e-MANTSHI

A KZNJETCOM Newsletter

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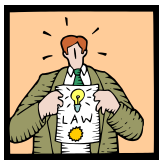
Welcome to the hundredth and seventy fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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.Proposed amendments to the Firearms Control Act have been published in the Government Gazette, no. 44593, on 21st May 2021 for public comments. The Draft Bill seeks to amend the Firearms Control Act, 2000 (Act 103 of 2000) amongst others to amend the purpose of the Act, the inclusion of a muzzle loading firearm in the definition of a firearm, the deletion of provisions to allow private collectors to possess firearms, to provide that no firearm licenses may be issued for self defence purposes etc. Comments may be made for 45 days after the notice was published to the Secretary of the Police Service in Pretoria. The gazette may be accessed here:

http://www.policesecretariat.gov.za/downloads/FAC_Bill/GOVERNMENT_GAZETTE_PUBLICATION_FCA_BILL.pdf

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Recent Court Cases

1. S v Woelf and Another (43/2021) [2021] ZAWCHC 89 (7 May 2021)

It is not permissible for a court to keep two separate records of the same proceedings.

Nziweni AJ:

[1] On 05 February 2021, the two accused tendered guilty pleas, in the Magistrate's Court, Somerset West on a charge of housebreaking with intent to steal and theft. Both were convicted on the strength of their pleas and sentenced to 12 months imprisonment. The sentences imposed on both accused rendered the case subject to automatic review.

[2] Having been presented with the record of the proceedings for review purposes, I noted that part of the mechanically recorded record was missing and that there was also a hand written record. I then raised a query to the presiding magistrate, along the following lines:

'1. The record is quite confusing. It indicates that the proceedings were mechanically recorded, yet it contains a hand-written record. Were the proceedings mechanically recorded? If so, kindly furnish the transcribed record. Because the furnished mechanically recorded one only ends with the state putting the charges to the accused; the rest of the mechanically recording is missing.

2. The hand written proceedings are also not typed. Kindly rectify on an urgent basis.'

[3] In her response, the learned magistrate and the Digital Court Recording System ("DCRS") clerk deposed to affidavits wherein they tendered an explanation for the incomplete transcript of the mechanical recording. In the affidavits they basically explain that they discovered after the fact that the DRCS did not record the proceedings as they expected.

[4] Having received the response from the magistrate; I then addressed a second query to her along the following lines:

'1. In answer to my previous query both the magistrate and the CRT operator agreed that on the day in question the proceedings were mechanically recorded.

2. What emerges from both affidavits deposed is that; during the recording of the proceedings the court was unaware that the recording machine was not recording all

the proceedings. The inevitable corollary of this is that there are missing parts of the record.
3. Certainly a court can keep two separate records of the same proceedings, one a being mechanical recording and the other hand written.
4. On record there is no explanation of the basis for the keeping of the hand written record.
5. Can the magistrate explain how the hand written record came into being? If the hand written proceedings were a re-construction, the magistrate should explain how she undertook the re-construction.
6. Due to the urgency of this matter the magistrate is requested to reply to this query by the 22 of March 2021.

[5] Notwithstanding the urgency of the matter, the magistrate failed to comply within specified time frame. It bears mentioning that in her response dated 13 April 2021, there was surprisingly no reason or explanation furnished for the delayed response, the magistrate simply remarked as follows:
'Annexure 'A' of the record is my handwritten recording of the proceedings whilst the Plea is also being recorded by the machine, it is not a reconstruction.'

[6] The response by the magistrate is rather unsatisfactory and very concerning. Particularly, when regard is had to the fact that a review provides an essential mechanism and a procedure meant to ensure that the interests of justice are safeguarded. It is therefore the pivotal role of any presiding officer to avoid delays and failure to respond to review queries in order to prevent any injustice that may be caused.

[7] On a reading of the responses by the magistrate and the DCRS clerk to my first query, it becomes apparent that the magistrate intended to proceed with the proceedings being mechanically recorded.

[8] The question that aptly arises therefore, is whether the record is adequate for purposes of a review as it stands.

[9] When regard is had to the contents of the charge sheet, relating to the day of the proceedings, on the 5th February 2021, the word 'mechanically recorded' appears in bold letters, before the commencement of the proceedings. The response of the magistrate and the DCRS clerk to this Court's query evinces that, on the day in question the magistrate was oblivious to the problem with the DCRS until the record had to be prepared for review purposes.

[10] Even though the magistrate intended to have the proceedings mechanically recorded, seemingly she also simultaneously kept a handwritten recording of the proceedings.

[11] Under the circumstances of the instant case I grapple with the question of whether it is permissible for a court to keep two separate records of the same proceedings. One being the mechanically recorded and the other being hand written notes. The facts of the present matter raises another issue for consideration, which is; if it happens that the machine was not recording as in this case, can the hand written notes be considered to be the record?

Can a court keep two separate recording of the same proceedings?
[12] Section 1 of the Magistrates' Court Act 32 of 1944 defines 'to record' as:
"To take down in writing or in shorthand or to record by mechanical means, and 'recorded' has a corresponding meaning".

[13] I find it necessary to emphasise the importance of a complete record in any type of proceedings. The record of the proceedings in court is of cardinal importance. As such, the credibility of the record is very important, because it's one of the guarantees to a fair hearing on review and appeal. It is so that although most courts have machines to record proceedings, it is still a notorious fact that some presiding officers personally prefer to record proceedings long hand, particularly guilty pleas.

[14] In order to preserve the credibility of proceedings and to protect the accused's rights to a fair trial, it can never be stressed enough that, it is highly desirable that courts should make use of DCRS wherever possible. Even though I am well alive to the fact that there is absolutely nothing wrong with a handwritten record, as the record may be kept as handwritten or an electronic recording. Nevertheless, I cannot really fathom why in this day and age, certain presiding officers still prefer to keep a hand written records.

[15] Gleaning from the furnished record, it becomes evident that the mechanical recorded record is incomplete, and conversely, the hand written notes are complete.

[16] In light of the fact that the DCRS failed to electronically record the court proceedings, whilst everyone was labouring under the impression that it was recording; in hindsight it is actually a good thing that the magistrate was also making a hand written record. However, the question which aptly arises is whether the hand written notes of the magistrate are a record or her notes.

[17] In Lifecare Special Health Services (Pty) Ltd t/a Ekuhlengeni Care Centre v CCMA & Others (2005) 5 BLLR 416 (LAC), the following was stated:
"This brings me to the question: what comprised the record of the arbitration proceedings before the commissioner in the present appeal? …The rules provided: "The record may be kept as handwritten notes or an electronic recording."
Since the commissioner made use of an electronic recording, the desirable form, the probable inference is that he chose that form as the "official" record, and that his handwritten notes were no more than bench notes kept for the tribunal's

convenience, as is the invariable practice among magistrates and Judges." (my own underlining and emphasis)

[18] In the case in casu, a mechanical record was made though incomplete. Insofar as the magistrate responses are concerned it is not clear as to why she chose to keep two separate recordings of the proceedings. As alluded to earlier, the magistrate in her response to the query by this Court identified that the handwritten proceedings as follows:
"Annexure "A" is my handwritten recording of the proceedings whilst the Plea is also being recorded by the machine."

[19] It is very interesting that the magistrate does not label the handwritten proceedings as her notes. In any event, under the circumstances of this matter, the notes which the magistrate had kept during the course of the proceedings cannot constitute a record of the proceedings. This I say because, by the virtue of the magistrate labouring under the impression that the DCRS was recording and her being entirely unaware and oblivious to the fault with it; she had clearly chosen to record the proceedings mechanically.

[20] The situation would have been different had the magistrate chosen to only keep a handwritten record and not to also simultaneously mechanically record. The fact that the DCRS did not completely record the proceedings does not necessarily mean that the handwritten record should then automatically, be regarded as the official record.

[21] Without a re-construction taking place, with both the accused, the handwritten notes cannot constitute a transcript of the plea proceedings. Accordingly, I find that the record is not a complete record of the plea proceedings. Consequently, this Court is not in a position to determine the review of the plea proceedings.

[22] The record is thus remitted to the magistrate to begin with the procedures of re-construction of the record. On urgent basis the magistrate should ensure the following takes place.
1. The accused should be immediately requisitioned from prison, for their attendance at court. The accused must be brought before the court within five (5) days of receipt of the judgment.
On their appearance in court, they should be informed of the incomplete record and the existence of the magistrate's written notes.
2. The need to reconstruct the record and of their right to participate in the process, should also be explained.
3. Their rights to legal representation during the reconstruction process should be explained.
4. As soon as the record has been reconstructed and the parties agree on its correctness, then the re-constructed record must be submitted for review.

[23] The Registrar is directed to forward a copy of the judgment to the Legal Aid Board (Stellenbosch), with the request that the Legal Aid Board take steps as might be necessary to ensure that if the accused seeks free legal assistance, they prioritise the matter.

From The Legal Journals

Hoctor, S

"Voluntary withdrawal in the context of attempt – A defence?"

Obiter 2021 148

Abstract

Once a crime has been committed, full repentance and restoration do not have any bearing on liability (Simester and Sullivan Criminal Law: Theory and Doctrine (2001) 305), but may be taken into account in mitigation of sentence. (For a discussion of the concept of remorse in sentencing, in respect of which repentance and restoration may be strong indicators, see Terblanche A Guide to Sentencing in South Africa 3ed (2016) 229–230). On the other hand, there is no question of criminal liability ensuing for an attempt at a crime if there is a withdrawal from the envisaged crime while still in the stage of preparation, and before, in South African law, reaching the watershed moment of the "commencement of the consummation" (S v Kudangirana 1976 (3) SA 563 (RA) 565–566; Snyman Criminal Law 6ed (2014) 284; on the commencement of the consummation test, see Hoctor "The (Surprising) Roots of the Test for Criminal Liability for Interrupted Attempt in South African Law" 2015 SACJ 363). However, what occurs between the moment when the attempt begins, and the moment when the crime has been completed, where there has been a withdrawal from the criminal purpose, is more contested terrain. The disagreement does not apparently arise in the South African case law, where the few judgments that refer to this question have consistently held that where the accused withdraws after the commencement of the consummation of the crime, there will be attempt liability and, at best, the accused may rely on the abandonment as a mitigating factor in sentencing (see Rabie "Die Verweer van Vrywillige Terugtrede by Poging: 'n Tweede Mening" 1981 SACC 56, 61; the view that abandonment should only be a mitigating factor, rather than a substantive defence, is supported by Lee "Cancelling Crime" 1997 Connecticut Law Review 117 152 and Yaffe Attempts (2010) 291). However, as is discussed, prominent South African academic commentators, along with comparative sources in

both the civil-law and common-law jurisdictions, demur from such an "unyielding analysis" (the phrase is that of Simester and Sullivan Criminal Law 305), and would regard such withdrawal as giving rise to a defence to criminal liability. Which approach ought to be applied in South African law?

Njoko, T B

"The admissibility of criminal findings in civil matters: Re-evaluating the *Hollington* judgment"

2021 De Jure Law Journal 160

Abstract
In Hollington v Hewthorn & Co Ltd 2 1943 All ER 35 it was held that a finding of a criminal court did not have any probative value in a subsequent civil action and was inadmissible as evidence. Despite the case being one of English origin, the South African courts have largely adopted this ruling as one grounded in our common law. In this paper, the judgment in the Hollington case is critically analysed in order to determine its continued applicability in the face of South Africa's existing law of evidence and the Constitution of the Republic of South Africa, 1996 ("the Constitution"). It is argued that in light of the existing law, this rule no longer finds application in South Africa.

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

Contributions from the Law School

Extension of non-pathological incapacity doctrine

The purpose of this note is to challenge the assumptions that govern the concept of involuntariness that underlies automatism and loss of self-control which underlies that non-pathological incapacity. It is submitted that courts have misconstrued the concept of non-pathological incapacity which is based on a loss of self-control despite the fact that the accused is conscious at the time of the unlawful act. This position was noted and highlighted in the case of *Eadie* which essentially conflated the two defences

leaving the position regarding both automatism and non-pathological incapacity unclear. It is submitted that theorists such as Du Plessis and Yeo have pointed out that a total loss of self-control can only ever occur in cases of insanity. If this is correct and the accused is conscious during episodes of extreme emotional stress, then goal directed behaviour must necessarily be present during such cases. This point is demonstrated in cases decided prior to *Eadie,* where the courts conflated the accused's behaviour to explain multiple counts of goal-directed behaviour present. Goal directed behaviour was present not because the accused did not lack self-control but rather they did not lose total self-control as required by our courts. Rather, the accused suffered from diminished capacity which is a sentencing issue in our law.

Introduction

Historically, the underlying rationale for a defence based on provocation however, has been the law's concession to human frailty. This concession no longer plays the dominant role that it once did since the inception of *S v Eadie* (2002 (1) SACR 663 (SCA); 2001 SACR 172 (C)). The defence of non-pathological incapacity was adopted into our law through the statutory definition of pathological incapacity stemming from the *Rump Commission of Enquiry into the Responsibility of Mentally Deranged Persona and Related Matters* (RP 69/1967). This report formed the basis for what could be viewed as a 'new model for criminal responsibility' based on both cognitive and conative capacity. This model was adopted into section 78 of the *Criminal Procedure Act* 51 of 1977 (S Hoctor "Tracing the origins of the defence of non-pathological incapacity in South African Criminal Law" (2011) 17 *Fundamina* 70 at 76-77). If at the time of commission of an offence a person who by reason of mental illness or defect, is incapable of appreciating the wrongfulness of his/her act or acting in accordance with an appreciation of the act, s/he is not criminally responsible for the act. In addition, the report defined self-control as "..a disposition of the perpetrator through which his insight into unlawful nature of the particular act can restrain him from, and thus set up a counter motive to, its execution. Self-control is simply the force which insight into the unlawfulness of the proposed act can exercise in that it constitutes a counter-motive" (Rumpff Commission Report at par 9.33). With the finding of *S v Chretien* 1981 (1) SA 1097 (A) and subsequently *S v Van Vuuren* 1983 (1) SA 12 (A) the court noted that both intoxication and factors such as emotional stress and provocation could cause a 'loss of self' control as envisaged by section 78 of the criminal capacity test (17G-H) A long line of questionable precedent followed this finding (*S v Arnold* 1985 (3) SA 256 (C); *S v Campher* 1987 (1) SA 940 (A), *S v Nursingh* 1995 (2) SACR 331 (D) and *S v Moses* 1996 (1) SACR 701 (C). By adopting the view that the accused is still able to exercise deliberative functions of the mind but still be incapable of controlling their actions, it allows for the sane to yield to an impulse to commit a crime because of a lack of self- control, is to strike at the roots of criminal law (Du Plessis "The Extension of the Ambit of Ontoerekeningsvatbaarheid to Defence of Provocation – A Strafregwetenskaplike Development of Doubtful Practical Value 104 *South African Law Journal* 539 (1987)

540 at 546). Nevertheless, our courts have embraced such an approach. Two examples will suffice. In *Moses* (supra) the accused who killed his lover, presented psychiatric testimony to the court to the extent that his controls collapsed (708G-711A) due to various emotional stress factors and provocation. The accused had been abused as a child and rejected by his family due to being homosexual. In addition, on the night in question, he was told that his lover was leaving him, after announcing that he was HIV positive. This resulting in the accused's controls collapsing when he killed the deceased. The accused performed fourteen different instances of goal directed behaviour despite the contention that control was lost: the court simply equated these two acts as that of hitting and stabbing. This begs the question, while controls may have collapsed, is it not possible that the controls might only have been diminished (R Louw "S v Eadie: Road rage, incapacity and legal confusion" (2001) *South African Journal of Criminal Justice* 206 at 215). The court does not draw this distinction in our law but rather acquits the accused. Further, as has already been demonstrated in our law, diminished capacity is only taken into account at the sentencing stage of the trial (G Kemp et al *Criminal Law in South Africa* 3rd ed (2018) 185.

In *Campher*, Viljoen in analysing facts found that the accused's evidence was compelling enough to convince the judge that at "at the critical moment her mind was severely disturbed and that her version of her inner experience is reconcilable with an impulse against which she could not offer resistance" (at 958G-H). By stating that the mental aberration that the accused was suffering from was not a mental illness or defect as contemplated in section 78(1) the accused had she presented evidence to the court of her mental deficit, could have been acquitted without being Presidents patient (at 545). This seems to suggest that the courts have made the "insanity defence" available to the sane and sober without placing onus on the accused" (J. R Du Plessis supra 540).

With the leading case of *Eadie* the position in relation to non-pathological incapacity has changed. The trial court noted that the facts did not present themselves as that of an accused who had lost self control during a case of road rage. The court was of the view that the accused had lost his temper (2001 SACR 172 (C) 182I-J) The accused had proceeded to dispose of his hockey stick and changed his pants before the police had arrived with the intention of misleading them. What is noteworthy about this case was the courts focus on the issue of criminal capacity and whether the accused in fact had lost self-control. The court noted that the courts had indeed 'inappropriately extended the boundaries of the defence of non-pathological incapacity by allowing the defence to succeed in cases where goal directed behaviour was present. The reason for this was that there was no distinction between the defences of sane automatism and non-pathological incapacity due to factors such as emotional stress and provocation ((2002 (1) SACR 663 (SCA) at par [56]). If this is the case, then the second leg of the conative capacity test should fall away. Therefore, where an accused is able to understand the difference between right and

wrong, the accused would then be expected to raise involuntariness as a defence (at par [42]. Essentially the court has equated the defence of sane automatism (an objective test of conduct) with the defence of lack of conative capacity (subjective test of mental state). This raises several problems, most notably whether the defence of non-pathological incapacity continues to exist and whether or not the new position has now caused precedent to have to be revisited (J Burchell "A Provocative response to subjectivity" (2003) *Acta Juridica* 23 at 38). That is not only the South African courts position on insane automatism, but further that if a loss of self-control equates with automatism then it would result in a mental element forming party of the inquiry into the existence of a voluntary act which is not required (Snyman "The tension between legal theory and policy considerations in the general principles of criminal law" (2003) *Acta Juridica* 1 at 17). The general principle of criminal law is that a person should only be convicted of an unlawful act where they have acted voluntarily. Automatism is defined as 'involuntary behaviour' that occurs in an altered state of consciousness and which is compulsive and repetitive and simple. More simply, it is a lack of concomitant or controlling will over the act (J Burchell and Milton *Principles of Criminal Law* at 103) due to diverse causes (*S v Campher supra*). The courts have also described involuntary conduct as "mechanical activity (*R v Dhlamini*) 1955 (1) SA 260 (N) 265, automatic activity (*R v Ngang* 1960 (3) SA 3636 (T) and involuntary lapse of consciousness (*S v Trickett* 1973 (30 A 526 (t) 531, in addition to the term unconsciousness (J Burchell *Principles of Criminal Law* 4th ed (2013) 67-68) This raises several questions. If automatism and consequently involuntariness consist of a state of unconscious, it essentially means that the accused did not act with deliberation. Therefore "all deliberative functions of the mind have to be absent for an accused person to act automatically" (*R v Burr* [1969] NZLR 736, 745 (CA) 744-745).

Du Plessis is of the view that to allow a sane person to claim loss of self control is unacceptable especially in cases of murder where accused acted with intention. It is another to argue that the killing occurred due to loss of self-control. Du Plessis is thus of the view that the latter scenario indicates an abnormal state of mind and should therefore be dealt with in terms of Chapter 13 of the *Criminal Procedure Act* of 1977. However, as Maharaj notes, it is arguable that this contention is invalid since "the defence of non-pathological incapacity due to provocation and emotional stress has a unique quality that it is a defence for the sane and accommodates a middle ground in respect that the effects of provocation or emotional stress short of sanity is recognised, the law through the defence of non-pathological incapacity rightfully acknowledges that due to emotional distress in the form of fear, anger and extreme emotional turmoil cause a disintegration of capacity resulting in actions become uncontrollable and therefore not blameworthy" (S Maharaj *Non-pathological incapacity – Reassessing the Defence of Provocation and Emotional Stress in South Africa* PhD UKZN (2015) 247-248). With respect, such a contention is incorrect. It creates the impression that you can be conscious, suffer from mental illness or defect, know the difference between right and wrong and yet still not be able to

control your behaviour. Either the defence of non-pathological incapacity does exist and the courts simply decided the cases wrongly, that is the accused affective functions were affected or alternatively the accused had diminished capacity in the cases of *Nursingh, Moses* and *Campher* and the way the law is currently structured has left our courts unable to cater for such behaviour. It is my contention that the latter view is correct. This would explain the presence of goal-directed behaviour present in these cases. By adopting such a view, it would also alleviate the tension present in the case of *Eadie* where the court equates the defences of automatism as being one and the same as a loss of self-control, thereby introducing a mental element. The goal directed behaviour in cases of non-pathological incapacity would be better explained as instances of diminished responsibility which our courts only acknowledge at sentencing.

It is submitted that there are two reasons why South African courts have not been able to properly distinguish between the defences of automatism and non-pathological incapacity. Firstly, the way the capacity test is set out in our law will inevitably lead courts to duplicate the voluntary conduct requirement (i.e. capacity is treated as a distinct element of liability or more correctly, as a prerequisite for liability). As has been noted: "In terms of South African laws established general principles, it is already required that actus reus entails proof that the conduct of the accused is voluntary. It is normally stated that the accused's conduct be subject to his conscious will. It is submitted that it is not necessary to ask the same question twice" (R Louw "The End of the Road for the defence of Provocation?" (2004) *South African Journal of Criminal Justice* 200 at 204). Secondly, the fact that a lack of capacity (i.e. non-pathological incapacity) can lead to a total acquittal (Louw *supra*). This places the outcome of the defence on the same footing as automatism. In both cases it creates the impression the accused could not control themselves and therefore in both cases the accused is deserving of an acquittal. This creates an anomaly. Once the accused is proved to have been acting voluntarily (i.e. not in a state of automatism), they can still lack capacity. However, there will still be goal-directed activity, and any goal-directed activity militates against a loss of self-control or a defence of automatism for that matter. It is submitted that where an accused is acting voluntarily, there will be a measure of goal-directed conduct. Where goal-directed conduct is present, it necessarily implies that there must be a level of capacity present in the case of the defence of non-pathological incapacity (A Reilly Loss of Self-control in Provocation" (1997) *Criminal Law Journal* 320 at 325-326). In other words, the question is not whether capacity present, but to *what* extent it is present (P De Vos "*S v Moses* 1996 (1) SACR 701 (C) Criminal capacity, provocation and HIV" (1996) 9 *South African Journal of Criminal Justice* at 358 notes this point about the *Moses* supra case. In this case the court pointed out that the accused's controls were significantly impaired, not completely absent (714H-I). This point is not acknowledged by our courts: the concept of psychological fault underlying South African law offers no explanation for the fact that culpability is capable of gradation. It is recognized and accepted that criminal capacity may range from full capacity to

diminished (FFW Van Oosten “The Psychological fault concept versus the normative fault concept: Quovadis South African Criminal Law?” (1995) 58 *Tydskrif vir Hedendaagse Romeinse-Hollandse Reg* at 579) capacity, intention may range from *dolus directus* to *dolus eventualis* and negligence may range from *culpa levis* to *culpa lata* (Van Oosten *supra*). A shortcoming of advocating a normative theory of fault is that the argument that has been advanced in its favour may have merit in the single-phase German criminal justice system which treats issues of criminal liability and criminal punishment as part and parcel of the same enquiry, but it lacks merit in South African law which treats criminal liability and criminal punishment as two separate and distinct enquiries. As Van Oosten has noted, during the former enquiry, the existence of criminal fault is in issue. During the latter the degree of criminal fault is in issue (Van Oosten *supra*).

The case of *S v Schwarz* (1999) JOL 5626 (A) (unreported) illustrates how such a defence would apply in our law. In this case, the accused, a police officer, acknowledged that he had stabbed the deceased (his wife) with a knife and chopped her with an axe with “direct intent to kill her” (*ibid* at par [3]) The accused further submitted that he committed these crimes in a state of emotional stress (at par [3]) and that it lead to a state of diminished capacity See also *S v Sibiya* (1984) SA 91 (A) at 95H-96C; *S v Calitz* 1990 (1) SACR 119 (A) at 129B. The court was correct to reject the accused’s version of events: namely that his wife did finally admit to an affair. Grosskopf JA was of the opinion that the stressful circumstances in which the deceased found herself in at the time shortly before her death would not have been conducive to making such a confession (at par [16]). Although the accused was convicted of murder, it is submitted that the importance of this judgment lies in the fact that the State accepted the accused’s plea that he committed the murder due to emotional stress which resulted in diminished capacity and therefore argued their case on this basis. Such an approach would bring South African non-pathological incapacity as a complete defence since “in both English and American law the provocation defence is structured in a way that suggests that people are not totally at the mercy of their emotions. The defence requires a diminished level of self-control rather than, as the test is literally expressed, a loss of self-control. A literal loss of self-control would entitle the accused to an acquittal. It would be more in line with human reality to suggest that loss of self-control is not a single mental condition but can vary in intensity over a spectrum” (S Yeo *Unrestrained killings and the law: Provocation and Excessive Self-Defense in India, England and Australia* (1998) 538 at 48; see also *Phillips v R* [1969] 2 AC 130 at 137: “there is an intermediate stage between icy detachment and going berserk” (see further *S v Moses* supra case where the defence’s witness implied that the accused’s controls might only have been diminished; see also *S v Marx* [2009] 1 All SA 499 (E) where defence counsel wanted a pronouncement on diminished responsibility at the merit stage of the case). This still leaves the extent of lost self-control for the defence unclear, other than the loss need not be complete. In *Schwarz* the accused stated that on the advice of his advocate he changed his plea to guilty of murder with direct intent to kill. The problem

that the court had with this contention was that the accused maintained throughout his trial that despite his plea, he suffered from memory loss and that he did not have the intention to kill her. The court was of the opinion that these two statements clearly contradicted each other (at par [15]). It is this author's submission that the accused's counsel was correct in pleading diminished capacity, and that the accused had acted with intent. The New South Wales court *R v Croft* (1981) 3 AR 307 also set out the provocation defence as requiring intent: "It is of course, obvious that such a history must be taken into account in determining whether the provocative incident was such as could have caused an ordinary person, placed in all the circumstances in relation to the deceased as the accused then stood, to have so far lost self-control as to have formed an intent to kill or to do grievous bodily harm to the accused and that the accused did in fact so lose self-control" (at 321). The concluding words in this case indicate the extent of actual loss of self-control required for provocation. It comprises the mental state of a person who as a result of passion, becomes so emotionally charged as to form a murderous intention. Actual loss of self-control is therefore assessed by means of the mental element of murder (Yeo *supra* at 49). Therefore, any formation of intent on the part of the accused would indicate to the court that capacity was present to a certain extent. Therefore, "diminished capacity recognizes that because the accused suffered from some abnormal mental condition not rising to the level of legal insanity, they lacked the capacity to act with a certain mental state. Thus, the accused's culpability for the killing is lessened and she should be convicted only of a reduced offense. Typically, this involves evidence that an accused, because of his/her mental condition could not act with premeditation or deliberation required for murder" (LE Goldman "Non-confrontational Killings and the Appropriate Use of Battered Child Syndrome Testimony: The Hazards of Subjective Self-Defence and the Merits of Partial Excuse" (1994) 45 *Case Western Reserve Law Review* supra at 226-227) In such a case goal-directed behaviour by an accused would not militate against a claim that his/her capacity was diminished and therefore should be convicted of a lesser offence, providing that there is no evidence of premeditation, or "extensive planning" of the murder.

Conclusion

While the doctrine of 'ontoerekeningsvatbaarheid' has been extended to the intoxicated and provoked, it would seem that the defence of insanity has been extended to the sane simultaneously (Du Plessis supra at 540). As Du Plessis has argued "it is one thing to say a man behaved violently because he lost self-control, it is an entirely different thing to say he behaved violently or killed someone deliberately, because he could not do otherwise. The latter condition is an abnormal state of mind and should be investigated accordingly in terms of the defence of insanity.

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Matters of Interest to Magistrates

DRAMA AS ZIM COURT FINDS CHIEF JUSTICE MUST RETIRE, CONFUSION ABOUT AN APPEAL

By Carmel Rickard

An urgent application, brought last weekend to stave off a constitutional crisis in Zimbabwe, may not achieve this aim, despite a court victory. The case challenged the extension of office of the country's chief justice, Luke Malaba, for an additional five years beyond the constitutionally mandated retirement age of 70, thanks to a new constitutional amendment. Human rights lawyer Musa Kika, in whose name the case was brought, said that if Malaba were to stay on, unconstitutionally, then all decisions he made would be void. The matter should be heard urgently to stave off a constitutional crisis, he argued. After a marathon hearing, the three high court judges agreed that Malaba had to step down at 70 and that the deputy chief justice should now become the acting CJ. This provoked a furious reaction from the minister of justice who claimed that the judiciary had been 'captured' by foreign elements. But the outcome of the case creates a problem for those who wish to appeal. As all the supreme court judges have been cited in the case – they too are affected by the amendment that grants an additional five-year tenure – who is to hear an appeal?

It was a weekend of great courtroom drama in Zimbabwe. Three high court judges unanimously decided that the country's chief justice, Luke Malaba, was constitutionally barred from continuing in office beyond his 70th birthday on 15 May. He is thus now out of a job.

In response to this decision, the country's minister of justice, legal and parliamentary affairs, Ziyambi Ziyambi, issued a vitriolic statement that some lawyers claim amounts to contempt of court. And while the minister wants to appeal the court decision, there might not be any judges qualified to hear the challenge.

The case, brought as an urgent matter by human rights lawyer, Musa Kika, against the minister, Malaba and others, was argued for 11 hours on Friday, beginning at 2pm and running deep into the night. Kika wanted to test the announcement, made a few days before the hearing, that the CJ would not retire at 70 as required by the constitution. Instead, in terms of a new constitutional amendment, President Emmerson Mnangagwa would allow him to stay on for a further five years.

Substantive judge

All members of the supreme court and the constitutional court are similarly affected by the sections permitting an additional five year after they turn 70, so Kika cited them all in his application as well. He also cited those judges of the high court who were acting in the supreme court on the basis that any of them 'may very well be a substantive judge of the supreme court' by the time his application was filed or decided. (The amendment does not apply to high court judges and they are not given the choice whether to stay on beyond compulsory retirement at 70.)

Following a countrywide referendum, a new constitution was adopted in 2013. Under that constitution, judges of all the superior courts have to retire at 70. This provision was 'purposefully inserted into the constitution by the people of Zimbabwe', Kika said in his founding affidavit.

During December 2019 it became clear that the cabinet had approved a constitutional amendment that would prolong the tenure of senior judges, a move Kika said was 'stigmatised as a form of authoritarian consolidation'.

'Assail'

According to Kika the purpose of the amendment was to 'assail' judicial independence. He said it was a matter of regret that, because of the amendment, the impression could now be created that the judges concerned were 'being made to receive a favour, one which is fundamentally improper'.

The amendment was hurried through the national assembly and the senate, was given presidential assent on 7 May and was now said to be in operation.

According to Kika, however, the constitution required that such a change be the subject of a referendum – which had not taken place. Absent the proper formalities involved in changing the constitution, the amendment could not lawfully extend the tenure of the senior judges. 'I must lament the fact that … this matter causes much embarrassment to me as a Zimbabwean, particularly when I have to sue the entire superior court structure.'

'Void'

He said that the matter was urgent because if Malaba were to continue in office beyond his constitutionally mandated retirement date 'all his actions would be void.'

It was a dispute whose resolution would determine whether there would be a constitutional crisis in Zimbabwe, he said.

The three judges who heard the case agreed it was urgent. They delivered their unanimous decision just hours after argument, holding that, despite the amendment, Malaba was constitutionally required to retire as CJ from 15 May. Their judgment has not yet been made available.

'Captured'

That decision immediately sparked the rage of Ziyambi. He issued a 20-point statement claiming that the judiciary had been 'captured by foreign forces', that

‘certain members of the opposition’ were being paid a monthly allowance to cause ‘turmoil’ and ‘for being arrested’. He said that the time ‘may now have come’ to ‘expose’ these ‘malcontents and economic saboteurs’ who would not sleep until they had brought down the government.

‘We are now going to poke the enemy in the eye,’ he said and an appeal would be brought.

But the question now arises as to who would hear such an appeal, since all the judges of the senior courts are implicated. Thanks to the contentious amendment, they too are directly affected by the ‘favour’ of being able to stay on for an additional five years, and they are cited by Kika for that very reason.

Which court?

The only time a similar problem has arisen in the region seems to have been a South African case involving the Judge President of Western Cape, John Hlophe. In 2008, judges of the constitutional court complained that he had attempted to influence some of its members in relation to a case.

Years later, after the judicial service commission decided that the complaint should not be pursued, two applicants challenged this decision in the high court. The outcome in the two cases was taken to the supreme court of appeal where, in 2012, Judge Hlophe lost both. He wanted to appeal, but the question was – to which court?

There had been some new appointees since the 2008 complaint. But when, in 2012, Judge Hlophe wanted to appeal to the constitutional court, many of that court’s judges were still those who had been party to the initial complaint against Judge Hlophe or had become involved in the matter in other ways. This meant they could not sit in the court because of their ‘perceived or actual interest in the outcome of the matter’. If, however, those members recused themselves, there would be no quorum to hear and decide the matter.

‘Vacancy’

In its judgment on the case the constitutional court said that litigants did not have an ‘automatic right of appeal’ and that leave to appeal must only be granted if the court concluded that it was in the interests of justice to do so. This key concept was what ultimately decided the matter.

There was a suggestion that acting judges should be appointed to hear the appeal. But the court found that the constitution provided for the appointment of an acting judge of the constitutional court only where there was a ‘vacancy’ or if a judge was ‘absent’. However, recusal did not cause a vacancy, said the court, nor were judges who had recused themselves, ‘absent’.

The court was also not convinced by the argument that the parties had agreed to the ‘conflicted judges’ sitting in the case when they would normally have had to recuse themselves.

Finalised

So, what was the answer? Clearly, the matter had to be finalised. But that did not mean the Constitutional Court had to agree to hear the appeal, said the judges.

The court therefore unanimously concluded that, 'to preserve the fairness of its own processes', the court should refuse leave to appeal. In other words, Judge Hlophe had to make do without the appeal he had wanted.

It's a judgment that should have considerable weight when it comes to deciding what to do next in Zimbabwe.

(The above article appeared on the *africanlii.org* blog on 21 May 2021)

A Last Thought

Why politics shouldn't influence how much we pay judges

Have you ever wondered who determines the salaries and benefits paid to judges, and on what basis they decide? Until I was asked by the Canadian Provincial Court Judges Association, an independent federation of provincial and territorial judges' associations, to conduct research into the existing process for determining judicial compensation, I had not thought much about the issue.

But in my research study, I identified at length how the process has become highly contentious.

Secure and appropriate compensation for judges is a constitutionally recognized component of judicial independence, which itself is a set of interrelated principles meant to ensure that the rule of law applies fairly to everyone, including governments.

To ensure both the reality and appearance of independence, judges can't simply go to governments and ask for pay raises. They can't form unions to bargain collectively. Nor can they negotiate through the media.

To engage in any of these actions would imply that judges might relax their scrutiny of government action as a trade-off for a salary increase.

Therefore, any process for determining judicial compensation must balance the requirements of responsible government and democratic accountability with the requirement for secure and appropriate compensation. That compensation must ensure public confidence in the independence of judges as well as attract high-

quality legal talent to the multiple levels of courts.

Public spending cutbacks

Historically, governments claimed they had a constitutional right to determine judicial compensation unilaterally. During the 1990s, in response to an economic downturn, governments imposed cutbacks and freezes on spending in the public sector, including the courts.

Losing financial ground to inflation, and to lawyers in the private sector, associations of judges took governments to court to protect their independence. Eventually, on appeal from decisions in various provinces, the Supreme Court of Canada ruled in 1997 that compensation could not be determined until after a commission process that must be "independent, objective and effective."

The court ruled more than 20 years ago that a commission process had to be put in place to determine judges' compensation. Within two years, all provinces and territories had created commissions (called tribunals or committees in some jurisdictions) that typically operate on three-year cycles. Governments and judges select members of these commissions, along with a chairperson chosen by the two sides.

These principles were confirmed in another landmark case in 2005. The Supreme Court made it clear that an effective commission process did not necessarily require binding rulings, only that governments treat recommendations seriously and provide meaningful reasons for why they might decide to reject or alter recommendations from commissions.

Politics involved

The court recognized compensation decisions were inherently political, but it hoped that the commission process would significantly "depoliticize" decision-making.

Unfortunately, the opposite has happened.

Especially since the economic downturn in 2008, governments have taken a hard line on compensation. Acrimony, conflict and litigation became the pattern due to the rejection or reduction in the pay raises proposed by commissions, often without compelling reasons or evidence to support such decisions. Almost all provincial court judges' associations, in fact, have been in court over the past decade.

Judges have felt compelled to take governments to court in order to enforce their constitutional right to secure adequate compensation. Such court battles involve significant costs of time and money for both sides. And the often over-simplified, sensational media coverage risks bringing the judiciary into disrepute.

Governments often make a series of arguments on why they should not be bound by commission recommendations.

They claim the Constitution requires that only ministers and legislatures can be responsible and accountable for spending. They insist that in periods of budgetary restraint, spending on courts cannot be protected while cuts are being made in other fields like health care. Nor, they argue, is it fair to protect the incomes of judges

while other public employees are undergoing wage freezes or pay cuts.
Finally, governments argue that commissions fail to take into account their budgetary priorities and/or incorrectly weight the various factors that the law requires them to consider.

Implicit approval
None of these arguments is entirely persuasive. By approving legislation that establishes commissions, governments are implicitly approving future spending. Open-ended spending authority is granted to election agencies, after all, to ensure fair elections.
Similarly, binding authority for compensation commissions would protect judicial independence. Spending on judicial salaries is a minuscule part of total spending and governments never explain how pay increases will prevent spending in other high-priority areas.
Judges are not regular public servants since they cannot form unions or bargain collectively, and so determination of their compensation should not be treated as part of a government's collective bargaining strategy with its unionized employees.
Commissions are not bound by law to consider the budgetary strategies of governments, and to do so would inappropriately drag them into the political fray.
Finally, when governments reject commissions' pay recommendations for judges because they disagree with the relative weight assigned to different factors, they undermine a compensation process that is meant to be independent and objective.
The main problem with the current compensation process is not constitutional or monetary, it's political. Governments fear a public backlash if they give pay raises to judges who earn a lot of money compared to most voters.

Two reforms could help to address the political problem.
First, commissions should be granted binding authority. A binding model provides political cover for decisions that may be unpopular in the short term. Binding rulings also reduce conflict and litigation.
Second, another stage should be added to the commission process that would make interim recommendations public, allowing governments and judges to offer additional reasons and evidence for their position before a commission makes its final decisions.
This additional stage would allow for consideration of unexpected developments and could increase public support for the final decision.
In combination, these reforms would help to create a compensation process that is independent, transparent, objective, balanced and effective.

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