant, a policeman, was convicted of armed robbery. He applied, after the imposition of sentence, for leave to appeal and to adduce evidence in terms of section 309B (5) of the Criminal Procedure Act which had not been led at the trial. The new evidence was the appellant's wife's testimony. The appellant's wife had been made available as a witness to the defence at the commencement of the trial but the defence had elected not to call her. The appellant's attorney's mandate was terminated after conviction and a new legal representative took over.

The appeal court held that the section 309B (5) procedure was a novel procedure in the magistrate's court and that it was appropriate to provide some appellate guidance as regards how magistrates should deal with such applications.

The validity of the appellant's conviction depended on whether the appellant had been correctly identified as the perpetrator of the crime (para [3]). The identifying witness, the complainant, was a single witness. The appeal court analysed the evidence (paras [6]-[22]) and found that there was no reason to interfere with the magistrate's findings on fact and credibility which had led to the appellant's conviction (para [23]). The appropriate caution had been exercised.

After the conviction, the trial was postponed to get a probation officer's report to be used in mitigation of sentence. When the trial resumed, the appellant had a new attorney. After the appellant had been sentenced, his new representative made an application for leave to appeal and at the same time also made an application in terms of section 309B (5) of the Criminal Procedure Act to adduced new evidence – that of the appellant's wife who had not been called as a witness at the trial.

The appeal court set out the contents of section 309B (5) and (6) of the Criminal Procedure Act, which are as follows:

"(5) (a) An application for leave to appeal may be accompanied by an application to adduce further evidence (hereafter referred to as an application for further evidence) relating to the conviction, sentence or order in respect of which the appeal is sought to be noted.

(b) An application for further evidence must be supported by an affidavit stating that—

(i) further evidence which would presumably be accepted as true, is available;

(ii) if accepted the evidence could reasonably lead to a different decision or order; and

(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
(c) The court granting an application for further evidence must—
(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.
(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question."

The appeal court was not aware of any reported judgements dealing with the provisions of section 309B (5), but said that it seemed clear that the provisions were intended to short cut the laborious process and the disruption of the appeal process when an application to lead new evidence was made for the first time at the appellate stage. In those circumstances, if the application to lead new evidence was granted, the case would be remitted to the trial court for the hearing of the additional evidence (para [26]). In the case of *S v Ergie* (2021 (1) SACR 127 (WCC)), discussed above, the appeal court opted not to follow this process because of the delays which it would entail where the appellant had already been in detention for six years. It decided the appeal in the appellant's favour without the new evidence which was sought to be adduced.

The appeal court observed that the requirements prescribed in section 309B (5) are basically a replication of those applicable to an application to a superior court to allow new evidence to be adduced for the purposes of the appeal (para [27], section 19 (b) and (c) Superior Courts Act 10 of 2013, commentary of sections 19 (b) and (c) of the Superior Courts Act in Van Loggerenberg Erasmus Superior Courts Practice (Juta) vol 1 at A2-69ff, *S v De Jager* 1965 (2) SA 612 (A) at 613 A-D). The appeal court then discussed the principles developed by the appeal courts on the adducing of new evidence at the appeal stage (paras [27]-[29]).

The appeal court observed that it was important that magistrates dealing with applications in terms of section 309B (5) be mindful that they were dealing with it at the appeal stage since the accused would already have been convicted and sentenced. All the jurisprudence developed by the superior courts in relation to the hearing of new evidence was thus applicable, and one of the most important principles coming out of the jurisprudence was there was the very significant interest in the finality of litigation, be it civil or criminal. The jurisprudence further emphasized the courts' reluctance to reopen litigation and speaks to the sparing use of the power to permit new evidence to be adduced [para 30]. The appeal court noted that applications to adduced new evidence in terms of section 309B (5) should not be granted where there was only token compliance with section 309B (5) (b) (the supporting affidavit) (para [30]). Also, the appeal court noted that the appellate courts had been extremely reluctant to allow new evidence to be adduced at the appeal stage where the reason it had not been adduced at the trial stage was the "inadequate presentation of the litigant's case at trial" (para [29], *De Aguiar v Real People Housing (Pty) Ltd* 2011 (1) SA 16 (SCA) at para 11).

In the case before the appeal court, the appellants supporting affidavit in terms of section 309B (5) (b) was cursory (para [32]), and set out the reason for the failure to call the appellant's wife at the trial stage, despite having had access to her statement at the beginning of the trial, as his attorney's oversight in circumstances where he trusted the judgement of his attorney (para [31]).

The appeal court was not sympathetic to this argument, it having been made in a very bald, uncorroborated and superficial manner. The appeal court referred to the appellant's averments in the section 309B (5) affidavit as "bald, weak and unconvincing" (para [39]). The appeal court found that the appellant as a policeman with sixteen years' experience would have easily been able to appreciate the significance of his wife's testimony and should have instructed his attorney to call her. "It was inherently most improbable that a person with his years of service in the police force would have meekly accepted advice from his attorney not to call a witness who was, according to him, able and willing…" to give exculpatory evidence for him. The appeal court referred to the case of *De Villiers v S and another* ([2016] ZASCA 38 (24 March 2016)) where the court discussed the duty of the client to instruct their attorney and held that the accused could not just remain supine until after conviction and then complain about the conduct of his case (para [33]).

When an ex client makes allegations against an attorney, they are held pro tanto to have waived attorney-client privilege and the attorney has a right to respond (para [35], cf *S v Tandwa and others* (2008 (1) SACR 613 (SCA) paras 19-20), *S v Mponda* (2007 (2) SACR 245 (C) paras 4-42)). There was no confirmatory affidavit by the appellant's attorney and he had not been given an opportunity to respond to the serious allegations about his conduct of the trial which would have been proper (para [34]). At the very least, held the appeal court, the magistrate should have required a supplementary affidavit which should have been made available to his ex-attorney for a response (para [40]) before considering whether to admit the new evidence.

The magistrate in allowing the further evidence to be led did not confine himself to allowing just the evidence which had been the subject of the application to be led. In the end another witness was also called, and the prosecutor was allowed to recall the complainant. The proceedings continued for another full year after the sentence had been imposed (para [42]). The appeal court noted that to avoid situations such as this one, the ambit of the new evidence to be heard should be clearly delineated in the court's order. "A clear delineation will have the effect of similarly circumscribing the nature of any rebutting evidence or evidence called by the court as contemplated in section 309B (5) (c) (i) (para [43])."

Having considered the manner in which the section 309B (5) application had been dealt with, the appeal court noted that it was too late to do anything about the fact that the new evidence was improperly admitted by the magistrate because sub section (6) of section 309B provides that new evidence led in terms of sub section (5) must be regarded as if it had been led at the trial, and the appeal court could not revisit the magistrate's decision (para [41]).

The appeal court noted that it had dealt with the section 309B (5) procedure at length because it was a novel procedure in the magistrate's court, one which the presiding

judge had not encountered before, and it had therefore considered that some practical guidance from the appellate court on how to handle such applications would be useful (para [41]).
The appeal court then proceeded to deal with the appeal on the evidence, including the new evidence led in terms of section 309B (5) (paras [44]-[55]). The appeal on conviction was unsuccessful (para [53]).

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Matters of Interest to Magistrates

South Africa is set to appoint a new chief justice. The stakes have never been so high

By October, South Africa's Chief Justice, Mogoeng Mogoeng, will have finished his 12-year term at the helm of the Constitutional Court. How will his successor be selected, and what qualities are needed by the holder of this high office?

To answer these questions, we need to understand the context. This is because the country's judiciary has been increasingly drawn into party political wrangling and contestation.

Any form of constitutional democracy which allows judicial review of the exercise of public power thrusts the courts into the political limelight. Inevitably, acts and decisions of parliament, the president and cabinet will be challenged against the constitutional framework. The superior courts of the country provide the forum in which this plays out.

If there is no rule of law, brute force, random acts of violence and popular anarchy become the avenues for settling scores. In South Africa, the determination never to repeat the devastating legacies of apartheid resulted in "the supremacy of the

constitution and the rule of law" being enshrined as fundamental values, justiciable and enforceable by the courts.

This has inevitably raised the political profile of the judges, especially their leaders, given that they effectively have the final say on what the words in the constitution mean.

The judicial process is thus hugely contested. This places an exaggerated burden on the courts to act with maximum independence and impartiality. Without such qualities, the judiciary runs the risk of losing its legitimacy among the public, ultimately its surest form of protection from interference.

Out of sync

The exercise of constitutional authority in South Africa is constrained by the checks and balances inherent in the doctrine of the separation of powers. It requires each branch of government (parliament, the cabinet and the courts) to show mutual respect to the others.

If one branch of government fails in its regulatory role, an imbalance is created. In turn this means that other branches are subject to unjustified pressure.

This happened in South Africa between May 2009 to February 2018, when the regime of former President Jacob Zuma manifestly and corruptly abused its constitutional authority. Parliament failed dismally to fulfil its constitutional obligation to hold the executive accountable.

As a result, those who wished to challenge such abuse of power and to uphold the constitution, approached the courts. This increasing resort to the courts came to be known as "lawfare". The more frequently the courts found against actions and decisions of the government, the more virulently the political leadership of the governing African National Congress criticised the judges.

The level of such lawfare has subsided since President Cyril Ramaphosa came to power in February 2018, with one exception. Those whose abuse of power has been exposed through the Zondo Commission into state capture or through the investigative media have vilified the courts generally in public, or targeted specific judges for scandalous attack. This is the context in which a new Chief Justice will be appointed in South Africa later this year.

What should be taken into account

Formally, the constitution is clear: section 174 (3) provides that

The President as head of the national executive, after consulting the [Judicial Service Commission] and the leaders of parties represented in the National Assembly, appoints the Chief Justice.

This means that the president must act in consultation with his cabinet, and after consultation with the Judicial Service Commission and other political leaders (consultation is required but the advice given need not be followed).

Given the highly contested nature of the judicial process, I would argue that the following criteria should be uppermost in Ramaphosa's mind when selecting the next chief justice:

Strong credentials as an intellectual leader on the Bench, enjoying the respect of their peers in the superior courts. The Chief Justice needs to be able to be confident that, having taken a stance on behalf of the judiciary as a whole, the judges will support him or her;

A clear proponent of the transformative nature of the entire constitutional framework, with a jurisprudential track record to back up such a stance. In other words, that a judge has given judgments in the past that show their understanding of – and commitment to – transformation to achieve social justice. The constitution demands this;

Proven capacity to lead the judiciary as a whole. Precisely because they should be appointed for their independence of mind, among other qualities, judges need particularly nuanced and skillful leadership to ensure that they remain committed to the overall success of the constitutional project. An engaged and wise leader will ensure this;

An impressive record as a manager, preferably within the administration of justice. The Office of the Chief Justice has been a department of state for a number of years. This means that the incumbent must also give operational and administrative guidance to the entire administration of justice. At the same time, the Chief Justice must maintain his or her judicial profile by presiding over matters in the apex court;

Manifest ability to engage credibly with the general public, reassuring it of the fair-minded, principled, fearless, and incorruptible nature of those appointed as judges, and of the superior court system as a whole.

Independence is key

Furious controversies have been sparked by the failure of the current Chief Justice Mogoeng to separate his religious views from his public office.

His successor must tread carefully when tempted to enter the broader political terrain. This is a key quality. Legitimacy (in the sense of public trust and confidence) is the final guarantor of judicial independence. Without it the courts are susceptible to party political abuse and undermining. The judiciary needs a strong, principled, articulate and fearless person to lead it.

These are high stakes indeed. The appointment of the next Chief Justice is a matter which should concern all South African and, I would argue, those who value the rule of law across the continent and beyond.

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(The article was published on *The Conversation* web page on 22 April 2021)

A Last Thought

FACED WITH 'WRONGFUL ALLEGATIONS' OF BRIBERY, JUDGE RECUSES HERSELF

The contentious matter of recusal has emerged again. This time it takes the form of what could well be a deliberate attempt to force a judge to stand down from a controversial matter she has been hearing.

Judge Fiona Mwale of Malawi's high court, was presiding in a criminal case where the accused is Mohamed Shahin Mahomed Iqbar Juma. In a judgment on recusal, delivered last week, she noted that Juma is accused of having caused the death of his wife, Zaheera Juma, 'with malice aforethought', during December 2019.

Juma pleaded not guilty and has tried repeatedly to persuade the court to allow him out on bail, so far with no success. In July 2020 the court found he had a case to answer. Juma's lawyers have since asked the court to reconsider that decision, but that application was dismissed.

Bombshell

The trial is now at the stage in which Juma is explaining his defence to the charge.

Then came a bombshell, as Judge Mwale explained in her decision: 'Today, on 15 April 2021, during the defendant's testimony in his defence, he testified to the effect

that his father-in-law, Jamal Akbanie, [in other words, the father of Juma's deceased wife] broadcast on a family social media group (WhatsApp) with membership within and beyond Malawi, on Wednesday 9 June (presumably 2020), amongst other issues, that the Khatrii community had organised between K20 000 000 and K25 000 000 to bribe the judge in the matter.
'It was a rallying call for members of his community to turn up at the court in solidarity against the release of the accused. An audio recording of the said Jamal Akbanie making this broadcast was played in court.'

'Sacred principle'
Judge Mwale needed to reach a swift decision about her response and she did so with a written decision issued the same day. In her ruling, she said that she was a judicial officer who had sworn to uphold the law and protect the constitution. She had therefore 'to abide by the sacred principle that "justice must not only be done, it must also be seen as being done".'
The bribery accusation, though untrue, was now in the public domain, she noted. 'Any credible action taken in response to the accusation by the authorities (should the need arise) cannot proceed while I am handling the matter.'
'After careful reflection, with the utmost regret in view of the advanced stage to which this matter has progressed, I have decided to recuse myself.

'Wrongful allegations'
'My recusal shall pave the way for justice to be seen as being done, with the case being presided over by a judicial officer who has no cloud of wrongful allegations hanging over his or her head.'
However, she stressed, she reserved the right, 'as an aggrieved person' to protect her reputation through the civil courts. She then adjourned the case for it to be continued after the matter has been reallocated to another judge.
The question of when recusal would be appropriate is becoming something of an elephant in the courtrooms of the region. There have been cases where an allegation of the kind made in the Juma matter was brought specifically to ensure that a judge, seen as unfriendly to one side or the other, was forced to step away so that a different judge had to take on the matter.
There have also been cases where it would have seemed highly appropriate for the judge to stand down, but he or she has not done so.

- Judge Mwale has won a number of awards for her work on the bench, including being honoured as 'judge of the year' for 2020 by Women Lawyers Malawi. In particular, she is seen as someone deeply concerned about violence against women and children.

(The above article written by Carmel Rickard appeared on the *africanlii.org* website on 23 April 2021).