e-MANTSHI

A KZNJETCOM Newsletter

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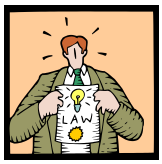
Welcome to the hundredth and seventy fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. A *Cybercrimes Act, Act 19 of 2020* has been published in Government Gazette no 44651 dated 1 June 2021. The purpose of the Act is to create offences which have a bearing on cybercrime; to criminalise the disclosure of data messages which are harmful and to provide for interim protection orders; to further regulate jurisdiction in respect of cybercrimes; to further regulate the powers to investigate cybercrimes; to further regulate aspects relating to mutual assistance in respect of the investigation of cybercrimes; to provide for the establishment of a designated Point of Contact; to further provide for the proof of certain facts by affidavit; to impose obligations to report cybercrimes; to provide for capacity building; to provide that the Executive may enter into agreements with foreign States to promote measures aimed at the detection, prevention, mitigation and investigation of cybercrimes; to delete and amend provisions of certain laws; and to provide for matters connected therewith. The Act will only come into operation on a date to be fixed by the President by proclamation in the Government Gazette. The Act can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202106/44651gon324.pdf

2.*Act No. 7 of 2021: The Correctional Services Amendment Act, 2021* was published in Government Gazette no 44650 dated 1 June 2021. The purpose of the Act is to amend the *Correctional Services Act, 1998*, so as to amend the definition of the Minister; to amend sections 73 and 136 of the Act related to parole of offenders; and to provide for matters connected therewith. The Amendment Act will only come into operation on a date to be fixed by the President by proclamation in the Government Gazette. The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202106/44650gon323.pdf

3. *Act No. 1 of 2021: The Recognition of Customary Marriages Amendment Act, 2021* was promulgated in Government Gazette no 44646 dated 1 June 2021. The purpose of the amendment is to amend the *Recognition of Customary Marriages Act, 1998*, so as to further regulate the proprietary consequences of customary marriages entered into before the commencement of the said Act; and to provide for matters connected therewith. The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202106/44646gon319.pdf

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Recent Court Cases

1. *Mxolisi Mananga and Others v Minister of Police* (Case no 342/2020) [2021] ZASCA 71 (04 June 2021)

Whether an arresting officer held a reasonable suspicion that a person had committed an offence listed in Schedule 1 to the Criminal Procedure Act where there was an assault, when a dangerous wound is inflicted it is not required of such a police officer to examine the wounds of a victim, as a doctor would, nor would that be appropriate. He is merely required to have regard to the facts and circumstances at his disposal, and, where reasonably possible, to satisfy himself of the merit thereof. If, on a consideration thereof, there are reasonable grounds to suspect that a dangerous wound has been inflicted, he is entitled to arrest the suspect without first obtaining a warrant.

Eksteen AJA (Zondi and Makgoka JJA concurring)

[1] The appellants were arrested on 20 March 2015 by Warrant Officer Siphiwo Qunta (Warrant Officer Qunta) of the South African Police Service (SAPS) without a warrant, on charges of assault with intent to do grievous bodily harm (assault GBH) and they were detained until 23 March 2015. They contended that their arrest and subsequent detention was wrongful and unlawful and they issued summons against the respondent (the Minister) in the Eastern Cape Division of the High Court, Mthatha (the high court), for damages. The Minister admitted that the appellants were arrested without a warrant, but denied that it was wrongful or unlawful. He contended that the arrests had been effected 'in terms of s 40(1)*(b)* of the Criminal Procedure Act 51 of 1977 as they were [reasonably] suspected of having committed an offence referred to in Schedule 1 (assault, where a dangerous wound is inflicted)'. The high court upheld the Minister's defence and dismissed the appellants' claim. The appeal is with leave of this Court and it was considered without oral argument, in terms of s 19*(a)* of the Superior Courts Act, 10 of 2013.

[2] The events which gave rise to the arrests were as follows. On 15 March 2015, in the Ncora administrative area, in the district of Cofimvaba, in the Eastern Cape, Ncedile Duel Sambunjana (the complainant) was allegedly assaulted by a number of assailants, including the appellants. He was severely beaten and sustained, *inter alia*, five lacerations on his head and a fractured wrist. As a result of his injuries he proceeded first to the nearby clinic to seek medical assistance, from where he was transported by ambulance to the Cofimvaba Hospital. There his head wounds were sutured and he was transferred to a hospital in East London for the assessment of his wrist. At the East London hospital his wrist was immobilised in a plaster of paris cast before he was again returned to Cofimvaba. In Cofimvaba he was admitted and kept in hospital until 19 March 2015. Upon his discharge, he proceeded first to a doctor to obtain a J88 medical report,[1] and then to the SAPS to lay a charge of assault GBH. A docket was opened in which the complainant recorded these events and identified his assailants.

[3] Warrant Officer Qunta, who was stationed at the Cofimvaba Police Station, reported for duty on 20 March 2015 when the docket was allocated to him for investigation. He perused the contents of the docket and, as a result thereof, proceeded to Ncora to interview the complainant. He found the complainant 'severely injured'[2] and he observed the wounds to his head and the broken arm. During the interview the complainant identified further witnesses to the assault and, accordingly, Warrant Officer Qunta proceeded to interview them and to take statements from them. Thereafter, he arrested the appellants and charged them, accordingly. On

[1] The standard medical form commonly utilised in police investigations.

[2] The terminology used by Qunta in evidence.

Monday 23 March 2015 the prosecutor at Cofimvaba Magistrate's Court (the magistrate's court) decided to release the appellants until the other identified assailants had been arrested. They were subsequently traced and also charged. At the time of the hearing of the appellants' civil claim in this matter in the high court, the criminal proceedings in the magistrate's court were partly heard.

[4] The basis of the appellants' case, as pleaded, was that their arrest and subsequent detention was unlawful because the arrest was effected without a warrant and without 'justifiable cause in law'. Thus, the parties agreed at the pre-trial meeting that the only issues for determination were:
'1. Whether the members of [the SAPS] had [reasonably] suspected that the plaintiffs had committed an assault, where a dangerous wound was inflicted. . . .
2. Whether the plaintiffs were wrongfully and unlawfully arrested by members of [the SAPS].
3. Whether the detention of the plaintiffs which flows from the arrest by members of the [SAPS] was wrongful and unlawful and therefore had no justification.'

[5] As I have explained, the Minister admitted the arrests, and subsequent detention, and contended that the arrests were justified and therefore lawful, in terms of s 40(1)*(b)* of the Criminal Procedure Act (the CPA). Section 40(1)*(b)* provides:
'(1) A peace officer may without warrant arrest any person-
. . .
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'
An assault (or an assault GBH) is not listed, as such, in Schedule 1. Schedule 1 provides for an arrest without a warrant in respect of an assault only when a dangerous wound has been inflicted.

[6] The Minister's plea is a confession and avoidance, which attracts the onus to prove the justification pleaded, that is, the lawfulness of the arrests in terms s 40(1)*(b)*, on a balance of probabilities.[3] In order to discharge this onus the Minister was required to establish: (i) that Warrant Officer Qunta is a peace officer; (ii) that he in fact entertained a suspicion; (iii) that the suspicion which he held was that the suspects (the appellants) had committed an offence which is referred to in Schedule 1 (in this case, an assault in which a dangerous wound had been inflicted); and (iv) that the suspicion rested upon reasonable grounds.[4] Once these jurisdictional facts have been established the arrestor has a discretion whether or not to carry out an

[3] *Mabaso v Felix* [1981] 2 All SA 306 (A); 1981 (3) SA 865 (A); *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A) at 589E-F; *Lombo v African National Congress* [2002] 3 All SA 517 (A); 2002 (5) SA 668 (SCA) para 32.
[4] *Duncan v The Minister of Law and Order* 1986 (2) SA 805 (A) at 818G-H (*Duncan*); *Minister of Safety and Security v Swart* [2012] ZASCA 16; 2012 (2) SACR 226 (SCA) para 20.

arrest.[5] In the present matter the exercise of the discretion to affect the arrest was not in dispute.

[7] Warrant Officer Qunta was a peace officer by virtue of his office. As I have said, a charge of assault GBH had been made against the appellants and a docket had been opened. He had before him the content of the docket which included a statement by the complainant, in which he recounted his ordeal, and a medical report of a doctor reflecting the injuries which he had sustained. Having perused the docket, and acquainted himself with the contents thereof, he proceeded to interview the complainant and he observed his injuries. The complainant, as I have said, referred him to further witnesses and he proceeded to interview them. He manifestly held a suspicion that the appellants had perpetrated the assault upon the complainant.[6] However, s 40(1)*(b)* of the CPA requires more. On behalf of the appellants, it was submitted that the Minister had failed to establish that Warrant Officer Qunta had reasonable grounds to suspect that a dangerous wound had been inflicted in the assault.

[8] As adumbrated earlier, an assault GBH, which is the offence of which the appellants had been charged, is not listed in Schedule 1 of the CPA as an offence for which an arrest without a warrant may be justified by s 40(1)*(b)*. Such an assault may be brought within the ambit of Schedule 1 of the CPA when a 'dangerous wound' has been inflicted. In respect of an assault, the section requires the Minister to establish, on a balance of probabilities, that the arresting officer held the suspicion, on reasonable grounds, that such a wound had been inflicted. It is not necessary to establish as a fact that the inflicted wound was dangerous.[7] 'Suspicion' implies an absence of certainty or adequate proof. Thus, a suspicion might be reasonable even if there is insufficient evidence for a *prima facie* case against the arrestee.[8]

[9] On behalf of the appellants, it was contended that the fracture to the wrist was not a wound as envisaged in the schedule. In the interpretation of a statutory provision language must be considered in the context in which it appears, in the light of the ordinary rules of grammar and syntax. Where a provision is open to more than one interpretation, a sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results.[9] Whilst a 'wound' refers more often to a cut or laceration

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[5] *Duncan* at 818H-J; *Minister of Safety and Security v Sekhoto and Another* [2010] ZASCA 141; [2011] 2 All 157 (SCA) paras 6 and 28.

[6] This court has endorsed and adopted Lord Devlin's formulation of the meaning of 'suspicion': 'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect, but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.' *Duncan* at 819I; *Minister of Law and Order v Kader* 1991 (1) SA 41 (A) at 50H-I; *Powell NO and Others v van der Merwe N.O and Others* [2005] 1 All SA 149 (SCA); 2005 (5) SA 62 (SCA) para 36.

[7] *Rex v Jones* 1952 (1) SA 327 (E) at 332 (*Jones*).

[8] *Duncan* at 819I – 820B.

[9] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

penetrating the skin, it is not necessarily so. It is described in *The New Shorter Oxford Dictionary* (1993) as 'an injury to body tissue caused by a cut, a blow, hard or sharp impact . . .; an external injury'.

[10] Applying the established approach to interpretation, no logical reason commends itself for excluding an arrest without a warrant where a dangerous injury (in the sense of endangering life or limb) has been inflicted to the body of the victim with a blunt instrument, while permitting it when the injury is inflicted with a sharp object causing a laceration. It is the potential consequence of the injury which justifies an arrest without a warrant. Therefore, both the fracture of the wrist and the lacerations to the head of the complainant were wounds as envisaged in the schedule.

[11] I turn to consider whether the wounds were dangerous, as contemplated in the schedule. In *Jones*, Jennett J remarked:
'It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ. The officer effecting the arrest has only to have reasonable grounds for suspecting that such a wound has been inflicted.'[10]
Whether he had reasonable grounds for his belief must be approached objectively.[11]

[12] The high court held that the Minister had discharged the onus resting on him. Regrettably, the presentation of the case on behalf of the Minister left much to be desired. As adumbrated earlier, Warrant Officer Qunta had in his possession a docket including a statement, presumably taken on oath, from the complainant, and a J88 form. These documents, on their own, could have gone some way to discharging the onus resting on the Minister, yet, astonishingly, neither was introduced in evidence.

[13] Nevertheless, Warrant Officer Qunta testified that he first acquainted himself with the contents of the docket. It related to a charge of assault GBH and it identified the appellants, amongst others, as the perpetrators. He then proceeded to Ncora to interview the complainant because he appreciated that he could not arrest the appellants without an investigation to verify the information contained in the docket. Upon seeing the complainant, he perceived that he had been 'severely injured' and noted the fractured arm and the injuries to his head. Warrant Officer Qunta did not describe the injuries which he observed in any finer detail, but, as I have said, the complainant testified that he had sustained five lacerations to his scalp, which had been sutured, and that his wrist had been fractured and immobilised in a plaster cast. These are the injuries which Warrant Officer Qunta observed.

[14] The complainant testified that, following the assault, he bled profusely and was

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[10] *Jones* at 236; *Bobbert v Minister of Law and Order* 1990 (1) SACR 404 (C) at 409E-H; *De Klerk v The Minister of Police* [2018] ZASCA 45; [2018] 2 All SA 597 (SCA) (*de Klerk*) para 10.
[11] *R v Van Heerden* 1958 (3) SA 150 (T) at 152D-E; *Wiesner v Molomo* 1983 (3) SA 151 (A) at 159B.

'dehydrated', to the extent that he was unable to speak, and that he was admitted to hospital for approximately four days. It is not apparent from the evidence of Warrant Officer Qunta that the content of the docket revealed the extent of the blood loss sustained. However, in explaining the reason for the arrest, Warrant Officer Qunta testified that he decided to arrest the appellants as a case of assault had been opened and that the complainant had been detained in hospital for a period of four days. He considered it imperative to look for the assailants by virtue of the 'nature of his injuries'.

[15] As I have explained, it was the appellants' contention, that the evidence did not establish that Warrant Officer Qunta had reasonable grounds to suspect that the wounds were dangerous. Warrant Officer Qunta, so the argument went, did not refer in his evidence to Schedule 1 of the CPA nor to s 40(1)*(b)* thereof and did not state that '[he] arrested the appellants because [he] had a suspicion that the wounds were dangerous'. He could not have determined, so the argument proceeded, from merely looking at the complainant that he had sustained dangerous wounds, and he could not have satisfied himself, as a medical officer could, that the wounds were dangerous.

[16] The appellants misconstrue the nature of the inquiry. It is not required of a police officer to examine the wounds of a victim, as a doctor would, nor would that be appropriate. He is merely required to have regard to the facts and circumstances at his disposal, and, where reasonably possible, to satisfy himself of the merit thereof. If, on a consideration thereof, there are reasonable grounds to suspect that a dangerous wound has been inflicted, he is entitled to arrest the suspect without first obtaining a warrant.

[17] The argument advanced on behalf of the appellants stemmed from *Jones* and *de Klerk*. In *Jones* a member of the public had witnessed a fracas in which Jones had assaulted a young girl by striking her with a sjambok. She sustained five abrasions or bruises on the arms, a linear abrasion, 3 inches long, on each breast and a linear abrasion-bruise, 3 inches long, on the upper lip. The witness noted that she was bleeding from the mouth and summoned the police. A constable hastened to the scene where Jones was pointed out to him and was arrested. The complainant had not yet reported the matter; no charge had been made; and a docket had not been opened. The constable had no evidence on oath; had not seen the complainant; and had merely the say so of the witness that Jones had assaulted the girl with a sjambok. Jennett J concluded that: 'He had the right to arrest [Jones] only if he suspected that the appellant had committed one of the offences mentioned in the first schedule to Act 31 of 1917[12] and it is clear that that question was not tested in evidence'.[13] The State had accordingly failed to establish the jurisdictional facts

[12] A predecessor to the CPA, in which s 31 read in terms identical to s 40(1)*(b)* of the CPA.
[13] *Jones* at 237.

required to justify an arrest without a warrant.

[18] In *de Klerk*, the Minister did not rely on an assault, where a dangerous wound had been inflicted, as justification for the arrest. De Klerk had contended that the complainant in that matter had owed him money. He proceeded to confront the complainant in his office and a scuffle ensued. In the course of the scuffle, de Klerk grabbed the complainant and pushed him against the wall causing him to bump into the frame of a wall picture. The glass broke and cut the complainant's back. The cut to the complainant's back was sutured and a medical report was issued. The complainant laid a charge of assault and de Klerk was arrested. De Klerk sued for damages for wrongful arrest. No medical evidence was tendered, the report was entirely illegible, and, because no reliance had been placed on a 'dangerous wound' in the justification pleaded, the nature of the injury was not canvassed in evidence. No reason was demonstrated for the arresting officer to have suspected that the wound may have been dangerous, as that terms have been interpreted in case law (ie. a wound endangering life or limb).

[19] The present matter is markedly different. As I have said, Warrant Officer Qunta appreciated that he was not entitled to arrest the appellants until he had satisfied himself that there were reasonable grounds to suspect that the injuries inflicted were dangerous. He had every reason to suspect that the injuries which he observed had been inflicted by the appellants in the alleged assault. The lacerations which he observed were to the scalp. Whether they were inflicted by sharp objects or by blunt force, Warrant Officer Qunta perceived these injuries to be severe. The application of such force to the head, per definition, suggests that the injuries were not trivial and the information at the disposal of Warrant Officer Qunta was that the complainant had been hospitalised for a period of four days in consequence of his injuries. Warrant Officer Qunta observed, too, the injury to the complainant's arm, which had been immobilised in a plaster of paris cast, and which the complainant advised him, had been fractured. It was an injury which patently endangered the use of a limb.

[20] The question, whether the suspicion of the person affecting the arrest is reasonable, must, as I have said, be approached objectively. Accordingly, the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable person to form the suspicion that the arrestee had committed a first schedule offence.[14] I agree with Ndamase AJ, that the information before Warrant Officer Qunta in the docket, coupled with his own observations of the injuries, which were objectively proved, demonstrated an actual suspicion, founded upon reasonable grounds, that an assault, in which dangerous wounds had been inflicted, had been committed. The Minister had established that there were reasonable grounds to suspect that both the injuries to the head and the fracture of the wrist, which

[14] Du Toit et al *Commentary on the Criminal Procedure Act* (2020) Chapter 4 at 3 (Juta electronic version); *R v Van Heerden* 1958 (3) SA 150 (T) at 152D-E.

endangered the use of the limb, constituted dangerous wounds. The complainant's evidence in respect of the nature of his injuries was not challenged and Warrant Officer Qunta was not cross-examined at all. The arrests and subsequent detention were therefore lawful.

[21] In the result, I make the following order:
The appeal is dismissed with costs, including the costs of two counsel.

2. *Kunene and Others v Minister of Police* (260/2020) [2021] ZASCA 76 (10 June 2021)

Where the conduct of the State Attorney results in the subversion of the administration of justice a court can order that a settlement agreement can be rescinded.

Mocumie JA (Dambuza and Schippers JJA and Eksteen and Mabindla- Boqwana AJJA concurring)

[1] This case concerns the rescission of two court orders granted consequent to settlement agreements concluded by the State Attorney on behalf of the respondent, the Minister of Police (the Minister), and the first appellant's legal representatives. In terms of the first order, granted on 6 February 2017 by the Gauteng Division of the High Court, Johannesburg per Tsoka ADJP, the Minister was directed to compensate the first appellant, Mr Ayanda Irvin Kunene (Mr Kunene), for all the proved and/or agreed damages arising from an unlawful assault on him by members of the South African Police Service (SAPS) on 7 August 2013. The second order, granted by the same court (Matojane J) on 2 March 2018, directed the Minister to pay R34 077 000 as damages suffered by Mr Kunene as a result of the unlawful arrest, detention and assault on him by the police.

[2] The Minister then approached the high court in July 2019 seeking an order to rescind both court orders on the basis that the State Attorney had no authority to conclude the underlying settlement agreements. The matter came before Keightley J. This appeal is against her judgment, in terms of which she rescinded the two court orders. The appeal is with the leave of the high court.

[3] The facts which form the background to the dispute are largely common cause. On 7 August 2013 Mr Kunene was shot by members of SAPS near Pick and Pay, along Mabalane Street, Senaoane in Soweto. As a result of the incident, he sustained serious injuries which rendered him a paraplegic. In September 2015, he issued summons against the Minister, claiming damages in the amount of R39 million. The summons was served on the State Attorney's office, Johannesburg. At that time, Mr

Kgosi Gustav Lekabe, (Mr Lekabe) the second appellant, was the Head of that office. He allocated the matter to Mr Dovhani Mphephu, (Mr Mphephu) one of the attorneys employed in that office.

[4] In a letter dated 13 October 2015, Mr Mphephu informed SAPS' Legal Division about the action. On 20 October 2015, Colonel Charlene Blackman Britz (Colonel Britz) of SAPS, responded as follows:

'1.4 The South African Police Service accepts full liability for legal costs in this matter. However, should the defence entail the necessity to appoint a correspondent or to brief counsel, please liaise with this office about the nature and tariff of fees of the correspondent/counsel prior to appointing them in order to obtain the written requisite authorization from this Department in terms of Treasury Regulation 12.2.1[15]

1.5 In the interim, proof of quantum, if outstanding, must be obtained from the Plaintiff and forwarded to this office for a decision regarding the fairness and reasonableness of the claim.'

Colonel Britz then requested that SAPS be kept informed, well in advance, of the developments in the matter, including, the dates of consultation and trial dates, and that they be provided with copies of all the pleadings. That, however, never happened. Instead, the Minister's plea (which included a special plea) was drafted and filed by the State Attorney, without consultation with any member of the SAPS.

[5] During the days preceding the trial date, Mr Mphephu suggested to Mr Kunene's attorneys that the case was not ready for trial and that it should be postponed; a suggestion that was firmly rejected by the latter. On the morning of 6 February 2017, the matter served before Tsoka ADJP for trial. Mr Lekabe appeared on behalf of the Minister. Mr Kunene's attorneys moved two interlocutory applications, which were opposed by Mr Lekabe. In the first application Mr Kunene sought an order for separation of the merits from the quantum, in terms of Uniform Court Rule 33(4). The second application was for condonation of Mr Kunene's non-compliance with s 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002. Both applications were granted.

[6] The aspect of the amount of damages to be awarded was reserved for a trial date, which was to be agreed upon between the parties. While the matter stood down for allocation to a trial judge (on 6 February 2017), Mr Lekabe did a *volte face.* He approached Mr Kunene's legal representatives and conceded the merits of the case.

[7] When the matter resumed in the afternoon, after 14h00, Mr Kunene's attorney approached Tsoka ADJP, together with an advocate, the third appellant, Mr Hassim Ebrahim Kajee (Mr Kajee), who had in the interim been instructed by Mr Lekabe to

[15] This is premised on the 'Treasury Regulations, GN R225, *GG* 27388, 15 March 2005' issued in terms of s 76 of the Public Finance Management Act 1 of 1999. (Own footnote added.)

appear for the Minister, and advised that the parties had reached agreement on the merits. Tsoka ADJP directed Mr Kajee to record his name on the written agreement, in the place of Mr Lekabe. Thereafter, an order was granted by consent in accordance with the settlement agreement.

[8] In terms of that order, as I have said, the Minister undertook to compensate Mr Kunene for his proved (or agreed) damages arising from the assault perpetrated upon him on 7 August 2013, by members of SAPS'.[16] The matter was thereafter adjourned and set down for trial on 28 February 2018, for the adjudication of the quantum of damages.

[9] By letter dated 14 February 2018, Mr Moshabane Christopher Mafiri (Mr Mafiri), of the State Attorney's Office, who had evidently replaced Mr Mphephu, briefed an advocate, Mr Mthetwa, to provide a legal opinion (to the Minister) on the quantum of Mr Kunene's damages. In the same letter Mr Mafiri stated that 'Adv Kajee will be the leader in this matter'. Mr Kajee thereafter furnished an opinion on the quantum of damages, which was received the day before the trial was due to commence.

[10] On 16 February 2017, Mr Mafiri wrote to SAPS Legal Division, advising that Mr Mphephu was no longer with the office of the State Attorney. Thereafter, on 22 February 2017, Lt Colonel Daluxolo Wycliff Jama (Lt Colonel Jama), the Provincial Commander of SAPS Legal Division, inquired, by e-mail, from the State Attorney's Office as to the outcome of the court hearing of 6 February 2017. In response, Mr Mafiri ignored the substance of the inquiry and merely advised that he was now handling the file.

[11] At some stage, between the granting of the first court order (6 February 2017) and the trial date for the determination of quantum (28 February 2018), Mr Kunene sought to amend his particulars of claim by adding a claim for damages resulting from his unlawful arrest and detention on the same day of his assault by members of SAPS. In a pre-trial minute, dated 15 February 2018, it is recorded that the Minister conceded Mr Kunene's claim for damages for unlawful arrest and detention. Mr Kajee and Mr Mafiri are recorded as having represented the Minister at that pre-trial conference.

[12] When the matter came to trial on quantum before Matojane J, on 28 February 2018, Mr Kajee again represented the Minister, on Mr Lekabe's instructions. Mr Mafiri was also in attendance. The parties' legal representatives concluded a further settlement agreement, without obtaining authority from their client, SAPS or the Minister. Matojane J instructed the parties to prepare a stated case.

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[16] The issue around whether Tsoka ADJP granted the order on 6 or 7 February is cleared by the record which reflects that the proceedings before Tsoka ADJP were on 6, and not 7, February. The date of 7 February was accepted by all as a typo.

[13] In the stated case, apart from setting out the background to Mr Kunene's claim, the parties recorded that 'the Minister had conceded "that [he] was not in a position to dispute the truth and correctness of the factual basis and findings (opinions) expressed by the experts for whom [the Minister had] no counterparts."' They recorded furthermore, that the Minister had tendered payment of the amount of R34 077 000 as damages. Included in the settlement amount were damages in the amount of R3 500 000 for Mr Kunene's additional claim of unlawful arrest and detention.

[14] Matojane J postponed the matter in order to reflect on the stated case. Only after the adjournment did Mr Lekabe first transmit the opinion, which he had received the previous day from Mr Kajee, to Brigadier Denise Beukes (Brig Beukes). As it turned out, the tender made on behalf of the Minister, in respect of the quantum of damages, had been based on that legal opinion.

[15] On 2 March 2018 Matojane J granted an order in terms of which the Minister was directed to pay R34 million to Mr Kunene for damages which he had suffered as a result of the shooting by the members of SAPS.

[16] On 15 March 2018, Mr Mafiri tersely wrote to Lt Colonel Jama, advising of the proceedings of 28 February 2018 as follows:

'We confirm that this matter was on trial on the 28th February 2018.

The matter proceeded to court and was finalized by way of a stated case as instructed by the head of our office.

Kindly find attached herein the following:

- Stated Case
- Draft Order

We trust you find the above in order.'

In terms of the order, the Minister was to pay the approved amount within 30 days thereof.

[17] On 19 March 2018, Brig Beukes requested an urgent report on the developments in the matter. She did not receive any response. On 23 March 2018, she followed up with another email, requesting the identity of the person who had authorised the concession to the merits of the matter. It appears that there was no response to this request.

[18] It is against this background that the Minister approached the high court seeking that the two orders, granted on the back of the settlements, be rescinded. Essentially, the Minister's case for rescission of the orders was that Mr Lekabe and Mr Kajee never had any authority to concede Mr Kunene's claim and the Minister and the police were never aware of their actions. The Minister highlighted that Mr Lekabe acted irrationally, against express instructions, not bona fide and his conduct and that of Mr Kajee in making the concessions were motivated by corruption.

[19] The latter allegation was founded on certain alleged irregularities in the manner in which Mr Lekabe and Mr Kajee had conducted themselves. Mr Kajee's sudden appearance in court, on behalf of the Minister, on the first day of trial, was surprising, to say the least. He explained it as 'doing a favour', presumably for Mr Lekabe, who had asked him to attend court. It later turned out that he started invoicing the office of the State Attorney in relation to this case two months prior to his appointment. As the high court found, his irregular invoices were paid by the State Attorney, with Mr Lekabe's approval as the only person in that office who held both the authority to appoint counsel and to approve payments. Disturbingly, Mr Lekabe insisted that Mr Kajee was appointed on 15 December 2017, despite the fact that he (Mr Lekabe) had recorded in the register of briefed counsel that he was appointed on 14 February 2018.

[20] Furthermore, the high court considered that the quality of Mr Kajee's work was poor. It had traces of information probably belonging to a document from which he had cut and pasted the advice on quantum, that he had prepared for the Minister. His invoices showed a pattern of inflated charges. He charged for two day's work in respect of perusing each expert report filed in the matter, at R2 500 per hour, with each day seven hours long.

[21] In opposing the application, Mr Kunene's main contention was that the Minister was bound by acts performed by Mr Lekabe, in the exercise of his ostensible authority as the State Attorney, even if it could be found that his conduct was tainted by fraud. It was also submitted on his behalf that the Minister had no bona fide defence to Mr Kunene's claim.

[22] Mr Lekabe denied all the allegations of impropriety made against him. He denied that he attended court on 6 February 2017 and that he concluded the settlement agreement with Mr Kunene's attorneys. He supported the submissions by Mr Kunene's legal representatives that his actions were authorised in terms of s 3 of the State Attorney Act 56 of 1957 (the State Attorney Act). He denied the allegations of an improper or corrupt relationship between himself and Mr Kajee and protested that, on the facts, no fraud was proved. Mr Kajee echoed the same sentiment. Mr Lekabe however, could not dispute the gross impropriety of the concession to additional damages for unlawful arrest and detention.

[23] The high court accepted Mr Kunene's contentions, and that of Mr Mphephu, that it was, in fact, Mr Lekabe who concluded the settlement agreement on 6 February 2017 on the Minister's behalf. The court also found that Mr Lekabe facilitated the unauthorised tender of a payment of R34 million to Mr Kunene. It rejected Mr Lekabe's version that he had attempted to contact Brig Beukes to obtain instructions on the quantum. It found that public interest demanded that the *imprimatur* of the court should not be given to the orders that were tainted by fraud. It rescinded both

court orders, and, to mitigate the impact that would result from the matter going to trial, it ordered that the matter be allocated an expedited trial date.

[24] The central issue to be determined in this appeal is whether the high court was correct to rescind and set aside the orders and underlying compromise agreements granted on 6 February 2017 and 2 March 2018 respectively. But first, there is the anterior issue raised by this Court as to whether the order is appealable.

[25] At the hearing of the appeal it was submitted, on behalf of the Minister, that the rescission order was not appealable. Because of the conclusion I have reached on this issue it is unnecessary to consider the matter at length. I may just state that, with the recent developments in our law, an inquiry into the question whether an order of court is final in effect, and whether it disposes of a substantial portion of the relief sought, no longer depends on mere technical classification thereof. Recently, in *National Director of Public Prosecutions v King*[17] this Court pronounced on the issue as follows:

'[W]hile the classification of the order might at one time have been considered to be determinative of whether it was susceptible to an appeal *the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic. It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle.*' (Emphasis added.)

[26] In this case, although the effect of the order of the high court is that Mr Kunene still has a full opportunity to present his case at a trial, the matter is appealable because firm findings of fraud were made against the second and third appellants, as the basis for the rescission, and personal costs orders were made against them. So, while orders for rescission of judgment would ordinarily not be appealable, the effect in this case is final. I am therefore in agreement with the submission that the interests of justice permit that an appeal be allowed. The rescission order granted by the high court is therefore appealable.[18]

[27] As to the merits of the appeal, it is trite that a judgment or order may be set aside at common law on any of the traditional grounds on which *restitutio in integrum* would

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[17] *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656 (SCA); [2010] 3 All SA 304 (SCA) para 51. See also *Tshwane City v Afriforum and Another [2016] ZACC 19; 2016 (9) BCLR 1133 (CC);* 2016 (6) SA 279 CC para 40.

[18] The test of irreparable harm must take its place alongside other important and relevant considerations that speak to what is in the interests of justice, such as the kind and importance of the constitutional issue raised; whether there are prospects of success; whether the decision, although interlocutory, has a final effect; and whether irreparable harm will result if leave to appeal is not granted. It bears repetition that what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case. See *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA) and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) para 53.

be granted, such as fraud, *justus error* or some other just cause (*iusta causa*). The question is therefore whether, in this case, any one of these grounds exist for the Minister to resile from the compromise agreements concluded.

[28] This Court stated, in *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government*,[19] that '[w]hen a compromise is embodied in an order of court the order brings finality to the *lis* between the parties and it becomes *res judicata*'. And in *Eke v Parsons*,[20] the Constitutional Court cautioned that:

'This in no way means that anything agreed to by the parties should be accepted by a court and made an order of court. The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place "relate directly or indirectly to an issue or *lis* between the parties". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. . . .' (Footnotes omitted.)

[29] Much reliance was placed, by the appellants, on the judgment of this Court in *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another*;[21] in which it was held that the State Attorney has ostensible authority to bind a client at a pre-trial conference convened in terms of rule 37 of the Uniform Rules, even where the effect of the agreement is to settle an opposing party's claim. Somewhat similar to this case, in *Kruizenga* the dispute related to agreements which the State Attorney had concluded with the respondents at two rule 37 pre-trial conferences, without the consent of the client. The minutes of the first conference showed that the State Attorney had conceded the merits of the plaintiff's claim, with the result that all that remained for determination by the court was the issue of the quantum of damages claimed. An order was granted by the court accordingly. Subsequently the Minister launched an application to rescind that court order and the underlying admissions.

[30] Having considered the relevant principles in AJ Kerr *The Law of Agency*[22], together with a number of judgments of this and other courts, this Court in *Kruizenga* said at para 20:

'I accept that, in this matter, by agreeing to the settlement the State Attorney not only exceeded his actual authority, but did so against the express instructions of his principal. As opprobrious as this conduct was, I cannot see how this has any bearing on the respondent's estoppel defence. The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way it matters not whether the attorney acting for the

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[19] *Slabbert v MEC for Health and Social Development of Gauteng Provincial Government* (423/2016) [2016] ZASCA 157 para 7.
[20] *Eke v Parsons* [2015] ZACC 30; 2015 (11) BCLR 1319 (CC); 2016 (3) SA 37 (CC) para 25.
[21] *MEC for Economic Affairs, Environment and Tourism: Eastern Cape v Kruizenga and Another* [2010] ZASCA 58; 2010 (4) SA 122 (SCA); [2010] 4 All SA 23 (SCA).
[22] A J Kerr *The Law of Agency* 3ed (1991) at 149.

principal exceeds his actual authority, or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents' did, that the attorney who is attending the conference clothed with "an aura of authority" has the necessary authority to do what attorneys do at a rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondent's eyes the State Attorney quite clearly had apparent authority'. (Footnotes omitted.)

[31] An extraordinary distinguishing factor in this case is the irregular addition of a further cause of action in the form of the claim for unlawful arrest and detention, subsequent to the settlement of the case on the merits, and in respect of which no order of court was obtained. While the high court concluded that there was no evidence connecting Mr Kunene's legal representatives to the fraudulent conduct of Mr Lekabe and Mr Kajee, there is no reasonable basis on which it can be found that they (Mr Kunene's legal representatives) were unaware of the illegality of the bizarre post settlement amendment, to which the State Attorney had agreed.

[32] Mr Kunene's legal representatives must have known that such absurd augmentation of the cause of action after settlement of the merits, which in the order of 6 February 2017, was confined to damages for 'unlawful assault', was impermissible in law. The order of 2 March 2018 however, included damages for 'unlawful arrest and detention' in the amount awarded for general damages. This cause of action was not pleaded, did not 'relate . . . to an issue or *lis* between the parties',[23] and thus could never have been conceded in the merits order of 6 February 2017. On this aspect the question of ostensible authority on the part of the State Attorney does not even arise. The irregularity/illegality in the concession and the consequent compromise tainted both the orders made in relation to the merits and the quantum of Mr Kunene's claim. This factor alone justified rescission of both court orders.

[33] There is no doubt that the judgment of this Court, in *Kruizenga,* remains the correct exposition of the law on the ostensible authority of the State Attorney.
However, when Mr Kunene's attorney could not have reasonably thought that the State Attorney had the authority to make the concessions he did, the protection afforded by ostensible authority was not available to him. This however, was not the ground on which the high court's rescission order was based.

Principle of Legality

[34] Part of the Minister's case before the high court was that Mr Lekabe and Mr Kajee's conduct was irrational and 'required judicial overview with reference to the principle of legality'. The high court agreed and was of the view that the powers of the State Attorney were limited by the constitutional principle of the rule of law. It will be

[23] *Eke v Parsons* op cit fn 7 para 25.

recalled that in *Kruizenga*, this Court left open the question whether the broad mandate of the State Attorney may be limited.

[35] After considering the relevant judgments of this Court and the Constitutional Court[24] on ostensible authority, the high court said:

'Applying the above principles to the present case it is immediately apparent that absent particular circumstances pointing to considerations of legality and the rule of law, the Minister would be bound by the State Attorney's concession on the merits and the tender of R34 077 000 on the quantum . . . .'

It considered that the Minister could not be bound by the illegal acts of Mr Lekabe and Mr Kajee (individually or jointly).

[36] The judge reasoned that Mr Lekabe and Mr Kajee had subverted the administration of justice. They had acted contrary to the best interests of their client, the Minister, and had denied him the opportunity to properly defend the matter or to settle it on a rational basis. Their conduct was inconsistent with the rule of law and the principle of legality. Consequently, the Minister could not be bound by the compromises concocted by them. This is a case where public interest demanded that the *imprimatur* of the court should not be given to the orders that were made.

[37] On appeal, counsel for the appellants submitted that the issues could be adequately determined on precedent and it was unnecessary to invoke the constitutional principle of legality and that there was no basis on which the principle applied. It was disputed that the State Attorney performed public functions or that it was an organ of state. Even if it was an organ of state, so it was contended, Mr Lekabe was 'not exercising a public power when he conceded liability – he was just doing what attorneys do, whether they represent the State or a private party'. Then it was contended that the 'rule of law, in the context of this case, should have meant nothing more than the application of the *Kruizenga* principles relating to ostensible authority'.

[38] These contentions are however incorrect. The powers and functions of the State Attorney are conferred by statute. Section 3(1) of the State Attorney Act[25] provides that:

'The functions of the offices of the State Attorney shall be the performance in any court or in any part of the Republic of such work on behalf of the Government of the Republic as is by law, practice or custom performed by attorneys, notaries and conveyancers.

Likewise, s 3(3) reads:

'Unless the Minister of Justice and Constitutional Development otherwise directs, there may also be performed at the offices of State Attorney like functions in or in connection with any matter in which the Government or such an administration as aforesaid, though not a party, is

[24] *Makate v Vodacom Ltd* [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) para 48 citing Lord Denning in *Hely-Hutchinson v Brayhead Ltd and Another* [1968] 1 QB 549 (CA).

[25] Section 3 amended by s 35 of Act 93 of 1962 and substituted by s 3 of Act 13 of 2014.

interested or concerned in, or in connection with any matter where, in the opinion of a State Attorney or of any person acting under his or her authority, it is in the public interest that such functions be performed at the said offices.'

[39] Most recently, this Court in *Zuma v Democratic Alliance and Another* [26] dismissed an appeal against the order of a Full Bench in terms of which it reviewed and set aside a decision by the State Attorney to authorise payment of personal legal costs incurred by the former President of the Republic of South Africa in his criminal prosecution and related matters. That decision was set aside on the basis that the State Attorney had no power to do so under s 3(1) or s 3(3) of the State Attorney Act, and Mr Zuma was ordered to repay the funds received.

[40] Furthermore, the employment of State Attorneys is governed by the provisions of the Public Service Act 104 of 1994. When the impugned orders were granted, Mr Lekabe was in the employment of the Department of Justice and Correctional Services as Head of the State Attorney's Office.

[41] It is thus beyond question that the State Attorney's Office is an institution that exercises public power or performs public functions in terms of legislation. Those powers and functions are sourced in the State Attorney Act. The high court was thus correct to hold that the Office of the State Attorney is an organ of state as defined in s 239 of the Constitution,[27] and that it was bound by rule of law and the principle of legality. The Constitutional Court has said that 'the exercise of public power is always subject to constitutional control and to the rule of law, or . . . more specifically, the legality requirement of our Constitution'.[28]

[42] In *Affordable Medicines Trust and Others v Minister of Health and Others*[29] the Constitutional Court held:

'Our constitutional democracy is founded on, among other values, the "[s]upremacy of the constitution and the rule of law . . .

. . . The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and

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[26] *Zuma v Democratic Alliance and Another* (1028/2019) [2021] ZASCA 39 (13 April 2021).

[27] Section 239 of the Constitution, in relevant part, reads:

'**organ of state means** –

(a) . . .

(b) any other functionary or institution –

(i) . . .

(ii) exercising a public power or performing a public function in terms of any legislation,

. . . . '

[28] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) para 29.

[29] *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 48 and 49.

perform no function beyond that conferred upon them by law." In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.' (Footnotes omitted.)

[43] The principle of legality thus serves to ensure that a public power or function is exercised to achieve the purpose for which it was given in the empowering provision or on the information before the organ of state.[30] And the principle of legality, which is an incident of the rule of law, is a mechanism to ensure that the State, its organs and its officials do not consider themselves to be above the law in the exercise of their functions, but remain subject to it. In the context of the principle of legality, rationality is a 'minimum threshold the requirement applicable to the exercise of all public power by members of the executive and other functionaries',[31] and requires a rational relationship between the exercise of the power or function and the purpose for which it was given.[32]

[44] There can be no dispute that the two court orders granted in favour of Mr Kunene (6 February 2018 and 2 March 2019) were founded on Mr Lekabe's irrational decisions. As the high court correctly held, Mr Lekabe inexplicably refused the proposal by Mr Mphephu, on two occasions, that counsel be appointed to deal with the matter, contrary to the express instruction of SAPS. He was the only person in the State Attorney's Office with the authority to appoint an advocate. Instead of doing so, he made sure that he retained the file, with the result that Mr Mphephu attended a pre-trial meeting without it. Then Mr Lekabe, who had not been handling the file and had not attended the pre-trial meeting, appeared before Tsoka ADJP and initiated the settlement of the case without any authority to do so. Not only that, he unlawfully authorised Mr Kajee to attend court to finalise the compromise agreement on the merits. All of this, contrary to clear and consistent instructions by SAPS as to the Minister's stance on the matter.

[45] Mr Lekabe's denial of his involvement in the proceedings of 6 February 2017 was correctly found to be untrue by the high court. The text messages exchanged between Mr Mphephu and one of Mr Lekabe's deputies, Mr Dhulam on the morning of 6 February 2017, to the effect that Mr Lekabe was en route to court put paid to Mr Lekabe's lies.

[46] There was also no credible challenge to the contention that Mr Mphephu had no authority to appoint counsel and to make concessions of the kind made in this case. In fact, Mr Kajee's version that he was requested by Mr Lekabe to attend court on 6 February 2017, disproves Mr Lekabe's assertion that Mr Mphephu tendered the concessions and concluded the settlement agreement. The recordal of Mr Lekabe's

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[30] C Hoexter; *Administrative Law in South Africa 2ed* at 357-358.
[31] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674; 2000 (3) BCLR 241 para 90.
[32] C Hoexter op cit fn 19 at 358.

name on the court orders also firmly disproved his version. The high court's finding that it was Mr Lekabe rather than Mr Mphephu who represented the Minister in court on that day cannot be faulted. Mr Lekabe's dishonourable attempt to shift the blame to Mr Mphephu for the misrepresentations made to Mr Kunene's attorneys and to court was correctly rejected by the high court.

[47] The high court thus correctly concluded that Mr Lekabe did not act in good faith and was intent on subverting the law and his client's interests. Such fraudulent conduct is inimical to the rule of law and cannot form a legitimate basis for the Minister's liability. No public servant has authority to subvert the constitutional principles on which the very idea of public confidence is founded.

Costs

[48] Mr Lekabe and Mr Kajee were aggrieved by the personal costs order granted on a punitive scale of attorney and client by the high court against them. They made much of the reference by the high court to statements attributed to them in an application brought by the Johannesburg Society of Advocates against Mr Kajee for his disbarment. Therein, Mokgoatlheng and Modiba JJ made uncomplimentary findings against Mr Kajee. The complaint was that the personal costs orders granted by the high court against them in this case resulted from its improper consideration of the remarks made by the two judges.

[49] It is trite that costs are ordinarily granted against a legal representative in exceptional circumstances. In *Stainbank v South African Apartheid Museum at Freedom Park and Another*,[33] the Constitutional Court held:

'Although the courts have the power to award costs from a legal practitioner's own pocket, costs will only be awarded on this basis *where a practitioner has acted inappropriately in a reasonably egregious manner.* However, there does not appear to be a set threshold where an exact standard of conduct will warrant this award of costs. Generally, it remains within judicial discretion. Conduct seen as unreasonable, wilfully disruptive or negligent may constitute conduct that may attract an order of costs *de bonis propriis*.' (Emphasis added.)

[50] The dishonourable conduct by the second and third appellants in this case is described above, and justified the costs orders granted by the high court. That the high court viewed their conduct, comprising of lies and abuse of State funds, as egregious, is clear from its judgment. There is no demonstrable error in the exercise of its discretion.

[51] In the result, the following order issues.

The appeal is dismissed with costs against the second and third appellants; on an attorney and client scale, which include the costs of two counsel where so employed.

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[33] *Stainbank v South African Apartheid Museum at Freedom Park and Another* [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) para 52.

From The Legal Journals

Somaru,N & Rautenbach, C

"Non-criminal dispute resolution in South Africa's criminal justice system: Proposals for reform."

(2020) 33 SACJ 645

Abstract
The National Prosecuting Authority has issued a comprehensive document containing policy directives that are available only to prosecutors. This document makes provision for non-criminal dispute resolution mechanisms in the form of diversions and informal mediations where the offender is an adult. It seems as if a large number of less severe cases are disposed of in this way every year. The directives are not in the public domain, and their scope and application are shrouded in a cloud of secrecy. This contribution analyses the alternative dispute mechanisms of diversion and informal mediation available to prosecutors, which are referred to as non-criminal dispute resolution mechanisms, with the aim to propose ways to effect reform in this area

Bekink, M

"Reversing the 'syndrome of secrecy': Peremptory reporting obligations in cases of child abuse and neglect."

SA Crime Quarterly n.70 2021

Abstract
Mandatory reporting laws are a controversial mechanism that require members of particular occupations to report cases of serious child maltreatment that they encounter in the course of their work to welfare or law enforcement agencies. In April 2019 a video went viral in which a woman filmed her colleague beating toddlers at a crèche in Gauteng. The crèche was closed, and arrests were made, including of the videographer. Given extent of violence and abuse against South African children, this paper investigates whether South African law adequately provides for the liability of those compelled to report child abuse but who fail to do so, why mandated reporters

fail to report abuse, and how South Africa's mandatory reporting rules should be amended to better serve their purpose.

The article can be downloaded here:
http://www.scielo.org.za/pdf/sacq/n70/02.pdf

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

Contributions from the Law School

Addressing some criticisms of the common purpose doctrine

It has long been recognized that the nature of common purpose liability is controversial in nature. De Wet has expressed concern that the application of this doctrine could lead to the flouting of the basic foundations of criminal liability (*Strafreg* 4ed (1985) 193). Burchell engages in an extended critique of the doctrine in his latest edition of *Principles of Criminal Law* (5ed (2016) 485ff). Kemp *et al* (*Criminal Law in South Africa* 3ed (2018) 286) refer to its 'controversial application'. It is noteworthy that such criticism of the doctrine emanates primarily from academic writers, rather than the courts, where the doctrine has gone from strength to strength. A crucial development occurred where the Constitutional Court, in *S v Thebus* (2003 (2) SACR 319 (CC)), held what is commonly regarded to be the form of the doctrine which most militates against the sacrosanct principles of criminal guilt, active association common purpose (which incorporates a common purpose formed on the spur of the moment), to be constitutionally acceptable. Since then, the courts have felt free to apply the doctrine to numerous cases involving criminal conduct committed by a group of persons. Most recently, the Constitutional Court in *S v Tshabalala* 2020 (2) SACR 38 (CC) has swept away any previous doubt as to whether the common purpose doctrine could apply to autographic crimes (crimes that can only be committed through the instrumentality of a person's own body).
Despite the burgeoning importance of the common purpose doctrine, some criticisms of the doctrine remain, and in this short note I propose to briefly address six such criticisms which are highlighted by Kemp *et al* at 284. (A full discussion of the doctrine is not possible here, the reader seeking a fuller treatment of the relevant law is referred to Hoctor *Snyman's Criminal Law* 7ed (2020) 222-233.)

The first criticism is that the fact that, in terms of the common purpose doctrine the state need not establish a causal link between the individual accused's conduct and the harmful result, which amounts to 'an unwarranted lowering of the threshold for criminal liability'. The authoritative response of the Constitutional Court in *Tshabalala* was to state that the object and purpose of the doctrine is to overcome an otherwise unjust result which offends the legal convictions of the community, by removing the element of causation from consideration in the inquiry into criminal liability, and replacing it, where appropriate, with imputing the act which caused the unlawful harm to all the co-perpetrators (at para [56]).

The second criticism is that liability for a serious crime, like murder, 'can arise from a relatively trivial act of association that in no way contributed towards the death of the deceased, or encouraged or facilitated the commission of the crime'. Once again, the Constitutional Court in *Tshabalala* stressed that persons who may not have actually committed the unlawful act, but who contributed towards the commission of the crime 'by encouraging persons who fail to exclude themselves from the actions of the perpetrators', should not be absolved from liability (at para [53]). It seems that the court is indicating that, in the context of unlawful group action, simply giving support to the commission of the unlawful act, with the intention that the consequences of the unlawful act should follow, is deserving of criminal liability. The sentence which the individual accused persons may receive should take into account the nature of their respective involvement, and therefore may well differ between accused persons in the same common purpose.

The third criticism identified by Kemp *et al* at 284 is that the application of the doctrine is rendered too wide by the fact that *dolus eventualis* suffices for liability. While space does not permit a fulsome analysis of the notion of *dolus eventualis* (the reader who wishes to engage with this matter is referred to ***Snyman's Criminal Law*** at 161-169), it may simply be pointed out that *dolus eventualis* can only be applied if it can be *proved*, and it is evident from cases such as *Humphreys* 2013 (2) SACR 1 (SCA) and *S v Maarohanye* 2015 (1) SACR 337 (GSJ) that a court will not inevitably accept that intent in the form of *dolus eventualis* has been established, even where serious harm has been caused.

The fourth criticism of the doctrine raised follows from the third. It is the 'fact' that in cases involving common purpose 'the process of inferential reasoning applied by courts to determine the existence of *dolus eventualis* is sometimes so robust that it amounts to the now defunct *versari in re illicita* rule in disguise'. This claim is unfortunately devoid of any cited evidence by way of illustration, and so it is difficult to weigh its accuracy. It may be argued that, on the contrary, courts will carefully evaluate evidence of the presence of *dolus eventualis* in the context of common purpose – see, for example, the approach of the courts in *S v Lungile* 1999 (2) SACR 597 (SCA) at paras [15]-[17], *S v Mahlalela* 2016 JDR 2221 (SCA) at paras [20]-[23], *S v Nkosi* 2016 (1) SACR 301 (SCA) at para [7].

The fifth criticism of common purpose set out by Kemp *et al* is that an accused who seeks to establish that he or she has withdrawn from a common purpose 'attracts an evidential burden so heavy that it virtually amounts to a reversal of the normal onus of

proof'. In this regard the authors cite the case of *Nduli* 1993 (2) SACR 501 (A) at 504E:

'The more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to *convince a court*, after the event, that he genuinely meant to dissociate himself from it at the time' (authors' emphasis).

It is however entirely clear that the Appellate Division in the *Nduli* case was not advocating a radical subversion of the principles of proof, such that the accused was required to prove his innocence, but was simply expressing the reality of the difficulty of casting doubt on the state case where this consists of strong evidence based on objectively viable criteria. This is indicated by the words which immediately follow the cited words: 'It remains, I tend to think, a matter of fact and degree as to the type of conduct required to demonstrate such an intention.' The issue directly concerns the court's interpretation of the accused's conduct, rather than any additional evidentiary burden placed on the accused. The cases cited by the court in *Nduli* in the context of dissociation are helpful in this regard, it is submitted.

In *S v Nomakhlala* 1990 (1) SACR 300 (A) at 303-304 the court held, dismissing the prosecution argument that in order for dissociation from the common purpose to be accepted it was incumbent on the appellant to have tried to dissuade his alleged companions or to have protected the deceased in some way, that in the situation in which he found himself, it might not have been very prudent of the appellant to act in this way. Moreover, the court held, his refusal to stab the deceased, before withdrawing, was sufficient for dissociation. In *S v Nzo* 1990 (3) SA 1 (A) at 11 the fact that the appellant made a clean breast of his involvement in the unlawful activities was, for the court, determinative of his dissociation. And in *S v Singo* 1993 (1) SACR 226 (A), the court puts this question into the clearest of perspective, when it states (at 233F-H):

'The test for dissociation…will often be difficult to apply, but ultimately it is a question of fact and evidence. The accused starts with the problem that, *ex hypothesi*, he was an active participant in the common purpose, and a court may well be sceptical of his avowal of abjuration. Nevertheless here, as elsewhere, the *onus* is on the prosecution. If in a case of murder a Court has a reasonable doubt whether at the critical stage when the deceased received his or her mortal wounds the accused was still a party to the common purpose of those assaulting the deceased, the accused is entitled to the benefit of the doubt.'

The final criticism set out by Kemp *et al* relates to sentencing: that when 'meting out sentence in [common purpose] cases, courts seldom draw a sufficient distinction between the individual participants based on their actual role in and contribution towards the commission of the crime'. The authors refer to part of the general critique of Burchell of the common purpose doctrine at 485-491 of his work, as support for this criticism. However Burchell does not deal with sentencing in any detail in this discussion, simply making a brief link between fair labelling and fair sentencing, without elaboration. In any event, as mentioned in relation to the second criticism above, the court ultimately has discretion over the sentence imposed on an individual

accused, and so, on a conspectus of all the significant factors impacting on sentence, the court has the task of handing down a sentence which is fair and just for each and every accused. In the same way that the court is required to establish the necessary fault on the part of each individual accused before holding him liable, so too the court should not simply apportion blameworthiness in sentencing without considering all relevant factors relating to each individual accused.

The list of criticisms and concerns set out by Kemp *et al* is not exhaustive – other issues have been raised by other writers, Burchell in particular. However, the brief discussion above would suggest, I argue, that the doctrine of common purpose is stronger than ever, and is able to brush off such criticisms much more easily than when the doctrine was associated with the ideological taint of being a powerful weapon used against opponents of the apartheid regime.

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Matters of Interest to Magistrates

JUDICIAL APPOINTMENTS' PROBLEMS SPREAD LIKE A VIRUS

Like a rampaging judicial virus, political and other problems are infecting the process of appointing judges in a number of African countries. And there's no vaccine or any other easy solution in sight. Developments in Lesotho, Zimbabwe, Kenya – and then, out of the blue last week, South Africa – all point to serious problems about the process of judicial appointments. Here's a guide to the symptoms of this particular virus.

Lesotho

Let's start in Lesotho, where five judicial nominations by the judicial service commission were refused ratification by King Letsie III in September 2020. The government eventually appointed a new JSC headed by a new Chief Justice, but even that new body has failed to resolve the problem: citing financial difficulties, the government has put all appointments on hold. As a report by the SADC Lawyers' Association noted in March, the problems of Lesotho are about lack of resources almost more than anything else.

Zimbabwe

In Zimbabwe, where the rule of law is already in serious trouble, a new constitutional amendment extending the terms of office of certain judges, has caused a whole raft of

legal challenges. The amendment allows the chief justice and other judges of the apex court to apply to the President for an extra five-year term of office. This is an application that the President may or may not grant, entirely at his discretion.

The first legal challenge against the extension of the term of office of Chief Justice Luke Malaba led to the court finding that neither he nor any other judge presently in office could benefit from the amendment, and that he had legally ceased to be CJ from his 70th birthday. One of the many problems raised by the decision was who should hear the appeal that was almost immediately filed against the outcome: all the then members of the supreme court had been cited in the first case since they too were affected by the constitutional amendment.

That question was resolved last week. Though an urgent application was brought during the week to prevent it, President Emmerson Mnangagwa appointed six new supreme court judges from the ranks of the high court. The challenge had been based, on, among other grounds, a failure by the JSC to interview any candidates who might be considered for the position and who were not already members of the judiciary. Since Mnangagwa appointed only high court judges to the supreme court, that argument would fail, and it is unclear whether the case will continue. Whatever happens, however, the picture that emerges is of an executive exercising undue influence over the judiciary and judicial appointments.

Kenya

In Kenya, 41 judicial nominations have been waiting formal presidential ratification since mid-2019 (one of the nominees has died in the interim, however). President Uhuru Kenyatta hinted at 'integrity concerns' with certain candidates and he refused to act.

Despite a court order that the appointments could not be refused by the President, nor the JSC be ordered to re-think their list, there has been no movement on the problem. Until last week. Out of the blue it appears, President Uhuru Kenyatta appointed or promoted 34 judges last week. The JSC's nomination of six others was ignored. The previous CJ, David Maraga, had made his position clear: appoint all or none, he said.

Quite what, if anything, the new CJ, Martha Koome, might have told Kenyatta in private meetings is not clear. She participated fully in the swearing-in ceremony, however, – even being seen making an apparent bow to Kenyatta, a gesture picked up and commented on in social media – along with all the 34 new appointees. But afterwards she issued a statement calling on the President to appoint the remaining six, saying there was a judicial shortage in Kenya and they were needed. Reaction to that statement from judicial commentators was sharp: the six had to be appointed, not primarily because of a shortage, they said, but because it was the law and because of the court judgment that had ordered them all to be appointed.

Legal steps have already begun to challenge these appointments – and non-appointments – and experts have been expressing their deep concern about the situation since the unexpected ceremony.

'A matter of justice' asked judge and academic, Key Dingake, who has written on the judicial appointments' systems of Kenya, Botswana, South Africa and Swaziland (now Eswatini), for his views on the situation. Judge Dingake, who began his judicial career in Botswana and now serves on the apex courts of Seychelles and Papua New Guinea, commented: 'It is inimical to the rule of law, anywhere in the world, for a President to

choose which law to obey or disregard.' On the question of the President's duty in relation to JSC nominations, he said, 'A reading of the relevant sections of the Kenya 2010 constitution seems to suggest that the role of the President in the appointment of Judges is to rubber stamp the recommendations of the Judicial Service Commission. The function is purely ceremonial.'

One of the issues that concerns commentators is that among the six excluded judges are two who sat on the panel that recently found against Kenyatta's Building Bridges Initiative (BBI), a plan that proposed wide-ranging changes to the country's constitution. Kenyatta has not disguised his anger with the court's decision, and many conclude that the exclusion of these two judges from promotion is a form of punishment for their decision. Commentators say it is to prevent personal favours - or the appearance of them - by the executive, that the constitution tasks the JSC with nominating candidates and leaves the President to rubber-stamp the commission's expert decisions.

Like other commentators, Judge Dingake also noted the problem of excluding from promotion the two judges involved in a decision critical of the President. 'Judges Joel Ngugi and George Odunga, who were part of the panel in the now famous BBI judgment case, but have been denied elevation to the Court of Appeal, are amongst the brightest judges you can find anywhere in the world,' he said.

South Africa

Perhaps, in a way, the problems in all these countries could have been anticipated. What no-one – not even human rights defenders working on the judiciary – appears to have expected, was the launch of new legal action in South Africa. It criticises the way the JSC handled the most recent crop of interviews, asks for a record of the actual closed-session deliberations, and requests that in the light of its alleged unfair and irrational process, the JSC should be ordered to re-consider the list of candidates whose names are sent to the President.

During the April JSC hearings, interviews with several candidates for positions on SA's apex court had been controversial, seeming unfairly to raise what appeared to be irrelevant or extraneous issues. Sometimes it even appeared that the commissioners from political parties in particular were scoring points off each other via questions asked of the candidates, or were grandstanding by interrogating candidates in a way that would appeal to their political constituents.

As required by the constitution, the JSC gave President Cyril Ramaphosa a shortlist of names from which to fill the two vacancies, but he has not yet done so. Then, out of the blue late last week, the Council for the Advancement of the Constitution, CASAC, launched an urgent application challenging the JSC's nominations of five candidates to fill the two vacancies on the constitutional court.

Analysing the way questions were put to certain candidates in particular – some included and others not included among the five recommended to the President – CASAC said commissioners had not behaved properly; instead, they had been engaged in an unfair and irrational process, ambushing candidates, and indulging in 'naked political point settling'. The upshot was that commissioners did not approach their task of choosing candidates 'with an open mind'.

Both by implication and directly, the application criticises the CJ for allowing – and himself indulging in – improper lines of questioning, instead of protecting candidates from the harassment of politicians and maintaining the decorum and dignity of the interviews.
Although unexpected, the application is a timely and useful intervention, highlighting irregularities that the public watching the interviews has, wrongly, come to accept as normal, simply because they happen during many JSC hearings.
The application and the analysis on which it is founded has to be a lesson for the JSC and its chairperson on how proceedings ought to be conducted and what ought not to be tolerated. And it is no mere academic argument: the timing of the application means that the President is likely to delay any announcement of who will fill the vacancies until after the matter is finally settled. Given that two appeals would be possible after the high court decides the matter, the vacant seats on the Constitutional Court are likely to be warmed by acting appointees for a considerable time.

- **Carmel Ricard in 'A matter of justice', Legalbriefs, 8 June 2021**

A Last Thought

"Poetry never stood a chance
of standing outside history
. . .
Suppose you want to write
of a woman braiding
another woman's hair—
straight down, or with beads and shells
in three-strand plaits or corn rows—
you had better know the thickness
the length the pattern
why she decides to braid her hair
how it is done to her
what country it happens in
what else happens in that country
You have to know these things
. . .

I am writing this in a time
when anything we write
can be used against those we love
where the context is never given
though we try to explain, over and over
For the sake of poetry at least
I need to know these things."

From Adrienne Rich "North American Time" (1983). As Quoted by Khampepe J in *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13.