e-MANTSHI

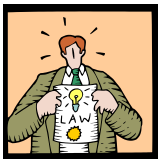
A KZNJETCOM Newsletter

September 2021: Issue 178

Welcome to the hundredth and seventy-eight 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 South African Law Reform Commission announced the availability for general information and comment of its Project 100E Issue Paper 41 regarding the review of aspects of matrimonial property law.

The Matrimonial Property Act 88 of 1984 (Matrimonial Property Act) was passed to address perceived shortcomings in the law governing matrimonial property at the time and has been in place for over 35 years. In August 2018, the Commission published Issue Paper 34 where the closing date for comments was set for 16 November 2018. As is evident from the few comments received, Issue Paper 34 did not elicit wide public interest. As such it has been decided that a revised/supplementary issue paper be published replacing the Commission's initial Issue Paper 34. The revision is considered particularly necessary in the light of recent case law and law reform overtures since the issue paper was published, as well as statutory and common law changes.

The Matrimonial Property Act contains certain default provisions which purport to apply to all valid marriages unless the spouses enter into an antenuptial contract. However, the applicable rules often result in substantive gender inequality, leaving women (and their children) destitute at the end of the marriage. In addition, religious marriages not solemnised in terms of the Marriage Act 25 of 1961 are currently treated as being out of community of property without accrual.

A large number of South Africans also live together in intimate relationships without marrying. These relationships have never been fully legally recognised. This means that a large category of people cannot access the law and the courts when their relationships dissolve. They are denied fair access to assets accumulated during the relationship, maintenance and other benefits which people who are married are accorded by the law. The lack of a statutory remedy to claim a share of partnership property outside of valid marriages is a problem with significant gendered consequences, potentially leading to the social and economic vulnerability of women (and children) when intimate relationships end. Although the law has been developed by the courts to provide life partners with the possibility of entering into a universal partnership, disputes about the existence and the terms of universal partnerships in the context of cohabitation are common. As a result, there is a need for a statutory framework to bring clarity to the position of cohabitants. In the context of marriage and divorce, if substantive gender equality is to be achieved, laws relating to matrimonial property have to, inter alia, seek to place spouses in an equal position, taking into account the impact of factors like the unequal division of domestic and family-care responsibilities between wives and husbands and differences in bargaining power between men and women. At this stage, the issue paper does not contain proposals for law reform. The Commission seeks comments on any relevant issues in the paper. Comments will provide direction on the proposed scope and focus of the investigation. On the strength of these responses, a discussion paper will be prepared, setting out the Commission's provisional proposals. Responses to the discussion paper will then be collated and evaluated in order to prepare a report setting out the Commission's final recommendations.

The report (with draft legislation) once finalised, will be submitted to the Minister of Justice and Correctional Services. Respondents are requested to submit written comments and representations to the Commission by 30 November 2021 for the attention of Maureen Moloi at the following address: The Secretary South African Law Reform Commission Private Bag X668 Pretoria 0001 E-mail: gmoloi@justice.gov.za

The report can be accessed here:

https://legalbrief.co.za/media/filestore/2021/09/Media_Statement_relating_to_Issue_Paper_41_Matrimonial_Property.pdf

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Recent Court Cases

1. S v Mashego (R24/2021; A360/2020) [2021] ZAMPMBHC 36 (10 August 2021)

The authority judicial officers are endowed with are from the public and it is not meant to intimidate it, but to execute justice to its members with respect and humility. Judicial officers are not in these positions because they are indomitable.

Ratshibvumo J

[1] Introduction.

This is a special review from Bushbuckridge Magistrate Court. It was sent by the Senior Magistrate, Mr. CM Mokgotho, in terms of section 304 (4) of the Criminal Procedure Act, no 51 of 1977 (the Act). On 19 March 2021, Mr. Mashego (the accused) was sentenced to six months imprisonment following a conviction for "failure to appear in court" by the Acting Magistrate (the Magistrate). The Senior Magistrate sent the matter on review because he was of a view that the proceedings may not have been in accordance with justice. The concerned Magistrate was afforded an opportunity to respond to the queries raised by the Senior Magistrate in his covering letter. I also raised questions in terms of section 302 (2) of the Act to which he responded.

[2] I was privileged to have the submissions from the office of the Director of Public Prosecutions, Mpumalanga, which were made available following my request in terms of section 302(3) of the Act. I am indebted to Adv. N Mpolweni, the Deputy Director of Public Prosecutions (the DDPP) assisted by Adv. Z Mata, whose views greatly assisted me in this judgment. The DDPP raised several incongruities in this case on which he argues that the conviction and sentence imposed on the accused should be set aside. While this can be done based on any one of the uncovered irregularities, I deem it necessary to look into all of them as this may be necessary for judicial training going to the future.

[3] Background.

The accused, then aged 32, was arrested on 23 September 2020 on charges of malicious damage to property. It was alleged that he damaged a window valued at R200, and contravening the Domestic Violence Act 116 of 1998, for making verbal threats. His mother was the complainant in all the charges. Although the complainant later filed a withdrawal statement with the police, this was not acceded to by the

Senior Prosecutor. She ended up acquiring services of an attorney to represent her son and apparently also paid for his bail. The accused remained in custody until 13 October 2020 when bail was fixed for him in the amount of R500.00. It is not clear from the record as to when the accused paid this. He was however in default when the matter was called on 17 November 2020. Bail money was therefore finally forfeited to the State on 07 December 2020.[1]

[4] Upon his court appearance on 18 December 2020 following his arrest, the accused presented a doctor's letter to the effect that he was not fit to attend court on 17 November 2020. The Magistrate did not attach much weight to it as he thought it was not necessary to hold a "full inquiry." Bail was however fixed again for him at R700.00. Unfortunately this too was forfeited to the State on 07 February 2021 after the accused was again in default. He was again arrested and brought before court on 19 March 2021. An inquiry was conducted after which the accused was convicted and sentenced as reflected in paragraph 1 above.

[5] Automatic Review.

Section 302(1) of the Act provides,

(a) Any sentence imposed by a magistrate's court-

(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children's Act, 2005 (Act No. 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii)…

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction. [Own emphasis].

[6] As already alluded to, this case was not sent on review in terms of the above provision, but by way of special review as provided in section 304(4) of the Act. Given this confusion, I raised a question on the date on which the Magistrate was appointed and why the matter was not sent on review in the ordinary course if he had not held that position for longer than seven years.

[7] In response, the Magistrate indicated that his date of appointment to a position of

[1] It is apparent that the Magistrate calculated the fourteen days from the date the accused was in default excluding the weekends. Section 1 of the Act however defines a day as "the space of time between sunrise and sunset." There is no reason why the space between sunrise and sunset on weekends cannot be included in the calculation of fourteen days as the Act does not refer to business days but just days. The calculation may have been confused with Rule 2(2) of the Magistrate Court Rules which specifically excludes Saturdays and Sundays in calculation of *dies*. In the Criminal Procedure Act, there is no such exclusion unless it is specified in a particular section as was done is sections 54(3) and 144(4)(a). Thus the seven days' postponement allowed for bail hearing in section 50(6)(d) of the Act includes weekend days, otherwise the calculation would amount to nine days. In light of the above, this case should have been postponed to 01 December 2020 for final forfeiture of bail.

a magistrate was 01 July 2019. He conceded that the case was as such subject to automatic review and gave a one line explanation for his failure to send it as provided in the Act saying, "it was due to an error and/or oversight on my part due to work load." The DDPP submitted that the explanation by the Magistrate is not good enough especially because he further dealt with this matter on more than one occasion on later dates following the date of the sentence. He had more than sufficient time to rectify his "error" by ordering that the record be transcribed and sent to the High Court for review.

[8] In *S v Jacobs*, *S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe*[2] the court expressed frustrations at non-compliance with section 302 of the Act by the Magistrates who delay the submission of review matters to the High Court. It proceeded to conclude as follows,

"In our view, if an accused's constitutional right of review is effectively stymied and rendered nugatory because of egregious delay, for example where, by the time the matter is reviewed he has already served the sentence that was imposed upon him, his constitutional right to a fair trial has been infringed and this may constitute a failure of justice and a ground for the Court not only to decline to certify that the proceedings are in accordance with justice, but also to set aside or correct the proceedings or to make any other order in connection with the proceedings as well, to the Court, seem likely to promote the ends of justice. Judicial pro-activism requires that this Court move beyond being a passive bystander lamenting lengthy and unnecessary delays in the automatic review process without doing something practical in order to attempt to remedy systemic deficiencies and indeed, in the interests of justice the Court has a duty not only to the accused in the matter before it but also to other unrepresented accused who may have been sentenced at a particular magistrate's court where there is a clear problem, to ensure that effective measures are taken to resolve such deficiencies."

[9] In *S v Joors*,[3] the High Court went to the extent of directing that a copy of the judgment, where there was undue delay in the submission of a case for review, be referred to the Director of the Legal Resources Centre for consideration as to what assistance should be given to the accused in order to achieve appropriate redress. In *S v Osmond*,[4] this court held the following:

"Presenting a case for review after an accused has already served the sentence defeats the whole purpose of review. We need to understand that, for an accused to have their case reviewed by a High Court, is a right and not a privilege. We all owe it to the Constitution and to the public to respect this right and to do all within our means to make this a reality. If all the court support officers do their part without negligent delays in submitting review records, injustice can be circumvented."

[10] It is inconceivable that here we are not dealing with a case of a delay in submission of a review matter. This is a case of non-submission of a case for review altogether. Had it not been picked by the Senior Magistrate, the accused would have

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[2] *2017 (2) SACR 546 (WCC)* at para 40.
[3] 2004 (1) SACR 494 (C).
[4] 2020 (1) SACR 357 (ML) at para 33.

suffered great and unexplained injustice due to non-compliance with the provisions of section 302 of the Act.

[11] Failure to have this matter submitted on review was a gross irregularity which denied the review court of an opportunity to rectify any injustice the accused may have suffered. In just over a month from today, the accused would have served his full sentence without an opportunity to be considered for parole as he remains an awaiting trial prisoner with no bail. When one's right to liberty is taken away by judicial means, great care should be exercised to avoid any margin of error.

[12] For the Magistrate to simply put it in one line saying, "it was an error and/or oversight on my part due to work load," leaves much to be desired. The workload magistrates face daily is not unique to one office. All the magistrates countrywide work under tremendous pressure due to increased responsibilities[5] which often come without the creation of new magisterial posts and the vacancies that sometimes take long to be filled. Magistrates however take an oath to "administer justice to all and uphold the law and the Constitution of the Republic, without fear, favour and prejudice…" The duty to obey the law and to respect everyone's constitutional rights is superior to any workload judicial officers may have. In fact, their workload should be seen as increased in terms of protecting these rights as opposed to being so busy that the rights are overlooked.

[13] As it is apparent hereunder,[6] the Magistrate in this case may have been too busy that he was distracted from protecting the accused's rights, but some of his work was unnecessary and self-created. I refer to the events of 01 April 2021 when the Magistrate spent a lengthy period of time (six pages of the transcribed record) trying to force a Legal Aid Attorney on the accused, while the accused was uninterested. The Magistrate ended up making an order against the accused's wish and postponed the matter for a legal representative. This was unnecessary and should have been avoided. Time spent in this regard could have been utilised effectively in just giving the clerks an instructions to transcribe the record and have it sent on review. I agree with the DDPP that when the Magistrate dealt with the matter on several occasions after the sentence, it should have come to his attention that the case should have been sent on review. His failure to comply with section 302 of the Act is therefore inexcusable.

[14] The nature of inquiry.

The Magistrate was also asked, "in terms of what empowering statute or authority were the proceedings held on 19 March 2021 (which resulted in the accused being convicted of "failure to appear in court" and sentenced to six months imprisonment), conducted?" His response was that "the proceedings were conducted in terms of section 67(2)(c) and 67(3) of Act 51 of 1977."

[15] The said section provides as follows:

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[5] *Association of Regional Magistrates of Southern Africa v President of the Republic of South Africa and Others* 2013 (7) BCLR 762 (CC) at para 63.

[6] See "The right to conduct own defence under paragraph 25 below)

"**67. Failure of accused on bail to appear**

(1) If an accused who is released on bail-

(a) fails to appear at the place and on the date and at the time-

…

the court before which the matter is pending shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused.

(2) (a) … (b) …

(c) If the accused does not appear before court within fourteen days of the issue under subsection (1) of the warrant of arrest or within such extended period as the court may on good cause determine, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall become final.

(3) The court may receive such evidence as it may consider necessary to satisfy itself that the accused has under subsection (1) failed to appear or failed to remain in attendance, and such evidence shall be recorded.

[16] It is doubtful if the Magistrate took a glance at this section before penning down his response. A simple reading of this section makes it pertinently clear that it provides for the procedure to be adopted upon "failure of an accused on bail to appear" as the heading provides. This procedure was conducted by him on 07 February 2021. This section does not provide for the conviction of the accused and for any sanction to be imposed. The question was clearly directed at the inquiry that resulted in the conviction and the sentence. Questions posed on review give an opportunity to a Magistrate to reflect back and research the legal position before responding. They are not meant to invoke defence of whatever he/she did at all cost.

[17] Section 67 therefor, cannot be used to conduct an inquiry in which the accused is convicted and sentenced. However, this does not mean that the accused released on bail cannot be convicted and sentenced for his failure to appear in court. If he is to be found guilty as such, it would be based on a different section and requiring a different procedure. That would be section 67A of the. It provides,

"67A. Criminal liability of a person who is on bail on the ground of failure to appear or to comply with a condition of bail.

Any person who has been released on bail and who fails, without good cause, to appear on the date and at the place determined for his or her appearance, or to remain in attendance until the proceedings in which he or she must appear have been disposed of, or who fails without good cause to comply with a condition of bail imposed by the court in terms of section 60 or 62, including an amendment or supplementation thereof in terms of section 63, shall be guilty of an offence and shall on conviction be liable to a fine or to imprisonment not exceeding one year."

[18] Section 67A was inserted by section 9 of Act 75 of 1995 and came into operation on 21 September of the same year. It was created following a number of judgments such as *S v Ndwayana*[7] which held that an accused who was out on bail could not be convicted of the offence of failing to appear in court as the forfeiture of

[7] 1983 (1) PH H93 (E).

his bail money was sufficient punishment. Anything more was considered as double jeopardy. This has changed with the insertion of this section. The fact that an accused already had the bail money forfeited to the State only serves as mitigating factor to be considered before the sentence is passed.

[19] It is now settled that section 67A creates a statutory offence which requires the State to prove the accused's guilt beyond a reasonable doubt. Unlike the onus placed on the accused in inquiries in terms of sections 67 and 170 of the Act, where he has to satisfy the court that failure to appear was not due to a fault on his part; under section 67A, there is no onus on the accused to prove anything. The accused would have to be charged by the prosecution with a proper charge sheet drafted and have all the elements of the offence proved in a normal trial.[8] The wording of the conviction by the Magistrate which makes no reference to any statutory provision makes it looks like the accused was convicted of a common law crime. However, failure to appear in court is not a common law crime. It suffices to conclude that the conviction of the accused has no legal basis and should be set aside.

[20] Other irregularities.

The manner in which the inquiry was conducted leaves much to be desired. The accused had been legally represented on all the dates he appeared in court except the date on which he was convicted and sentenced. The Magistrate did not afford the accused an opportunity to secure the presence of his legal representative. If he/she was not present in court, the case could have been postponed for his/her presence. This was not done and the accused was not asked any question around the legal representative. One would never know if the Magistrate would still have misdirected himself as he did, had he allowed the accused's legal representative to be present. Instead, the magistrate proceeded with the inquiry without even telling the accused of his rights to legal representation.

[21] To this end, the Magistrate explained that that he proceeded in the manner he did (conducting an inquiry without explaining these rights) as the accused's legal representative had withdrawn from the record. Indeed, on the date the accused was absent in court, the legal representative withdrew as he did not have instructions on where the accused was. This however does not mean that once the accused is arrested, the legal representative would not want to represent the accused again if re-instructed. Moreover, the accused has a right to appoint a new legal representative if the one who withdrew would not want to be instructed again.

[22] The Magistrate tried to justify this lacuna by pointing at the events of a later date in which the accused refused to get a legal representative for purposes of a trial. He was adamant that he would conduct his own defence against the wishes and orders made by the court. Surely this is a misdirection in that he is trying to use the end to justify the means the same way mobility would be limited if not impossible when a

[8] See *S v Luzil* 2018 (2) SACR 278 (WCC), *S v Williams* 2012 (2) SACR 158 (WCC) and *S v Mabuza* 1996 (2) SACR 239 (T).

cart is placed before the horse. The accused cannot be blamed for not wanting any legal representation after suffering so much injustice in a court of law. He even verbalised his mistrust on the lawyer because the one who appeared for him in the past was not appointed by him. Failure to explain the right to legal representations is an irregularity that vitiates the entire proceedings irrespective of the merits.[9]

[23] After the conviction of the accused, the Magistrate went on to pass the sentence without inviting the accused to mitigate. the Magistrate merely asked the accused, "what should the court sentence you to?" The Magistrate is adamant that this question amounts to an invitation of the accused to mitigate. The question on whether the Magistrate honestly believed that he was inviting the accused to mitigate can be answered by visiting the record of proceedings. Did the accused present mitigating factors to the court before he was sentenced?

[24] When asked as to what sentence should be passed, the accused merely asked for forgiveness. Without any further question, the court pronounced the sentence and did not even explain the rights to appeal or to make representation on review. In imposing the sentence, the Magistrate did not know the accused's age, marital status and whether he has children or if he was their primary caregiver. If the Magistrate invited the accused to mitigate, what did he do when the accused failed to do so? The accused was not invited to mitigate and the best the magistrate could have done was to concede. Sadly, irrespective of all the irregularities exposed in the questions directed to him, the Magistrate does not see anything wrong in the nature of the inquiry and the sentence imposed.

[25] The right to conduct own defence.

Six pages of the transcribed record reflect an unfriendly exchange between the Magistrate and the accused over the right to legal representation. The Magistrate ended up ordering that the accused shall be legally represented and that the accused could not have any more say in this regard as the Magistrate's order was final. The Magistrate went further to deliberately confuse and/or mislead the accused who kept on saying he wanted to plead guilty, by asking him to plead well knowing that the charge sheet had not been properly read out to him. When asked why he forced legal representation against the accused's wishes, the Magistrate said "…the accused wanted to proceed with a guilty plea and displayed that he could not conduct his own defence properly." It is rather unfortunate that the Magistrate did not see this inability to conduct proper defence on the date he convicted him.

[26] The DDPP remarked that "it seems rather astonishing that the Learned Magistrate after he convicted an unrepresented accused without warning him of his right to legal representation suddenly he is eager to force legal representation to the accused as it appears on record." His previous disregard of the accused right in this regard makes one to wonder whether this insistence was about safeguarding the accused's interests. Towards the end of the exchange he had with the accused, the Magistrate said the following:

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[9] *S v GR* 2015 (2) SACR 79 (SCA).

COURT: "No, this one is going to get us into trouble. You know what, we do not want to be going on review because you do not know. I am going to postpone your matter, you get a lawyer who is going to prepare a statement properly from Legal Aid. Now I am making a ruling on you." (01 April 2021)

[27] With the statement above, one would be forgiven for concluding that the Magistrate wanted the accused to get legal representation to avoid a review which becomes compulsory when an accused is not represented should he be given a sentence stipulated in section 302 of the Act. As much as the accused has a right to be legally represented, the flipside of the same coin is that he/she also has a right to conduct his/her own defence. This should not be confusing to the judicial officers as section 112(1)(b) was enacted for accused who wished to plead guilty without help of a legal representative. The accused person does not have to be a law graduate to be able to plead guilty on any crime. In *S v Wildridge*,[10] a case that deals with the right to dismiss a legal representative and to conduct one's defence, the following was said by Plasket J,

"Section 35(3) of the Constitution provides that, everyone has the right to a fair trial. That right includes the right to be represented by a legal practitioner of an accused person's choice and to be legally represented 'at state expense, if substantial injustice would otherwise result'. The corollary of the right to legal representation is the right to represent oneself."

[28] Court's decorum flowing from the bench.

Something that caught the attention of the DDPP that had not been raised with the Magistrate is the unsavoury language he used in an open court in communication with the accused to which the DDPP remarked, "[T]he language of communication with the accused was even less the standard of decorum expected from the Presiding Officer." From various sections of the transcripts, the following appears.

COURT: ***Stand up. This is not a tavern.*** *There is a warrant for you. You ran away. Now we have to hold an inquiry.* (19 March 2021 page 1).

On 17 February 2021 when bail was finally forfeited to the State, the following exchange appears on record in the absence of the accused.

COURT: Are you related to the accused?

WITNESS: He is my child your worship.

COURT: Where is he today?

WITNESS: We do not know his whereabouts your worship because he is residing at some other homesteads your worship.

COURT: Okay, you heard.

PROSECUTOR: As the court pleases your worship. Since they do not know the whereabouts of the accused, it means that his bail will have to be final forfeited and the warrant then… (intervenes)

COURT: Alright, thank you. You are excused ma'am. But his bail is finally forfeited to the State because he is not here.

[10] 019 (1) SACR 474 (ECG) at para 3.

WITNESS: Your worship, he is present because he is residing at certain homesteads and he comes to our homestead at night your worship and he would break our window panes your worship.
COURT: Okay. ***Then you can see that he is even intimidating witnesses****.*
PROSECUTOR: As the court pleases your worship.
COURT: Definitely. His bail if finally restricted estreated but we have already issued a warrant for his arrest. The police will arrest him and bring him in.
On 01 April 2021, after a long exchange in which the Magistrate attempted to force a legal representative on the accused, while the accused refused rather opting to plead guilty without a legal representative; the following is recorded.
COURT: What do you want to do?
ACCUSED: Eish.
COURT: Do not say eish.
ACCUSED: I do not know. I do not know. I just wanted… (intervenes)
COURT: ***Are you playing April fool there?***
ACCUSED: No, I am not.
…
ACCUSED: I cannot hire Machubeni. I do not have money to hire Machubeni.
COURT: Who spoke about Machubeni? Is this lady Machubeni?
ACCUSED: No, I am surprised when he came and represented me the last time.
COURT: Where?
ACCUSED: I did not ask for him.
COURT: Machubeni was not here. Machubeni did you represent you (sic). ***Do you not lie.***
ACCUSED: ***I am not lying.***
COURT: ***You are.***
ACCUSED: He represented me. He came, you gave me R700.00 bail My Lord.
…
COURT: Okay, let us do the plea. Let us do the plea.
ACCUSED: She want me… (intervenes)
COURT: You see, now you are going to waste our time ***because you think speaking English is being smart.***

[29] As judicial officers, we cannot expect members of the public to respect the bench if we do not accord them similar reverence. Each one of us can find himself in the dock at any given moment. All it takes is for someone to make allegations against us, and we will need people to treat us with respect. One does not lose his esteem because he is an accused. There were less intrusive ways to ask the accused to stand up without suggesting to him that he was behaving as though he was in a tavern. Everyone would feel insulted when asked to stand up in that manner, especially if he happened to be a person who does not consume alcohol and as such, not a tavern visitor.
[30] The authority we are endowed with as judicial officers is from the public and it is not meant to intimidate it, but to execute justice to its members with respect and

humility. We are not in these positions because we are indomitable. If we did not volunteer our service, there would be others doing exactly what we are doing and maybe even better. When the time is due, we will be replaced and justice will continue being meted out to the public in our absence.

[31] The utterances made by the Magistrate on the day he ordered the final forfeiture of bail money may have been the root cause of the impatience he displayed when the accused finally appeared. For it appears that he had already made up his mind that the accused was "even intimidating the witnesses." When asked if he considered recusing himself in light of these utterances, the Magistrate's response was a simple no. The Magistrate also accused him of playing April's fool and of lying about being represented by Mr. Machubeni. A simple back paging of the record would have confirmed that the accused was not lying as he was represented by Mr. Machubeni, the day bail of R700.00 was fixed by the court.

[32] As outlined above, the conviction and the sentence meted out to the accused can be attacked from innumerable prongs. The most distinguishable being that there is no legal basis upon which the whole inquiry, the conviction and the sentence were founded.

[33] Under the circumstances, the following order is made.

33.1 The conviction and sentence are set aside.

33.2 The Registrar should avail a copy of this judgment to the Office of the Chief Magistrate – Mpumalanga.

2. Menyuka v S (SS216/2012) [2021] ZAGPJHC 19; 2021 (2) SACR 316 (GJ) (24 February 2021) 2021 (2) SACR 316 (GJ)

The appellant was granted leave to appeal against his convictions and sentences for murder and attempted murder. As he had already commenced serving his sentence, he brought his application for bail in terms of s 321(1)*(b)* of Criminal Procedure Act 51 of 1977. The court found that, despite the wide discretion provided for in s 321, the criteria and test applicable were those set out in the provisions of s 60(11)*(a)* or *(b)* of the Act and the appellant was required to show exceptional circumstances to be admitted to bail.

Strydom J:

[1] This is an application for bail pending the hearing of an appeal against both conviction and sentence.

[2] The applicant was convicted by the Late Honourable Judge Maluleke sitting as a court of first instance. As a result of the death of the trial judge, this application was heard by this court. Previously, the trial judge refused leave to appeal against conviction and sentence but leave to appeal was granted on 25

August 2017 by the Supreme Court of Appeal, to the Full Court of the Gauteng Division of the High Court, Pretoria, against conviction and sentence imposed by the trial judge.

[3] During or about 2013, the applicant was convicted on a count of murder and attempted murder and was sentenced to an effective 27 years' imprisonment. The applicant has been serving his sentence since 22 August 2013.

[4] This bail application is brought pursuant to the terms of section 321 of the Criminal Procedure Act, 51 of 1977 ("the CPA") which reads as follows:

"321 When execution of sentence may be suspended

(1) The execution of the sentence of a superior court shall not be suspended by reason of an appeal against a conviction or by reason of any question of law having been reserved for consideration by the court of appeal, unless –

(a) …

(b) the superior court from which the appeal is made or by which the question is reserved thinks fit to order that the accused be released on bail or that he be treated as an unconvicted prisoner until the appeal or the question reserved has been heard and decided:

Provided that when the accused is ultimately sentenced to imprisonment the time during which he was so released on bail shall be excluded in computing the term for which he is so sentenced:

Provided further that when the accused has been detained as an unconvicted prisoner, the time during which he has been so detained shall be included or excluded in computing the term for which he is ultimately sentenced, as the court of appeal may determine.

(2) If the court orders that the accused be released on bail, the provisions of sections 66, 67 and 68 and of subsections (2), (3), (4) and (5) of section 307 shall mutatis mutandis apply with reference to bail so granted, and any reference in –

(a) section 66 to the court which may act under that section, shall be deemed to be a reference to the superior court by which the accused was released on bail

(b) section 67 to the court which may act under that section, shall be deemed to be a reference to the magistrate's court within whose area of jurisdiction the accused is to surrender himself in order that effect be given to any sentence in respect of the proceedings in question; and

(c) section 68 to a magistrate to be deemed to be a reference to a judge of the superior court in question."

[5] In terms of section 321(1)(b), the superior court from which the appeal is made has a wide discretion to consider whether bail should be granted to a sentenced prisoner. This is underpinned by the use of the words "*thinks fit to order*" that the accused be released on bail.

[6] When this matter was heard by this court I posed the question to counsel appearing for the applicant and the State whether section 60 of the CPA, and more particularly section 60(11)(a), would determine the criteria and test to be applied in the court's exercise of its discretion to either grant or refuse bail as envisaged in section 321 of the CPA.

[7] Section 60(11) determines as follows:

"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to –

(a) in Schedule (6), the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;"

[8] Upon consideration of the wording of section 60, it becomes apparent that this section deals with accused persons not yet convicted. Section 60(11) deals with an accused who has been charged with an offence and does not refer to a convicted and/or sentenced person.

[9] Turning to section 321, this section does not render section 60 applicable whilst it does so in relation to sections 66, 67 and 68 of Chapter 9 of the CPA dealing with bail. In terms of section 321(2) subsections (2), (3), (4) and (5) of section 307 apply *mutatis mutandis* with reference to bail so granted.

[10] Section 307 deals with reviews and subsection (2) cross-references to sections 59 and 60 of the same Act in the following terms:

"(2) If the court releases such a person on bail, the court may –

(a) if the person concerned was released on bail under section 59 or 60, extend the bail, either on the same amount or any other amount;"

[11] This section does not render sections 59 or 60 applicable to a bail application in terms of section 321 as it merely states that if bail was previously granted under these section, such bail may be extended.

[12] Reference should also be made to section 58 of the CPA to consider the applicability of section 60(11)(a) or (b) when bail is considered by the trial judge pending appeal. This section deals specifically with the effect of bail and makes it clear that bail endures until a verdict is given by a court in respect of the charge to which the offence in question relates. Where sentence is not imposed forthwith after the verdict and the court extends bail until sentence is imposed, it should only do so subject to the following *proviso* contained in section 58:

"Provided that where a court convicts an accused of an offence contemplated in Schedule 5 or 6, the court shall, in considering the question whether the accused's bail should be extended, apply the provisions of section 60(11)(a) or (b), as the case may be, and the court shall take into account –

(a) the fact that the accused has been convicted of that offence; and

(b) the likely sentence which the court might impose."

[13] The relevance of this section is that the legislator specifically dealt with the applicability of section 60(11)(a) and (b) when bail is extended pending the imposition of sentence. It does not deal with a further bail application after an accused was sentences and after he or she started to serve such sentence. It is also to be noted that section 321 of the Act does not have a similar proviso as that contained in section 58.

[14] The question that arises is whether a superior court hearing a bail application pursuant to the terms of section 321 is bound by the terms of section 60(11)? More particularly so as section 321 stipulates that the superior court from which the appeal is made can grant bail to a person serving a sentence if the court thinks it fit to do so.

[15] In *S v Masoanganye*[11] Harms JP found as follows:

"[13] I now revert to the appeal proper. An application for bail after conviction is regulated by s 321 of the Act. It provides that the execution of the sentence of a superior court 'shall not be suspended' by reason of any appeal against a conviction unless the trial court 'thinks it fit to order' that the accused be released on bail. This requires of a sentenced accused to apply for bail to the trial court and to place the necessary facts before the court that would entitle an exercise of a discretion in favour of the accused. Compare S v Bruintjies 2003 (2) SACR 575 (SCA) para 8."

[16] In *S v Bruintjies* the Supreme Court of Appeal also dealt with an appellant who was convicted on a count which fell within the ambit of section 60(11) of the CPA. After quoting the section, the court found as follows:

"[5] The section deals, on the face of it, with unconvicted persons. However, it must follow that a person who has been found guilty of a Schedule 6 offence cannot claim the benefit of a lighter test. It was conceded that the mere fact that a sentenced person has been granted leave to appeal does not automatically suspend the operation of the sentence, nor does it entitle him to bail as of right. (See R v Mthembu 1961 (3) SA 468 (D))."

[17] This *ratio* of *Bruintjies* was accepted by the Supreme Court of Appeal in *S v Scott-Crossley.*[12] The court in *Scott-Crossley* found as follows:

"[4] It is thus clear that the appellant bore the onus to persuade this court that exceptional circumstances exist which in the interests of justice permit his release on bail."

[18] The Supreme Court of Appeal in matters pertaining to bail applications pending appeal accepted that the criteria set in section 60(11) remains applicable. See for instance *S v Rohde.*[13] In this matter Van der Merwe JA, delivering the majority judgment, made the following comment dealing with a bail application after conviction and sentence:

"As my Colleague points out, s 60(11)(b) of the Criminal Procedure Act, 51 of 1977 (CPA) is applicable."

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[11] 2012 (1) SACR 292 (SCA)
[12] 2007 (2) SACR 470 (SCA)
[13] 2020 (1) SACR 329 (SCA)

[19] Section 321 which provides the court with a wide discretion through the use of the words "*thinks fit to order that the accused be released on bail"* was not referred to in the judgment in *Rohde.*

[20] As indicated hereinabove, the Supreme Court of Appeal in *Rohde* specifically found that section 60(11)(b) remains applicable in a bail application pending appeal after sentence was imposed. In *Bruintjies*, it was held that an applicant under such circumstances cannot claim the benefit of a lighter test than that imposed in the case of unconvicted persons by section 60(11). The court stated that exceptional circumstances must be established without reference being made to the discretion provided for in section 321.

[21] In both these cases the test applied to consider the bail applications, after sentence pending appeal, was to apply the criteria of either section 60(11) (a) or (b). In The case of *Bruintjies* the court found that the appellants bore the onus to persuade the court that exceptional circumstances exist, which in the interests of justice permit their release on bail. In *Rohde* it was specifically stated that section 60(11)(b) remains applicable.

[22] The fact that in *Bruintjies*, the court acknowledged that on the face of it, section 60(11) is applicable as far as unconvicted persons are concerned, serves as an indication that the court considered that it may not be applicable in the case of convicted persons. The court nevertheless concluded that a convicted person convicted of a crime falling within the ambit of section 60(11)(a) cannot claim a lighter test to be applied when bail pending appeal is concerned. This would mean that an applicant will have to lead evidence, in a case falling within the ambit of this section, that exceptional circumstances exist which in the interest of justice permit his release. There is a difference in the approach adopted in *Rohde* and *Bruintjies.* In the case of *Rohde* the court found that section 60(1)(b) was applicable whilst the court in *Bruintjies* applied the criteria set in section 60(11)(a) as the appellant could not claim the benefit of a lighter test after conviction. I am bound by these decision and in any event, am in agreement with the finding in *Bruintjies* that exceptional circumstances will have to be shown before a person convicted of schedule 6 offences and sentenced to long term imprisonment is released on bail pending an appeal. Despite the wide discretion provided for in section 321 a starting point should be that exceptional circumstances will have to be shown to be granted bail which effectively suspends the sentence of the applicant until his appeal is dealt with.

[23] Accordingly, I will approach this matter and exercise my discretion on the basis that the applicant had to adduce evidence to persuade this court that exceptional circumstances exist which in the interests of justice permit his release on bail.

[24] The applicant made it clear in his notice of bail that he applies for bail in terms of section 321(1)(b) of the CPA. He filed an affidavit in support of his bail application. No affidavit was filed on behalf of the State. When the matter was heard, counsel for the applicant enquired from the court whether oral evidence

would be necessary and the court indicated to Mr Nobangule, that it is the applicant's choice to lead further evidence or to stand by the filed affidavit.

[25] The affidavit of the applicant on the face of it was drafted without the assistance of a legal practitioner and in prison whilst serving his sentence. The affidavit contains factual allegations and legal submissions in a somewhat disorganized fashion. To some extent the court will bear in mind that this is an affidavit of a layman who attempted to place facts before court. From this affidavit, the following facts can be discerned:

25.1 The applicant is a 49-year-old father of four and a South African citizen.

25.2 He has been incarcerated since his conviction on 22 August 2013.

25.3 The address where his children live and where he would reside if released on bail is 480 Blue Gum Street, Extension 10, Boksburg. He also has a home in Jozini, KwaZulu-Natal, where he was born.

25.4 He stated that he has a large amount of assets in his possession as an incentive for him not to abscond.

25.5 He indicated that he was previously out on bail in the amount of R3,000 and stood his bail and adhered to all bail conditions throughout the trial.

25.6 He stated that since August 2017, after he obtained leave to appeal against his conviction and sentence, he attempted to have his appeal prosecuted in the High Court but was informed that the judgment could not be found. He states that one of the grounds for his application for bail is on the basis that the Director of Public Prosecutions has, on several occasions, failed to place the matter before an appeal court for hearing.

25.7 He pointed out that he has no previous convictions or other pending cases against him.

25.8 He indicated that he has no travel documents.

25.9 He has no links outside of this country that would make it easy for him to abscond.

25.10 He indicated that he will not abscond should his appeal not be successful. He submitted that he is not a danger to the public and that he would not place in jeopardy the functioning of the criminal justice system.

25.11 He claims that he has reasonable prospects of success that his appeal will be upheld.

25.12 Reference was also made to alleged irregularities during the course of the trial particularly as far as the trial judge's interference with the cross examination of witnesses was concerned.

[26] It was argued on his behalf that there is a high likelihood that the conviction will be overturned. To come to this conclusion, reliance was not only placed on the fact that the applicant obtained leave to appeal from the Supreme Court of Appeal but reference was made to the evidence pertaining to his identification as one of the perpetrators.

[27] It has been found many times by our courts, including by the Supreme Court of Appeal, that the mere fact that an accused obtained leave to appeal, either from the trial court or from the Supreme Court of Appeal upon petition, is not necessarily on its own a sufficient factor to entitle a convicted accused to be released on bail. This fact does not establish exceptional circumstances in favour of the granting of bail.[14]

[28] In *Masoanganye* the Supreme Court of Appeal held that what was of more importance than merely being granted leave to appeal, was the seriousness of the crime, the real prospects of success on conviction and a real prospect that a non-custodial sentence may be imposed. The same sentiment was expressed in *Bruintjies* where it was found that what was required was that a court examine all relevant circumstances and determine whether these circumstances, individually and cumulatively, amounted to exceptional circumstances justifying the appellant's release on bail. The court in *Bruintjies* found as follows:

"[6] …The prospects of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other factors which persuade the court that society will probably be endangered by the appellant's release or there is a clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence."[15]

[29] Accordingly, this court will not be persuaded to grant bail merely because the applicant obtained leave to appeal from the Supreme Court of Appeal. The court will have to make an independent finding to determine the real prospects of success on conviction coupled with all other relevant circumstances of this case. Having said this, it should be mentioned that in evaluating the prospects of success, it is not a function of this court to analyse the findings of the court *a quo* in great detail. As was found in *S v Viljoen*[16], if this is done, it would become a dress rehearsal for the appeal to follow. The consideration whether bail should be granted or not should be confined to reasonable boundaries, subject to the applicable legislation and the rights of an applicant.

[30] The conviction of the applicant was premised on limited evidence. First, he was identified as a driver of a vehicle which transported the perpetrators from the crime scene by way of a dock identification by Ms Motaung, a witness who previously made a sworn statement to the effect that she would not be able to identify the perpetrators who committed this offence. This was also the reason, according to the investigating officer's evidence, why no identification parade was held. Second, the only other admissible evidence against the applicant was that the applicant was part of a group that made threats previously that they

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[14] See *Beetge v S* (925/12) [2013] ZASCA 1 (11 February 2013); see also my judgment *S v Zondi* 2020 (2) SACR 436 (GJ)

[15] See also *Babuile and others v S* (CC32/2014) [2015] ZAGPPHC 1110 (13 October 2015)

[16] 2002 (2) SACR 550 (SCA) at 561 G-I

will shoot people that interfere with their taxi routes. Despite this unreliable identification of the applicant, the court *a quo* went ahead to make a finding that the applicant acted in the pursuance of a common purpose with his co-accused to commit these crimes. I am of the view that there is a likelihood that a court of appeal may set aside the conviction of the applicant. In my view, the applicant has a strong case on appeal which would mean that, in my view, the conviction is demonstrably suspect. This factor, in my mind, is the one outstanding feature why the court must consider the granting of bail.

[31] This finding does not mean that the applicant should be released on bail. This court must still consider whether the applicant is a flight risk or not.

[32] A strong argument was advanced on behalf of the State that the applicant has provided insufficient particularity in his affidavit to convince the court that he is not a flight risk. For instance, the applicant failed to provide the court with the particularity of his assets and the value thereof. The court was referred to the matter of *Beetge, supra.* In that matter the court concluded that insufficient information was provided about the personal circumstances of the applicant. But importantly, the court concluded as far as the strength of the State's case, that the objective elements of the evidence tended to show that the State's case was by no means weak. The corollary was that, according to the finding, the appellant's prospects of success in that matter could not be categorised as strong.[17] This finding distinguishes the application in *casu* from the *Beetge* case.

[33] The applicant was previously out on bail but the circumstances have now changed materially. He has now been convicted and has been sentenced to a long term of imprisonment. Despite this, I am of the view that the applicant has indicated that he would not abscond should his appeal not be successful. He already served more than 7 years of his sentence and may become eligible to be granted parole at some stage. He has provided the court with his address and the court accepts his evidence that he has no ties, either family or business related, outside the Republic of South Africa. He has no travel documents and in my view, has proven on a balance of probabilities that he will not abscond.

[34] This is not a matter in which the conviction could possibly be altered to a conviction which will still lead to a sentence of incarceration as was the case in *S v Oosthuizen & another.*[18] In this matter, the court has concluded that before bail pending appeal can be granted, there has to be a real prospect in relation to success on conviction and that a non-custodial sentence might be imposed, before a further period of detention would be unjustified (see: paras [28] and [29]of this judgment). There is no midway as far as the case of the applicant is concerned. Either he is going to be acquitted and his sentence set aside or his appeal is going to fail and the term of imprisonment will remain long term. I am

[17] *Beetge* para [10]
[18] 2018 (2) SACR 237 SCA

of the view that the former is the more likely scenario, though this really remains an issue for decision by the court of appeal.

[35] I asked counsel for the applicant to establish when this appeal would be heard by the full court. This court has been provided with a document from the Registrar of Full Court Appeals, Gauteng Local Division, Johannesburg, which reads as follows:

"Please be advised that the reconstructed full court record has been forwarded to the Director of Public Prosecutions for enrolment on 10/12/2021 concerning the prosecution of the appeal."

[36] Consequently, if the applicant is not granted bail he will remain in custody and he will continue to serve his sentence for a further approximately 10 months. In my view, the undue delay of this appeal for a period of approximately four years is a further factor which the court should consider when deciding whether the applicant should be release on bail. Considering this factor, together with the more than reasonable prospect of success on appeal and the applicant's personal circumstances, this court finds that the applicant, on a balance of probabilities, established that exceptional circumstances do exist which in the interests of justice permit his release on bail. I find it fit, as contemplated in section 321, that the applicant should be released on bail and that the execution of his sentence be suspended.

[37] As far as bail conditions are concerned, the court will order that the applicant report to the Vosloorus Police Station as will be stipulated in the Order.

[38] The applicant has previously been out on bail of R3,000 but in light of the change in circumstances, I am of the view that this amount should now be increased to R10,000.

[39] In the result, the following order is issued:

(1) That bail pending the appeal to the Full Court of this Division is granted.

(2) The applicant's release on bail is subject to the following conditions:

a. Payment in the amount of R10,000;
b. The applicant shall prosecute his appeal in the manner and within the time periods prescribed by the Rules of Court, failing which his bail shall be cancelled forthwith. In this regard the date of 10 December 2021 has been provided for enrolment.
c. The applicant shall report to the Vosloorus Police Station between the hours of 6am and 6pm on Wednesday and Saturday of each week.
d. The applicant shall reside at his given residential address situated at 480 Blue Gum Street, Extension 10, Boksburg.
e. Should the applicant plan to visit his home situated in Jozini, KwaZulu-Natal, he should inform the investigating officer of his intention to do so and the duration of his stay, seven days before departure thereto.
f. The applicant shall notify the registrar of this court in writing, of any change of his residential address in Boksburg seven days prior to such change.

g. The applicant shall report to the Vosloorus Police Station within 48 hours of written notice to the effect that his appeal has been unsuccessful and he must submit himself to continue with the remaining term of imprisonment. This notice can be served on him at his residential address or changed residential address.
h. The applicant is prohibited from applying for any passport.

From The Legal Journals

A Molaiwa

"Municipal Courts and Environmental Justice in South African Local Government "

PER / PELJ 2021 (24)

Abstract

South African law establishes environmental justice (EJ) as among the environmental management principles to direct decision-making. EJ's inclusion as a guiding principle in the National Environmental Management Act107 of 1998 (NEMA) is relevant because of its legacy of continuing environmental injustices and inequalities concerning natural-resource dependent services and benefits. Also, the municipal service delivery of water and sanitation, electricity, land matters and municipal health should supplement, not compromise local communities' environments, and access should be equitable. In the event of service delivery-related environmental injustices, it is to be expected that communities must have remedial options available, one of which may be access to the judicial system. Therefore, this article seeks to identify and explain the role municipal courts may play specifically in strengthening the relationship between municipal service delivery and improved grass-root level environmental justice in South Africa. The underlying question is whether such courts can be agents of (environmental) change where local communities are exposed to environmental harm due to the failure of municipal services or the environmentally harmful actions of other community members or local industries.

Baird, S B

“What about the Child? Preventing the Publication of Children's Names After the Age of 18”

PER / PELJ 2021 (24)

Abstract

Children are afforded a number of different protections when they encounter the criminal justice system. The need for special protection stems from the vulnerable position they occupy in society. When children form part of the criminal justice system by being an offender, a victim or a witness they may be subjected to harm. To mitigate against the potential harm that may be caused, our law provides that criminal proceedings involving children should not be open to the public, subject to the discretion of the court. This protection naturally seems at odds with the principle of open justice. However, the courts have reconciled the limitation with the legal purpose it serves. For all the protection the law offers and the lengths that it goes to in order to protect the identity of children in this regard, it appears there is an unofficial timer dictating when this protection should end. The media have been at the forefront of this conundrum to the extent that they believe that once a child (an offender, victim, or witness) turns 18 they are free to reveal the child's identity. This belief, grounded in the right to freedom of expression and the principle of open justice, is at odds with the principle of a child's best interests, the right to dignity and the right to privacy. It also stares incredulously in the face of the aims of the Child Justice Act and the principles of restorative justice. In the context of the detrimental psychological effects experienced by child victims, witnesses, and offenders, this article aims to critically analyse the legal and practical implications of revealing the identity of child victims, witnesses, and offenders after they have turned 18.

Meintjies-van der walt, L & Olaborede, A

“Demeanour, credibility and remorse in the criminal trial”

South African Journal of Criminal Justice **Volume 34 Issue 1 2021 55**

Abstract

This article, referring to South Africa as well as to selected other common law jurisdictions, proceeds from the premise that it is a well-accepted practice for judges to consider demeanour in assessing the credibility of a witness and in assessing whether the accused shows remorse when decisions regarding sentences are taken. However, the article also takes cognisance of the fact that there is a lack of generally agreed-upon objective methods for the identification of remorse. The article was

prompted by recent health precautions regarding the mandatory use of face masks, in order to protect people and to contain the spread of the coronavirus, which provides an opportunity to review demeanour in general and perceptions concerning facial demeanour or facial expressions in the courtroom, in particular. The article explores the validity and reliability of findings on remorse and of making credibility assessments based on demeanour evidence. Part 1 of the article is an introduction. Part 2 of the article provides a brief overview of credibility and demeanour evidence in the courtroom. Part 3 of the article examines remorse and demeanour evidence in criminal trials. Part 4 of the article considers demeanour evidence as a 'tricky horse to ride'. Part 5 of the article provides a discussion of empirical research studies in the field of social psychology relevant to the reliability of finding credibility and remorse on the basis of demeanour evidence. Part 6 briefly discusses COVID-19 face-covering regulations and demeanour evidence in the criminal trial. The article emphasises that although non-verbal cues could be valuable to judges, such evidence may be unreliable and that courts have cautioned against demeanour evidence being afforded undue importance. The article concludes that even when facial expressions are available to the court, it would be in the interests of justice to exercise great care concerning demeanour in general and facial expressions in particular as a guide to assessing credibility and the existence of remorse.

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

Contributions from the Law School

Revisiting the terrorism offence in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004

The media in South Africa is reporting that the National Prosecuting Authority plans to charge those who were arrested for instigating and participating in the recent unrest with serious crimes, including that of terrorism in terms of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA). In anticipation of the pursuit of terrorism charges, it is prudent to

revisit the terrorism offence in the POCDATARA and highlight the constitutionality concerns which the courts are likely to grapple with in the impending litigation.

A key aspect of the offence of terrorism is the notion of 'terrorist activity' in s 1(1)(xxv)(a), the commission of which constitutes the offence of terrorism, as per s 2. "Terrorist activity" is defined broadly in s 1(1)(xxv)(a) to mean:

(a) any act committed in or outside the Republic, which –

(i) involves the systematic, repeated or arbitrary use of violence by any means or method;

(ii) involves the systematic, repeated or arbitrary release into the environment or any part of it or distributing of exposing the public or any part of it to –

(aa) any dangerous, hazardous, radioactive or harmful substance or organism;

(bb) any toxic chemical; or

(cc) any microbial or other biological agent or toxin;

(iii) endangers the life, or violates the physical integrity or physical freedom of, or causes serious bodily injury to or the death of, any person, or any number of persons;

(iv) causes serious risk to the health or safety of the public or any segment of the public;

(v) causes the destruction of or substantial damage to any property, natural resource, or the environment or cultural heritage, whether public or private;

(vi) is designed or calculated to cause serious interference with or serious disruption of an essential service, facility or system, or the delivery of any such service, facility or system, whether public or private, including, but not limited to –

(aa) a system used for, or by, an electronic system, including an information system;

(bb) a telecommunication service or system;

(cc) a banking or financial service or financial system;

(dd) a system used for the delivery of essential government services;

(ee) a system used for, or by, an essential public utility or transport provider;

(ff) an essential infrastructure facility; or

(gg) any essential emergency services, such as police, medical or civil defence services;

(vii) causes any major economic loss or extensive destabilisation of an economic system or substantial devastation of the national economy of a country; or

(viii) creates a serious public emergency situation or a general insurrection in the Republic,

whether the harm contemplated in paragraphs (a)(i) to (vii) is or may be suffered in or outside the Republic, and whether the activity referred to in subparagraphs (ii) to (vii) was committed by way of any means or method.

The language employed in the above quote makes it clear that a terrorist activity can either be violent or non-violent, and that it is not limited to the typical acts associated

with terrorism, such as those that endanger human life, bodily integrity, as well as the health and safety of the public. Instead, a terrorist activity could also be in the form of causing substantial damage to public and private property, the disruption of an essential service, the causing of major economic loss and the creation of any public emergency or general insurrection.

Despite the centrality of terrorist activity insofar as the offence of terrorism is concerned, the definition of this concept (as quoted above) faces some serious constitutionality questions. To begin with, there is the issue of fair labelling given the fact that the acts which amount to a terrorist activity can also be adequately criminalised and punished as assault, murder, attempted murder, public violence, arson, malicious damage to property, intimidation, kidnapping, sedition and treason (A Cachalia 'Counter-terrorism and international cooperation against terrorism – an elusive goal: a South African perspective' (2010) 26 *SAJHR* 510 at 514). It would therefore not bode well for fair labelling that people are stigmatised as terrorists when the ordinary laws of the land are equally, if not more, appropriate. Furthermore, it would not bode well for the imposition of punishment that fits the crime should the severe penalties prescribed for terrorist acts be imposed when there are other more appropriate crimes.

It has been suggested that the adverse effects of the rather broad definition of terrorist activity, as well as the possible constitutional challenges to this definition, can be addressed through restrictively interpreting the fault element of terrorist activity in s 1(1)(xxv)(b) as requiring only subjective fault or intention (K Roach 'A comparison of South African and Canadian anti-terrorism legislation' (2005) 18 *SACJ* 127 at 134). Section 1(1)(xxv)(b) adds to s 1(1)(xxv)(a) that a terrorist activity is any act committed in or outside the Republic:

> *(b) which is intended, or by its nature and context, can reasonably be regarded as being intended, in whole or in part, directly and indirectly, to –*
>
> *(i) threaten the unity and territorial integrity of the Republic;*
>
> *(ii) intimidate, or to induce or cause feelings of insecurity within, the public, or a segment of the public, with regard to its security, including its economic security, or to induce, cause or spread feelings of terror, fear or panic in a civilian population; or*
>
> *(iii) unduly compel, intimidate, force, coerce, induce or cause a person, a government, the general public or a segment of the public, or a domestic or international organisation or body, to do or to abstain or refrain from doing any act, or to adopt or abandon a particular standpoint, or to act in accordance with certain principles,*
>
> *whether the public or the person, government, body, or organisation or institution referred to in subparagraphs (ii) or (iii), as the case may be, is inside or outside the Republic*

As already indicated, according to Roach, what would reduce the wide scope of the definition of terrorist activity, set terrorism apart from other crimes, and also address the issue of fair labelling and that of appropriate punishment, is that the acts that amount to a terrorist activity be committed intentionally. Put differently, the

perpetrators must know and intend that their actions directly constitute a terrorist activity. This is undoubtedly a much higher standard, but it is appropriate for the offence that is as serious as that of terrorism.

Roach (op cit 136-137) further adds that, where the Legislature sought to create a negligence-based fault standard in the POCDATARA, it has done so by employing the phrase 'ought reasonably to have known or suspected'. Therefore, only this phrase can be read by the courts to capture negligence as the sufficient form of fault. This opens way for the courts to reject the interpretation of other phrases in the POCDATARA (such as 'by its nature and context, can reasonably be regarded as being intended') as referring to negligence-based fault. Instead, such phrases may be interpreted restrictively to require subjective intent, in the form of *dolus eventualis* at the very least (Roach op cit 137).

The problem with restricting the fault standard only to intention or subjective fault, is that the POCDATARA is seemingly unequivocal in that the fault standard in respect of terrorist activity is both intention and negligence. It is therefore questionable if the objective fault standard can simply be ignored as though it is not contemplated in the Act. A court case dealing with this constitutionality issue will thus have to grapple with such an argument, if it is raised.

Regarding the broad and vague provision in paragraph (viii) of s 1(1)(xxv)(a), to the effect that the creation of a serious public emergency or a general insurrection amounts to a terrorist activity, Roach (op cit 136) suggests that a solution to the overbreadth of these concepts and the likely unconstitutionality thereof due to the violation of the rule of law, could be to read these to require that their invocation follow a declaration of a state of emergency in terms of section 37 of the Constitution. Once again, a court case dealing with such an argument will have to decide whether or not this reading is permitted by the text and context of the POCDATARA.

It is further noteworthy that certain provisions in s 1(1)(xxv)(b)(ii) and (iii) are identified by Roach (op cit 137) to be so intractably broad and vague that he even questions if they should be forming part of an offence as serious as that of terrorism. Examples in point include references to 'feelings of insecurity', 'economic security' and others. One gets a sense that, had Roach developed this argument further, he would effectively have suggested that, since the offence of terrorism can do without the impugned provisions, these can effectively be struck down as unconstitutional or severed from the rest of the Act.

The third and last aspect of the definition of terrorist activity is s 1(1)(xxv)(c), and it adds to s 1(1)(xxv)(a) and (b) that a terrorist activity is any act done in or outside the Republic with the necessary fault:

> *(c) which is committed, directly or indirectly, in whole or in part, for the purpose of the advancement of an individual or collective political, religious, ideological or philosophical motive, objective, cause or undertaking.*

Therefore, a terrorist activity must be committed in advancement of a political, religious, ideological or philosophical motive. The unfortunate result of this requirement is that the police will have to investigate the politics and religions of suspects, and it may encourage the targeting of people based on their political and

religious association and belief (Roach op cit 138). Furthermore, people's motives are notably 'too complex and obscure to determine criminal liability' and would thus create unnecessary prosecutorial difficulties and complicate terrorism trials (Cachalia op cit 518 and Roach op cit 139). Ultimately, the motive element infringes the right to freedom of religion, belief and opinion; freedom of expression; freedom of association; and the political right to campaign for any political cause (Cachalia op cit 518-519).

Even though the motive requirement is justified on the basis that it seeks to separate terrorism from other ordinary crimes, Roach (op cit 138) is of the view that the separation could have been achieved by simply stipulating that the offence of terrorism be intended to intimidate the civilian population or to compel the government and any organisation to act. Therefore, according to Roach (op cit 139), the motive requirement should not even be forming part of the offence of terrorism or the offence could do without the motive requirement. Thus, it might happen that the courts in South Africa will, as has happened in Canada, have to strike down the motive requirement as unconstitutional or sever it from the rest of the POCDATARA (Cachalia op cit 519).

Khulekani Khumalo
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

Whistleblowers are key to fighting corruption in South Africa. It shouldn't be at their peril

Numerous corruption scandals have been reported in South Africa in recent times. The extent of corruption in the country has been laid bare at the judicial commission probing allegations of state capture over the past three years. Corruption can impede a country's economic growth, and undermine democratic principles, stability and trust.

Whistle-blowing is one of the mechanisms used to deter corruption. It plays a role in encouraging accountability, transparency and high standards of governance in both the private sector and public institutions. Whistleblowers help combat criminal conduct and should thus be afforded protection by the state. But South Africa's system is flawed.

Recently, the country was shocked by the murder of a woman who had exposed corruption in the procurement of COVID-19 personal protective equipment.
As an academic, I've done work on the importance of whistleblowers in general, and on the possibility of paying incentives to people who blow the whistle on tax evasion.
This is one way in which the role of whistleblowers could be elevated. There are others too, such as harnessing special courts to try cases. For example I support calls for physical security to be provided to whistleblowers and their families. I also believe that whistle-blowing should be made national strategic priority. This would enable the country develop an environment for transparency and accountability.

Protection of whistleblowers

South Africa has seen a fair number of whistleblowers raising the alarm on irregularities and corruption. The outcome for the individuals in a lot of the cases point to the fact that they don't get the protection they deserve.
Notable examples include Paul Theron, the prison doctor who exposed poor health conditions at Pollsmoor Prison in the Western Cape.
Dr Theron was suspended after he made the disclosures to parliament. He battled to get his case heard in the whistle-blowing process. But he finally ended up in the Labour Court. He was never reinstated.
There's also the famous case of Mike Tshishonga, a civil servant who made serious allegations to the media about a former Minister of Justice and Constitutional Development. He was immediately suspended and subjected to a disciplinary inquiry.
The matter took many years to be resolved ending up in the Labour Appeal Court.
The most notable recent case was the murder of Babita Deokaran. She had exposed corruption within the Gauteng province's health department prior to her death.
It is evident from these examples that the South African whistle-blowing environment is failing to encourage people to come forward.

What's in place

South Africa has various pieces of legislation and regulatory policy documents that cover corruption and whistle-blowing. They also provide for the protection of whistleblowers.
The most important of these is the Protected Disclosures Act 26 of 2000. The act aims to encourage whistle-blowing in the workplace. It also seeks to create a culture that makes it easier to disclose information about criminal and other irregular conduct.
The Constitution, the Labour Relations Act and the Companies Act are also part of the whistle-blowing legislative framework.
For its part, the South African Competition Commission encourages "authorised whistle-blowing" on cartels involved in, among other things, price fixing and collusive tendering.
In addition, the Prevention and Combating of Corrupt Activities Act seeks to strengthen measures to prevent and combat corruption. It places a duty on certain people holding positions of authority to report certain corrupt transactions.

The Protected Disclosures Act lists the Auditor-General and the Public Protector as institutions that whistleblowers can disclose information to. Both are important in achieving the purposes of the Act and are equipped with specialists to deal with corruption and other illegal activities. But they should receive additional funding to do their jobs better.

South Africa's regulatory framework is one of the best in the world. But there are gaps in the system.

Steps to strengthen the system

South Africa should consider setting up an independent whistle-blowing institution. This would help whistleblowers from the time they make disclosures. It could ensure:

- the confidentiality of information flow
- the protection of their identities
- mapping the way forward for them.

This would enhance the current system. It would also showcase the important role these heroes and heroines play.

I also think that the country should consider using dedicated specialised courts and units that deal specifically with corruption and whistleblower protection. This would:

- show that government is serious about dealing with criminal and illegal activities that have high social and economic costs
- send a clear message that the full impact of the law will be felt by perpetrators and,
- show a serious commitment to upholding a value-system where whistleblowers are valued and protected.

Employers should have a zero-tolerance policy in dealing with corruption and other irregular activities. Internal procedures sometimes lack a proper commitment to follow up issues raised by whistleblower. Often no feedback is provided or nothing is done.

I support the suggestion by the Open Democracy Advice Centre that the development of a "Code of Good Practice" would help. It sets out a full and considered guidance to private and public bodies on interpretations of the law, implementation of whistle-blowing policies, and alternative mechanisms for preventing corruption

In my research I support calls for the remuneration of whistleblowers. For example, they could be eligible for a financial reward based on the amount of tax revenue eventually collected.

Lessons can be learned from the US which has strong whistle-blowing protections. These include the False Claims Act which allows private citizens to file suit on behalf of government when they have evidence of fraud. Such citizens who recover money or assets are entitled to rewards for their efforts.

Another is the Dodd-Frank Act. It provides for a reward of between 10% and 30% of the amounts collected if an "eligible whistleblower" voluntarily provides original information.

These measures can be easily adopted by South Africa where compensation is wholly inadequate. The compensation cap provided for in the Protected Disclosures

Act in line with the limits under the Labour Relations Act is not sufficient. For example, in the case of an unfair labour practice the employee would be entitled to a maximum of 12 months' compensation and in the case of automatically unfair dismissal to a maximum of 24 months' compensation.

Another problem is that it only kicks in when the whistle-blowing employee has suffered an "occupational detriment". For example, when a employee faces disciplinary action, dismissal, suspension, demotion, harassment, intimidation, or transfer against his or her will.

It is time for business and political leaders as well as civil society organisations to push harder for a system where speaking up is normalised and whistleblowers are adequately protected. And rewarded.

Monray Marsellus Botha is Head of Department and associate professor in the Department of Mercantile of Law at the University of Pretoria.
(The above article appeared on *The Conversation* webpage on 23 September 2021).

A Last Thought

"[68] An analysis of the word illegitimate means "not allowed by law or rules". Whilst the Act no longer uses the term "illegitimate child" this is implied by the reference to so-called children "born out of wedlock" which continues to perpetuate the common law distinction between so-called "legitimate" and "illegitimate" children.

[69] This reference is a stark reminder that we, as a nation, are still grappling with outmoded legal terminology which goes to the core of dignity and equality, not only for the child but also the unmarried father, and indeed the unmarried mother as well. The use of the expression "born out of wedlock" to describe a child undoubtedly injures their dignity and implies that they are not worthy of equal respect and concern. The continued distinction between children born within or out of wedlock, which the impugned law conveys, stigmatises the latter category of children. A separate process for the conferral of a father's surname during the birth registration process for children born out of wedlock remains contradictory to the

rights of the child as embedded in the Bill of Rights and contradicts the paramountcy principle."

As per Victor A J in *Centre for Child Law v Director General: Department of Home Affairs and Others (*CCT 101/20) [2021] ZACC 31 (22 September 2021)