e-MANTSHI

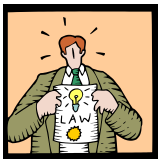
A KZNJETCOM Newsletter

October 2021: Issue 179

Welcome to the hundredth and seventy ninth 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 Women, Youth and Persons with Disabilities intends introducing the National Council on Gender Based Violence and Femicide Bill, 2021, to parliament in the current financial year. An explanatory summary of the Bill is hereby published in accordance with section 9 (e) of the Promotion of Access to Information Act, 2000. The notice was published in Government Gazette no 45267 dated 5 October 2021. The Bill seeks to establish a multi sectoral, independent and non – partisan advisory body, comprising of representatives from both the government and civil society organisations to ensure effective coordination and implementation of the National Strategic Plan on Gender – Based Violence and Femicide. This envisaged structure will be called a National Council on Gender Based Violence and Femicide; and shall be accountable to a Board. Whereas, the National Council on Gender Based Violence and Femicide Secretariat unit led by the Chief Executive Officer will provide technical and administrative support to the Council.

Copies of the Bill can be obtained from Ms Nondumiso Ngqulunga, Director: Legal Services, Department of Women, Youth and Persons with Disabilities, No.36 Hamilton Street, Arcadia, Pretoria, Cell: 076 7929 142 or Nondumiso.Ngqulunga@women.gov.za

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Recent Court Cases

1.Minister of Justice and Constitutional Development and Another v Masia (A13/2019) [2021] ZAGPPHC 428; 2021 (2) SACR 425 (GP) (28 June 2021)

The presiding officer in a maintenance enquiry ordered the arrest and detention of the respondent to coerce him into increasing his offer of maintenance. The arrest and detention were not only found to be unlawful but that the magistrate had acted maliciously and was therefore not immune from liability.

INTRODUCTION

[1] This case is about the flagrant disregard of the fundamental rights of the Respondent, in particular, the right to freedom and security of a person entrenched in Section 12 of the Constitution of South Africa.

[2] The matter before us is an appeal against the judgment handed down on 16 March 2018 of the Civil Magistrate Court of Tshwane in Pretoria and the reasons for that judgment dated 14 November 2018. In the reasons, the judgment was not amended but only the order by clarifying against which defendants the order was granted.

[3] The relevant facts in this matter are not in dispute, but the findings of the court a quo are in contention.

FACTUAL BACKGROUND

[4] On the 5th of August 2013, the Respondent presented himself, by appointment, at the Atteridgeville magistrates court before a maintenance officer for an enquiry in terms of the Maintenance Act 99 of 1998 pertaining to the maintenance of the minor child of the Respondent. When the matter could not be resolved, the maintenance officer referred the matter to the maintenance court magistrate for adjudication. The Respondent adduced evidence regarding his income and expenditure to enable the court to make an order regarding the maintenance payable in respect of the maintenance of his minor child. Subsequent to adducing evidence, the Respondent

offered to pay maintenance in the amount of R300.00 (three hundred rand) per month

[5] The presiding magistrate in the maintenance court rejected the Respondent's offer and then ordered the arrest and detention of the Respondent in the Atteridgeville police station cells for one night. The Respondent was arrested by warrant officer Letlape and detained to go and think clearly and thoroughly and to come up with a better offer. Respondent was arrested without a warrant , he was not charged with any offences, nor was he found guilty of any offence. The arrest took place in full view of his colleagues. Respondent was detained for 1 (one) day from 6 August 2013 at about 13h35 and was released on 7 August 2013 at about 10h00, after he made an offer to pay maintenance of R700.00 (seven hundred rand) per month. The Respondent was detained along with other detainees. He described the cell conditions as dirty. He slept on the floor on a mat and was given a smelly blanket. He was almost robbed by other cell mates but managed to ward off the robbery. He was hurt and humiliated by the arrest and due to the fact that his colleagues witnessed it.

[6] Warrant officer Letlape testified that he effected the arrest on the instruction of the magistrate and not on a reasonable suspicion. He testified that he did not know the events leading to the instruction given by the magistrate. Therefore, he could not have entertained a reasonable suspicion. The Second Appellant did not lead evidence that the detention was justified. The Respondent subsequently claimed R95 000.00 for unlawful arrest and detention and R5 000.00 for legal costs in the Tshwane magistrates court in Pretoria against the First and Second Appellants jointly and severally.

[7] Although the Magistrates Commission was cited as Third Defendant, the Third Defendant did not appear and the case did not proceed against the Third Defendant. The magistrate in the maintenance court was not joined as a defendant.

[8] In the judgement delivered on 16 March 2018 (the matter was heard on 11 August 2017), the Magistrate made the following order:

"(a) The Defendant is directed to pay the plaintiff R75,000.00 (seventy-five thousand rand) being damages for unlawful arrest and detention;

(b) Interest on the aforesaid amount at a rate of 10.25% per annum from the date of judgement to the date of payment;

(c) Costs of suit on a party and party scale."

[9] The Appellants applied for condonation for the late request for reasons for the judgement delivered on 16 March 2018 in terms of the Magistrate Court Rule (MGR) 54(1). The vague wording of the said order that did not indicate against which

Defendant the order was given, prompted the Appellants to request reasons.

[10] On 2 October 2018 the magistrates court granted condonation for the late request for reasons in terms of MGR 51(1). On 10 October 2018 the Appellants requested reasons for the judgement.

[11] On 14 November 2018 the reasons were provided and in November 2018 the Appellants noted their appeal in terms of the Uniform Rules of Court (URC) 51(3).
[12] The Magistrate provided the following reasons on 14 November 2018:

"I stand by my written judgment delivered on 16 March 2018 which is attached herein. In the light of the fact that I have already made a ruling that Second Defendant is vicariously liable, there can be no liability against the Third Defendant. The order is therefore amended as follows:

(a) The First and Second Defendants are jointly and severally liable to compensate the Plaintiff in the amount of R75, 000.00 (seventy- five thousand rand) for unlawful arrest and detention;

(b) Interest on the aforesaid amount at a rate of 10.25% per annum from date of judgement to date of payment;

(c) Costs of suit on party and party scale."

[13] The First and Second Appellant appeal against this order.

THE ISSUES TO BE DECIDED
[14] The Respondent issued summons for damages as a result of his unlawful arrest and detention and claimed R100,000.00 . The issues to be decided are:

[14.1] The points in limine raised by the Respondent that the appeal was out of time and did not comply with Rule 53(7) of the Uniform Rules of Court.
[14.2] Was the Respondent unlawfully arrested and detained?

[14.3] Was the magistrate employed by the First Appellant and did he act in the course and scope of his employment?

[14.4] Did the magistrate act negligently or maliciously?

[14.5] Is the Second Appellant liable as the warrant officer and other members of the South African Police Services executed an order of the magistrate?

[14.6] Was the R75.000,00 quantum correctly awarded?

POINTS RAISED IN LIMINE BY THE RESPONDENT

[15] The Respondent raised two points in limine. Respondent submitted that the procedure to be followed in respect of appeals from the magistrate court is divided into two stages. The first stage deals with the processes in the magistrate court and is regulated by Rule 51 of the Magistrate Court Rules ("MCR"). The second stage deals with the process in the high court and is regulated by Rule 50(1) of the Uniform Rules of Court ("URC").

[16] Respondent submitted that the appeal is not properly noted because the Appellants failed to timeously note the appeal in compliance with the provisions of Rule 51(3) of the MCR which provides that "an appeal shall be noted within 20 (twenty) days after the date of judgement appealed against or within 20 (twenty) days after the Clerk of the Court has supplied a copy of the judgement in writing to the party applying therefor, whichever period shall be the longer “.

[17] The Appellants were granted condonation for the late request for written reasons for the judgement in terms of MRC 51(1) but Respondent submitted that Appellants failed to also seek condonation in the high court as the notice of appeal was given more than in November 2018 and the judgement on 16 March 2018 .

[18] The Appellants were in our view correct to ask for reasons as it was not possible to appeal against the order dated 16 March 2018. The Appellants then timeously noted their appeal in the high court after receipt of the amended order of 14 November 2018.

[19] Because the Appellants properly noted the appeal in accordance with MCR 51(3) after the reasons were provided and prosecuted the appeal timeously in terms of URC 50(1), there is no need to lodge a further application for condonation in the court of appeal.

[20] It was further submitted as a second point in limine, that the Appellants failed to serve the Respondent with the record as directed by the URC 50(7)(d) which states that the party lodging copies of the record shall not less than 15 (fifteen) days prior to the date of the hearing of the appeal also furnish each of the other parties with 2 (two) copies thereof, certified as prescribed by the rules.

[21] The Appellant did not comply with URC 50(7)(d) in that the Appellants uploaded an incomplete record of the appeal on Case Lines without the consent of the Respondent.

[22] The following copies were not included in the record:

[22.1] The Rule 50(1) notice to request reasons for judgement dated 6 April 2018;

[22.2] The condonation application for the late request of the reasons dated 3 May 2018;

[22.3] The notice of intention to oppose the application for condonation dated 9 May 2018.

[23] The question is whether failure to provide the documents listed above, failure to provide a list of all the documents that have been excluded from the record, failure to have the excluded documents available at the appeal, failure to list the documents that have been excluded, and failure to consult with Respondent's attorneys about which documents should be excluded, constitutes failure to properly proceed with the appeal.

[24] This failure to comply with the rules is clear but the question is whether such failure justifies an order that the appeal be struck from the roll with costs. The documents that were excluded are not material to the issues to be decided in this appeal. We are of the view that striking the appeal from the role is not justified . See S v Jafta (CA&R 490/02) [2003] ZAECHC 18 (10 April 2003); Myeni v Organisation Undoing Tax Abuse (15996/2017)[2021]ZAGPPHC 56 (15 February 2021); Minister of Home Affairs v Liebenberg 2002 (1) SA 33 (CC) 35H-36A; Kuilders v Pharo (LCC101R/OO) [2001] ZALCC 17 (22 May 2001).

[25] The Appellants failure to timeously file a request for reasons which is a relatively simple and uncomplicated notice caused them to apply for condonation. The reasons for that delay and why condonation was granted, are not before this court. This effectively caused a 7 (seven) month delay in prosecuting the appeal to the detriment of the Respondent. Appellants also failed to comply with Rule 50(7) of the Rules of the High Court and failed to seek condonation for this failure. In both instances , the Respondent was severely prejudiced. This will be taken into account when considering the cost orders.

[26] However, this failure is not considered to be sufficiently grave to strike the appeal from the roll. The points in limine are dismissed . No order as to costs is made in favour of the Appellants in their opposition of the points in limine.

WAS THE RESPONDENT UNLAWFULLY ARRESTED AND DETAINED?

[27] It is common cause that the Respondent was arrested by the warrant officer and detained by members of the South African Police Services pursuant to an order by the magistrate without having committed an offence or having been found guilty of any offence.

[28] The Second Appellant admitted that Respondent was arrested without a warrant and detained by members of the South African Police Services who were acting in the course and scope of their employment. The Second Appellant did not lead

evidence that the detention was justified.

[29] We concur that the Respondent was unlawfully arrested and detained for one day by members of the South African Police services and that the entrenched Constitutional rights of the Respondent were breached.

[30] Because the court a quo found that the arrest was made without a warrant , it referred to Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 ("the CPA") which provides for an arrest by a peace officer without a warrant of any person whom he reasonably suspects of having committed an offence referred to in Schedule 1 of the CPA. The Second Appellant did not rely to this Section in its plea and argued that it is not applicable. We concur that it is not applicable.

VICARIOUS LIABILITY OF THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

[31] The First Appellant pleaded that the magistrate was not his employee, even if the magistrate is administratively appointed by the First Appellant on the recommendation of the Magistrates' Commission . Thus, the First Appellant cannot be held vicariously liable. The First Appellant pleaded further that he cannot be held vicariously liable for acts of a magistrate which were discharged whilst he was exercising a judicial discretion. Counsel for First Appellant argued that if the First Appellant is held vicariously liable, then the magistrate did not act maliciously but negligently.

[32] Relying on the judgements of Janse van der Walt and Another v Minister of Safety and Security and Others [2011] ZAGPJHC 15 (25 January 2011), Tsotetsi v The Honourable Magistrate Delize Smith and Another (239691150) [2016] ZAGPJHC 329 (29 November 2016), Minister of Safety and Security v Van der Walt and Another (1037113) [2014] ZASCA 174, the court a quo found that magistrates are employed by the Minister of Justice and held the following in paragraph 10 of the judgement:

"The question who Magistrates are employed by is a legal issue, governed by statute. In my view, the legal position of employees of the National Prosecuting Authority and that of magistrates are not identical. Section 9(1)(a) of the Magistrates Court Act 32 of 1944 provides expressly that magistrates are appointed by the Minister of Justice. The Magistrates Act 90 of 1993, establishes a Magistrates Commission which inter alia ensures that the appointment of magistrates by the Minister takes place without favour or prejudice and advises the Minister thereon. In terms of Section 1O of the Magistrates Court Act, the Minister of Justice appoints magistrates after consultation with the Magistrates Commission. Although the magistrates function independently and impartially that does not detract from the fact that they are appointed by and employed by the Minister of Justice. To the contrary, the statutory framework within which magistrates are appointed by the Minister of Justice ensures that they are appointed on the basis that they function independently and impartially. In carrying

out their functions independently and impartially, they act within the course and scope of their appointment and in accordance with the basis on which they were appointed. It follows that the Minister of Justice remains in my view, as in the past, vicariously liable for the conduct of magistrates acting within the course and scope of their employment."

[33] It is trite law that whilst serving in a judicial capacity, a judicial officer can only be held delictually liable for an act or omission if his or her actions are ma/a tides, malicious or fraudulent (Moeketsi v Minister van Justisie en ander 1988 (4) SA 707 (T) at 713G; Telematrix (Pty) Ltd tla Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA); Claassen v Minister of Justice and Constitutional Development & another 2010 (6) SA 399 (WCC) , para 22).

[34] In the Telematrix case, Harms JA turned to Johannes Voet (Commentary on the Pandects 5.1.58, Gane's translation) to cite the common law rule in this regard, as follows:

But in our customs and those of many other nations it is rather rare for the judge to [bear the responsibility for the outcome] by ill judging. That is because the trite rule that he is not made liable by mere lack of knowledge or [lack of skill], but by fraud only, which is commonly difficult of proof It would be a bad business with judges, especially lower judges who have no skill in law, if in so widespread a science of law and practice, such a variety of views, and such a crowd of cases which will not brook but sweep aside delay, they should be held personally liable to the risk of individual suits, when their unfair judgment springs not from fraud, but from mistake, lack of knowledge or [lack of skill]. (para 17).

[35] The learned judge went on to comment that the 'decisive policy' underlying the immunity of the judiciary is the protection of its independence to enable it to adjudicate fearlessly. Litigants ... are not "entitled to a perfect process, free from innocent [i.e. non mala fide] errors (para 19).

[36] In Claassen supra, a full bench of the Western Cape High Court refused to dilute judicial immunity by stripping away immunity for negligent conduct (para 27). The court also found that the criminal magistrate concerned enjoyed immunity against delictual liability even though he had unlawfully committed the appellant to prison in breach of the latter's fundamental rights under s 12(1) of the Constitution. The court noted that although section 12 of the Constitution entrenched a right to personal liberty, it did not by itself afford a right to compensation to a person whose right had been infringed (para 31).

[37] In the case at hand, the question is therefore whether the magistrate's actions were mala fide, malicious or fraudulent, or, drawing from Telematrix, whether the magistrate committed an 'innocent error'? In May v Udwin 1981(1) SA 1 (A), which

dealt with a judicial officer's liability for defamatory statements, Joubert JA expanded on the meaning of malicious conduct as 'conduct actuated by a dishonest or improper motive' (at 11C-D).

[38] In Claassen, a criminal court magistrate summarily remanded the appellant in custody until the next date to which the appellant's co-accused in the pending criminal trial and been warned or remanded to appear. The appellant and his co-accused were facing charges relating to theft and malicious damage to property. The magistrate was annoyed with the appellant who had not appeared in court on a particular date, but the accused had experienced unforeseen difficulties with the transport he had arranged from Cape Town to Oudtshoorn in order to be in court on the appointed date. Instead of enquiring into the reasons underlying the appellant's non-appearance, as he was required to do in terms of s 72(4) of the Criminal Procedure Act 51 of 1977, the magistrate summarily ordered his detention in prison. He had also not cancelled the appellant's release on warning in the manner prescribed in s 72A read with s 68(1) and (2) of the Act. The magistrate's explanation for his conduct was that s 72(4) of the CPA employed the word 'may' rather than 'must' and was therefore permissive, not pre-emptory. The court found this explanation inherently implausible in the context of the magistrate's conduct, but held back from finding that such conduct was mala fide or malicious, despite being urged to do so. A decisive consideration appears to have been the absence of a dishonest, improper or 'unreasonable' motive.

[39] Claassen can nevertheless be distinguished from this case on the basis of the status of the appellant, who had already been accused.

[40] In Moeketsi supra, a regional magistrate ordered the summary detention of a police official who had arrived at court to deliver a docket. On the magistrate's version of events, the police official had disturbed court proceedings and disrespected the court by moving between the bench and the witness stand without bowing to the judicial officer. He then proceeded to the back of the court and had a brief exchange with a colleague with his back to the presiding officer. This proved too much for the regional magistrate who ordered his summary detention. At the trial, however, it emerged that the magistrate had warned the police officer concerned about such disturbances . The court found that the magistrate's conduct, while unreasonable and unfair, fell short of being mala fide (at 714C) . The magistrate was guilty of negligence and was thus protected against delictual prosecution on the basis of the doctrine of judicial immunity.

[41] Moeketsi supra, is distinguishable from this matter on at least three grounds: The first is the history of engagement between the magistrate and the officer, the second is the fact that the officer appeared in court in official capacity, and the third is that the case was decided prior to the Constitution becoming effective.

[42] Janse van der Walt & another v Minister of Safety and Security & others [2011] ZAGPJHC 15 (25 January 2011) sheds further light on how courts approached the question of conduct that is mala fide, malicious or fraudulent on the part of a judicial officer. In the action, the plaintiffs sought damages for malicious prosecution and unlawful arrest. The defendant was an ordinary member of public, but the magistrate hearing the case had been overheard saying that she 'will not tolerate this anymore'. She then intervened in the case by adding a charge of armed robbery to the charge sheet, which prevented the plaintiffs from applying for bail. In determining whether the magistrate had acted with malice and bad faith, the court made the following observations at para(s). 48 - 9:

"Since the existence of malice or bad faith is not an issue which can be observed in the abstract, it is by necessity an issue which must be determined by drawing an inference from established factual circumstances. In the absence of rebutting evidence or a plausible explanation by the magistrate in question, such an inference is justifiable and the most probable and most plausible inference which can be drawn from the testimony of the plaintiffs regarding the conduct of the magistrate.

There clearly was no factual or evidential basis for the formulation of the charge of armed robbery against the plaintiffs before the prosecutors or before the magistrate. The comment of the magistrate that the type of conduct as she apparently suspected the plaintiffs were guilty of "can no longer be tolerated", suggests, on a balance of probabilities and in the absence of rebutting evidence, that the magistrate was advancing a personal agenda which was not disclosed to the plaintiffs and which was intended to teach the plaintiffs a lesson, irrespective of whether they were legally and procedurally entitled to be released on bail.

[43] In the matter before this court, the magistrate ordered the summary detention of the Respondent after his offer to pay maintenance of R300 per month for the maintenance of his minor child was deemed too low and the magistrate sent him to the cells 'to think "clearly and thoroughly" and to come up with a better offer. The Respondent was arrested without a warrant and was not charged with any offence. Unlike Claasen, the Respondent had not already been accused and the magistrate was not labouring under a false impression that his powers were permissive rather than mandatory. The facts of the case appear to be most closely aligned with those in Janse van der Walt in that the conduct of the magistrate sought to teach the applicant a lesson. The bullying tactic of detaining the Respondent without a warrant of arrest is a clear abuse of judicial power and malicious.

[44] In the result we find that the magistrate acted maliciously. The submission by counsel for First Appellant that the magistrate acted negligently and not maliciously is rejected.

[45] The court a quo found that the Magistrate enjoys delictual immunity so long as

he/she does not act with malice. The court a quo also relied on the decision of Minister of Safety and Security and Others v Van Der Walt and Another (1037113) [2014] ZASCA 174; Le Roux and Others v Dey 2011 (3) SA 274 (CC) and Janse van der Walt and Another v Minister of Safety and Security and Others 2011 ZAGPJHC 15 (25 January 2011).

[46] The court a quo held that "vicariously liability may in general terms be described as the strict liability of one person for the delict of another. The former is thus indirectly or vicariously liable for the damage caused by the latter. And the liability applies where there is a particular relationship between the two persons. Where an employee, acting within the scope of his employment , commits a delict, the employer is fully liable for the damage. Fault is not required on the part of the employer , and therefore this is a form of strict liability."

[47] The court a quo held that the magistrate is employed by the Department of Justice and Constitutional Development and that the Minister of Justice remains vicariously liable for the conduct of a magistrate acting within the course and scope of his employment. (See Tsotetsi v The Honourable Magistrate Delize Smith and Another (23969/150) [2016] ZAGPJHC 293 (29 November 2016); Minister of Safety and Security v Van Der Walt and Another (1037/13) [2014] ZASCA 174).

[48] We find that the magistrate acted as employee of First Appellant in the exercise of his duties. The magistrate acted maliciously . The magistrate did not enjoy judicial immunity. The magistrate accordingly committed a delict against the Respondent whilst acting within the course and scope of his employment. The First Appellant is therefore vicariously liable. There was no need to have joined the magistrate personally as a defendant in the court a quo.

VICARIOUS LIABILITY OF THE MINISTER OF POLICE

[49] The Second Appellant pleaded that the Respondent was arrested and detained by members of the South African Police Services in compliance with a court order and accordingly cannot be held liable. Second Appellant further admitted that the members of the South African Police Services were acting within the scope and course of their employment with the Minister of Police. Second Appellant also pleaded that the court a quo incorrectly applied section 40(1)9b) of the Criminal Procedure Act 51 of 1977 as the court orderly had to execute a court order. Second Appellant did not rely on this section in his plea and the court a quo should not have relied on it.

[50] Section 165(5) of the Constitution determines that an order or decision issued by a court binds all persons to whom and organs of state to which it applies and therefore all judicial orders must be obeyed. The Second Appellant pleaded that the police officers acted on the strength of a court order. Relying on Section 165(5) of the Constitution argued that the police officer simply executed an order of the magistrate

and he is not entitled second guess that order. Accordingly, he did not act unlawfully, and the appeal of the Second Appellant should be upheld. Second Appellant relied on the judgement of the Department of Transport and Others v Tasima (Pty) Ltd 2017 92) SA 622 (CC) 669A-B

[51] We concur with this submission and find that the police officers were not acting unlawfully as they were complying with a court order.

[52] The delay in prosecuting the appeal, the failure to explain the delay and the failure to properly comply with the URC is taken into account when considering the cost orders in this appeal. The Respondent has been prejudiced by the delay and failure to properly comply with the URC, apart from having been deprived of his fundamental rights by the malicious conduct of the magistrate.

WAS THE QUANTUM CORRECTLY AWARDED?

[53] The presiding magistrate found (in paragraph 16 of the judgement) that in determining the fair and reasonable amount of compensation the court must consider the following factors:

(a) The circumstances under which an arrest took place;

(b) the degree of publicity afforded to the arrest;

(c) the duration of the detention;

(d) the absence or presence of malice on the part of the arrestor;

(e) the conditions of the cell;

(f) the awards in previous comparable cases; and

(g) the effects of inflation.

[54] The Respondent claimed R95,000.00 (ninety-five thousand rand) for unlawful arrest and detention and a further amount of R5,000.00 (five thousand rand) for legal costs. The magistrate found that the Respondent did not lead evidence about the R5,000.00 (five thousand rand) claimed in respect of legal fees and accordingly did not deal with the claim for legal expenses.

[55] These facts regarding the arrest and detention were not disputed and the magistrate took in consideration that that the Respondent did not commit any offence and that the arrest was pursuant to an instruction of the magistrate that was clearly malicious.

[56] In relying on the matter of Strydom v Minister of Safety and Security and Another (31353/07) [2014] ZAFSHC 73 (28 May 2014) the magistrate quoted the principles for damages for unlawful arrest and detention as follows:

"In the assessment of damages for unlawful arrest and detention, it is important to bear in mind that the primary purpose is not to enrich the aggrieved party but to offer him or her some much-needed solatium for his or her injured feelings. It is therefore crucial that serious attempts be made to ensure that the damages awarded are commensurate with the injury inflicted. However, our courts should be astute to ensure that the awards they make for such infractions reflect the importance of the right to personal liberty and the seriousness with which such arbitrary deprivation of personal liberty is viewed in our law. It is impossible to determine an award of damages for this injuria with any kind of mathematical accuracy. Although it is always helpful to have regard to awards made in previous cases to serve as a guide, such an approach if slavishly followed can prove to be treacherous. The correct approach is to have regard to all the facts of the particular case and to determine quantum of damages on such facts."

[57] In the matter of Minister of Safety and Security v Kruger (183/01) [2011] ZASCA 7 (8 March 2011) the Court on appeal awarded an amount of R50,000.00 (fifty thousand rand) for unlawful arrest and detention of 1 (one) day. In Guidione v Minister of Safety and Security (2008/37480) [2015] ZAGPJHC 110 (11 June 2015) the Plaintiff was arrested and detained from 24 August 2008 to 25 August 2008 and the amount awarded was R75,000.00 (seventy-five thousand rand).

[58] The Magistrate also considered the case of Minister of Safety and Security v Scott (969/2013) [2014] ZASCA 84 (30 May 2014) where the Plaintiff was awarded initially an amount of R75,000.00 (seventy-five thousand rand) by the court a quo for unlawful arrests and detention of 9 (nine) hours. The amount of R75,000.00 (seventy-five thousand rand) was altered on appeal to R30,000.00 (thirty thousand rand).

[59] The amount awarded by the magistrate was not seriously disputed by the Appellants. We concur with the finding of the magistrate.

[60] In the result the following order is made: -

[60.1] The points in limine are dismissed, no order as to costs is made;

[60.2] the appeal of the First Appellant is dismissed with cost on an attorney and client scale;

[60.3] the appeal of the Second Appellant is upheld, no order as to costs is made; and

[60.4] the First Appellant is ordered to pay the Respondent the amount of R75 000,00 (seventy-five thousand rand) plus interest at a rate of 10.25% per annum from 14 November 2018 to date of payment, plus the costs of the hearing in the court a quo on a party and party scale.

From The Legal Journals

Batchelor, B L & Makore, S T M

Combating harassment under the Protection from Harassment act 17 of 2011 in South Africa: does it punish victims and protect perpetrators?

OBITER 2021 269

Abstract

The Protection from Harassment Act 17 of 2011 (the Act) seeks to protect victims of harassment. Despite this legislative development, the effectiveness of the Act has not been widely explored. This article fills this cavity. It argues that the broadly drafted definition of harassment, together with other concomitant shortcomings in the Act, makes it prone to abuse by unscrupulous litigants, thereby militating against its regulatory efficiency goals. The article further maintains that the Act is constructed in an unbalanced manner as it protects the rights of complainants, but unintentionally is open to abuse, allowing, unfathomably, an alleged victim of harassment to become the harasser. The article analyses the regulatory aptness of the Act in an age marked by an exponential increase in cyber-related harassment and makes a case for enhancing the regulatory approach of the Act to offer an effective means of protecting victims of harassment in a rapidly evolving society.

The article can be accessed here:
https://obiter.mandela.ac.za/article/view/11922/17044

Mabeka, N Q

An Analysis of the Implementation of the CaseLines System in South African Courts in the Light of the Provisions of Section 27 of the Electronic Communications and Transactions Act 25 of 2002: A Beautiful Dream to Come True in Civil Procedure.

***Potchefstroom Electronic Law Journal* 2021 (24)**

Abstract
The Electronic Communications and Transaction Act 25 of 2002 is an effective piece of legislation that strives to put South African law on the map of the evolving global world. However, some provisions have not yet been recognised in civil proceedings, particularly section 27 of the ECT Act. Although some rules attempt to embrace e-technology, such as Rule 4A of the Uniform Rules of Court, this is not sufficiently compliant with e-technology. The CaseLines system implemented by the judiciary seeks to enforce this section to a certain extent but a lacuna has been identified and must be modified. This article analysis the CaseLines system with reference to section 27 of the ECT Act and provides solutions and recommendations.

The article can be accessed here:

https://perjournal.co.za/article/view/8707/16438

Bekink, M

The Right of child offenders to intermediary assistance in the criminal justice system: A South African perspective.

***Potchefstroom Electronic Law Journal*, *24*, 1–34.**

Abstract
The right of a child offender to participate effectively in criminal proceedings is a fundamental aspects of a right to a fair trial and is guaranteed in the Constitution of the Republic of South Africa, 1996 as well as in international instruments, including the United Nations Convention on the Rights of the Child. An arguments is made that ensuring that this right is fully realised at domestic level, allowances should be made for child offenders to be included in the provisions of section170A of the Criminal Procedure Act 51 of 1977. Section 170A makes allowances for the use of an intermediary by witnesses and victims when presenting testimony in criminal proceedings. It is argued that the best interest of the child principles as well as other rights such as the right to dignity and equality enshrined in the Constitution and guaranteed in international instruments warrants the inclusion of child offenders in the enabling legislation. An interpretation and implementation of Section 170A of the Criminal Procedure Act in line with the Constitution and international instruments that

gives recognition to the child offender's vulnerability and enforces the best interests of the child offender is accordingly advocated.

The article can be accessed here:
https://perjournal.co.za/article/view/8563

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

Contributions from the Law School

Duress by indirect circumstances (*R v Brandford* ([2017] 2 All ER 43; [2016] EWCA Crim 1794)

Introduction

While duress by means of direct threats can provide a defence in criminal law, the legal question is whether threats conveyed indirectly are capable of providing a valid defence in criminal law. More specifically, can indirect threats then also be used as a means of defending another party's interests that are under attack? There appears to be both academic support and precedent which answers this question in the affirmative (*S v Pretorious* 1975 2 SA 85 (SWA); Burchell *Principles of Criminal Law* (2016) 279). In this case the court made clear that while *mens rea* is not relevant to the enquiry, the defence must be "confined within the strictest and narrowest limits because of the danger attendant upon allowing a plea of necessity to excuse criminal acts" (289). These limits include that the threat must be imminent and more specifically it must have been necessary for the accused to avert the danger by any reasonable means (285). This is the legal question which arose in *R v Brandford* ([2017] 2 All ER 43; [2016] EWCA Crim 1794), and which will be examined in the light of a comparison between English law and South African law in relation to the defence of duress and necessity respectively.

Facts

The accused and her boyfriend were arrested by the police during the course of a police operation which involved the supply and distribution of Class A drugs in the

London Borough of Lewisham. A number of drug runners, acting as street dealers, were charged and tried alongside each other (par 6), including the accused's boyfriend, Alford, and one Karemera. The accused was charged with concealing drugs in her vagina. There were 121 packages. Seven consisted of wraps of crack cocaine and 44 wraps contained heroin with an estimated street value of £1,500 to £2,300 (par 8). It was alleged by the accused that she had only become involved in the conspiracy on the night of her arrest on 26 August 2014, by agreeing to carry drugs for her boyfriend, which assisted the conspiracy (par 9). Her defence was that Alford had approached her for assistance on the basis that he had inherited a debt from a former friend, "Allman", who had been murdered. He alleged that his life would be in danger if the drugs were not distributed (par 10).

On the basis of these facts, a criminal trial resulted in the conviction of each accused on two counts (count 1 concerning cocaine and count 2 concerning heroin), of supplying controlled drugs in contravention of s 1 of the Criminal Law Act 1977 (par 2). Following the majority verdict of the court on these two counts, it handed down a sentence of 28 months imprisonment on count 1 and 28 months on count 2, which were to run concurrently for Brandford (par 3).

In the judge's summing up, the judge noted that the appellant had not been physically compelled to secrete the drugs but had done so at the "urgent request" of her boyfriend (par 20) and therefore withdrew the defence of duress from the jury (par 26). The judge was of the view that Brandford's belief of a threat to kill Alford, was not reasonable nor would a reasonable person of ordinary firmness, view it as such, in the absence of immediate conclusive proof that the threat would also be carried out (par 24). This was because she had no first-hand knowledge of the threats (also called "hearsay duress") although the trial court had disapproved (par 23).

The grounds of appeal thus related to the judge's treatment of hearsay evidence, that is whether threats always had to be directly conveyed to successfully rely on a defence of duress (par 23).

Judgment

In the Court of Appeal, the crux of the appellant's argument was the judge's decision to withdraw the defence of duress from the jury (par 1). More specifically the argument centered around the judge's treatment of "hearsay duress", which was not well grounded since there was nothing precluding the use of "hearsay duress" (23). This complaint was unfounded since there was no "basic irreconcilability" between the pressure created by a relationship and fear that forms the basis of duress (par 23). The first makes use of affection whereas the latter is based on fear. It is important to distinguish between pressure that one party places on another to manipulate that individual without serious threat of death or injury. This is because such pressure will not establish a defence of duress (par 24). The distinction is important since the English legal system "leans heavily" against use of hearsay evidence, especially where the threat has not directly been conveyed (par 25). This ultimately formed the basis of the defence counsel's contention that the evidence

should have been placed before the jury. Defence counsel contended that Brandford was of good character and had in fact only appreciated the severity of the situation the night before the crime was committed and therefore had not voluntarily associated herself with any criminal activity.

The court proceeded to examine whether duress can indeed be regarded as a defence where the offence in question does not include direct threats, which leads to the criminal conduct, and came to the conclusion that while it may not necessarily be a fatal bar to a defence, the manner in which the threat is conveyed is but one of the circumstances that the court will take into consideration.

Another reason why duress could not be available as a defence was based on policy grounds: duress in this form could not be available where it frustrated the legitimate aims of government in controlling the A class drug trade (par 25). The court proceeded to examine several pertinent decisions in this regard, in determining whether defence counsel was correct in its submission that duress could equally be applicable in the context of threats that were made indirectly. Defence counsel noted there was no authority that precluded the use of hearsay duress (par 27).

On the facts of the case, the Court of Appeal noted that the trial court was incorrect in the contention that while fear which forms the foundation of duress and pressure which is brought to bear from intimate relationships and which exploits a person's affection are irreconcilable (par 40; emphasis in the original). They can operate in a collective manner (par 40). In addition, whether or not a defence of duress can be founded rests on whether the pressure based on exploitation of relationship is accompanied by threat of death or serious bodily injury (par 40).

The court confirmed the conviction but allowed the appeal against the sentence, deeming the sentence that was passed was manifestly excessive despite the fact that she had a significant role in a category 3 offence as a willing courier of 121 wraps of Class A drugs, with knowledge they would be sold in Portsmouth (par 53). The court substituted her sentence with that of 21 month's imprisonment (par 56).

The nature of the defence of duress in English law

Brandford raised the question of whether duress can successfully be invoked as a defence (*R v Hasan* [2005] UKHL 22, [2005] 2 AC 467) in the case of drug trafficking or drug dealing (Storey "Duress by Indirect Threats" 2017 *Journal of Criminal Law* 91 94). In this respect see *R v Aikens* [2003] EWCA Crim 1573; *R v McDonald* [2003] EWCA Crim 1170).

The defence of duress by threats can be characterized as necessarily involving a choice of alternatives:

"Thus, although the defendant must honestly believe that force is necessary, this belief is not required to be reasonable, as opposed to the requirement that the response be reasonable (Freer "Driving Force: Self-Defence and Dangerous Driving" 2018 *Cambridge Law Journal* 9 10).

This choice of alternatives plays a key role since it has the ability to exculpate the defendant in a particular case. However, policy considerations demand that such a defence be narrowly circumscribed (*R v Hasan* [2005] UKHL 22; [2005] 2 AC 467). Therefore, the defence is only available if the two-prong test is satisfied:

"[w]ould the defendant have been impelled to act as they did because, as a result of what they reasonably believed the threatener had said or done, they had good cause to fear that if they did not so act the threatener would kill or seriously injure them?"

Notably, the above quote suggests that only a limited category of threats could qualify for a defence if there were threats of death or serious bodily harm (*R v Hasan* [2005] UKHL 22, [2005] 2 AC 467 at par 21) or a threat directed to a member of the defendant's immediate family or a person for whose safety the defendant would reasonably regard themselves as being responsible (*R v Brandford supra* par 32). Further, in instances where the second stage of the test was reached, that is where death or serious bodily injury is a likelihood, then the matter was one left for jury determination (see *R v Lynness* [2002] EWCA Crim 1759 24–25). That is the question of whether the appellants reasonable belief in death or serious bodily harm from Alford becomes a crucial question that needs to be determined (Ashworth and Horder *Principles of Criminal Law* 7ed (2013) 206), and this is where the primary source of criticism in this case lies. Where no circumstances existed where the defence could be found, then such a defence has to be withdrawn from the jury (*R v Bianco* [2001] EWCA Crim 2516). Circumstances where such a defence would be withdrawn, for instance, can be found where there was no immediacy of threat or through the doctrine of prior fault: that is where a person had voluntarily joined a criminal enterprise (*R v Ali* [1995] Crim LR 303; *R v Heath* [2000] Crim LR 109; *R v Harmer* [2001] EWCA Crim 2930; *R v Ali* [2008] EWCA Crim 716; *R v Hussain* [2008] EWCA Crim 1117 (Percival "Cases in Brief: Brandford [2016] EWCA 1794; December 2, 2016" 2017 *Archbold Review* 1 2.). In *Hasan*, the court noted that:

"[N]othing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant's subservience. There need not be foresight of coercion to commit crimes …" (37).

Duress by threats, developed through a line of authorities, seems to suggest that while indirect threats can in principle be relied upon (see *R v Hudson*, *R v Taylor* [1971] 2 All ER 244, [1971] 2 QB 202), the courts follow a direct approach. That is, the more directly the threat is conveyed, the more likely it will be capable of establishing defence (*R v Brandford supra* par 39).

One aspect that was particularly noteworthy about this judgment was the trial court judge's discussion of the context in which indirect threats could be made. The judge was of the view that there was a clear distinction between a person whose free will was overbourne as a result of fear as opposed to the case in question where the accused was merely pressurized to act as a result of the romantic relationship that she shared with Alford (*R v Brandford supra* 23).

The Court of Appeal rejected the trial court's position, noting that the two concepts are different and could in fact operate in a cumulative manner (Laird 2017 *Criminal Law Review* 557). This is because the pressure based on a relationship exploits

infatuation or affection, whereas the second concept, fear, which lies at the heart of duress, is based on fear (*R v Brandford supra* par 40). Laird points out that this raises two questions: (1) does compulsion and pressure which arises in the context of a certain type of relationship give rise to a new form of defence? (Laird 2017 *Criminal Law Review* 557) and (2) was there any immediacy of threat to constitute a complete defence? (par 33).

What is noteworthy about this "new" defence is that like duress, it is also predicated on the principle of compulsion (Laird "Evaluating the Relationship Between Section 45 of the Modern Day Slavery Act 2015 and the Defence of Duress: An Opportunity Missed?" 2016 6 *Criminal Law Revie*w 395 398). Furthermore, compulsion must be ascribed to some form of "relevant exploitation" (Laird 2016 *Criminal Law Revie*w 395 398). Section 76 of the *Serious Crimes Act* 2015 (SCA) discussed the ambit of this new offence of controlling and coercive behaviour, which is limited to intimate or family relationships and which is capable of causing harm and special vulnerability to victims in these settings (Edwards "Coercion and Compulsion Re-Imagining Crimes and Defences" 2016 *Criminal Law Review* 876 877).

The implications of accepting such a defence are radical and problematic at best. First, since compulsion is not defined, it will have to be interpreted broadly. This means that since compulsion is subjectively tested, no evidence of threats or outward action is necessary (Laird 2016 *Criminal Law Review* 398). Therefore, viewed from the defendant's perspective, she could not have helped but acted as she did. Such an approach does not accommodate the restrictive nature of the rest of the elements of the defence (Laird 2016 *Criminal Law Review* 398). Second, what criteria are envisaged in relation to the causation element. It appears as if the strict requirement for causation, namely that of the "but for" test is relaxed and a lower criterion would suffice (Laird 2016 *Criminal Law Review* 398).

What appears to be clear is that Brandford did not appreciate the true nature of the threat to Alford up until the night before the events on 27 August, and any notion of voluntary association could be discounted (*R v Brandford supra* 27). However, in this instance, the jury was not given an opportunity to canvass this defence and therefore their jurisdiction was usurped in respect of this matter (*R v Brandford supra* 27). Despite flawed reasoning concerning the basic irreconcilability between pressure based on relationship, the judge was entitled to withdraw the defence. Therefore, where there is an exploitation of relationship without a real threat of "relevant threat of death or serious injury of sufficient potency, cannot found duress" (*R v Brandford supra* 40). In this case, it was clear from the evidence that there was no immediacy of threat. This was demonstrated by the following factors. First, the vagueness of the threats made as well as the absence of the identity of the perpetrator making the threats (*R v Brandford supra* par 46). Second, the absence of an immediate threat on the night in question: that is, she was able to purchase latex gloves and other items freely. She was able to contemplate the option of contacting either her father for assistance to pay off those threatening Alford or even the police

In relation to the contention that it can form the basis of new defence as set out in section 45 of the Modern Slavery Act 2015, it has been held that it is insufficient to form the basis of duress on the basis of the above discussion (Laird 2017 *Criminal Law Review* 557). Nowhere is this more clearly demonstrated than in the traditional test used to assess duress as expounded in *R v Graham* [1982] 1 All ER 891 (and followed in the subsequent cases of *R v Howe* [1987] 1 All ER 771; [1987] AC 417); *R v Hasan* [2005] 2 WLR). In *R v Brandford* supra at par 31, the court again highlighted, the court, objective test for duress:

"would the sober person of reasonableness firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed [the threatener] said or did by taking part [in the offence]?"

The first leg of the test is subjective in nature, that is, did the defendant entertain an honest belief as opposed to a reasonable belief that their life was in danger (James "Duress: Objective Test" 2007 *Journal of Criminal Law* 193 194). This means that the reasonable person would share the same characteristics, including psychiatric impairments, which would not make them more vulnerable or timid but in fact genuinely more susceptible to threats (James 2007 *Journal of Criminal Law* 194; see also *R v Bowen* [1996] 2 Cr App R 157).

South African law

It is instructive to compare the English legal position in relation to the defence of duress discussed in *Brandford* with the position in South African law. The legal position pertaining to necessity has been set out in *S v Goliath* (1972 (3) SA 1 (A)). It can constitute a complete defence, even in cases of murder (*S v Bailey* 1982 (3) SA 772(A) on the basis that heroism is not expected from ordinary people in life and death situations (25B–D). No distinction is made between threats induced by natural causes or by means of human agency (Yeo "Compulsion and Necessity in African Criminal Law" (2009) *Journal of African Law* 90 93; see also *S v Goliath supra* 24). Furthermore, for such a defence to be successful, certain conditions must be met. These include:

(1) Legal interest is threatened;
(2) Threat has already commenced or is imminent;
(3) Threat is not caused by the accused's fault;
(4) Which makes it necessary for the accused then to avoid the danger; and
(5) Reasonable means must be used to avert the danger (Burchell *South African Criminal Law and Procedure: General Principles of Criminal law* (2011) Vol 1 148.

English law requires that the existence of the threat need only be based on an honest belief on the part of the defendant. However, in South African law, because necessity operates as a justification ground, not only must the threat be real, but it must be of such a degree that no reasonable person would be able to withstand it (*S*

v Goliath supra 11D; *S v Peterson* 1980 (1) SA 938 946 E–F; Burchell "Unravelling Compulsion Draws Provocation and Intoxication Into Focus" 2001 *South African Journal of Criminal Justice* 363). In other words, the accused's beliefs are not considered a factor regarding the enquiry into unlawfulness (Burchell *Criminal Law* 4ed (2013) 162). The accused's beliefs only become relevant when his conduct is proven to be unlawful, that is where fault is present on his part (Burchell *Principles of Criminal Law* 4ed (2013) 166–167). This point is crucial, in light of our new constitutional dispensation, as well as the culture of crime and violence and "blatant" disregard for human life (*S v Mandela* 2001 (1) SACR 156 (C) 166i–j). Noting these points, the court in *Mandela* rejected a defence of necessity where certain factors were absent, such as the immediacy of life-threatening compulsion (168b). After the pronouncement by the court it appears as if necessity has been delegated to the realm of criminal excuse: achieving an compromise between limits of human fortitude on the one hand and constitutional ideals such as the right to life (Le Roux "Killing Under Compulsion, Heroism and the Age of Constitutional Democracy" 2002 *South African Journal of Criminal Justice* 100 104; *S v Mandela supra* 168c–d). While fault is a requisite criteria for necessity (*S v Bradbury* 1967 (1) SA 387 (A) 404H; *S v Lungile* 1999 (2) SACR 597 (SCA) 603c–d), case law has demonstrated that convictions will not solely be based on its association with an organised crime syndicate, knowing its disciplinary code of conduct (per Holmes JA in *S v Bradbury supra* 404H, quoted in *S v Mandela supra* 164i–j). Rather, fault is merely one of the factors that courts use to determine whether an accused can successfully rely on the defence (Le Roux 2002 *South African Journal of Criminal Justice* 101). The ruling in *Bradbury* would be confined to members of a gang who at least know or foresee the violent nature of the gang and its code of vengeance which they may be compelled to follow (Burchell 2001 *South African Journal of Criminal Justice* 363). Although, in theory, the defence could be available if it could be shown that there was no question of voluntary association (*R v Brandford supra*), it would fail since the issue turns not solely on the question of whether she joined the gang, but rather because there was no immediacy of life threatening compulsion *(S v Mandela supra* 168b) and therefore any action taken was not necessary to avert the danger. Although the appellant in that case had argued that she had not appreciated the true nature of the threat up until the night in question (*R v Brandford supra* par 27), any reasonable person in the position of the appellant would have appreciated the nature of the threat that Alford faced (par 46). This is because of the length of the appellant's association with Alford and his dealings with the criminal syndicate (*R v Brandford supra* par 46). These included three previously known incidents to the appellant which included the January pepper spray incident, the Allman murder, as well as the June stabbing (*R v Brandford supra* par 27), which she alleged she only "half believed" (par 27). Further, Brandford's general demeanor and conduct was not indicative of a person who was unduly fearful following this series of linking events (*R v Brandford supra* par 27).

The effect of the *Mandela* decision, in a particular context other than that of the *Brandford* context, is that the defence of necessity has been relegated to the realm of criminal excuse. Since the accused is exercising a choice to protect his life over that

of another person, the defence will only prevail where heroic acts that extend beyond the capacity of a reasonable person are necessary to avert any possible harm. In such cases it would be evident that the accused lacked the requisite culpability needed (*S v Mandela supra* 167c–e; Le Roux 2002 *South African Journal of Criminal Justice* 103).

Does this mean that *Mandela* case is advocating the normative approach? (Le Roux 2002 *South African Journal of Criminal Justice* 104). A move towards a normative approach is problematic for a number of reasons. First, it places traditional necessity and putative necessity on an equal footing as a defence to fault. This could lead to an obfuscation of the two defences since with traditional necessity all requirements for the defence must be met, whereas with putative necessity, the normative concept of fault rests on whether or not the necessity arose from a mistake of law or "unavoidable ignorance" (Van Oosten "The Psychological Fault Concept Versus the Normative Fault Concept: Quo Vadis South African Criminal Law (Continued)" 1995 *THRHR* 568 574). In contradistinction, if putative necessity is relied upon, it implies that the requirements for traditional necessity have not be met. The normative concept of fault implies that the defence will only be successful on the basis of circumstances of mistake of law or "unavoidable ignorance" (Van Oosten 1995 *THRHR* 568 574). However, it seems that if the accused lacked awareness of unlawfulness and therefore an absence of intention in terms of psychological fault, the defence would still not be available. Real necessity on the other hand, affords a full defence despite the presence of intention. It also raises the issue of how an unlawful killing done in circumstances of necessity with the presence of intention can be harmonised with a conviction on the basis of crime with intention, where awareness of unlawful is absent on account of mistake of law or unavoidable ignorance. (Van Oosten 1995 *THRHR* 568 574). Lastly, necessity as a defence to fault, as opposed to unlawfulness, leads to the same result as necessity as a defence to unlawfulness rather than to fault (Van Oosten 1995 *THRHR* 568 574).

In relation to the question of whether such a defence would be available under a similar set of facts, the following points are noteworthy. The central focus is whether there was voluntary association. The ruling in *Bradbury* would be confined to members of a gang who at least know or foresee the violent nature of the gang and its code of vengeance which they may be compelled to follow (Burchell 2001 *South African Journal of Criminal Justice* 363). Although the appellant argued that she had not appreciated the true nature of the threat up until the night in question (*R v* Brandford *supra* par 27), any person in the position of the appellant would have appreciated the nature of the threat that Alford faced (par 46). This is because of the length of the appellant's association with Alford and his dealings with the criminal syndicate (*R v Brandford supra* par 46). These included three previously known incidents to the appellant which included the January pepper spray incident, the Allman murder, as well as the June stabbing (*R v Brandford supra* par 27) – which she alleged she only "half believed" (par 27). Further, her conduct was not conducive of an individual who unduly fearful following this series of linking events. Her evidence indicated that she only "half believed" what Alford had told her about the

modus operandi of the syndicate (for instance, the January pepper spray incident, the Allman murder as well as the June stabbing (*R v Brandford supra* par 27)). Even if the defence of necessity were in principle available on the basis of the "relatively low standard" for assessing necessity as set out in *S v Goliath* (*supra*), she would not be viewed as having acted reasonably in the circumstances. This is because she had other reasonable alternatives, which clearly demonstrate that she did not act reasonably (*S v Goliath supra*). These include a lack of immediacy of life threatening compulsion (*S v Goliath supra*) and the fact that she had the opportunity to change her mind, contact the police or ask her father for assistance (*S v Mandela* 2001 (1) SA 156 (C)).

Concluding remarks

It is submitted that a bifurcated approach, which is currently followed in English law of compulsion and duress is problematic and ought to be avoided at all costs. This approach was given prominence in the case of *Mandela* where the court in cases of compulsion implied that a normative approach ought to be adopted. It is submitted that a "one size fits all approach" as followed prior to the *Mandela* decision is to be preferred for the following reasons. First, the dichotomy between justification and excuse plays an indispensable role in extrapolating and expounding the goals that criminal law seeks to achieve. One of these goals is ensuring legitimacy by elucidating the problems in criminal responsibility, which are essentially geared at reflecting community values. The second goal of criminal law is efficiency. This can be achieved by ensuring that the distinction in the law maintains coherence and clarity needed for correctly attributing blame (Mousourakis "Distinguishing Between Justifications and Excuses in the Criminal Law" 1998 *Stellenbosch L. Rev*. 165 180). These goals can be attained by maintaining the traditional approach to necessity, by treating it as a justification ground. The primary difficulty with adopting a pragmatic approach as has been followed in *Mandela* and in the English law, is that such an approach does not sufficiently maintain key distinctions. The case of *Mandela* taken to its logical conclusion, leads to the same primary critiques that have been demonstrated in the English approach, which is a failure to maintain critical distinctions. For example, consider the defence of necessity and duress of threats and circumstances. The English courts have gone on to develop duress of circumstances as an excusatory defence and this is problematic since the defence now covers circumstances that are viewed as necessity in other jurisdictions (Williams 2014 *Common Law World Review* 1 5). The English approach also appears to incorporate aspects that belong in the sentencing enquiry into liability enquiry. This is clear when one considers how the courts have grappled with what factors to take into consideration in the test for duress, whether by threats or circumstances. The test now incorporates a subjective criterion: did the defendant in circumstances, as she reasonably believed them to be, have good reason to fear that serious bodily harm or death would follow if the offence was not committed (Virgo 2002 *Archbold News* 4).

The distinction between justification and excuse is important and should remain a justification ground: the basis on which an acquittal rests serves a "symbolic function in criminal law since if it is raised as legitimate defence, it assumes that the holder of the right can use force against an unlawful attack" (McCauley 1998 *Irish Jurist* 120 127). By describing the defence as one of justification it sends a clear message that the conduct is approved. Furthermore, a person "cannot turn away from his concrete interests when he is evaluating the [dilemmatic choice with which he is confronted] … the state acknowledges that, even though from an objective point of view the interests of a person who acts under duress have no more weight than the interests of the actor's innocent victim, it is comprehensible that citizens attach more value to their own ends …" (Chiesa 2008 *Vand. J. Transnat'l L.* 760).

Finally, in accordance with the approach of the Court of Appeal in *Brandford*, it may be concluded that there is no logical basis for excluding a defence of necessity to an accused on the basis of indirect threats. However, the success of such a defence would be dependent on whether there was "immediacy of life threatening compulsion".

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Matters of Interest to Magistrates

DOING WELL, BUT COULD DO BETTER: THE JUDICIARY AND TECHNOLOGY IN AFRICA

By Carmel Rickard

The theme of the 2021 Southern African Chief Justices' Forum conference was 'The judiciary and technology in Africa'. As readers might expect, there was considerable focus on the switch, in many jurisdictions, to virtual court hearings because of Covid-19. But that's not all that was on the agenda.

For many at the conference, it would have been the first in-person gathering of this size since the start of the pandemic in 2020. If so, it would have been worth the effort. The theme, 'The judiciary and technology in Africa', is one that surely troubles, excites and challenges virtually everyone working in this field.

How is it possible that, almost overnight, courts and those who work in them, were able to move from the traditional format to online hearings? Keynote speaker,

Professor Richard Susskind, legal futurist, expert on artificial intelligence and the courts, and said to be the originator of the concept of online courts, pointed out this unexpected development. While judges and lawyers were often seen as conversative and resisting change, in fact they have been able to embrace the new developments quite quickly, and in no fewer than 168 jurisdictions, some form of remote court is now operating.

And they are not merely operating – the conference audience heard that some are actually doing better now, and proving more efficient in their virtual format than before.

Human interaction

From the African Court on Human and Peoples' Rights, Grace Wakio Kakai, head of the court's legal division, said that though human interaction suffered, virtual sessions had actually been more effective than the traditional court systems.

Another regional court, the East African Court of Justice, provided even more evidence that the new system could produce good results. Speaker Geoffrey Kiryabwire, a member of Uganda's court of appeal and vice president of the EACJ, produced some startling figures comparing the number of legal issues handled to completion by the court in 2019, before anyone had even heard the word 'Covid', and in 2020 when a switch to virtual hearings became essential: a total of 59 matters were completed in 2019 but that number more than doubled when in-person hearings were no longer possible.

These figures would not have surprised Susskind had he heard them (he addressed the conference by video-link from the UK, and was not 'present' during the time of those presentations).

Accelerate automation

During his address he drew a distinction between automation and innovation and suggested that the judicial response to Covid has been to accelerate automation, rather than to increase innovation.

'What we've essentially done is to drop conventional hearings into Zoom or Teams or some kind of video conference. We haven't much changed the underlying participants.' They were still the old crew: 'Still judges, still lawyers, still similar rules and similar processes'.

'I don't think the future has yet arrived. I don't think home working is a full transformation of a court system. I don't think dropping hearings into Zoom is a shift in paradigm as commentators want to suggest. We are still at the foothills of change.'

Digital society

In the view of Susskind, the elephant in the room was worldwide inadequate access to justice. 'Increasingly, the way we practice law and administer justice feels out of step in a digital society.'

‘The problem is not unique to Africa; it’s a global problem. It’s the global access to justice problem. In some countries, the backlogs are staggering. In Brazil for example, there’s a backlog of some 80m cases.
‘We have to think more fundamentally.

Disrupt
‘The first 60 years of court technology has been about automation, crafting new technology onto our old ways of working, systematising our traditions. Often that delivers “mess for less”, and it doesn’t address the fundamental problem.
‘Instead I ask you to think beyond automation to innovation, by which I mean using technology not to support or enhance our old ways of working but fundamentally to change our old ways of working – to disrupt, to replace, to displace – to allow us to deliver better access to justice in a digital society. I don’t think you should be assembling in your [meeting] room to discuss automation. You have to go beyond computerising what you already do if you want to deliver better access.’
Susskind made several points about the video hearing, now the default way of conduct court sessions in many jurisdictions.

Iceberg
‘The first is that they have worked rather better than most lawyers and judges would have expected. If you had suggested video hearings in early 2020, most lawyers and judges would have said it’s not possible and certainly not desirable. But in practice, for many cases, they have worked rather well.
‘Secondly, we find that judges and lawyers actually can adapt quite quickly. It’s often said that lawyers and judges are conservative, resistant to change. But that doesn’t mean if the platform is burning, if the iceberg is melting, that judges and lawyers cannot adapt. The response to Covid has shown that judges and lawyers can indeed embrace technology.
‘The third observation I would make is because of the use of these systems and services online many legal minds have been opened to new ways of working. Some legal minds in fact have been changed. I also acknowledge that an absence of technology in some jurisdictions and poor technology in others, has been a problem. You cannot satisfactorily offer video hearings unless the enabling technology functions.

Worst
‘But here’s one thing to think about: the enabling technologies you see today are the worst they are ever going to be from now on. Our technologies are getting better and better and as I say, in Africa, increasing investment and deployment of these technologies. We cannot judge the acceptability of Covid technologies for the future simply by looking at today’s short-comings. We have to anticipate and indeed urge improvement in technology.

‘I would say as well, that Covid has had an unfortunate polarizing effect in the legal world. Some lawyers and judges say we should never go back. We should use video hearings more extensively. This is the future. But others are saying we cannot wait to go back. As soon as we can we should dismiss all this technological nonsense and return to proper legal and court work.
‘I sit somewhere in between. I think the future will be a blend of traditional hearings and video hearing and of online courts. I don’t think we should be dogmatic and insist on one way or the other. I think we should find what suits our legal system and what suits different kinds of cases. But I underpin again my major point: that if we continue as we have always been, offering physical court hearings, we will not crack the access to justice problem.’

(The above article appeared on the *africanlii* website on 1 October 2021.The keynote address of Prof Susskind can be accessed here: https://africanlii.org/sites/default/files/Keynote%20address%20by%20Professor%20Richard%20Susskind.pdf)

A Last Thought

“A home is more than brick and mortar, it is often a place of comfort, safety, and the keystone of a functional society. The background to this application illuminates, in living colour and grim reality, the lived experiences of the applicants, for whom this comfort and safety was disregarded through a sustained search and seizure campaign by the respondents. The applicants, who are poor and vulnerable people, were subjected to cruel, degrading and invasive raids, which were conducted without any warrants. The duration of the search and seizure campaign lasted approximately a year. The true purpose of the raids was not only to seek out and arrest undocumented immigrants but also to frighten and harass the applicants into leaving their homes.”

Per Mhlantla J in *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others [2021] ZACC 37 at Para [1]*