e-MANTSHI

A KZNJETCOM Newsletter

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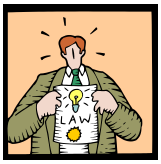
Welcome to the hundredth and seventy seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Minister of Justice and Correctional Services has, under section 23(1) of the Legal Aid South Africa Act, 2014 (Act No. 39 of 2014), and after receipt of recommendations of the Board of Directors of Legal Aid South Africa, amended the regulations published under Government Notice No. R. 745 of 26 July 2017, as amended by Government Notice No. R. 498 of 29 March 2019. The amendment was published in Government Gazette no 44936 dated 6 August 2021. The amended regulations are Regulation 9,11,13,14,15,23,27,31, and 32.

The amended regulations can be accessed here:
https://www.justice.gov.za/legislation/notices/2021/20210806-gg44936rg11320gon680-LASA.pdf

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Recent Court Cases

1. **Seloana and Others v Director of Public Prosecutions and Others (4019/2020) [2021] ZAFSHC 176 (24 August 2021)**

Section 75 (1) (c) of Act 51 of 1977 permits the prosecution as the *dominus litis* to decide on a court of first instance, the forum for the trial and the timing of the transfer of a case if necessary

Daniso, J

[1] This is an application for the review and setting aside of the decision of the third respondent, a district magistrate, in terms of which the third respondent transferred the applicants' case to the high court at the request of the prosecutor.

[2] The application is opposed by the first and the second respondents (the respondents). The third respondent does not oppose the application and will abide the decision of the court.

[3] The applicants together with their 7 co-accused were arrested on 08 and 09 November 2018 respectively. On 12 November 2018 they appeared in the Welkom district court charged with 7 offences including kidnapping, extortion, 2 counts of theft, money laundering, illegal possession and transporting of gold bars. The case was postponed several times for the purposes of bail applications and further investigations. Ultimately, on 26 April 2019 the prosecutor informed the third respondent that the case was ready to be transferred to the high court. The third respondent transferred the case consequent to making the following order:

"Case transferred to the High Court sitting at Virginia court on 10 June 2019. Accused 1, 2, 3,4,5,6,8 and 9 on bail and accused 7 and 10 on warning. All warned for 8:30am."

[4] It is common cause that the district court does not have jurisdiction to try the applicants' case. Section 75 of the Criminal Procedure Act 51 of 1977 ("The CPA") reads:

"(1) When an accused is to be tried in a court in respect of an offence, he shall, subject to the provisions of sections 119, 122A and 123, be tried at a summary trial in-

(a) a court which has jurisdiction and in which he appeared for the first time in respect of such offence in accordance with any method referred to in section 38;

(b) a court which has jurisdiction and to which he was referred to under subsection (2); or

(c) any other court which has jurisdiction and which has been designated by

the Attorney-General or any person authorised thereto by the Attorney-General, whether in general or in any particular case, for the purpose of such summary trial.

(2) (a) If an accused appears in a court which does not have jurisdiction to try the case, the accused shall at the request of the prosecutor be referred to a court having jurisdiction.

(b) If an accused appears in a magistrate's court and the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of a regional court, the court shall, if so requested by the prosecutor, refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge.

(3) The court before whom an accused appears for the purposes of a bail application shall, at the conclusion of the bail proceedings or at any stage thereafter, but before the accused has pleaded, refer such accused to a court designated by the prosecutor for purposes of trial."

[5] It is the applicants' case that the decision taken by the third respondent is marred by irregularities and also infringes their rights to a fair trial. The decision must accordingly be reviewed and set aside with an order that the applicants' criminal case is seized by the Welkom regional court for the following reasons: the third respondent failed to give reasons for his decision. The applicants argue that by failing to give reasons for his decision, the third respondent deprived the applicants their constitutional right to understand how the decision was arrived at, to enable them to decide whether the decision involved warrants a finding of fact or an error of law which is worth challenging. The ineluctable inference, in their view, is that there is no justification on the part of the third respondent for the impugned decision.

[6] It is also the applicants' case that the third respondent neglected his duties as a presiding officer by failing to appreciate that the decision to transfer lies within his domain and by making a decision which adversely affected the applicants' rights without holding an enquiry to afford them an opportunity to make submissions or object to the prosecutor's request.

[7] It was argued by Mr Omar for the applicants that defending a case in the high court is a greater financial burden to bear as opposed to the regional court. A magistrate's decision in the trial within a trial may be reviewed without the need to first complete the proceedings as the high court has inherent jurisdiction to intervene in incomplete proceedings whereas a high court judge's decision cannot be reviewed. A special entry may be made however that could result in substantial costs before the alleged irregularity is considered by the appeal court and to this end, the decision infringes the applicants' rights to a fair trial.

[8] The applicants submit that by overlooking the regional court which has sufficient jurisdiction to try the applicant's case he disregarded the requirements to be met for the transfer of a case to another court to be valid as envisaged by section 75 (2) of the CPA and *S v Khalema and 5 similar cases* 2008 (1) SACR 165 (C) para 20 and also *Sithole and Others v Director of Public Prosecutions and Another case number* 6146/2017*, Free State Division* at para 11, delivered on 27 September 2018.

[9] The respondents countered that the transfer of the applicants' case was done in terms of section 75 (1) read with sections 75 (2) (a) and 75 (3) of the CPA.

[10] It is the respondents' contention that Section 75 (1) (c) permits the prosecution as the *dominus litis* to decide on a court of first instance, the forum for the trial and the timing of the transfer of a case if necessary. A magistrate in the district court cannot transfer a matter out of the district court to a higher court except on the decision and request of a prosecutor. In this matter, on 25 April 2019 acting in terms of section 75 (1) (c) the prosecution through the acting deputy director of the public prosecutions Free State, invoked its powers in terms of section 75 (3) and informed the third respondent in writing of its intention to arraign the applicants in the high court. The transfer is accordingly valid.

[11] The respondents submit that *Sithole* is distinguishable to the facts of this matter. In *Sithole* the regional magistrate transferred a case to the high court yet the transfer was not centred on lack of jurisdiction by the regional court.

[12] Mr Manye for the respondents argued that the applicants have no basis in law to choose a court in which they may be tried, this application is merely an attempt to usurp the powers of the respondents by dictating in which court they must be tried. The application ought to be dismissed with costs.

[13] I do not agree with the applicants' contentions. The provisions of the Rule 53 (1) (b) of the Uniform Rules of Court are amenable. A magistrate may provide reasons if he so desires. There is also no provision in section 75 (2) where an enquiry by a magistrate can be inferred.

[14] The applicants' reliance on *Sithole*, *Kgalema* and Section 75(2) is misconstrued. The authorities gainsay the applicants' case. As already alluded to above at paragraph [4] section 75 (2) permits a magistrate presiding in a court which has no jurisdiction to try a case to transfer that case to a court which has sufficient jurisdiction when requested to do so by the prosecutor. See also *Khalema* at paragraphs 22 to 25.

[15] As correctly pointed out by counsel for the respondents, the facts of this matter are indeed dissimilar to that in *Sithole*. In that matter the case was transferred by a regional magistrate to the high court despite the fact that the regional court had sufficient jurisdiction to hear the case and, it is in that regard, that the court found that the jurisdictional requirements set out in section 75 (2) were lacking, consequently the transfer was invalid.

[16] It is axiomatic that in terms of section 35 of the Constitution of the Republic of South Africa, Act 108 of 1996 legal representation is a prerequisite for a fair trial. The applicants' contention that defending the case in the high court would be costly thereby infringing on their rights to adequate legal representation is meritless. There are options available to an accused who cannot afford the costs of legal representation namely: to apply for Legal Aid or Pro Bono legal services.

[17] Taking into consideration the facts of this case, I find that the applicants have failed to make out a case for the review and setting aside of the third respondent's decision. There is no reason why the costs should not follow the result.

[18] In the circumstances, the following order is made:

1. The application to review and set aside the order of the third respondent dated the 26th April 2019 is dismissed.

2. The costs to be paid by the applicants jointly and severally one paying the other to be absolved.

2. *S v Ngubane and Another* 2021 (2) SACR 158 (GJ)

The method of reasoning by which a court could operate when resolving questions of fact can be a deductive or an inductive model of reasoning which was found to be inappropriate. The court also considered the role of intuition. It concluded that the most appropriate method was a model of reasoning known as abduction and this was then applied as a method when assessing the evidence.

(The following part of the judgement consists of only paragraphs 12 to 104 of the original judgement. The full judgement can be accessed here:
http://www.saflii.org/za/cases/ZAGPJHC/2019/539.html

Grant A J
PROOF
[1] Zeffertt and Paizes,[1] in what is arguably the leading work on the law of evidence in South Africa, pose the question as to the basis on which a trier of fact (who I shall refer to as the 'decision maker') decides any matter of fact given that s/he will only be exposed to pieces of information relating to a historical event – particularly where the information is different in nature. Some of this information might appear to support deductive logic, while other information appears to require the application of intuition.[2] They pose the question: how do decision makers decide? They are daring enough, rightly it seems, to suggest that it is possible that a decision maker may not even realise that he or she has chosen one mode of reasoning over another. Their challenge on 'proof' deserves to be repeated here at length:
The fact that these questions are complex and taxing does not mean that they should simply be avoided. If the above examples[3] demonstrate anything at all it is that an election between the two approaches *must* be made, either to govern the whole field of forensic proof or, as seems to be more likely, to deal with particular problems on an *ad hoc* basis. The problems that make such an election necessary are neither uncommon nor artificial. They are everyday situations that form the daily staple of our judicial fare.
…
To take but one more example to illustrate this, consider the question of what kind of quantum of evidence is necessary to satisfy a particular standard of proof. Assume that it is known that of a crowd of 10 000 that attended a football match, 5 001 gained admission by knowingly presenting forged tickets. It could be argued that, since statistically the probability that any one person gained admission in this way is greater than the probability that he or she did not, the owners of the stadium could succeed, if this were the only available evidence, in a civil action against any one of the spectators. And, if the number of dishonest spectators were to be increased to a number far closer to 10 000 (say, 9 900 or, if one felt that this was still not enough, 9 999), a similar argument could be raised for the conviction of any randomly selected spectator on a criminal charge of fraud.
…
It is crucial, however, that the courts understand that such an election is unavoidable and that they appreciate the theoretical nature and practical consequences of that election in general and in each case. To that end

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[1] See page 37ffDT Zeffertt & AP Paizes *The South African Law of Evidence* 3rd ed (2017).
[2] See chapter 2: 'The South African evidentiary system and theories of proof', in ibid, at p 31ff.
[3] See, in particular, pages 34ff; ibid. One such example which reveals the conflicting decisions that may arise from a deductive/mathematical mode of reasoning relative to an intuitive mode is included in the quote below.

they will need to know more about the extent to which mathematical principles may appropriately be invoked in a forensic context and to be able to understand and evaluate the relationship between these principles and the conventional rules of evidence.[4]

[2] I think these are fair questions and that I must be able to account for how it is that I operate. I do not think it is an overstatement to say that far too often, the decision-making process is utterly unfamiliar to ordinary people and in some cases, appears quite strange. It is for this reason, no doubt, that suspicions arise that the reasons a decision maker offers for his or her decision are only ex post-facto justifications.[5]

[3] It may be expected that my attempt to answer this question will require the adoption of and adaption to some new way of thinking or some new set of rules. On the contrary though, the analysis and the conclusion are, I believe, liberating. It proposes that decision makers embrace the manner of reasoning by which they navigate their everyday lives and eschews almost entirely the imposition of operating by "special rules" for particular kinds of evidence. It allows for exactly the kind of reasoning that is so critical to making an informed decision on any set of facts: that it is all taken into account, and all accounted for.

[4] Let me begin by saying that I do not think I have access to knowledge about anything for certain. There is a common misconception – if I may – that there is such a thing as definitive 'hard' evidence of something. Popularly, for instance, it is supposed that cases of 'direct evidence' are easy and more compelling than those involving 'indirect' or circumstantial evidence.

[5] The first hurdle in understanding the process – or what is possible[6] – is to understand that this distinction, between cases of 'direct' and 'circumstantial evidence' does not hold. There are many cases in which circumstantial evidence is more compelling than so-called direct evidence.[7] A fingerprint, after all, is circumstantial evidence.

[6] Direct evidence might seem more forceful in terms of proof (probative), but it is not necessarily so. It can be less prone to logical error than less direct forms of evidence, but those kinds of evidence (such as eyewitness testimony) may have problems of their own – for instance – whether the witness is reliable (a witness may simply be mistaken). Alternatively, the question arises whether the witness is credible – that is, whether the witness is telling the truth or lying.

[7] Even if provided with what might be considered the most probative of all evidence – perhaps real evidence in the form of a firearm – the murder weapon, registered to the accused, found at the murder scene with his fingerprints on it, where the victim was found dead – already we are relying on various sources of data: fingerprints are circumstantial evidence and are only useful because an expert has linked an almost

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[4] Ibid page 37-8.

[5] See John Dewey, *Logical Method and Law*, 10 Cornell L. Rev. 17 (1924).

[6] I acknowledge here that in some respects our mental processes are beyond our comprehension, either as unconscious or unfathomable.

[7] Sidney N. Lederman, Alan W. Bryant & Michelle K. Fuerst *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* 5 ed (2018) page 72.

invisible pattern on the gun to the ridges on the accused's hands. And then of course, none of this is of any use if the victim was stabbed to death. Or, worse, was shot (by the accused's gun) but may have succumb to a stab wound first – inflicted by some other third party. All we are left with is scattered fragments of data – which I shall call information, evidence, or data points – so that we can begin to create an image – something comprehendible.

[8] So, I suggest, as Einstein insisted, one must create a mental picture. The notion of data points is to shift one into thinking of a piece of graph paper – or better still, a canvass, on which the pieces of information that one receives may be plotted or marked. The question becomes whether an image appears on the canvass – whether, when one assembles all of the pieces of the mosaic presented, one may discern a picture. The reference to a mosaic is quite deliberate and is an analogy often referred to by our Courts in explaining how they account for all the evidence – at least when dealing with circumstantial evidence.[8]

[9] The model of reasoning proposed here is entirely compatible and consistent with how one ought, properly, to deal with circumstantial evidence. This is a coincidence, but no accident. The model proposed here recognises that in all that we do we are drawing inferences, some inferences are compound or multi-layered, but every decision is based on inferences, and is, ultimately, in itself an inference. There are natural implications for how to deal with circumstantial evidence – simply as one deals with all inferences. Nevertheless, this will be discussed below from the perspective of circumstantial evidence – because it is critical to observe the morass that has developed in attempting to create special rules to apply to what we might want to otherwise identify as circumstantial evidence.[9] As one will note from that discussion, the argument there will be that special rules should be abandoned and what may otherwise qualify as circumstantial evidence, ought again, to be treated as we do all evidence.

[10] Thus, the argument for treating circumstantial evidence as all other evidence is bi-directional. Whether one looks at it from the perspective of how we should deal with evidence generally, or whether one considers it from how we ought to treat circumstantial evidence, one seems to be driven to the same conclusion. All evidence is, in a relevant respect "circumstantial" in that it requires inferential reasoning and looking backward, one cannot escape that what we might otherwise treat as circumstantial evidence is only an instance of inferential reasoning.

[11] However, even in proposing this, I have left over a most fundamental issue. On what basis do I propose that the pieces of information may be treated as marks on a canvass? Does this not assume an approach to reality and knowledge – and, at the very least, a mode of reasoning.

[12] I regret that it does. I say regret because this discussion is often absent from many claims to knowledge or to have reconstructed what happened at a particular

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[8] See the discussion under 'Circumstantial Evidence' of the reliance by our courts on the analogy of a mosaic – at paragraph [75]ff.

[9] See CIRCUMSTANCIAL EVIDENCE on page 27ff.

moment, at a particular place. Do I, for instance, rely, as Holmes claims to have on deduction (although wrongly so). Can I say – with absolute certainty - that, say, because:[10]

Y1 was shot dead; and
The bullet is traced to the gun of X1;

_____
that it was X1 who shot Y1.

[13] No, I cannot. It seems that while the application of law to fact may follow a deductive form of reasoning, the determination of the facts cannot. And even so, there is controversy here – not least because the idea of law may be regarded as inherently normative and not reducible to a mathematical equation.
[14] Do we operate by induction? That is, by considering the behaviour of a sample of people in all material respects the same as the accused, and infer his or her guilt from that? Certainly not – although, a hint of this may appear in the form of similar fact evidence, where one relies on a sample of the accused's own conduct to generalise to what he or she might have done at the relevant moment. But otherwise, induction is unhelpful. It belongs to research sciences or other activities where one seeks to extrapolate something about a population, based on a sample of that population.
[15] But then what are we doing? It would seem that whatever we might claim to be doing, or whatever we may wish we could do, we are inevitably engaged in a mixed process of logical reasoning – both deductive (reliant on a mathematical model of the world[11] and non-deductive (reflecting a more intuitive approach).[12]
[16] It seems that the mode of reasoning by which we choose between versions of facts, or indeed, how we navigate in this world, is what has come to be known as 'abduction'.
[17] In most part it seems that, the mixed or dual mode of reasoning that we operate on in attempting to decide between versions of facts, we engage in an abductive exercise[13] – as described, to a large extent, by Charles Sanders Pierce.[14] We look at

[10] One may notice that, in attempting to extract and isolate the logical form of an argument, the premises as stated above the line, and the conclusion (which is supposed to follow), is stated below the line.
[11] Most closely affiliated with Pascal - Zeffertt & Paizes *The South African Law of Evidence* 3rd ed (2017) at 34ff.
[12] Most closely affiliated with Bacon - ibid at 34ff.
[13] This is, I acknowledge, to attach a label to what we do – or ought to do. I also acknowledge the danger of unthinkingly attaching a label expecting that in doing so a problem is thereby solved. I mean however to attach the label deliberately to attract to what it is we do or ought to do, the attributes which have come to be associated with abductive reasoning – especially in its attributes discussed below. If, however, we need, by the dictates of law or practice, to deviate from what ordinarily follows on abduction, then we cannot allow a label to prevent us from doing what is necessary.
[14] Widely credited with formalising this form of logic (C.S. Pierce *Writings of C.S. Peirce: a Chronological Edition,* Vol 1 (1865)). See, for instance, Giovanni Tuzet 'Legal Abductions' In *Legal*

the facts on which we think we can rely and formulate an explanation for them. In particular, we are looking for the best possible explanation[15] – or, in criminal law, the only feasible, or, to be more precise, the only reasonable explanation.[16]

[18] It is an advantage of abduction that it admits of uncertainty.[17] In this way, it is at least honest. As Tuzet explains:

[A]bduction never yields certainty. It is a probable inference, that is an inference determining conclusions whose truth does not necessarily follow from the truth of the premises. But this is not a check: it is indeed a principle of responsibility. The knowledge of the uncertainty of abductive conclusions, means the responsibility for their inference. The knowledge of the lack of certainty of a certain piece of reasoning, means the impossibility of concealing an arbitrary decision under the shield of logic. The shared knowledge of the hypothetical nature of a certain conclusion, means the impossibility of claiming it as necessary.[18]

[19] Pierce[19] argued that we approach everything we do with preconceptions and prejudgments. He is famously credited with saying:

Any novice in logic may well be surprised at my calling a guess an inference. It is equally easy to define inference so as to exclude or include abduction. But all the objects of logical study have to be classified; and it is found that there is no other good class in which to put abduction but that of inferences. Many logicians, however, leave it unclassed, a sort of logical supernumerary, as if its importance were too small to entitle it to any regular place. They evidently forget that neither deduction nor induction can ever add the smallest item to the data of perception; and, as we have already noticed, mere precepts do not constitute any knowledge applicable to any practical or theoretical use. All that makes knowledge applicable comes to us viâ abduction. Looking out of my window this lovely spring morning I see an azalea in full

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Knowledge and Information Systems: Jurix 2003 edited by D. Bourcier 41-9 (2003); Lipton, P. (1991), *Inference to the Best Explanation*, Routledge, London. Pierce wrote prolifically and both introduced and developed the concept of abduction and what it must be understood to mean over nearly half a century – from about 1863 virtually until his death in 1914. Despite the prominence given to Pierce, I acknowledge that the adoption of abduction is not to tie us slavishly to whatever he said. It is to rely on a rich source of thought on how we reason. If reason dictates that we depart from what Pierce has said, then so it must be.

[15] C.S. Pierce *Writings of C.S. Peirce: a Chronological Edition,* Vol 3 (1878) 323-38; Pierce *Writings of C.S. Peirce: a Chronological Edition,* Vol 1 (1865) 180, 266; C.S. Pierce *Writings of C.S. Peirce: a Chronological Edition,* Vol 1 (1866) 362, 430.

[16] There is, in this a semblance of the what has come to be known as the second of the ‘cardinal rules of logic’ from the case of *R v Blom* 1939 AD 188. This is perhaps no accident – as submitted (see [9] and [10]), the mode of reasoning proposed is to treat all evidence as circumstantial evidence.

[17] C.S. Pierce *Writings of C.S. Peirce: a Chronological Edition,* Vol 2 (1982) 22. Peirce, C. S. ‘On the Logic of drawing History from Ancient Documents especially from Testimonies’ (1901), *Collected Papers* v. 7, paragraph 219. C. S. Pierce, A Letter to F. A. Woods (1913), *Collected Papers* v. 8, paragraphs 385–388.

[18] Tuzet 'Legal Abductions' In *Legal Knowledge and Information Systems: Jurix 2003* edited by Bourcier 41-9 (2003) 45.

[19] Peirce, Charles S. (1901). The Proper Treatment of Hypotheses: a Preliminary Chapter, toward an Examination of Hume's Argument against Miracles, in its Logic and in its History.

bloom. No, no! I do not see that; though that is the only way I can describe what I see. That is a proposition, a sentence, a fact; but what I perceive is not proposition, sentence, fact, but only an image, which I make intelligible in part by means of a statement of fact. This statement is abstract; but what I see is concrete. I perform an abduction when I so much as express in a sentence anything I see. The truth is that the whole fabric of our knowledge is one matted felt of pure hypothesis confirmed and refined by induction. Not the smallest advance can be made in knowledge beyond the stage of vacant staring, without making an abduction at every step.

[20] It falls then to the decision maker to declare his prejudices and preconceptions – rather than pretending that s/he has none.[20]

[21] As Pierce noted, it is the direction of the justification which validates a reason.[21] In this way, the suspicions of Dewey – referred to above[22] - are addressed.

[22] In addition, it is a feature of abduction that it permits one to take account of new information. In this way it crosses the divide between those who might think that intuition and mathematics cannot be reconciled.[23] The ability to account for new information and the updating of beliefs is foundational to Bayes Theorem. Bayes theorem, in particular, Bayesian probability,[24] acknowledges (as does inductive reasoning)[25] that one commences with an initial estimation of the probabilities of an event – known as the 'prior probabilities'. They are 'prior' because they have not yet taken into account new or additional information. The theorem permits for very accurate calculations to be performed based on the integration of new or additional information to one's (prior) beliefs as to the (prior) probabilities. Once updated, the beliefs represent the 'posterior probabilities' – relative to the new/additional information. This process may be repeated to accommodate all information. It represents a clearly attractive method for establishing the probability that a particular

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[20] Pierce stated – in a criticism of Descartes (René Descartes 'Sixth Meditation' In *Meditations on First Philosophy* (1641/1996)) method for confirming existence (which came to be known as **Cartesian Dualism**): 'We cannot begin with complete doubt. We must begin with all the prejudices which we actually have when we enter upon the study of philosophy. These prejudices are not to be dispelled by a maxim, for they are things which it does not occur to us *can* be questioned. Hence this initial scepticisms will be a mere self-deception, and not real doubt; and no one who follows the Cartesian method will ever be satisfied until he has formally recovered all those beliefs which in form he has given up. It is, therefore, as useless a preliminary as going to the North Pole would be in order to get to Constantinople by coming down regularly upon a meridian. A person may, it is true, in the course of his studies, find reason to doubt what he began by believing; but in that case he doubts because he has a positive reason for it, and not on account of the Cartesian maxim. Let us not pretend to doubt in philosophy what we do not doubt in our hearts.' (Some Consequences of Four Incapacities, *Journal of Speculative Philosophy* (1868) 2, 140-157, at 140.)

[21] Pierce explained: '… it is no longer the reasoning which determines what the conclusion shall be, but it is the conclusion which determines what the reasoning shall be. This is sham reasoning.' C.S. Pierce *Collected Papers of C.S. Peirce* Vol 1 (1931-1958) 57.

[22] See note 5 and associated text.

[23] A. Jøsang *Subjective Logic: A Formalism for Reasoning Under Uncertainty*, Springer 2016.

[24] See note 20.

[25] See note 20.

event took place – which is especially valuable because it requires that one declare one's initial (subjective) beliefs.

[23] Bayes theorem is, regrettably, exceedingly difficult to utilise on a practical level – and it is, of course, sensitive to one's initial estimation. One must also be cautious to only feed into the equation estimates of variables that are truly independent. A variable is a piece of information which can assume different values – for example, the colour of a car. In the infamous case of *Collins*[26] – the use of mathematics failed spectacularly because, at least, the statisticians failed to separate out the variables properly.

[24] So, for instance, the probability that the male perpetrator (of a male and female) had both a beard and a moustache – whereas the fact that one has a beard implies that one also has a moustache. This might have been an obvious error – adopted for the sake of illustration. In real life, this is not a simple exercise.

[25] In addition, assigning a probability to a variable may be readily available in some spheres, such as in medicine but, for the sort of probability that is a function of social research, the necessary data may not be. For instance, in a rape case, one may need to know the probabilities of anyone engaging in casual sex at a public venue. Alternatively, in a murder case, one may need to know what the chances are of being attacked and stabbed in two independent attacks in the same evening. These are the sort of difficult probabilities that a decision maker would need available to process some of the factual issues which confront our courts.

[26] Thus, I look to the 'canvass' to see whether the 'data points' reveal a picture. In the language of ropes and cables relied on in discussing circumstantial evidence,[27] I consider whether the data has created strands which together may hold the nominal weight (whatever that is) of a guilty or innocent explanation.

[27] In settling on the best and only reasonably possible version one must accommodate all of the evidence and be alert to the fact that no version can be constructed which includes a fact which is inconsistent with that version. This is, of course, in line with the general principle that while confirmation of any particular hypothesis, depending on the degree to which its presence would discriminate between that hypothesis and any other, can never guarantee the truth of any particular hypothesis.

[28] This is not the case with facts or evidence which is inconsistent with a version or hypothesis. One single fact can disconfirm a hypothesis which is consistent in all other respects with the hypothesis. One need only consider the well-known example of the black goose to observe the functioning of confirmation and disconfirmation. The hypothesis that all geese are white can be confirmed by the presentation of numerous white geese and then further white geese. At this point one may amass perhaps millions of white geese but nevertheless not have proved one's hypothesis.

[29] In contrast, one need only present one single black goose to disk confirm the entire hypothesis. The power of disconfirmation is therefore overwhelming and any

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[26] *People v. Collins*, 68 Cal.2d 319, 438 P.2d 33 (1968).

[27] See paragraph [83]ff.

attempt at reasoning must be deeply sensitive to whether or not any fact exists which would disconfirm a hypothesis or the version which is proposed.

[30] As indicated above,[28] adopting this style of reasoning it is submitted, allows for what Zeffertt and Paizes may term a hybrid model where one adopts a mathematical model in some respects and otherwise an intuitive model in other respects. As they say it would seem impossible to definitively determine which of these two should prevail. It does not appear that there is any resolution to the problem of which style of reasoning (deductive or intuitive) one should adopt so that perhaps the answer is that one might need to adopt a little mathematics here, and a little bit of intuition there.[29]

[31] Does this model of abduction assist in answering the classical dilemma referred to above[30] – of the football stadium? I think it does – because the model obliges one to consider the alternative possible versions. It allows the maths to do substantial work, while reminding one that each individual accused may, nevertheless, be able to present a (reasonably) plausible explanation as to their innocence.

[32] In exactly the same way as the flaw in what has come to be known as the "prosecutor's fallacy",[31] is that more data is required, the abductive model requires that one must take account of the "big picture". An abductive model requires one to consider whether the accused can construct – perhaps even out of what may be regarded as strands in a rope or cable, an alternative hypothesis. One needs more to decide the issue.

[33] This does not eschew a deductive/mathematical model – it allows it, as mentioned, to do substantial work, but it allows one, at the same time, to give expression to the "intuition" that there is something wrong in relying on the maths alone. On an abductive model, the decision maker would, I expect, remain sensitive to the presentation, by the accused, of other information, such as the accused's ticket stubs, or proof of payment.

[34] Thus, I have set for myself the question of what hypothesis could possibly explain to the exclusion of all other hypotheses, the facts before me in this matter.

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[28] See paragraph [15] above.

[29] Zeffertt and Paizes state: 'An election, in short, must be made between these two schools of thought. It is unlikely that either of the approaches is universal, which means that different problems may have to be solved in different ways, here with a little Bacon, and there with a touch of Pascal.' (Zeffertt & Paizes *The South African Law of Evidence* 3rd ed (2017) 38)

[30] Contained in the quote at paragraph [1].

[31] In its most basic form, it would run as follows: from blood collected at the scene of a crime (leaving aside issues of chain evidence and other ancillary issues), it is established that the perpetrator has a rare blood characteristic: only, let's say, 1% of people share this characteristic. The accused has this blood characteristic. Let me call these bits of information "the initial premises". The (fallacious) argument may be made that, therefore, we can be 99% certain that the accused is the perpetrator. The flaw in the logic lies in looking at the statistic in isolation – instead of considering, as one must, who else shares this blood characteristic? In a population of 10 million, it is 1% of 10 million: 100 000 people. Thus, the flaw is revealed that in truth, the probability of the accused being the perpetrator is 1/100 000. Thus, whereas the probability that the accused is the perpetrator, is proposed, in error, to be 99%, it is, instead, 0.00001%. The "trick" to avoiding the prosecutor's fallacy is to take account of the "big picture". More information is required before one can make anything of the data contained in the initial premises.

The evidence presented by the state comprises various different forms of evidence including eyewitness testimony and admissions. The defence presented the testimony of the two accused to the effect that they were present at the scene of the robbery innocently. Thus, in this case I must consider not only the so-called direct evidence, but also the circumstantial evidence presented by the state.

FROM THEORY TO APPLICATION

[35] In adopting an abductive model of reasoning to establish the facts, what must one do? The implications are onerous.

[36] In my view, being faithful to the underlying precepts of abduction from Pierce and Bayesian theory, one must begin by being alert to any preconceptions – preconceptions in the sense that one will likely have formed estimates of the probabilities of certain events having occurred as the information is being presented. These may relate for instance to the appearance of the accused, he or she may walk with a limp or appear intimidatingly large and strong. One may, for instance, hear that a vehicle drove through a stop street without stopping – and form a prima facie view of the impropriety of doing so.

[37] One's attention may also be drawn inevitably to the fact that an accused is in custody and not on bail and that this in itself will mean that someone has considered the various factors, including, whether this person will stand trial or be a menace to the witnesses and that it is possible, of course, to draw an adverse inference against a person for this reason. We are cautioned not to do so by case law to the effect that in terms of the appearance of the accused, s/he may not be presented with any hint of a previous conviction.[32]

[38] This is the second manifestation of one's commitment to intellectual honesty. The first, of course, is to admit what it is that one is doing in the sense of what mode of reasoning one is adopting.

[39] The significance and value of setting out one's prior beliefs and prejudices is that you force yourself into an exercise of bringing what might otherwise be unconscious into one's consciousness where one can work with it or at least acknowledge it.[33]

[40] Next it appears sensible to sketch out the various versions which one will be required to adopt – of course, in the alternative. Each version will represent a mosaic or picture, perhaps a moving picture but a picture nonetheless. It may be helpful - indeed it would seem to be helpful - to consider what each party proposes presenting to sustain each picture that it proposes – it's version.

[41] At the very core of each and every version will be a number of “data points” or “dots” on the “canvass”. The exercise requires that one sketch out the dots and then look to see in what way they can be joined. In fact, in constructing any version one is required to join the dots. However, one will likely recall that – in doing this sort of exercise - the dots may be joined in a variety of different ways. On occasion – in

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[32] In *S v Stevens* 1961 (3) SA 518 (CPD) at pages 518H to 519C; *S v Papiyana* 1986 2 PH H115 (A) at 206; *S v Mthembu and Others* 1988 (1) SA 145 (A) at 155G-H; *S v Maputle* 2002 (1) SALR 550 (WLD) at 552; *S v Phiri* (2033/05) [2005] ZAGPHC 38, particularly at paragraph 15ff.

[33] See note 20. Even social psychology and in particular in the critical schools of thought this method is known as ‘bracketing’.

doing this sort of exercise - the “picture” the author wants you to see will be numbered. But in forensic fact-finding there is no such numbering and no particular reason to attempt to be faithful to anyone's construction of what it is that the dots show.

[42] It may be helpful to consider what it is that the prosecution, for instance, in a criminal case proposes to prove as the data points from which one must see the picture it proposes emerge. This is helpful for two reasons:

> [42.1] Firstly, because one will be alert to what it is that the prosecution in a criminal case, or perhaps the plaintiff in a civil case sets up for themselves as what it is that they intend to prove. This reveals the basis on which they see a particular version or picture, so that when the prosecution or plaintiff fails to prove or set down a particular data point, the question must arise as to whether the picture or version it proposes can truly be drawn. On some occasions, it will remain possible - some data points will be redundant, but in others they will be essential and in their absence, there will be no picture. The version will have failed to be established.
>
> [42.2] Secondly though it will allow one to consider whether, even if the plaintiff or prosecution is able to prove these data points, this must necessarily lead to the conclusion proposed.

[43] Even at what might be considered an early stage, it will be helpful to consider whether the picture proposed in fact amounts to anything or whether such a picture can be seen or can otherwise emerge from the various data points. Against this the opposing versions must be considered and to the extent to which they overlap the facts are common cause – however, the picture that one is being asked to see is very different.

[44] The standards of proof applicable in civil and criminal trials will also have implications for the work one must do at this stage. While it is trite that the standard of proof in a civil trial is proof on a balance of probabilities, one may easily overlook that this could be satisfied by one of two mutually exclusive propositions.

> [44.1] The first is simply that the plaintiff's version must be more probable than the defendant’s version so that for instance if the plaintiff proves his case at, say, a 40% probability whereas the defendant proves his or her case at a probability of only 30%, then the plaintiff has prevailed.
>
> [44.2] Another alternative – which appears to be adopted by our courts is the model by which a plaintiff must prove that his or her case (version) is more likely than not, so that s/he must prove at least an excess of 50%.[34]

[45] Nevertheless, in a civil trial one need consider only the version proposed by the plaintiff and the defendant. One may be in an entirely different situation in a criminal trial where, while the prosecution must of necessity propose one particular guilty version, the possibility may arise (such as for instance where an accused elects to

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[34] It appears that our Courts have adopted the approach pronounced by Denning J in *Miller v Minister of Pensions* ([1947) 2 All ER 372 (KB) at 374ff): ‘“we think it more probable than not”, the burden is discharged, but if the probabilities are equal it is not.’

remain silent), that the presiding officer must, of his own accord, consider the alternative possibilities – alternative versions.

[46] Each alternative version raises the prospect that there are other pictures that may be consistent even with what the state proposes to prove. Of course, since our law can only but take account of the possibility that an innocent accused person may have forgotten certain facts and can only propose several different alternatives, one will need to consider these alternatives up against whether the hypothesis of the state is the only reasonable explanation.

[47] In this way one may see the prospect of an accused's alternative versions presenting more force than a single version of the same probative value alone. Schreiner J famously commented[35] – regarding the reasoning of Davis AJA in the case of *R v Du Plessis*[36] that he (Schreiner) fails to see or understand – as Davis AJA proposed[37] - how discrete alternatives can somehow combine to present, as a composite, a reasonable doubt against the state's version. We see here how this is indeed possible.

[48] In *R v Du Plessis* Davis AJA allowed for the prospects of alternative innocent explanations operating together in favour of an accused.[38] The facts of that case concerned the theft of a motor vehicle where the critical piece of evidence against the accused having somehow been involved in the theft was the discovery by the police of a fingerprint on the underside of the front bumper. The rest of the car had been wiped clean presumably to clear it from any possible fingerprints.

[49] The accused in his defence explained that it may have been that he was indeed near the car which may have been driven by friends of his and that he had perhaps stood near the car leaning against it and lent down touching the bumper to steady himself, alternatively he may have lent down to tie his shoelaces and in doing so again touched the bumper.

[50] The significance of these explanations is that they are mutually exclusive and yet they were taken together. Thus, an accused person has in his or her favour that he or she may propose alternative possibilities except that, as the directive from Schreiner J appears, at its core, to caution against, is that these versions must at least be compatible.

[51] Thus, the question for consideration was, on the one hand, for the state, whether the fingerprint had been placed there when the accused made contact with the vehicle during the course of its theft or thereafter, knowing it to have been stolen. Alternatively, for the defence, whether his fingerprint had come to be on the bumper by virtue of some innocent explanation such as that he had lent on the car to steady himself either when he was leaning on the car or perhaps as he might have lent down to tie his shoelaces near the car.

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[35] In *Ex parte Slabbert & Prinsloo: Re R v Slabbert & Prinsloo* 1944 TPD 327 at 331.

[36] 1944 AD 314.

[37] At page 320ff.

[38] At page 320ff.

[52] If our criminal law required of an accused person to be able to account for his or her whereabouts at every moment of everyday things may well be different.
[53] I turn now to consider the law of circumstantial evidence and the implications, if any, of the model proposed here – of abduction.
[54] Thereafter I discuss the law of common purpose and whether it permits for a conviction of the unlawful possession of a firearm.
[55] I turn then to an application of the model of abduction to the facts of this case.[39]

CIRCUMSTANCIAL EVIDENCE

[56] Our law on circumstantial evidence is governed by what have come to be known as the two cardinal rules of logic in *R v Blom.*[40] These "rules" appear from the judgment of Watermeyer JA, as follows:

In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.[41]

[57] Despite the reverence with which this judgment is cited, it appears to be conceptually flawed and also appears to be at odds with what our courts do.
[58] What is crucial to notice – as Zeffertt and Paizes have – that there is a logical flaw built into the 'rules'. The rules propose that every inference sought to be drawn must be:

[58.1] Consistent with all the *proved facts*; and
[58.2] The only reasonable inference given the *proved facts*.

[59] Zeffertt and Paizes ask, rightly, what are these 'proved facts' – and on what standard must they have been proved.[42] In my view the entire exercise could grind to a halt here. However, I will let it be for the moment because there is possibly an even greater problem ahead: if every inference is to be tested against the standard of reasonable doubt – the 'rules' in *Blom* are a specific injunction to treat evidence in a piecemeal fashion – utterly contrary to what our courts in fact do.
[60] The reasoning adopted by Watermeyer AJ is, itself, contrary to his own rule.
[61] To understand the reasoning adopted by Watermeyer AJ, it is helpful to understand the basic facts of the case. The case concerned whether the accused was responsible for the death of a woman whose dead body had lain across a railway line and had been struck by a passing train. The train had done such damage to the body that it was difficult to know why the woman had died – and, most importantly,

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[39] On page 45ff.
[40] *R v Blom* 1939 AD 188.
[41] Ibid, pages 202-203.
[42] Zeffertt & Paizes *The South African Law of Evidence* 3rd ed (2017) at 103.

whether the accused was responsible. There was only so-called circumstantial evidence against the accused.[43]

[62] For Watermeyer AJ, the evidence fell into three categories:

(1) Evidence of the conduct of the accused before the event, showing that he had (*a*) a motive to kill the deceased, (*b*) a design to kill someone.

(2) Evidence to show that accused had an opportunity to kill the deceased.

(3) Evidence of the conduct of the accused after the event showing a guilty conscience.[44]

[63] As to my submission that the reasoning is flawed - one may see that in *R v Blom* itself, logical errors were committed in the application of the very rules which went on to become regarded as critical to reasoning by inference. Watermeyer JA, in *R v Blom*, from whose judgment the rules appear, agreed that nothing less than proof that the victim in that case was murdered in a particular way (by chloroform poisoning) would suffice to prove that the accused had killed her.

[64] However, in what may qualify as, with respect, a strange line of reasoning, he proceeded to arrive at that conclusion by accepting, by the operation of a *weak inference* – that the accused had killed the victim – and so in turn that the victim had been killed in the required way. What is critical to note is that his line of reasoning, as impressive as his logic appears, operates on the assumption of the answer to the ultimate question: that the accused had killed the victim.

[65] It may be helpful to strip this of its content so as to reveal the underlying logical form. What Watermeyer JA set for himself was that, to resolve the ultimate enquiry, whether the accused killed the deceased, say “D”, he must find “E” – whereas “E” is not the ultimate issue. The then reasoned as follows:

D is “reasonably possibly” true

E is ‘possibly’ true.

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[Conclusion]

[66] The reasoning of Watermeyer JA is as follows:

If the case be considered without regard to the evidence of Dr Naude and Inspector Talken, then it would, in my opinion, have been insufficient. It would have related entirely to facts and circumstances antecedent to and coincident with the girl's death, and even if the accused's motive and unlawful design connected with chloroform and opportunity were given their fullest weight, an inference that he killed the girl would not have been justified because in no way could they be regarded as excluding the hypothesis of murder by someone else.

But the evidence of a guilty conscience after the event supplies additional material for inference which when considered together with the other evidence makes it reasonably possible to infer that the accused killed the girl, and that leads to a

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[43] *R v Blom* 1939 AD 188, page 201.

[44] Watermeyer AJ, ibid, page 201.

possible further inference that he did it by means of chloroform, and excludes the hypothesis of murder by some other person.[45]

[67] Thus we see that 'evidence of a guilty conscience' is added to the other material to conclude that it was 'reasonably possible' the accused killed the victim – and that, from that, it became 'possible' to infer that the accused had done this by an application of chloroform.

[68] This extract reveals several problems:

[68.1] At times, the court operates by agreeing that the accused can only be regarded as the murderer if the victim was killed by chloroform – but then relies on what is, ultimately in question (whether the accused killed the victim), to conclude that the victim was killed by the administration of chloroform.

[68.2] The issue, which the court agreed it must establish, that the victim was killed by the administration of chloroform, was proved on the basis of a 'possible' inference.

[69] The reasoning is at least circular[46] and reveals that the court was satisfied to convict on what was only a *possible* inference.

[70] In addition, it appears to be possible to read the second rule as requiring that each and every inference sought to be drawn must – for a criminal case – be the only reasonably possible inference.[47] This interpretation would, in the context of a criminal trial, demand that a court, in drawing an inference, considers each and every proposed inference to be drawn, individually against the standard of proof beyond a reasonable doubt, and if found to fail, must be discarded – and so on for each and every inference sought to be drawn.

[71] It is helpful to distinguish two kinds of reasoning: chain type reasoning versus what may pass under different names as rope, cable or mosaic type reasoning.

[71.1] Where one adopts 'chain type' reasoning – the name arises from the analogy of a chain- which is only as strong as its weakest link. Thus, in a case where one adopts "chain type" reasoning", every link must be – in a criminal case – as strong as whatever "proof beyond a reasonable doubt" would demand.

[71.2] Where one adopts "rope/cable style" reasoning, one permits items of evidence, which would not in themselves carry the weight of 'proof beyond a reasonable doubt', but one may rely on several such "strands" which, when weaved together, may well carry such weight. We see our courts adopting this style of reasoning – but it is expressly prohibited by the second of the *Blom* rules.

[72] As indicated, Watermeyer AJ himself relied on rope/cable style reasoning – contrary to his own rule – the second rule in *Blom*: every inference must be the only reasonably possible inference.

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[45] At page 205.

[46] This circularity was argued by Counsel (Snitcher) for the accused (see page 198) – but ignored.

[47] Zeffertt & Paizes *The South African Law of Evidence* 3rd ed (2017) 103ff.

[73] For some, this interpretation is neither sensible nor even possible. Yet it is the interpretation given to the circumstantial evidence presented in the infamous Australian "dingo case" of *R v Chamberlain*.[48] This approach has since been rejected in Australia.[49]

[74] This interpretation would also require of our Courts that they consider evidence on a piecemeal basis, whereas, clearly, they do not. Our Courts have shown that they are prepared to aggregate discrete facts and inferences together to arrive at a sensible answer.[50]

[75] That they do so is also evident in the 'mosaic' to which our courts refer. In *State v Hadebe*,[51] the Supreme Court of Appeal followed the approach set out in *Moshephi & Others v R*,[52] where the following was said:

The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual parts of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical, examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees.[53]

[76] Each piece of a mosaic may be unclear or even vague in itself, but, when placed with enough other pieces, it reveals a 'picture' of what occurred.

[77] Thus, following the general model of abduction proposed above – to the extent to which it is consistent with what may sensibly be extracted from the 'cardinal rules' in *R v Blom* – the following seems to follow:

> [77.1] There can be nothing wrong with a rule of logic that reminds one that one cannot hold two mutually exclusive beliefs simultaneously. One may also not draw an inference from facts where one of those facts is inconsistent with the inference. However, this must be true of all inferences – primary (from 'direct evidence') or secondary (from 'circumstantial evidence').

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[48] *Chamberlain and Another v The Queen [No 2]* 1984 153 CLR 521 536.

[49] See, in particular *Shepherd v The Queen* (1990) 170 CLR 573 270ff.

[50] *R v De Villiers* 1944 AD 493 508-9; *S v Cwele and another* 2013 (1) SACR 478 (SCA) paragraph [19].

[51] *S v Hadebe* 1997 (2) SACR 641 (SCA). The Constitutional Court also adopted this mode of reasoning in *S v Molimi* 2008 (3) SA 608 (CC) at paragraph 51 – there holding that the *mosaic* was not sufficiently complete.

[52] *Moshephi and Others v R* (1980-1984) LAC 57.

[53] *Moshephi and Others, a*t 59F-H

[77.2] We must decide what standard of proof ought to be applied to any particular inference or issue and consider whether, given the evidential material *considered together*, including any inferences that are at least permissible, the appropriate standard is met.

[77.3] The standard of proof required will be determined by the importance of the fact in question. Where the standard of proof to be satisfied is proof beyond a reasonable doubt, it will be perfectly acceptable to ask whether any other reasonable explanation could account for all the evidence. This is simply a different way to ask whether another reasonable possibility exists that would explain the evidence in question.

[78] There is nothing new or startling about this approach. In fact, it is the suggestion only that we continue to do this where we do and that we are not distracted by thinking that we need to switch into some other special mode of thought that is simply a distraction. It really is nothing more than to suggest that we should adopt – as I believe we do in any event, when we do not get distracted: abductive reasoning.

[79] One may find that inevitably the following question is posed:

What are the chances that:

Q (an inference) is not true (the null hypothesis);[54]

Given[55] that:

A;

B;

C; [and] ...

[80] In the classic example of the man (X) carrying a blood-stained sword leaving the home of a person (Y), who, on immediate inspection, is found to be dead for having been run through with a sword, the sort of question we seem naturally inclined to ask is: what are the chances that X was not responsible for the death of Y, given that:

The victim was killed with a sword;

X was with Y immediately before Y was found to be dead;

X had a sword; and

X's sword was blood stained.

[81] Given that the answer to this question takes on the significance of answering whether we regard X as innocent or guilty, the degree of certainty that is required is beyond a reasonable doubt.

[82] There will be instances in which a fact, or secondary fact, from which an inference, which carries the ultimate significance (of guilt or innocence), may only attract a degree of certainty as to its existence of far less than the ultimate degree of certainty.

[83] On a variation of the analogy of a mosaic,[56] a more helpful analogy may be that of a rope or cable - where each strand of the rope or cable is, in itself, weak, and

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[54] Where Q may be anything that requires proof for any conclusion to follow - even if that conclusion is a secondary fact, upon which a further inference must be drawn.

[55] Proved at whatever the appropriate standard is for each item. Again, here, we must observe that nothing inconsistent with the inference sought to be drawn may form part of the ‘givens’ - the basis for drawing the inference.

unable to ‘carry the load’ at the standard of proof required of the inference required. But - as the analogy goes - the strands may, when weaved together, carry the ‘required load’. This is, of course, exactly what is required by abduction.

[84] In contrast, by analogy, one may note that a chain carries the weight required of it to support, by the operation of a completely different mode. Each link in a chain must be capable of carrying the load.

[85] This mode of reasoning (by analogy), is the sort that is appropriate to facts or inferences which must all be proved at the required degree of proof to sustain the ultimate conclusion. Thus, on a charge of murder, where proof is required that the accused, acting with the required *mens rea*, committed the wrongful conduct. Each of these must be proved beyond a reasonable doubt, and each component (the elements (conduct, unlawfulness, capacity and fault) must be proved beyond a reasonable doubt. Thus, a chain of at least four links must be established, where each link is proved beyond a reasonable doubt.

[86] Then, if, in any case, whether the accused committed the conduct in question, turns on whether, and only whether, the accused was, say, in possession of a 9mm firearm, then proof that the accused was in possession of such a 9mm gun, assumed the significance of the ultimate conclusion, and must be proved beyond reasonable doubt.

[87] Other circumstances may arise that require that a conclusion of ultimate significance is, as usual, proved beyond a reasonable doubt, but it may be that this conclusion can be proved by the combination of proof of any, say, 5 of any 100 other facts or inferences. So, for instance, if the question is whether the accused killed the victim, this will depend on innumerable facts or inferences which will support the conclusion.

[88] One may be satisfied that, for instance, the accused had threatened to kill Y, had attempted to do so before, has stood to gain financially or otherwise from the death of the victim, had opportunity or was seen in the vicinity of the victim around the time of death, said when he woke up that day that he was going to kill someone that day, and that blood was found on his clothes, his clothes were torn, he had scratch marks on his face and the victim had skin under his/her nails, and finally that the accused had asked the local reverend to forgive his ‘sin’ that night - whereas he had never sought redemption before. If one is not satisfied, there will be innumerable facts or inferences which would implicate the accused.

[89] Of course, anything which is inconsistent precludes the required inference. This is the work done, by, say, an alibi.[57] An alibi is straightforwardly inconsistent with the guilt of an accused and cannot be forged together with other facts to draw the ultimate conclusion of guilt.

[90] A view of circumstantial evidence as creating alternative possible hypotheses which may be constructed of strands in a rope or cable can easily and will be accommodated in the abductive model proposed. A further benefit of recognising this

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[56] See paragraph [75]ff.

[57] Where common purpose by prior agreement is not implicated.

is that it permits for the construction of alternative hypotheses which are not linked in the same way as the scales which we often have reference to assist us with the analogy of balancing.

[91] The difficulty with the notion of a scale is that whatever goes in one pan or taken from that pan effects the relative position of the other pan. This is difficult to conceive where the presiding officer needs to construct, at least conceptually, all *independent* versions or hypotheses while acknowledging at the same time that there may remain an extent to which the truth of what happened will remain unknown and – if I may be so bold – to some extent, unknowable.

[92] It follows from what I have said, that a court is engaged in the determination of, in a criminal case, whether the states version has been proved beyond reasonable doubt and in the case of the civil trial whether the version of the plaintiff has been proved on a balance of probabilities.

[93] The question that is addressed on this model is whether, treating the guilty hypothesis as a rope or cable, all of the necessary strands are in place – treating the wrongful conduct and wrongful mental state as all part of ultimately one composite event.

From The Legal Journals

Murhula, P B & Tolla, A D

"The Effectiveness of Restorative Justice Practices on Victims of Crime: Evidence from South Africa"

International Journal for Crime, Justice and Social Democracy 10(1)2021: 98-110.

Abstract

Restorative justice is a holistic philosophy that has become increasingly popular in reformist criminal justice debates and criminological research. However, there is some debate as to whether its programs adequately address victims' needs. To this end, this paper analyses the effectiveness of restorative justice practices on victims of crime. Drawing on my interviews conducted with victims of crime and legal experts in South Africa, the findings of this study offer support for the effectiveness of a restorative justice approach to addressing victim satisfaction. Restorative justice can

enable the needs of victims to be more fully considered during the criminal justice process. This is very different from contemporary criminal justice, which has often effectively excluded victims from almost every aspect of its proceedings despite its continuous reform to protect and promote victims' rights.

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Contributions from the Law School

HOW THE QWELANE JUDGMENT NARROWS THE SCOPE OF PROHIBITED HATE SPEECH, WHILE REJECTING THE LIBERTARIAN VIEW OF FREEDOM OF EXPRESSION

Last week the Constitutional Court, in a ground-breaking judgment, confirmed that a homophobic article written in 2008 by Jon Qwelane, the late journalist and South African ambassador to Uganda, constituted hate speech in terms of section 10(1) of the Prevention of Unfair Discrimination Act (PEPUDA). Although the court found that section 10(1) was unconstitutional and invalid, it nevertheless held that Mr Qwelane was guilty of hate speech in terms of a reworked, constitutionally compliant, version of section 10(1). The judgment considerably narrows the scope of prohibited hate speech, while rejecting the libertarian view of freedom of expression embraced by the Supreme Court of Appeal (SCA) in its earlier *Qwelane* judgment.

Ever since PEPUDA came into force almost 20 years ago, different courts have interpreted and applied the prohibition on hate speech in section 10(1) of PEPUDA in markedly differently ways, creating much confusion and uncertainty. To add to the uncertainty, some courts suggested that section 10(1) was constitutionally invalid because it was overbroad and limited speech protected by section 16(1) of the South African Constitution. It is therefore a relief that the Constitutional Court, in its recent judgment in *Qwelane v South African Human Rights Commission and Another,* finally clarified matters, and that it did so in a way that seriously grapples with the impact of structural inequality on the intensity and nature of harm caused by specific types of speech.

Recall that, in its original form, section 10(1) of PEPUDA prohibited any person from publishing, propagating, advocating or communicating words that are based on prohibited grounds like race, sex, gender and sexual orientation, religion, belief and disability, against any other person, where the words could "reasonably be construed to demonstrate a clear intention *(a) to be hurtful; (b) be harmful or to incite harm; (c) promote or propagate hatred*."

As some lower courts previously did, the SCA in its *Qwelane* judgment interpreted the underlined words above disjunctively (as if there was an "or" and not an "and" between each subsection) and found that section 10 established three distinct grounds on which hate speech could be based. Section 10(1) thus prohibited speech targeting a person based on their race, sex, gender, sexual orientation and other prohibited grounds that could reasonably be construed to be merely "hurtful" to that person – regardless of whether the speech was reasonably intended to be harmful or inciting harm, or to promote hatred against that group. The SCA then declared section 10 unconstitutional to the extent that it prohibited speech merely intended to be "hurtful", and because it included speech based on grounds other than race, ethnicity, gender, religion or sexual orientation.

The Constitutional Court, in a unanimous judgment authored by Justice Steven Majiedt, held that section 10(1) must be read conjunctively, thus one must determine whether the words could reasonably be construed to demonstrate a clear intention to be hurtful AND to be harmful or to incite harm AND to promote or propagate hatred. It nevertheless found that section 10(1) was unconstitutional, both because the inclusion of "hurtful" unjustifiably limited the right to free expression in section 16(1) of the Constitution, and because the term was vague and, on a conjunctive reading, appeared "to be redundant" and thus superfluous. (I find the reasoning here confusing and muddled, as it is not clear how the inclusion of a phrase that that does not alter the meaning of the section could limit any of the rights in the Bill of Rights.)
The Constitutional Court gave parliament 24 months to fix the problem, but ordered that until that is done section 10(1) should read as follows: "… no person may publish, propagate, advocate or communicate words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred."

Not only does this interim definition excludes any mention of "hurtful" speech, it also requires the subsections to be read conjunctively. This means speech can only constitute hate speech if it targets individuals based on their race, sex, gender, sexual orientation or other prohibited grounds and could reasonably be construed as having the intention to be *both* harmful or to incite harm *and* to promote or propagate hatred. Read on its own, the courts' reworked definition of hate speech does not depart radically from the various approaches taken by lower courts – including by the SCA. Moreover, like the SCA, the Court also endorsed the view that "the expression

of unpopular or even offensive beliefs does not constitute hate speech", and continued:

[E]xtreme detestation and vilification which risks provoking discriminatory activities against that group". Expression will constitute hate speech when it seeks to violate the rights of another person or group of persons based on group identity. Hate speech does not serve to stifle ideology, belief or views. In a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not infringe the rights of persons or groups of persons.

But despite these similarities, the Constitutional Court approached the problem of hate speech, and how to identify the kinds of speech-harm that could permissibly be regulated, in a radically different way than the SCA did. Specifically, the court acknowledged that words may impact differently on different groups who occupy different structural positions in society. Speech-harm will be particularly acute where the words "contribute towards creating or exacerbating systemic disadvantage and subordination". The Court had previously recognized "the presence of deeply rooted structural subordination in relation to race" in our society. In *Qwelane* it extended this by acknowledging the existence of "structural subordination and vulnerability relating to sexual orientation and gender identity" as well.

This approach recognizes that objectionable or offensive speech is more likely to have an impermissible harmful impact on individuals from subordinated groups (in most contexts, this would be black people, women, LGBTQ+ people) than on individuals from socially privileged and dominant groups (in most contexts this would be white people, men, heterosexuals). The identity and status of the speaker and the individuals being targeted by the speech, the historical context and circumstances in which the speech occurred, and to what extent the speech perpetuates the structural subordination and vulnerability of the targeted group, are relevant factors to be considered when applying the section 10(1) test.

For example, and simplifying slightly, this approach suggests that when a white person targets black persons because of their race by using the "k" word and other racial slurs in order to humiliate and silence them and to assert the speakers imagined racial superiority, the intensity of the harm may be greater than when a black person targets white persons by referring to them as "Boers" and accusing them of "stealing the land". This is because the latter speech is not likely to produce or reinforce the subordination of white people in society. Similarly, the intensity of the harm may be judged to be greater when a heterosexual targets gay men by calling us "moffies" and accusing us of paedophilia, than when a gay men calls a heterosexual man a "breeder", or a patriarchal bigot. Of course, in all cases, the context in which words were spoken, the actual words used, and other relevant factors may also influence this assessment.

The reasoning employed by the court to justify its conclusion that Mr Qwelane was guilty of hate speech in terms of the revised text of section 10(1) of the Constitution provides further insight into the court's approach. Noting that Mr Qwelane vilified the LGBT+ community as "animals", and as less than human beings, and that he equated our sexuality with bestiality, the court concluded that the article unabashedly exuded his loathing and revulsion for LGBTQ+ people. But the court went further by recognizing that:

homophobic speech is part and parcel of the broader system of homophobia and transphobia in South African society which includes both hate speech and violent crimes perpetrated against members of the LGBT+ community. Homophobic speech is not only problematic because it injures the dignity of members of the LGBT+ community, but also because it contributes to an environment that serves to delegitimise their very existence and their right to be treated as equals. Hate speech regulation in our country ought in my view to be grounded in the express anti-racist and anti-sexist tenets of our Constitution. In this respect, our jurisprudence is unique because of its strong pronouncements on the transformative nature of the Constitution and its aim of eradicating the remnants of our colonial and apartheid past.

This passage (there are similar passages elsewhere in the judgment) makes clear that the court believed that the constitutionally permissible regulation of hate speech pro-actively protected subjugated individuals from the infringement of their right to equality and non-discrimination. When one lives in an environment that delegitimises your existence and your right to equal respect and concern, purely on the basis of your sexual orientation or gender identity (or on the basis of your race, sex, gender, or a combinations of these), you are likely to face informal discrimination and marginalisation in myriads of ways. But worse, LGBTQ+ people are also more likely to be assaulted and killed in this environment in which our lives are not equally valued and our right to exist is questioned. (Of course, the degree of likely harm will also depend on other factors such as your race, gender and class.)

I assume "libertarian" critics will not be happy with this judgment, not only because it confirms yet again that the right to freedom of speech is not absolute, but also because it acknowledges the ways in which racism, sexism and homophobia and the systems and structures of which they are a symptom, limit individual agency and disadvantages those on the wrong side of the structural divide. Individuals and religious organisations who contribute greatly to the creation of the environment that serves to delegitimise our existence, will probably also complain that the judgment limits their right to harm us.

But the Constitutional Court has spoken. The end.

Prof Pierre de Vos on his blog *Constitutionally speaking* on 3 August 2021

Matters of Interest to Magistrates

CONSTITUTIONAL COURT RULES THAT MARRIAGES OF BLACK WOMEN MARRIED IN TERMS OF SECTION 22(6) OF THE BLACK ADMINISTRATION ACT 38 OF 1927 ARE AUTOMATICALLY IN COMMUNITY OF PROPERTY

Historically marriages of black people were regulated exclusively by the Black Administration Act, 38 of 1927 ("BAA"). In terms of section 22(6) of the BAA, the default position for black couples was that their marriages were automatically out of community of property. This section was repealed by the Marriage and Matrimonial Property Law Amendment Act, 3 of 1998 ("Amendment Act"), which deleted section 22(6) of the BAA and inserted of section 21(2)(a) and 25(3) into the Matrimonial Property Act 88 of 1984 ("MPA") which provided black couples that were married under section 22(6) of the BAA with an "opportunity" to change their matrimonial property regimes within two years after the commencement of the MPA, from 2 December 1988.

Relevant Factual Background

Mr Sithole and Ms Sithole got married on 16 December 1972 in terms of section 22(6) of the BAA. In 2000, they purchased their matrimonial home which was registered in the name of Mr Sithole. Their relationship started deteriorating, and Mr Sithole then threatened to sell the matrimonial home. Ms Sithole approached the High Court to seek intervention and argue that the provisions of section 21(1) and 21(2)(a) of the MPA are unconstitutional because it unfairly discriminated on the basis of race and gender and should be declared invalid.

Courts Findings

The High Court ("HC"):

- The HC ruled in Ms Sithole's favour and declared that section 21(2)(a) of the MPA was unconstitutional; and invalid to the extent that it maintains and perpetuates the discrimination brought about by section 22(6) of the BAA i.e. that marriages entered into before 1988, by black persons, are automatically out of community of property.
- The HC ordered that all marriages of black persons concluded in terms of section 22(6) of the BAA are declared to be marriages in community of property from the date of its order; and permitted parties who wished to opt out to do so by executing and registering a notarial contract.
- The matter was referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

The Constitutional Court ("CC"):

The Constitutional Court held that the dire consequences suffered by black people as a result of such discriminatory laws made it compelling that such laws be urgently obliterated from our statutes. It found section 21(2)(a) of the MPA to be unfairly discriminatory and such discrimination was not justifiable under section 36 of the Constitution. The CC accordingly confirmed the HC's declaration of constitutional invalidity and the retrospective effect thereof.

Important considerations from this case:

Powers of the Constitutional Court:

- The CC did not limit the retrospective effect of the declaration of invalidity; or suspend the declaration of invalidity to allow the legislature to cure the constitutional defect because the Second Respondent (the Minister of Justice and Correctional Services) did not request this relief. Section 167(5) of the Constitution permits the CC to make a final decision whether an Act of Parliament is constitutional and to confirm any order of invalidity made by any court a quo, before such an order may come into effect. It is on this basis that the CC did not overstep its powers and had the authority to grant an order that does not limit the retrospective effect of the declaration of invalidity.
- An expert affidavit filed by the Applicant confirmed that despite the measures implemented by the MPA, research has showed that men believe that they should be the primary decision-maker at home and such men are unlikely to agree to change the matrimonial property system, when such a change would shift a significant portion of the decision-making power to their wives. The judgment therefore implements the automatic change in the matrimonial property regime, without requiring the consent of the other spouse.
- Additionally, the CC held that the retrospective regime which the court order would permit is properly aligned with the prospective regime created by Parliament for other couples of other racial groups and the effect is that the default position in all marriages would be marriages in community of property. Accordingly, the court did not deem it necessary to refer this matter back to the legislature.
- The expert affidavit demonstrated that there are more than 400 000 women who could be in the same position as Ms Sithole and would benefit from the declaration of invalidity. The Applicants relied on the Gumede (*Gumede v President of Republic of South Africa and* others 2009 (3) SA 152 (CC). and (Ramuhovhi *and others v President of the Republic of South Africa and others* 2018 (2) SA 1 (CC). cases in their submissions and held that in both cases, the Court found the Act in breach of the constitutional rights to equality and dignity and the court made an order in the circumstances that was just and equitable.

- The Applicants submitted that even if a woman was potentially able to obtain the consent of her husband to change their matrimonial property regime; this protection is only available if she has knowledge of her rights and the necessary access to legal services, to enable her to approach a court and/or arrange the execution and registration of a notarial contract. A substantial portion of the women married under the BAA are not in such a position and referring the matter back to the legislature would reinforce discriminatory laws in our statutes and delay the intention of the CC that such laws should be urgently obliterated.
- The Applicants, therefore; requested that the CC confirm the order of the court *a quo* and submitted that because the statutory provision was found to be inconsistent with the Constitution, the CC should declare it to be unconstitutional and make an order that is just and equitable.

Equality considerations:

- By placing black women whose marriages were concluded, before 2 December 1988, in the same position as women of all other races whose marriages were concluded in the same period, the judgment achieves both formal and substantive equality. The right to equality is reinforced because black women do not have to apply to a court to change their matrimonial property regime; neither do they have to obtain the consent of their partners to give effect to such a change in their marital regime.
- By confirming the declaration of invalidity, this judgment ensures that legislation which was in place and which reinforced the subordination of black women who were already facing multi-faceted forms of discrimination and disadvantage is done away with and black women are treated as substantive equals to women of other races.
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Practical considerations:

The automatic change in matrimonial regimes raises a number of practical considerations which attorneys should be aware of when advising their clients.

- The judgement is retrospective. Meaning, with effect from 14 April 2021, all marriages in terms of the BAA that were automatically out of community of property are now in community of property; unless the couples specifically opt out.

    - Couples who wish to opt out of the in community of property must notify the Director-General of the Department of Home Affairs in writing of such a decision.
    - In terms of the judgment, for those couples who are not aware of this judgement and upon death of their spouse establish that their marriage is in community of property, a generic order is made in favour of a person claiming specific prejudice arising from the retrospective change

of the matrimonial regime to approach a competent court for appropriate relief.

- The retrospective effect of the judgment does not, however; affect the legal consequences of any act or omission existing in relation to a marriage before the CC order was made and the order does not undo completed transactions in terms of which ownership of property belonging to any of the affected spouses has since passed to third parties.

Conclusion

In South Africa where black women face dual oppression, this judgment addresses the historical unfair discrimination and inequality faced by black women by affording them the same protection of the law that women of other races enjoy.

We are currently unable to determine whether black women will indeed benefit from this judgement in the future. However; this judgement also makes provision for persons claiming specific prejudice (arising from the retrospective change of the matrimonial regime) to approach a competent court for appropriate relief, thus making it a balanced judgement.

The power of our Courts to develop the law in line with our Constitutional values (in instances where the legislature has failed) and provide relief to vulnerable members of society is reinforced by this judgement.

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(The above post appeared on the https://africanlii.org/ website on 10 August 2021).

A Last Thought

"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. It 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 Paragraph [1].