e-MANTSHI

A KZNJETCOM Newsletter

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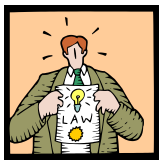
Welcome to the hundredth and seventy sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP.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



New Legislation

1. The salaries and allowances of Magistrates have been determined with effect from 1 April 2020. The notice was published in Government Gazette no 44856 of 15 July 2021.It repealed GenN 205 in *GG* 43142 of 25 January 2020 with effect from 1 April 2020. The notice can be accessed here:
https://www.justice.gov.za/legislation/notices/2021/20210715-gg44856proc30-MagRemuneration.pdf

2. A Draft *Children's Amendment Bill*, 2021 that is going to be introduced as a private member's bill and an explanatory summary has been published in the Government Gazette (GenN 404 in *GG* 44806 of 5 July 2021). South Africa has, since the dawn of democracy in our country, made huge progress in the legal protection of the LGBTIQ+ community in our country. Unfortunately, conversion therapy, a pseudo-science approach to 'curing' children of homosexuality is still rife in South Africa. A wide number of international institutions, health practitioners,

activists, and religious leaders have underlined the severe impacts of conversion therapy on children including depression, risks of suicide, loss of self-esteem, and deep trauma. Moreover, international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. Whereas, practices of conversion therapy target a specific group on an exclusive basis of sexual orientation and gender identity, and is therefore discriminatory in nature and contrary to international human rights standards. The current legislative framework under the Children's Act, 2005 (Act No. 38 of 2005) ("the Act"), does not prohibited conversion therapy on children nor does it consider it an offence. The Bill will therefore seek to— • insert certain definitions; • provide for the prohibition of conversion therapy on children; • provide that conversion therapy on children is an offence in terms of the Act; and • provide for matters connected therewith.

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Recent Court Cases

1. S v Rebese (CA&R 15/21) [2021] ZANCHC 22 (23 July 2021)

Punishment in terms of **section 276(1)(h) of Act 51 of 1977 (Correctional Supervision) can only be imposed** ***after a report of a probation officer or a correctional official has been placed before the court, .***

Lever J

1. This is a matter where the Chief Magistrate was made aware of an irregularity in sentencing the accused by a Senior Magistrate who himself became aware of the irregularity when reviewing finalised matters in Frances Baard District, Kimberley, The Chief Magistrate referred the matter to this Provincial Division with a request for a special review under the provision of s304(4) of the Criminal Procedure Act 51 of 1977 (CPA).

2. On investigation, it indeed transpired that this is a matter for review under the provisions of s 304(4) of the CPA.

3. The facts of the matter are; the accused was charged with the crime of stealing a mobile phone from a parked vehicle. The accused pleaded guilty and a statement was handed in under the provisions of s112(2) of the CPA. The accused was duly convicted. I am satisfied that the plea and the conviction are in accordance with

justice.

4. The problem arises in the sentence that the presiding magistrate purported to impose on the accused. The record shows that the presiding magistrate intended to impose a sentence of direct imprisonment for a period of three (3) years with the Correctional Services having the option in appropriate circumstances having the option to release the offender. Clearly the presiding magistrate intended to sentence the offender under the provisions of s276(1)(i) of the CPA.

5. However, in pronouncing the sentence the presiding magistrate sentenced the offender to three (3) years imprisonment under the provisions of s276(1)(h) of the CPA.

6. Section 276(1)(h) of the CPA provides for correctional supervision and not the direct imprisonment the presiding magistrate obviously intended. In corresponding with the presiding magistrate, he confirmed that a period of direct imprisonment was envisioned and that his reference to s276(1)(h) as opposed to s276(1)(i) of the CPA was a bona fide error on his part.

7. Imposing a sentence of correctional supervision in terms of s276(1)(h) of the CPA requires that the provisions of s276A of the CPA also have to be complied with. The provisions of the said section read:
"276A(1) Punishment shall, subject to the provisions of s 75 *of the* Child Justice Act, 2008*, only be imposed under* section 276(1)(h)-
(a) after a report of a probation officer or a correctional official has been placed before the court, . . . "

8. The provisions of s75 of the Child Justice Act do not apply to this case.

9. No report of a probation officer or a correctional official was placed before the court when the offender was sentenced. The sentencing of the offender was therefore irregular.

10.In the circumstances, the sentencing of the offender is set aside, and the matter is referred back to the same presiding magistrate to commence sentencing afresh.

2. Nedbank Limited v Niemann (4132/2019) [2021] ZAGPJHC 99 (26 July 2021)

Section 130 (3) (c) (ii) (bb) of the National Credit Act 34 of 2005 forbids a court from enforcing a credit agreement if it is established that the debtor has "agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement".

Wilson A J:

1. This matter concerns the scope of action available to a consumer on receipt of a notice under section 129 (1) (a) of the National Credit Act 34 of 2005 ("the NCA"), and the extent to which section 129 (1) (a) shields the consumer from the enforcement of a credit agreement while that action is taken.

Mr. Niemann's dispute with Nedbank
2. The plaintiff ("Nedbank") seeks summary judgment against the defendant ("Mr. Niemann") in an action on an instalment sale agreement ("the agreement") for the purchase of a caravan (described in the papers as an "Afrispoor Cheetah"). Nedbank alleges that Mr. Niemann is R31 898.09 in arrears and that it has cancelled the agreement in response to Mr. Niemann's breach of his repayment obligations.

3. The parties agree that this application falls to be determined in terms of Rule 32 of the Uniform Rules of Court as it read before its amendment on 1 July 2019 (See *Raumix Aggregates (Pty) Ltd v Richter Sand CC, and Similar Matters* 2020 (1) SA 623 (GJ)).

4. In its particulars of claim, Nedbank seeks "confirmation" that the agreement has been cancelled, return of the caravan, an order declaring that Mr. Niemann has forfeited "all monies" so far paid to Nedbank, leave to apply for what Nedbank describes as "damages to be calculated in accordance with section 127 (5) – (9) of the NCA", interest on the damages and costs on the attorney and client scale.

5. Mr. Minnaar, who appeared for Nedbank, accepted that only the claims for cancellation of the agreement, the return of the caravan and costs could properly form the subject of summary judgment proceedings, and asked only for that relief.

6. Mr. Niemann resists summary judgment. His reasons for doing so are set out in two affidavits drafted without the assistance of a legal representative. Mr. Niemann was represented by Mr. Shaw at the hearing. But Mr. Shaw did not draft or settle the affidavits resisting summary judgment.

7. Mr. Niemann is accordingly a lay pleader. That being so, I am enjoined to construe his affidavits generously, in the light most favourable to him (*Xinwa v Volkswagen of South Africa (Pty) Ltd* [2003] ZACC 7; 2003 (4) SA 390 (CC), para 13).

8. Mr. Minnaar submitted that I should disregard the second affidavit Mr. Niemann submitted. I am not sure that this stance can be sustained where a lay pleader submits a second affidavit in summary judgment proceedings. Be that as it may, in disposing of the application, it has only been necessary for me to have regard to the first of the two affidavits.

9. Read generously, that affidavit discloses only one defence that might lead to the rejection of Nedbank's claim at trial. That defence concerns what Mr. Niemann calls a dispute about the amount Nedbank demands to settle the agreement outright ("the settlement amount"). It is not necessary for me to outline this dispute in any detail. Suffice it to say, Mr. Niemann wished to bring an early end to the instalment sale agreement, but did not agree with the amount Nedbank said he would have to pay to do so.

10. This dispute was not resolved, and Nedbank decided to take steps to cancel the agreement. It issued a notice in terms of section 129 (1) (a) of the NCA on 28 November 2018. That notice reached Mr. Niemann's local post office on 5 December 2018. It is not clear whether and when the notice was collected.

11. Mr. Niemann says that he attempted to refer that dispute to the banking ombudsman, but was told that he first had to address his complaint to Nedbank itself. Mr. Niemann did this, but Nedbank reaffirmed its position. In an e-mail dated 12 December 2018, Mr. Niemann remained steadfast that Nedbank's calculation was wrong, and said he would "take the matter up to try and get a resolution".

12. It is not clear from the papers whether Mr. Niemann then approached the ombudsman once more. What is clear is that he met Nedbank's further attempts to enforce the agreement with repeated assertions that there was a dispute about the settlement amount, and that the cancellation and enforcement of the agreement was premature before that dispute had been resolved one way or the other. Mr. Niemann took the view that he ought not to be required to deal with Nedbank's attorneys in these circumstances. Nedbank's attorney, Mr. Rowe, asserted that he had a mandate to act for Nedbank, but nonetheless accepted Mr. Niemann's reluctance to deal with him, and stated that he would advise Nedbank accordingly.

13. On 14 December 2018, Nedbank purported to cancel the agreement. Nedbank's particulars of claim were served on Mr. Niemann on 14 February 2019.

14. The question before me is whether Mr. Niemann's affidavit discloses a defence that, if sustained at trial, would defeat Nedbank's claim.

15. With that in mind, I raised with Mr. Minnaar whether Nedbank had not sought enforcement of the agreement prematurely, in light of the fact that Mr. Niemann had raised a dispute about the settlement amount long before the particulars of claim were served.

16. Mr. Minnaar argued that, whatever the nature of that dispute, Mr. Niemann had no defence to the allegation of breach, and had effectively conceded that he had failed to pay the amounts due under the agreement. He encouraged me to dismiss

Mr. Niemann's reliance on the disputed settlement amount as a sham defence, and to grant summary judgment.

The NCA

17. I do not think that this case is that easy. It seems to me that the fact of Mr. Niemann's default is the beginning of the enquiry in this case, not the end.

18. Once Mr. Niemann fell into arrears, Nedbank was required, by section 129 (1) of the NCA, to draw the default to Mr. Niemann's attention in writing and propose that he "refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date".

19. Section 130 (3) (c) (ii) (bb) forbids a court from enforcing a credit agreement if it is established that Mr. Niemann has "agreed to a proposal made in terms of section 129 (1) (a) and acted in good faith in fulfilment of that agreement".

20. The proposals referred to in section 129 (1) (a) are the credit provider's proposal that the dispute be referred "to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction with the intent that the parties resolve any dispute under the agreement" and the proposal that the parties "develop and agree on a plan to bring the payments under the agreement up to date".

21. I do not think that there is any reasonable interpretation of Mr. Niemann's conduct in this case other than that he seeks the referral of the matter to the banking ombudsman. There is nothing on the papers that suggests that Mr. Niemann has taken this stance in bad faith. I would be slow, in any event, to draw an inference of this nature about Mr. Niemann's conduct on the papers in summary judgment proceedings, especially since not a word is said in Nedbank's particulars of claim about what it must have known was Mr. Niemann's desire to have the ombudsman consider the dispute he had raised. Nedbank's particulars of claim make various standard form allegations about the delivery of the section 129 notice, but are silent on Mr. Niemann's attempts to activate the ombudsman. Nedbank must have appreciated that these efforts are material to whether section 129 (1) (a) has been engaged on the facts of this case.

22. In these circumstances, there is a genuine prospect that Mr. Niemann will be able to demonstrate at trial that sections 129 and 130 of the NCA have not been complied with. If he can demonstrate that, Nedbank's claim will not succeed, at least until the ombudsman has been able to consider and resolve any dispute about the settlement amount due on the agreement.

23. In resisting this conclusion, Mr. Minnaar advanced two further arguments which it is necessary for me to address. First, Mr. Minnaar said that sections 129 and 130 of the NCA cannot prevent the enforcement of a credit agreement where there is no dispute that a consumer is in default, does not take issue with the nature and extent of the default alleged, and does not respond to the credit provider's proposal that a plan to bring the arrears up-to-date be developed.

24. However, I do not think the text of section 129 (1) (a) can sustain such an interpretation. The statutorily mandated proposal a credit provider must make is not limited to the agreement of a plan to eliminate the arrears. Section 129 (1) (a) makes quite clear that the credit provider must propose either that the consumer refers a dispute under the agreement to an appropriate body or that a plan to eliminate the arrears be developed. In response, the consumer may do either or both of these things. It is accordingly clear that the declaration of a dispute on the agreement that does not directly concern the nature and extent of a consumer's arrears will prevent the enforcement of the credit agreement, so long as the dispute is declared in good faith, and the consumer pursues the resolution of the dispute in good faith.

25. In any event, the resolution of the dispute about the settlement amount due, and its payment, would likely clear Mr. Niemann's arrears. In that sense, I cannot conclude that the dispute Mr. Niemann has raised is entirely distinct from the nature and extent of his default on the agreement.

26. Mr. Minnaar's second argument relies on the assertion that it was Mr. Niemann's duty to actually refer his dispute to the banking ombudsman, after Nedbank rejected his complaint, and that his failure to allege in his affidavits that he had escalated the matter to the banking ombudsman at that point means that there is no bar to the enforcement of the agreement.

27. Mr. Minnaar is correct to point out that Mr. Niemann does not tell us whether he referred the matter to the banking ombudsman after Nedbank rebuffed his complaint. However, I do not think that this automatically means that I can be "satisfied", as section 130 (3) (c) (ii) (bb) requires me to be before I can grant summary judgment, that Mr. Niemann has not responded to the section 129 notice by agreeing to Nedbank's proposal that he refer his dispute to the banking ombudsman.

28. Section 130 (3) (c) (ii) (bb) does not require a consumer to have actually referred a dispute under the agreement to a dispute resolution body. It states simply that a court may not determine a matter if a credit provider has approached it despite a consumer having "agreed" to a proposal made in terms of section 129 (1) (a).

29. What counts as having "agreed" to the proposal? It seems to me that agreement to a proposal to refer a matter in the manner envisaged in section 129 (1) (a) covers

a much wider range of potential conduct on the part of Mr. Niemann than him having actually referred the matter to the ombudsman himself.

30. I must construe Mr. Niemann's affidavit generously. The least that seems to me to require is an acceptance, at least *prima facie*, that there is a dispute suitable for referral to the banking ombudsman, that Mr. Niemann has attempted to refer the dispute once, only for the dispute to be referred back to Nedbank, and that Mr. Niemann may well have taken steps to refer the dispute again, or at least conducted himself in a manner that left Nedbank in no doubt that he has agreed to do so.

31. The factual nature and legal consequences of Mr. Niemann's actions seem to me to be matters for trial.

32. In all of these circumstances, it seems to me that Mr. Niemann has succeeded in outlining a *bona fide* defence that could succeed at trial. Simply put, that defence is that he has agreed to Nedbank's proposal that the dispute be referred to an appropriate body in terms of section 129 (1) (a) of the NCA, and that he has acted in good faith in attempting to bring about that result.

33. Accordingly, I refuse the application for summary judgment. Mr. Niemann is granted leave to defend the action, and I direct that costs in this application be costs in the trial.

3. Sigcawu v S (A47/2021) [2021] ZAWCHC 137 (28 July 2021)

Where a court has inadvertently admitted hearsay evidence, by not applying the provisions of section 3 of the Law of Evidence Amendment Act 45 of 1988., then the court still has a discretion to allow the hearsay evidence in terms of section 3 (1)(c), which must be governed by the interests of justice.

Henney, J et Pangarker, AJ

Introduction

[1] The appellant was charged in the regional court sitting at Caledon with one count of murder, that was committed on 15 September 2012 at or near Villiersdorp in the district of Caledon. He unlawfully and intentionally killed the deceased by shooting him with a firearm. He was legally represented during the proceedings and on 29 March 2019, and convicted by the regional magistrate on the above-mentioned charge.

[2] He was sentenced to a period of 15 years imprisonment of which two years imprisonment was suspended for a period of five years on condition that the appellant is not convicted of murder or a competent verdict thereto, committed during the period of suspension. An application for leave to appeal the conviction and sentence

was dismissed by the regional magistrate, and on petition to this court, leave was granted in respect of conviction only.

Grounds of appeal

[3] The appellant's grounds of appeal against his conviction was that the court erred in finding that the state has proven its case beyond reasonable doubt, and in particular that the court erred in relying on the evidence of a dying declaration of the deceased. That the court erred in finding that there was no material discrepancies or improbabilities in the evidence of the state witnesses more particularly that of the evidence of Qaqamba Vali ("Nana"), with respect to the last time she had seen the appellant prior to the murder. That the court erred in finding that this witness was an honest, reliable and credible witness. That the court erred in finding that Nana's evidence supports the evidence of the dying declaration. Lastly, that the court erred in finding that the version of the appellant was improbable and by rejecting the version of the appellant.

[4] After hearing the appeal on 16 April 2021, we directed the registrar to bring the following notice to the attention of the parties:

"On a perusal of the proceedings and the consideration of the arguments presented by the parties during the hearing of the appeal, the Judges wish to invite the comment of the counsel for the appellant as well as the state on the following issues:

1) Whether the Magistrate was correct to admit the hearsay evidence without properly dealing with it on the basis of the provisions of section 3 (1)(a) and or 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. See in this regard, *S v Ndlovu 2002* (2) SACR 325 SCA at 341b – 342 (e) para [17] and in particular, *S v Ramavhale 1996* (1) SACR 639 (A) although this case dealt with the admission of hearsay evidence in terms of section 3(1)(c).
2) The state's counsel submitted that on the basis of the decision of *S v Aspeling 1998(1) SACR* it was held that such evidence could be admitted in terms of section 3(1)(a) in circumstances where the defence counsel admitted to the submission of such evidence. The question to consider is whether such admission or acquiescence were reasonable under the circumstances where this was the only evidence upon which the court convicted the appellant.

See in this regard *S v Halgryn 2002* (2) SACR 211; *Saloman & Another v S 2014* (1) SACR 93 (WCC) where given the circumstances of this case, whether the attorneys failure to object to this evidence during the trial, was reasonable given the incriminating nature of the hearsay evidence (See *S v Ramavhale*).

3) Given the circumstances under which the evidence was admitted, can it be said that the appellant had a fair trial.

The parties are required to indicate to the Judges whether they wish to present further argument during a hearing of the matter (either in open court or virtually) or

whether they merely wish to present a further post hearing note regarding these issues.
The parties are requested to file their further heads on or before 14 June 2021 and similarly, indicate whether they wish to have a further hearing on the matter as prescribed to above."

[5] The parties in the light of this notice filed further heads of argument dealing specifically with these issues and a further hearing of the appeal dealing with the issues raised in the notice to the parties dated 7 June 2021, was held on 17 of June 2021. I will deal with these issues raised by the court later on this judgment.

The evidence and common cause facts

[6] It is common cause that the deceased was shot and killed on the evening of 15 September 2012, and that there was no evidence of any eyewitnesses who observed the killing of the deceased. After the shooting of the deceased, who was also known as Mambush, the first witness that arrived on the scene was Charlene Fortuin ("Fortuin"), who stayed opposite the deceased. It was about 11 PM on a Saturday night, when she heard five shots going off, whereafter the deceased called out her name. She went outside, where she found the deceased on the pavement and she observed that he was shot. She asked him what happened and she told him " … *Dat Kaizer wat by the municipality werk het hom geskiet"*[1]*.*

[7] Fortuin further testified that she did not know who the deceased was talking about, but she knew the Nana that he was referring to when he said it is "… *Kaizer van Nana*".[2] The deceased was a taxi driver and he requested her to call the other taxi owners to tell them what happened to him. At that stage, a police van came driving down the road, she stopped them and then she spoke to a police man known as Booysen.

[8] She also observed that the deceased was shot in his stomach. When the deceased told her that he was shot by Kaizer who works for the municipality, she did not know who that person was. She also did not see anybody at the time when she went outside after the shooting. The next witness that testified was Booysen, a police sergeant who was stationed at the uniform branch in Villiersdorp. He testified that some stage he also worked at the municipality in Villiersdorp and the municipal workers were known to him. He knew the appellant and he lives in the same area as the appellant. He is known to him as Kaizer.

[9] He confirms the evidence of Fortuin that on the evening of the shooting on 15 September 2012 between 10pm and 11pm, he was on duty and that he went to a

[1] loosely translated "That Kaizer that works for municipality shot him."
[2] loosely translated "Kaizer of Nana"

scene where a shooting had taken place. The person that had been shot was known to him as Mambush who was a taxi driver and he was still alive at that stage. He enquired from him what had happened and he stated that he had been shot by Kaizer, the man that worked at the municipality and the deceased told him that he should know him.

[10] According to this witness, he initially did not know who it was that the deceased was referring to, and the deceased told him "… *Kaizer is werksaam by die munisipaliteit, jy behoort hom te ken"*[3]. The witness says that after this explanation it was not still clear to him who this Kaizer was, until the deceased further explained that he (Kaizer), was involved in a relationship with Nana. It was only thereafter that he realised who this Kaizer was that the deceased was referring to. In court, he pointed out the appellant, as the person that they were referring to. After having received the information from the deceased he and Adams immediately went to the appellant's house, but they could not find him there. Thereafter they went to Nana's home and they also could not find him there.

[11] On the same day, of which was on 14 January 2019, the investigating officer, Warrant Officer Adams ("Adams") also testified. He also arrived at the scene, where he found Booysen, who at that stage, was still speaking to the deceased. He also spoke to the deceased because he knew him. The deceased also told him that it was Kaizer that works for the municipality, Nana's boyfriend, that shot him.

[12] Adams testified that he knew who Kaizer was and knew that he used to work for the municipality. He further stated that he interacted with him on a previous occasion. He also knew who this Nana was that the people were referring to. He and Booysen, after the deceased were taken away from the scene by the ambulance, immediately went to the place of the appellant. When he arrived at the appellant's place, the door was open and he noticed that the bed was unmade. Thereafter they went to the place of Nana, where he was told that she had seen the appellant about a week ago.

[13] The appellant was only arrested in December 2017. After he spoke to Nana in 2012, he did not immediately take a statement from her. The matter was postponed to 15 January 2019 for Adams to trace further witnesses, including Nana and take statements from them. At that stage, the statement of Nana was not yet taken. The matter was postponed to 26 February 2019 and thereafter once again to 11 March 2019, where Adams was recalled as a witness.

[14] It emerged that he had only taken a statement of Nana after he had given evidence on 14 January 2019. During further cross examination, he was confronted with the statement of Nana insofar as it contradicted his version. From this, it emerged that he was never at the house in the early hours of the Sunday after the

[3] loosely translated "… Kaizer is employed by the municipality you should know him."

incident, but only Booysen, and that he had only seen her a day or two after the incident. It furthermore emerged that Nana had told him in her statement, after he had testified, that it is not correct that she had seen the appellant about a week before the incident, but on the day before the incident, when she indeed spoke to him. Adams corrected himself and did not dispute the version of Nana where it contradicted his version. He testified that the incident happened a long time ago and that he could not remember all the details.

[15] Qaqanba Vali, also known as Nana confirmed that the appellant was her boyfriend and that he is known as Kaizer. The deceased was known to her only as a taxi driver. She was aware of the fact that he was shot and killed on 15 December 2012. At that stage, she was no longer in the relationship with the appellant. After the relationship ended they still got on very well; they greeted each other when they saw each other and they still maintained a good relationship and were friends.

[16] She confirmed the evidence of the police that in the early hours of the Sunday morning after the incident, they came to her place to enquire about the whereabouts of the appellant. The police still believed that they were in a relationship, but she told them that they were not and they requested her to give them his telephone number which she did not have at that stage. She however told the police that there are still some documents of the appellant and his telephone number might be between those documents.

[17] After searching through the documents, she found his telephone number which she gave to the police. She testified that she last saw the appellant on the day before the incident. They only greeted each other and he told her that he is going to friend of his. That was the last time that she had seen him before he made telephone contact with her on the Sunday. This was after the police had been to her place to look for the appellant. He called and said that the police might come to look for him at her place, and he said if the police would ask her about the incident, she must tell them that she does not know anything about it, which she in any event did not know about.

[18] She asked him what he did and he said he will explain to her a later stage. About a month after that, he called her again and asked her to buy him some airtime for his cellular phone. She once again asked him what he did wrong, and he told her that he will explain it her to at a later stage. She saw him again for the first time when she testified in court. According to her, the reason why the police came to look for him at her place was because they knew that she was involved in a relationship with the appellant for a very long time. They must have thought that she would be the first person that would be able to tell them where to find him. She did not know if the appellant was acquainted with Mambush.

[19] She furthermore confirmed that the appellant worked for the Theewaterskloof municipality at some time. She further testified that the relationship came to an end

when she became pregnant after she was involved in a relationship with another man, while he was incarcerated. She denied that she had last seen the appellant in June 2012, and that he had been in the Eastern Cape since August 2012. She also denied that she ever spoke to Booysen or Adams during the early hours of the Sunday morning after the incident, but spoke to a Mr. Nthandiso, also a police officer.

[20] The appellant testified and confirmed that he is known as Kaizer and further confirmed that Nana was his girlfriend with whom he had been in relationship for a very long time. He also confirmed that he worked for the Theewaterskloof municipality from April 2007 until June 2011. He knew the deceased as Mambush who was a taxi driver. He left Villiersdorp in August 2012 because his elderly mother was ill.

[21] At that stage, he was unemployed and his mother passed away in 2018. He was therefore in the Eastern Cape on 15 September 2012 and thereafter found work in Port Elizabeth in March 2014 as a contract worker. He was eventually arrested on 26 December 2017 in the Eastern Cape. He furthermore testified that he had gone to hospital to visit Nana during June 2012 to see the child and he never saw her again. When he left his home in Villiersdorp, he made no arrangements and he merely locked his place and left his property. He denied that he was involved in the killing of the deceased.

Evaluation

[22] Mr Sebueng in his heads of argument submitted that the court a quo was wrong to rely on the evidence of Nana, in the light of the contradictions in the evidence between her and the two police officers Adams and Booysen and the evidence regarding the time when she spoke to the appellant. I do not agree with Mr. Sebueng's submission that this witness was not credible and reliable. On the contrary, she impressed the court as an honest witness, she had a better recollection of the events than Adams, who only took a statement from her about seven years after the incident, and after he had testified in court for the first time on 14 January 2019.

[23] Adams, at a later stage when confronted with the discrepancies between her evidence, conceded that her evidence was correct. She was adamant during cross-examination that the appellant indeed had called her the next day after the police had paid her a visit in order to inquire about the appellant's whereabouts. Her evidence, although she states that she did not speak to Booysen, is consistent with the evidence of Booysen, who said that she was known to him. Her evidence is also consistent with the undisputed evidence that it was known that she was associated with the appellant, which is not in dispute because the appellant it seems was involved in a relationship with this witness. It would only have been the most logical and rational thing for the police in the light of what the deceased had told them, to go to the place of this witness to look for the appellant, based on the deceased's

spontaneous and unsolicited utterances made to them. Her evidence is therefore consistent with the surrounding circumstantial evidence and the court a quo was correct to find that this was a credible witness.

[24] Regarding the question whether the court was correct to accept the evidence of the deceased's so-called dying declaration, which points to the fact that the appellant was responsible for the shooting and subsequent killing, this evidence is clearly hearsay evidence. The admissibility of this evidence was not called into question and the regional magistrate did not, it seems, deal with the question of admissibility of this hearsay evidence on the basis of the provisions of the Law of Evidence Amendment Act 45 of 1988 ("the LEAA").

[25] Mr. Lewis who appeared for the respondent submitted that in the absence of any challenge to the admissibility of this evidence in the court a quo, the only question that this court on appeal has to consider is whether the court a quo based on this evidence, was correct to convict the accused of the murder of the deceased beyond reasonable doubt. He submitted that this evidence, even though it was not emphatically dealt with by the regional magistrate in terms of the provisions of the LEAA, seems to have been admitted in terms of the provisions of section 3(1)(a) of the LEAA.

[26] In her judgment on conviction[4], the regional magistrate recognised that the State relies on the dying declaration made by the deceased that the appellant was the person who had shot him with a firearm. The evidence indicates that the declaration was made to 3 witnesses, the neighbour Fortuin and the police officers Booysen and Adams. She found that the dying declaration amounts to hearsay evidence and that caution should apply when admitting this evidence as it is improbable that a person who is about to die would make a false statement.

[27] It is required of the person to whom such a statement is made, that he/she is a competent witness, is aware that the person is about to die, and that the statement must be made by the victim. Not only was the statement made to Booysen, Adams, but also Fortuin who reached the deceased very soon after he was shot. The regional magistrate goes on to find that the evidence of the witness Nana supports the version of the deceased and she consequently convicts the appellant as charged.

[28] It is apparent from the judgment that the regional magistrate as said earlier, did not deal with section 3 of the LEAA, but rather applied the common law rule relating to hearsay. The issue of hearsay in civil and criminal trials is governed by section 3 (1) of the Act. In our view, the regional magistrate was required to deal with the dying declaration and the admissibility thereof as hearsay evidence, in terms of section 3(1) and not the common law.

[4] Pg 150 record.

[29] The introduction by the prosecutor of the deceased's dying declaration was met with no objection thereto by the appellant and his attorney. The submission by respondent's counsel is that as there was no objection by the defence, section 3(1)(a) applies in that the appellant and his attorney consented to the admissibility of the hearsay evidence against the appellant.

[30] In S v Aspeling[5], the court considered section 3 (1)(a) in circumstances where the defence attorney accepted information which was communicated by the prosecutor from the Bar in relation to the opinion of the pathologist who had conducted a post-mortem examination which was already before the court.

[31] The court found that the attorney's acquiescence to the admission of the evidence implied an agreement to the admission, and thus the admission of the evidence was not irregular. In our view, in the absence of an objection to the introduction of the evidence, the admission thereof as against the appellant, was consented to in terms of section 3 (1)(a) of the Act. The admission of the evidence in terms of section 3(1)(a) should be distinguished from the probative value of the evidence. Once hearsay evidence is admitted, it becomes part of the totality of the evidence which must be evaluated (Mnyama v Gxalaba)[6]. Despite her failure to consider section 3(1), the regional magistrate nonetheless in her judgement approached the hearsay evidence with caution. She considered the admissibility of the evidence and found the deceased's declaration to be supported by the evidence presented by the witness Nana, and the independent witnesses to whom the deceased made the declaration of the identity of his assailant. She thus made a proper assessment regarding the weight or probative value of the evidence.

[32] In our view, as there was no objection to the admission of the dying declaration, the silence of the appellant and the attorney amounted to an agreement to the admission thereof in the trial. The dying declaration and identification of the appellant as the shooter was supplemented and supported by the version presented by Nana and the evidence considered holistically.

[33] If the admission of the hearsay has not been consented to or, where the court in our view has inadvertently admitted the hearsay evidence, such as in this case by not applying the provisions of section 3, then the court still has a discretion to allow the hearsay evidence in terms of section 3 (1)(c), which must be governed by the interests of justice. In circumstances where it would be absurd and not in the interest of justice to have regard to such evidence. In this regard, the court is alive to what was said in R v Hepworth[7], the following was said:

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[5] 1998 (1) SACR 561 at 567 I-J and 568 A-B.
[6] 1990 1 SA 650 (C).
[7] 1928 AD 265

"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge or an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

Section 3 (1) (c) of the Act which states that:

Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-

(a) each party against whom the evidence is to be adduced agrees to the admission thereof at such proceedings;

(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of evidence;

(iii) the purpose for which the evidence is tendered;

(iv) the probative value of the evidence;

(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and

(vii) any other factor which would in the opinion of the court should be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.

[34] In consideration of section 3(1)(c), the overarching principle in the admission of hearsay evidence should be the interests of justice (see Parkins v S[8]). In S v Ndlovu[9], Cameron JA observed that in the absence of an agreement, section 3 prohibits the admission of hearsay evidence unless the interest of justice requires it[10]. That the act was designed to create a general framework to regulate the admission of hearsay evidence that would supersede excessive rigidity and inflexibility - and the occasional absurdity of the common law position. The LEAA retained the common law cautions about receiving hearsay evidence, but attained the rules governing when it is to be received and when not. He furthermore agreed with the view that the statutory preconditions for the reception of hearsay evidence are now designed to ensure that it is received only if the interests of justice dictate its reception.

[8] 2017 (1) SACRS 235 (WCC) para [52]
[9] [2002] 3 ALL SA 760 (SCA)
[10] Para [12] …; [14]; and [15]

[35] The court should also in considering the hearsay evidence have regard to the factors as set out in this section before concluding that it would be in the interest of justice to admit such evidence. These are:

The nature of proceedings in this particular case, it is a criminal trial where a finding needs to be made beyond reasonable doubt, and where such evidence may play a pivotal part in the conviction of an accused person.
The nature of the evidence, which is the direct evidence of a dying declaration made by the deceased to three independent people, two of whom are police officers. The declaration implicates the appellant as the sole person who shot the deceased more than once. It is direct evidence of the deceased who was a witness to his own killing. A further and the most important considerations is the probative value of the evidence. This implies that the evidence must be considered with caution as the probative value depends on the credibility of the person who made the declaration, and it must be honest and reliable. There is no cogent reason why the deceased would specifically implicate the appellant as his assailant and state this to three people.

[36] The probative value of the evidence depends not only on the credibility and reliability of the statement made by the deceased but also the credibility and reliability of the neighbour Fortuin and the police officers to whom the declaration was made, and their evidence is without a doubt reliable and acceptable. They arrived on the scene at different occasions, and wholly independent of each other (the incident happened in a relatively small community where the deceased, Nana and the appellant were known).
In addition, the deceased did not deny that he was called “Kaiser”, nor that he worked at the municipality nor that he was in a relationship at the time with Nana. And as I said earlier, it would be absurd not to have regard to this evidence that consists of utterances made by the deceased, that was made spontaneously and unsolicited. None of the witnesses mentioned, asked the deceased what happened and more importantly, who the person was who shot him. Based on these utterances, not only the police but also Fortuin were provided with a clear and unambiguous picture of who the culprit was. This in our view, is overwhelming evidence that strengthens the reliability of the hearsay evidence, which is also strong evidence in respect of the identity of the appellant, and his direct involvement in the shooting of the deceased.

[37] The direct evidence of deceased that it was the appellant that shot him was strengthened by the strong surrounding evidence. The other reliable evidence was that of Nana who testified that the appellant had called her on the Sunday after the shooting to tell her that if the police came to look for him at her place that she must tell them that she knows nothing about the incident. This is strong evidence about the involvement of the appellant which corroborates the hearsay statements made by the deceased, that it was the appellant that shot him.

[38] A further factor to be considered is whether it would be prejudicial to the appellant. This would be obvious in a criminal trial but the overriding consideration would be whether the admission of such evidence would be in the interest of justice. And once the court reaches this conclusion, notwithstanding the fact that it might be prejudicial to an accused person, the court must admit such evidence. In S v Ndhlovu and Others, the court held at page 328 at [50]:

"*The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded it's just evidential weight once admitted must however be discountenanced. A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'. In the present case, Goldstein J found it unnecessary to take a final view, but accepted that 'the strengthening of the State case does constitute prejudice'. That concession to the proposition in question, in my view, was misplaced. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded that the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled; the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."* (our emphasis)

In this particular case, the regional magistrate correctly approached the evaluation of the hearsay evidence with caution. The admission of the hearsay evidence given the fact and circumstances of this case, does not pose a risk to the appellant's right to a fair trial as contemplated under section 35 of the Constitution. One of the main reasons being that the appellant conceded to the admission of such evidence and did not challenge it.

[39] In summary therefore, the admissibility of the hearsay evidence was based on the consent of the appellant, who was legally represented. Our view is that it is not necessary to consider section 3(1)(c), but even if the section is applied, a consideration of the factors therein would support the view that the admission of the hearsay evidence, objectively considered and approached with caution, was in the interests of justice.

[40] In conclusion, we state that even though the regional magistrate did not specifically refer to the provisions of the LEAA, and given the fact that there was no objection to the admission of such evidence, it cannot be said that it was not in the interest of justice to admit such evidence. The weight and probative value of the evidence was so overwhelming that it cannot be ignored.

[41] In our view therefore, the regional magistrate did not misdirect herself when she convicted the appellant on the strength of this evidence. The appeal against the conviction therefore falls to be dismissed.

[42] We therefore make the following order:

"*That the appeal against conviction is dismissed*."

From The Legal Journals

Meintjes-van der Walt, L & Dhliwayo, P

"DNA Evidence as the Basis for Conviction"

PER / PELJ 2021 (24)

Abstract
The sufficiency of DNA evidence alone, with regard to convicting accused persons, has been interrogated and challenged in criminal cases. The availability of offender databases and the increasing sophistication of crime scene recovery of evidence have resulted in a new type of prosecution in which the State's case focuses on match statistics to explain the significance of a match between the accused's DNA profile and the crime-scene evidence. A number of such cases have raised critical jurisprudential questions about the proper role of probabilistic evidence, and the misapprehension of match statistics by courts. This article, with reference to selected cases from specific jurisdictions, investigates the issue of DNA evidence as the exclusive basis for conviction and important factors such as primary, secondary and tertiary transfer, contamination, cold hits and match probability which can influence the reliability of basing a conviction on DNA evidence alone, are discussed.

Lombard, M

"The Consumer Protection Act 68 of 2008 and Parol Evidence"

PER / PELJ 2021 (24)

Abstract
The conflict between the objectives of the Consumer Protection Act 68 of 2008 –to protect consumers and ensure accessible and transparent redress–and the purpose

of the parol evidence rule–to exclude extrinsic evidence and observe the maxim pact servanda sunt–is evident and forms the basis of this article. The purpose of consumer protection legislation is to balance the rights of consumers and suppliers, to protect the interests of consumers and to ensure efficient redress for consumers who have been wronged. The parol evidence rule, which is still in effect in South Africa, prohibits extrinsic evidence in a dispute to interpret a written agreement between parties to ensure certainty on the terms and conditions agreed to in writing. In practice, the parol evidence rule can disadvantage consumers who enter into standard-form contracts, as they normally are in an inferior bargaining position and cannot negotiate the individual terms and conditions of consumer agreements. It is obvious that the strict enforcement of the parol evidence rule in consumer agreements could lead to unjust results in consumer disputes. The provisions of the Consumer Protection Act 68 of 2008 are discussed to establish the extent of the limitation of the parol evidence rule therein. Then, the Consumer Rights Act, 2015 in the United Kingdom is considered to establish the tendency to limit the application of the rule in foreign consumer legislation, and to compare that to the position in South Africa. This article discusses whether the restriction or limitation of the parol evidence rule in the Consumer Protection Act is efficient in reaching the aims and objectives of the Act

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

Contributions from the Law School

Caution, new evidence after conviction, physical demonstrations and a helping hand

This is a discussion of a recent case concerning a child complainant, and an incompetent legal representative, ***S v Ergie* 2021 (1) SACR 127 (WCC).**

The appellant was convicted of rape in the trial court, it having been found that he had inserted his finger into the genitals of the complainant who was eight years old at the time. The complainant testified that the appellant had “rubbed her vagina” but it was not canvassed with her what she understood by the term “vagina”. She demonstrated what had happened to her with a doll but the demonstration was not

placed on record. She was medically examined by a district surgeon four and a half days after the incident and the only significant finding was that there were old tears in her hymen which had completely healed. It emerged only later when the accused had been convicted, and while evidence in mitigation was being adduced that there was a possible explanation for the discovery of the old tears, which was that the complainant had had a vaginal infection about a year before the alleged rape.
The matter went on appeal.

Cautionary rule

There were two reasons for the complainant's evidence to be treated with caution. She was a child and a single witness. The appeal court referred to the "especially high degree of caution with which courts approach the single-witness evidence of a child in sexual assault cases (para [5]). To the extent to which this statement contradicts the dictum in *S v Jackson* (1998 (1) SACR 470 (SCA)) in which the cautionary rule applicable to complainants in sexual assault cases was abolished, it must be rejected. As the court held in the *S v Jackson* case (supra) there may be features peculiar to a particular case of sexual assault which cry for caution to be exercised before accepting the evidence of the complainant, but caution need not automatically be applied just because it is a sexual assault case (para [6]). Nor must an especial degree of caution be applied because it is a sexual assault case. It may be that the appeal court was simply saying that an especially high degree of caution was required because the complainant was both a child and a single witness, however. The appeal court referred to the case of *S v SMM* (2013 (2) SACR 292 (SCA)) where a thirteen year old complainant's evidence was rejected notwithstanding that she was found to be both reliable and credible. To the extent that the cases suggests that corroboration must always be present before accepting the evidence of a single child witness, it is wrong (para [6]. See also *S v Ncanana* (1948 (4) SA 399 (A)).
The magistrate in her judgement found as follows:
"… [the complainant] is not only a single witness but also a young child. The Court must therefore approach her evidence with caution to determine if it is not only credible but also reliable. But as it was stated in S v Sauls …"The exercise of caution must not be allowed to displace the exercise of common sense." [The complainant] is an innocent little girl with no apparent hidden motives. She gave a simple account about a single incident … She made a very good impression on the Court. She appeared to be credible and convincing and there is no reason to doubt her version of the events. During cross-examination she reiterated her version of the facts. Her version was not discredited by any material inconsistencies or ambiguities on her part. The double-barrelled cross-examination by two different attorneys did not damage her credibility, nor did it raise any serious concerns about the reliability of her evidence."
The appeal court was critical of the magistrate finding that the magistrate did not apply the necessary degree of caution when assessing the complainant's evidence, even saying that it was striking that the magistrate didn't refer at all to any of the

authorities on the application of the cautionary rule to child witnesses. The appeal court also found that she gave the impression that she thought that the exercise of common sense displaced the cautionary rules, and that her reference to the cautionary rules was superficial (para [9]-[10]). I am not convinced that this is so, and in Schwikkard et al (Principles of Evidence 4th ed Juta) the authors state that it has "often been stressed" that common sense must not be displaced by the cautionary rules (See also *S v Snyman* (1968 (2) SA 582 (A) at 585). I would further add that it has been held that it is not necessary for the trial court to explicitly refer to the cautionary rules, so long as the analysis of the complainant's evidence reveals that caution was applied. In this light, I consider that the appeal court's criticism of the magistrate for not citing authorities for the cautionary rules applicable to children and single witnesses seems harsh. I do however concur with the appeal court's criticism of the magistrate for a "paucity of critical analysis" of the evidence consistent with the exercise of caution (para [10]).

Demonstrations and physical gestures

In the re-examination of the complainant, she was asked to demonstrate what had happened to her with the assistance of an anatomically correct doll. The complainant made the demonstration but a record of what was demonstrated was not placed on the record. The appeal court said that "when demonstrations and physical gestures are used in the course of evidence in a trial, the presiding officer should be astute to ensure that they are properly described for the record for the purposes of a possible appeal." The appeal court held that it was unfortunate that this was not done in the present cases and that any doubt as to what the demonstration showed had to be resolved in favour of the accused. Thus it could not be assumed that the demonstration showed penetration of the complainant's vagina (para [17]-[18]).

New evidence on the merits after conviction, at the mitigation stage

The district surgeon noted in the J88 that there were old tears in the complainant's hymen which were consistent with vaginal penetration in the past (para [22]). Under cross examination he said that tears to the hymen would heal after 6-12 days. He was taken by surprise to learn that the alleged incident had taken place only 4 and a half days prior to his examination of the complainant, but he said that it was possible that she had healed in that time period (para [23]). The court noted that while it may have been possible, that did not necessarily mean it was probable.

After the appellant was convicted and while evidence was being adduced in mitigation of sentence a possible explanation for old tears to the complainant's hymen came to light – that she had had a vaginal infection approximately a year earlier (para [25]).

The defence attorney realized the significance of the evidence but clearly did not know what to do about the situation. (He had demonstrated a lack of competence previously in the trial too.) The magistrate took the view that the ship had sailed and her only duty was the imposition of sentence (para [26]).

The appeal court held that while it was true that the magistrate could not revisit the conviction in the light of the new evidence relevant to conviction adduced at the mitigation stage, that that did not relieve her of her overriding duty, at all stages of the trial, to strive to see that justice was done. The defence attorney was clearly at a loss as to what to do. The magistrate ought to have told him what his options were. He should have signaled his intention to apply for leave to appeal and made such an application immediately after sentence had been passed, coupled with an application for the new evidence to be heard in terms of section 309B (5) of the Criminal Procedure Act. The appeal court held that "if that had been done, a proper investigation of the issue would probably have followed; and the resulting evidence on the merits would have been put before this court of appeal, together with the magistrate's impressions (para [27])." The magistrate might also have considered stopping the trial at that stage and sending it for a special review in terms of sections 304A (a) of the Criminal Procedure Act (para [28]).

The problem remained as to how the appeal court should deal with the situation. Before the insertion of section 309B (5) of the Criminal Procedure Act (allowing the court granting leave to appeal to hear the new evidence) an appellate court in this position would have remitted the case back to the trial court to hear the new evidence if it believed it might result in a different outcome. However, the court noted that the appellant had already been in detention for six years and the court was reluctant to go that route. Instead it considered whether the appeal might be satisfactorily disposed of on any of the other grounds adduced by the appellant (para [29]).

In the end, after analyzing the evidence, the appeal court concluded that the state's evidence was not sufficient to sustain a conviction and the appeal succeeded on this ground alone, independently of the evidence adduced at the mitigation stage.

"Helping hand" to legal representative who is lacking in competence

The appeal court held that it had long been established that a magistrate owes a duty to an unrepresented accused to provide "appropriate judicious assistance" to them as an element of their constitutional right to a fair trial. It held that in their view the same obligation exists when the accused's legal representative is lacking in the necessary quality to defend the accused and take the necessary steps in the accused's interests (para [28]). The presiding magistrate should therefore have assisted the appellant's legal representative by telling him to apply for leave to appeal and to lead new evidence in terms of section 309B (5) Criminal Procedure Act after the exculpatory evidence came to light only at the stage of mitigation of sentence.

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Matters of Interest to Magistrates

JUDGE SUED BY COUNSEL OVER BEHAVIOUR THAT SUPREME COURT RULES IS 'UNACCEPTABLE'

Carmel Ricard

One of the legally most distressing cases ever to be argued in the courts of Zambia has reached a crucial point: the scandalous matter of a senior advocate suing a high court judge with allegations that his constitutional rights had been infringed by the judge, has now been considered by the country's highest court. The supreme court has ordered that the matter be properly heard in the high court, but with the judge no longer named as respondent. This part of the decision followed a reaffirmation by the court of the principle that judges cannot be sued in their personal capacity. But the three supreme court judges also used the opportunity to chastise the judge concerned for his behaviour, saying that to call his behaviour 'unacceptable' would be an 'understatement'. And they then went on to change the court rules to prevent such behaviour in the future. The dispute originally started when the judge did not announce a time for handing down his original decision and left counsel waiting, as the client's costs escalated, until an 11pm delivery.

The supreme court of Zambia was only too well aware of the drama of the situation at the heart of this case: a well-known and highly-respected legal practitioner sued a judge before whom he had appeared in a matter, and claimed that the judge had infringed the constitutional rights of the lawyer concerned.
The court began its judgment in a style and tone that showed its concern about what it would later describe as 'the sad and unpleasant situation that has led to this appeal'.
Here are the court's opening sentences, 'When news breaks that a judge has been sued, it is considered prime time news worldwide. The interest of … the public in which such news breaks, and indeed beyond the borders, is aroused …. The curiosity and concern is not restricted to ordinary members of the public. It is heightened in … legal circles ….

Prestige
'This reaction by the public lies in the fact that suing a judge is a rare occurrence due to the standing of a judge in society …. The office of a judge is regarded by most

members of the public as an office of honour, veneration, learning, wisdom, probity, prestige and power. This is the aura in which a judge is held and the expectation of the public from such judges are equally high.'

Having grabbed the attention of all readers, the court then explained the facts behind the dispute, saying that they made 'very sad reading'.

The appellant, legal practitioner and constitutional law expert John Sangwa, represented a company involved in a particularly acrimonious high court action before Justice Sunday Bwalya Nkonde. After trial, the judge said his decision would be ready for delivery on 28 February 2018, a date he later rescheduled to 2 May 2018. On that day, judgment was not ready. It was put off to the afternoon of 17 May.

Expenses

When Sangwa's two associates arrived at the judge's chambers at the appointed time, they were asked to wait until the judgment was finalised. At 5pm they were told to go home because it was still not ready and return the following day, though the time was not specified. They arrived at chambers at 4pm next day but once again were told to wait.

Eventually the judge concluded his decision at about 11pm and instructed that copies were to be distributed to counsel. In the meantime, lawyers for both sides had been sitting, waiting, for hours while their clients' expenses mounted.

And that was just the start. When Sangwa's clients, who lost under Judge Nkonde, decided on an urgent application for a stay of execution, the judge behaved in a way that, in anyone else, one would describe as giving the parties the run around. Eventually, counsel included a paragraph in support of an application for an injunction that expressed his frustration. Sangwa referred to the judge's absence from chambers on a day when he had originally indicated he would be available, and said that in his view this absence was 'deliberate' and intended to frustrate the application being brought by Sangwa to stay the judge's decision, and to undermine the appeal against it.

Contempt

This comment led to the judge summoning Sangwa to answer charges for contempt of court and to appear before the judge on 11 June 2018 at 10.30am 'and every other day thereafter, until the disposal of the matter'. Faced with this threat, Sangwa brought a petition against the judge, saying his rights under the constitution had been infringed by him.

From the high court, where three of the five preliminary matters raised by the judge were successful, the matter went to the appeal court, and from there Sangwa appealed to the supreme court.

Having heard argument, that court said it agreed that judges were immune from prosecution in civil matters and that no action 'can be brought against a judge for anything done or omitted to be done in the exercise of his or her judicial functions.'

Unfortunate

But after the court finalised its response to all the legal questions raised, the judges said they wanted to 'digress a little' to consider the 'unfortunate events' that led to the appeal.
They then recapped the history of the matter and concluded that the behaviour of the judge had the effect of making access to justice unduly expensive, because counsel spent hours waiting around to receive the decision – hours that were eventually charged to the client. Further, the judge's conduct infringed the constitutional directive that judges should dispense justice without delay.
'Here, we have asked ourselves the question, what motivated the judge to instruct counsel to wait as he concluded the judgment [only] to deliver it days later at 23.00 hours? We have had serious difficulty answering the question and are somewhat embarrassed at the conduct of one of our number.'

Volatile
At the least, the judge should have called counsel to his chambers and explained the delay to them instead of keeping them in suspense and fuelling an already volatile and acrimonious matter, said the court.
In this case the actions of the judge 'fell far short of the tenets of wisdom'.
'To say that [his] conduct is unacceptable is an understatement.' While a judge was independent, it was not 'independence to do as the judge pleases, nor is it absolute'.
The court had asked counsel for Sangwa what lessons could be learned from the events that led to the appeal.

Courtesy
The court was told that if the judge had delivered his decision at the time he had appointed, all subsequent events would have been avoided. Also, that there should be courtesy between the bench and the bar: if the judge had called counsel into chambers to sort out the issue that would have been preferable to issuing a summons against him for contempt.
Further, the event showed how the cost of justice was made unnecessarily expensive. And finally, said counsel, the matter showed there was a need for the apex court to give directions that would prevent such an 'episode' occurring in future.
The judges agreed and immediately issued a set of guidelines as to how the question of a projected date for judgments should be handled.
The court found that the matter could continue if it was amended by removing the judge's name 'as he cannot be sued in his personal capacity'. It did not, however, indicate against whom the case should be brought instead.

(The judgment can be accessed here https://zambialii.org/zm/judgment/supreme-court-zambia/2021/34)

(The above article appeared in 'A matter of justice', Legalbrief, 20 July 2021).

A Last Thought

"[1] It is a truth universally acknowledged that "[t]o be hated, despised, and alone is the ultimate fear of all human beings". Speech is powerful – it has the ability to build, promote and nurture, but it can also denigrate, humiliate and destroy. Hate speech is one of the most devastating modes of subverting the dignity and self-worth of human beings. This is so because hate speech marginalises and delegitimises individuals based on their membership of a group. This may diminish their social standing in the broader society, outside of the group they identify with and can ignite exclusion, hostility, discrimination and violence against them. Not only does it wound the individuals who share this group identity, but it seeks to undo the very fabric of our society as envisioned by our Constitution. We are enjoined by our Constitution "to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom".

Per Majiedt J in *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22