e-MANTSHI

A KZNJETCOM Newsletter

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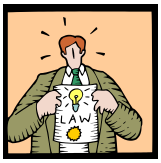
Welcome to the hundredth and eightieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Correctional Services has, under section 16 of the Magistrates Act, 1993 (Act No. 90 of 1993), on the recommendation of the Magistrates Commission, amended the regulations for judicial officers in the lower courts, 1994.The amendment was published in Government Gazette no 45395 dated 29 October 2021. The regulations, which were amended, are Regulations 4, 22 and 26.

The amendment can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202110/45395gon1440.pdf

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Recent Court Cases

1. S v Seroka (REV 93/2021) [2021] ZALMPPHC 64 (30 September 2021)

Once an accused person has appeared in another court, pursuant to a transfer of such person from the transferring court, for sentencing or trial purposes, such receiving court shall be vested to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings, unless the receiving court refers the matter back to the transferring court for a bail application.

Naude AJ:

[1] This is a special review in terms of Section 304(4) of the Criminal Procedure Act, 51 of 1977, as amended ("the Act"). The Acting Regional Court Magistrate, Mr. R.J Marais, has referred this matter to this court with a request that this court, in the interest of justice, exercise its inherent powers to review the decision of the District Court Magistrate not to attend to the bail application as was referred to him by the Regional Court Magistrate after appearance in the Regional Court.

[2] The Accused was arrested on 16 September 2020 on a charge of Robbery (with aggravating circumstances) for using a firearm and initially appeared in the Groblersdal District Court under case number MH 174/2020 where the Accused abandoned his bail application on 12 October 2020 while duly represented by Legal Aid South Africa.

[3] The Accused was transferred to and appeared in the Groblersdal Regional Court on 13 April 2021 under case number SH77/2021 during which appearance he terminated his Legal Aid Attorney's mandate and instructions. The Accused proceeded in person and was resolute to represent himself.

[4] On 26 July 2021 a pre-trial was concluded and a trial date was fixed for 8 September 2021. The Accused however indicated that he now wished to apply for bail.

[5] The matter was referred back to the District Court for the hearing of the bail application on 28 July 2021 as there is only one Regional Court Magistrate stationed at Groblersdal who had to attend to the trial on 8 September 2021 and was therefore precluded from attending to the bail application which will involve the hearing of evidence on the merits of the case.

[6] The Accused appeared in the District Court on 28 July 2021 as directed by the Regional Court Magistrate, but the District Court Magistrate declined to attend to the bail application and relied on the decision of this court in the matter between The *Director of Public Prosecutions, Limpopo v Rameez Patel & Another* under case number REV85/2020 dated 30 April 2021.

[7] The District Court Magistrate did not immediately bring his decision to the attention of the Regional Court Magistrate. Only when the Accused again appeared in the Regional Court for trial on 8 September 2021 was the Regional Court Magistrate apprised of the situation which gave rise to this special review.

[8] It is against this background that this Court is called upon to decide whether the District Court correctly relied on the *Rameez Patel*-matter supra and invoked the provisions of Section 60(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act") in its refusal to hear the bail application. The crisp issue therefore arising for determination in the present matter exclusively turns on a proper interpretation of the meaning of Section 60(1)(b) of the Act and the Rameez Patel – matter supra.

[9] Section 60(1) of the Criminal Procedure Act 51 of 1977 provides as follows:-

"An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, if the court is satisfied that the interests of justice so permit."

[10] Section 60(1)(b) of the Act provides that:-

"Subject to the provisions of section 50(6)(c), the court referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time." [Own emphasis]

[11] Section 50(6)(c) of the Act states as follows:-

"The bail application of a person who is charged with an offence referred to in Schedule 6 must be considered by a magistrate's court: Provided that the Director of Public Prosecutions concerned, or a prosecutor authorized thereto in writing by him or her may if he or she deems it expedient or necessary for the administration of justice in a particular case, direct in writing that the application must be considered by a regional court."

[12] John Van der Berg In Bail, A Practitioner's Guide, Third Edition at page 49 stated as follows:-

"The provision is somewhat less clear than s 60(1) as it read before the 1995 amendment, and which provided that 'an accused who is in custody in respect of any

offence may at his first appearance in a lower court or at any stage after such appearance, apply to such court or, if the proceedings against the accused are pending in a superior court, to that court, to be released on bail…'. This lack of express provision notwithstanding, however, it is submitted that 'the court' referred to in s60(1)(a) will of necessity by the court (and, moreover, usually a lower court) in which the accused makes his first appearance or, subsequently, the trial court (which may be a lower court or a superior court)."

[13] Further, John Van der Berg on page 49 of Bail, A Practitioner's Guide, states as follows:-

"6.2.1 Transfer of accused for trial or sentencing

Subject to the curtailment of the accused's right to be brought to court outside ordinary court hours, the court (usually the district court) referring the accused to another court (usually the regional court of High Court) for trial or sentencing will retain jurisdiction in respect of bail until the accused appears in such other court for the first time…

Difficulties of interpretation have arisen as a result of the amendment of s50(6), particularly when it is read in conjunction with s60(1)(b) of the Act, which provides that

the court [usually a magistrate's court] referring an accused to any other court for trial or sentencing retains jurisdiction relating to the powers, functions and duties in respect of bail in terms of this Act until the accused appears in such other court for the first time. [emphasis added.]

Does this mean that the magistrate's court, once it has referred an accused to the regional court or the High Court for trial, is functus officio with regard to the matter of the accused's bail, and retains no further jurisdiction thereanent? Or may it be said that the magistrate's court and the higher court in question hold concurrent jurisdiction once the accused has appeared in the latter court? The question is one of some importance, as it fairly frequently happens that a higher court is for one reason or another unable or unavailable to hear a bail application of an accused on trial or awaiting for trial before it. In such cases the accused's right to apply for bail speedily may be denied him if the referring lower court were deprived of its original jurisdiction. The question was considered in *Director of Public Prosecutions, Eastern Cape, v Louw NO: In re S v Makinana* 2004 (2) SACR 46 (E) where it was observed [at 56g]:

'The words 'subject to the provisions of s 50(6)(c) in s 60(1)(b) must be interpreted in conformity with, and in such a way as to promote, the values of the Constitution and the spirit, purport and objects of the Bill of Rights. It must be interpreted, in other words, so that it promotes the value of, and the right to, freedom as well as the right to be 'released from detention if the interest of justice permit, subject to reasonable conditions' and the right of access to court. More than that, it must be interpreted in such a way that it gives effect to the State's obligations, in terms of s 7(2) of the Constitution, not only to abstain from interfering with these rights – the negative obligation to respect them – but also to positively facilitate their exercise – the positive obligations to protect, promote and fulfil them.'

In the course of granting a declaratory the court in *Makinana* held that the magistrate's court has exclusive jurisdiction to hear a bail application in respect of any case in which an accused person is charged with a Schedule 6 offence (subject to a directive in terms of section 50(6)(c)) from the first appearance of the accused until he appears in such higher court to which his matter may be transferred, whereupon such other court shall enjoy jurisdiction to entertain a bail application. The court did not declare such higher court to be vested with exclusive jurisdiction to consider bail once the accused has appeared before it. [writer's emphasis]

In *S v Mzatho and Others* 2007 (2) SACR 309 (T) the court approved of the concurrent jurisdiction approach by holding that in appropriate circumstances (for instance where it would be unhealthy for an area's sole regional magistrate to hear a bail application as well as the subsequent trial) a regional magistrate could refer the matter back to the magistrate's (district) court, even though the accused had already appeared before him pursuant to a referral by the lower court."

[14] The above referred to approval stated in *Mzatho* (supra) was echoed and restated with approval in the unreported decision of *S v Hlongwane & Others* (AR507/13) [2015] ZAKZPHC 1 (28 January 2015) where it was stated:-

"40. In the result the court issued a declaratory order that the regional court, confronted with a bail application which in the opinion of the presiding regional magistrate it could not entertain, had the power to refer the bail application to a lower court if such referral would, in the opinion of the deciding regional magistrate, be in the interest of justice and serve to protect the fundamental rights of the applicant for bail as entrenched in the Constitution.

41. In my view similar considerations apply in the present matter for the protection of the rights of sentenced applicants for leave to appeal from the magistrates and the regional courts in terms of section 309B, as well as petitioners for leave to appeal in terms of section 309C."

[15] In *The Director of Public Prosecutions, Limpopo v Rameez Patel & Another* supra, the First Respondent was denied bail in the High Court and was remanded in custody on 2 March 2020. The matter was postponed to 1 to 12 February 2021 for trial and to 16 and 17 April 2020 for a bail application in the High Court, which application was never brought, but instead the First Respondent went back to the Magistrate's Court to apply for bail, despite already having appeared in the High Court after the matter was transferred to the High Court for trial.

[16] The Magistrate in the *Rameez Patel* matter supra, in granting bail after the High Court has made an order that the First Respondent is to remain in custody, acted irregularly and in effect sat as a court of appeal, although it was on new facts, which she could not have done.

[17] In this court's view, the present matter should be distinguished from the *Rameez Patel* matter supra, in that in the present matter the Accused was referred

back by the Regional Court to the court of first instance for a bail application as opposed to the situation in the *Rameez Patel* matter supra where the High Court already refused bail and postponed the matter without referring the matter to the Magistrate's Court and the Magistrate's Court then mero motu dealt with the bail application which was already dealt with by the High Court.

[18] In *The Director of Public Prosecutions, Limpopo v Rameez Patel & Another* supra at para 24 this court held as follows:-

"In both *S v Mzatho and Others* 2007 (2) SACR 309 (T) and in *S v Hlongwane & Others* (AR507/13) [2015] ZAKZPHC 1 (28 January 2015) the emphasis is on the Regional Court referring a matter back to the Magistrate's Court for a bail application."

[19] In the circumstances, considering the above case law, it is this court's view that once an accused person has appeared in another court, pursuant to a transfer of such person from the transferring court, for sentencing or trial purposes, such receiving court shall be vested to the exclusion of the transferring court, with exclusive jurisdiction in respect of bail application proceedings, unless the receiving court refers the matter back to the transferring court for a bail application. In such instance, where the matter has been referred back to the transferring court, such transferring court shall have the necessary jurisdiction to entertain the bail application.

[20] The District Court Magistrate loses sight of the fact that this court in the matter of *Rameez Patel* supra, distinguished the case on the facts and did not intend to interfere with the current practices in the lower courts where Regional Courts refer cases back to the District Courts for bail applications. The keyword is "referred back to". It is only in instances where there is an absence of a referral from the receiving court back to the transferring court, or in simple terms from the High Court or Regional Court back to the District Court, that a District Court has no jurisdiction to entertain a bail application once the accused has appeared before such receiving court.

[21] In this court's view, the *Rameez Patel* matter is to be distinguished on the facts. The *Mzatho* and *Hlongwane*-matters supra still finds application in the interest of justice in situations where a receiving court, and especially where a solitary Regional Court Magistrate is precluded from attending to both the bail application and the trial in the same matter and specifically refers a matter back to the District Court for the bail application.

[22] In the result, the District Court Magistrate's reliance on the *Rameez Patel* matter in the present matter is misconceived. He incorrectly interpreted and applied the principles laid down therein in the present matter and in doing so acted improperly in refusing to hear the bail application of the Accused. In the result the

application for review must succeed.

[23] This court therefore makes the following order:-

1. The refusal by the District Court Magistrate in the District Magistrate's Court to hear the bail application is declared invalid and set aside.

2. The District Magistrate's Court is ordered to hear the bail application within 7 (seven) days from date of this order.

2. Hall v S (A173/21) [2021] ZAWCHC 231 (12 November 2021)

To succeed in a prosecution for contravening section 65(2)(a) of the Traffic Act the State not only has to prove the results of the blood analysis (via a certificate in terms of section 212(4)), but proof must also be adduced as to how the gas chromatograph operates, how reliable its readings are and that it had been calibrated.

Montzinger AJ (Goliath DJP concurring)

[1] On 21 May 2021 the appellant was convicted in Worcester Magistrate's Court on one count of contravening section 65(2)(a) of the National Road Traffic Act 93 of 1996 ("the Traffic Act"). It was alleged that he drove a motor vehicle on a public road, while the concentration of alcohol in his blood exceeded the legal limit of 0.05 g/100 milliliters, to wit 0,25g/100 milliliters. He was sentenced to a fine of R2000 or six months imprisonment, wholly suspended for a period of two years. With the leave of the court a quo, the appellant now appeals against his conviction.

[2] The appellant pleaded not guilty to the charge and made admissions in terms of the provisions of section 220 of the Criminal Procedure Act 51 of 1977 ("the CPA"). He admitted that on 10 September 2019, he was the driver of the motor vehicle with registration number [….] on the Robertson Road, Worcester, a public road. At the outset, the appellant's legal representative conveyed to the court a quo that he disputed that the blood specimen was correctly obtained, sealed, handled, or analysed.

[3] The state called Mr Ayanda Botla, a traffic officer at Breede Valley Municipality as a witness. The state also presented evidence by handing in a certificate by Mr Kojak Bastian Samuels in terms of the provisions[1] of the CPA. After leading the evidence by Mr Botla and Mr Samuels, the state closed its case. The appellant did

[1] s 212 (4)(a) read with s 212(8)(a)

not testify in his own defence and closed his case. No other evidence was presented on behalf of the appellant.

The evidence before the lower Court

[4] Officer Botla testified that on 10 September 2019 he was on patrol duty when he observed the appellant driving a car with registration number NU 63997, with a cell phone in his hand. Botla immediately activated the patrol car's lights and siren, and signalled to the appellant to stop, which he eventually did at a nearby petrol station. Botla explained to the appellant the reasons why he was stopped. During their engagement, Botla detected the smell of alcohol and questioned the appellant to determine whether he drank alcohol. The appellant denied that he consumed alcohol. According to Botla the time of the incident was approximately 16:05 in the afternoon.

[5] Botla was suspicious of the appellant's level of alcohol intoxication, and requested a colleague to bring a breathalyser dragger machine. On arrival of the machine, he requested the appellant to submit himself to a breathalyzer test. The appellant agreed and the machine registered a reading of 0.24 g/100 millimeter. Since this reading was over the allowable legal limit, he informed the appellant of his rights and arrested him at approximately 16:15.

[6] Botla testified that he instructed the appellant to accompany him to the police station, and they travelled together in the patrol car. At the police station, Botla collected a blood sample kit with serial number DD397719, and thereafter, he accompanied the appellant to Worcester hospital. They arrived at the hospital at approximately 17:05.

[7] Botla explained that on their arrival at the hospital, the appellant was registered on the system, and they were escorted to a waiting room. At approximately 17:50, the doctor, Dr Naidoo, arrived and Botla handed the blood sample kit to him. Dr Naidoo did the mandatory interview with the accused in the presence of Botla. The interview was concluded and at approximately 17:55 Dr Naidoo drew the appellant's blood and sealed the sample in front of the appellant and Botla. The serial number of the sealed blood sample was DD397720, and was booked into the SAP 13 store with Worcester SAPS 13/1727/2019.

[8] During cross-examination, Botla remained consistent in his recollection of the events on that day. Two material issues arose during cross-examination. Firstly, the appellant's legal representative disputed the exact time when the appellant's blood was allegedly drawn by Dr Naidoo. Having been arrested at 16:15, the blood sample had to be obtained before 18:15. However, Botla insisted that although he and the appellant waited approximately an hour at the hospital, the blood was drawn by 17:55.

[9] The second issue under cross-examination related to a demonstration by Botla as to the security of the seal on the container that holds the tube with the blood sample. The appellant contends that it is apparent from the demonstration by Botla that the seal can be placed back on the container and can thus be tampered with. The appellant's representative invited Botla to do the demonstration, but it was not clarified what the relevance of the demonstration was. It was also never put to Botla that the seal of the container that held the tube with the appellant's blood sample had been tampered with.

[10] As mentioned, at the conclusion of Botla's testimony the state handed in a certificate in terms of s 212 (4)(a) of the CPA deposed to by Mr Kojack Samuels. This certificate was admitted by the appellant and was accepted as part of the record. Mr Samuels was a forensic analyst in the service of the Forensic Chemistry Laboratory of the Department of Health, in Cape Town. On 13 September 2019, the laboratory received a container sealed with number D397720, and bearing the identification mark of Worcester SAPS 238/09/2019 from the South African Police. Samuels confirmed that the container was kept in an access-controlled area until the analysis was executed. He confirmed in his section 212 (4)(a) certificate that the seal remained intact. On 9 October 2019, he broke the intact seal and found a blood specimen with a label attached, bearing the mark Worcester SAPS 238/09/2019 and reference number D397720. He analysed the blood specimen by using a chemical separation technique called gas chromatography and found that the blood specimen contained a concentration of alcohol of 0,25g per 100 milliliters. The concentration of the sodium fluoride in the blood specimen was 1,7g per 100 milliliters.

[11] Samuels further stated that the gas chromatograph was calibrated before the specimens were analysed. He confirmed that he was responsible for the calibration of the gas chromatographic machines before analysing the blood samples. He explained that calibration is done by using certified outdoor standards of different conditions to obtain a calibration curve, and the certified standards are supplied by the National Metrology Institute of South Africa. He would also regularly verify the performance of the instruments by testing a quality control sample to check that the gas chromatograph was still operating in accordance with acceptable standards.

The Grounds of appeal and the appeal court's approach

[12] The appellant contends that the magistrate materially erred and misdirected herself by finding that: (1) the appellant's blood was obtained within the two-hour period; (2) a registered medical practitioner drew the appellant's blood, (3) the state proved the chain of custody of the blood sample beyond reasonable doubt, (4) the section 212(4)(a) certificate for the calibration of the measuring instrument is admissible evidence.

[13] In analyzing the grounds of appeal this Court is aware of the approach it is obliged to follow as confirmed in *S v Hadebe & others*[2]. It is trite that a court of appeal will only interfere with the trial court's factual findings if the lower court committed a demonstrable and material misdirection and if the findings of fact were clearly wrong.

[14] It follows that if we are not convinced that the lower court materially misdirected itself in respect of its findings that relates to any of the grounds advanced, then the appeal must fail. The grounds will be considered in turn.

Was the blood drawn within the two-hour period?

[15] The only evidence that served before the lower court regarding the time the blood was drawn was that of Botla. The appellant's attack on Botla's evidence on this aspect are twofold. Firstly, that the *'manner'* in which the evidence regarding time was placed before the court was inadmissible. The *'manner'* referring to Botla relying on a piece of paper that contained information that he obtained from his pocketbook and police statement to refresh his memory for his testimony. Secondly, it was contended that Botla's recollection of the events on 10 September 2019 is not reliable, as he had to testify from the mentioned piece of paper, and not his notebook. Consequently, it was argued that he had no independent recollection of the day in question, and therefore the evidence he presented was inadmissible.

[16] An overview of the evidence before the lower court reveals that Botla, by virtue of his position, had been involved in numerous situations where he dealt with motor vehicle drivers who are suspected of driving under the influence of alcohol. In the normal course of his duties, he would accompany the driver to a hospital to have his/her blood drawn by a medical practitioner, and subsequently analysed. Botla testified that because of his experience, he has a pocketbook in which he records the times, and the serial numbers of the blood sample kits in respect of each incident. He is therefore aware of the critical importance of maintaining an adequate record of firstly, the time the blood was drawn and secondly, whether the blood sample belongs to the correct accused.

[17] Botla was not challenged on this issue. His evidence that he recorded 17:55 as the time Dr Naidoo extracted the blood from the appellant in his pocketbook, was thus uncontested. He also deposed to an affidavit at the police station on the evening of 10 September 2019, confirming the time. In addition, he reviewed his statement and his pocketbook in preparation of his testimony. We are accordingly satisfied that Botla's testimony is thus prima facie proof of the time the blood was drawn, and in the absence of evidence that rebut his recollection of the events on 19 September 2019, becomes conclusive proof.

[2] 1997 (2) SACR 641 (SCA) at 645 e – f

[18] In the face of this prima facie evidence presented by the testimony of Botla, the only person who could rebut Botla's evidence on the time issue was the appellant. Although no duty rests on an accused to advance evidence in rebuttal, there are two legal principles that directs a court how to deal with the probative value of the evidence in such a situation.

[19] The first principle was confirmed by the Supreme Court of Appeal in *S v Boesak*[3] that it is necessary for an accused to '*put his version'* when he or his legal representative cross-examines a particular witness by challenging each statement that he disputes, otherwise the trial court will accept that the relevant statement is not in dispute. In this case, an attempt was made to create doubt in the mind of Botla that he could not be certain about the time the blood was drawn from the appellant. However, no version by the accused was put to Botla about the time the blood of the accused was allegedly drawn. Beside Dr Naidoo, the appellant was the only person who could testify about the time. In the absence of a version by the appellant in this regard, the lower court was correct to conclude that the issue remained unchallenged.

[20] The second principle obliges an accused to rebut evidence, which establishes a prima facie case. This was confirmed by the Constitutional Court, also in *S v Boesak*[4]*,* where the court emphasised that an accused has to rebut evidence particularly in circumstances where the prima facie evidence proves the elements of the alleged crime. In this matter, the evidence before the lower court relating to the time the blood was drawn, was not seriously challenged, save for an unsuccessful attempt to create uncertainty with regard to the time. The appellant, as one of only three persons, was silent on the issue, and failed to present evidence on the critical issue of the time his blood was drawn.

[21] We therefore find that the magistrate did not misdirect herself when she found that the blood of the appellant was drawn within the prescribed time of two hours.

<u>The chain of custody of the blood sample</u>

[22] Two of the grounds of appeal relate to the chain of custody. First, whether the blood was obtained by a registered medical practitioner. Tied to this ground is the further consideration whether the practitioner made sure that the appellant's skin area from where the blood sample was drawn, was properly cleaned, sterilized, and not contaminated with an agent that contains alcohol. Secondly, Botla presented evidence that the seals can be tampered with and in the face of that evidence, led by the state, reasonable doubt exists about the chain of custody of the blood sample.

<u>Was Dr Naidoo a registered medical practitioner?</u>

[3] 2000 (3) SA 381 (SCA) par 50 - 52
[4] 2001 (1) BCLR 36 (CC) also reported at 2001 (1) SA 912 (CC) paras 24 – 25

[23] Botla testified that the doctor was attending to patients on their arrival at the waiting room. Botla further stated that he spent approximately an hour with the appellant in the waiting room and thereafter a medical practitioner extracted the blood sample from the appellant. According to Botla the doctor introduced himself as Dr Naidoo. It was not put to Botla that the appellant disputes that Naidoo was indeed a doctor. Nor did the appellant indicate that his interaction with the person of Dr Naidoo left with him the impression that a doctor was not treating him and was by implication not a registered medical practitioner. At no stage was it conveyed to Botla that the appellant disputed his version of the events as they unfolded at the hospital that afternoon. The principles laid down in *S v Boesak* therefore again operate against the appellant on this score.

[24] In the written submissions and during argument before us the proposition was advanced that since no evidence was led by the state whether Dr Naidoo was registered and has paid his registration fees[5] the state has failed to prove a crucial element of the offence. It bears mentioning that this issue was never raised in the lower court and was advanced for the first time before this court.

[25] In any event, we are not convinced that the lower court misdirected itself. The CPA defines a medical practitioner to mean *any person registered as such in terms of* the Medical, Dental and Supplementary Health Service Professions Act ("the Health Professions Act")[6]. Section 17 of the Health Professions Act expressly prohibits a person from performing health services if that person is not registered in terms of the act. Sections 39 and 40 of the same act makes it a criminal offence if someone should profess to be a registered medical practitioner, and it is found not to be the case.

[26] Therefore, considering the testimony of Botla, it is inconceivable that Dr Naidoo would be allowed to be at a public hospital creating the impression that he is a registered medical practitioner, while he in fact is not. Botla testified that he went to a hospital and was requested to wait for a doctor. The doctor later arrived, and it was Dr Naidoo. What is more, both Botla and the appellant was aware that Dr Naidoo had been working on a patient in another room. There is thus no doubt that the person that obtained the blood from the appellant was a medical practitioner as defined. These are all objective facts from which it can be inferred that Dr Naidoo was a registered medical practitioner as defined in the Health Profession's Act. As per *S v Mtsweni*[7] and *R v Blom*[8] our law supports inferences from objective facts from which other facts, which are sought to be establish, can be inferred.

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[5] This requirement flows from s 17(3) of the Health Professions Act
[6] (56 of 1974) This Act underwent a title change and is now known as the Health Professions Act
[7] [1985] 3 ALL SA 344 (A) 345-346 also reported at 1985 (1) SA 590 (A) 593D-594G
[8] 1939 AD 188 202 -3

Considering the objective proven facts, the possibility that Dr Naidoo was not a registered medical practitioner as defined in the relevant act, can safely be excluded.

[27] Continuing to press this issue the appellant's counsel relied on the judgment of *S v Conradie*[9] to support a proposition that the failure by the state to call the doctor or to proof that Dr Naidoo was a registered medical practitioner was fatal to its case. This is so as it was important for the doctor to testify about his clinical observations of the appellant at the time, the blood was drawn. *S v Conradie* is clearly distinguishable on the facts as evidence in that case was led by the appellant that the clinical observations by the doctor on behalf of the state was at odds with the blood alcohol level as alleged. Furthermore, in *S v Conradie* the clinical observations were directly in dispute and evidence was thus led by the state and the accused on the issue. That was not the case in this matter. *S v Conradie* is thus not support for the proposition that a doctor must testify to give evidence on the clinical observation of the accused at the time the blood is drawn.

No evidence that the skin was not contaminated

[28] For the second leg under this ground of appeal strong reliance is placed on the authority of *S v Glegg*[10] for the proposition that the presumption in s 65 (4) of the Traffic Act does not assist the state. It was argued that according to *S v Glegg* the presumption does not cover the cleanliness of the skin from where the blood was taken. Based on this authority, it was contended that since the doctor did not testify there is no evidence that the skin was not contaminated.

[29] The presumption contained in s 65(4) of the Traffic Act provides for the following:
"(4) Where in any prosecution in terms of this Act proof is tendered of the analysis of a specimen of the blood of any person, it shall be presumed, in the absence of evidence to the contrary, that any syringe used for obtaining such specimen and the receptacle in which such specimen was placed for despatch to an analyst, were free from any substance or contamination which could have affected the result of such analysis."

[30] The reliance on *S v Glegg* is misplaced. In fact, the judgment rather confirms the approach that the presumption[11] did not place a heavier burden on the state as was already the case. In addition, the judgment rather confirms that the state does

[9] 2000 (20 SACR 386 (C)
[10] 1973 (10 SA (A)
[11] The presumption at the time was codified in s 140 (20 of Ordinance 21 of 1966 (C). The presumption now in s 65 of the Traffic Act reads identical to the presumption contained in the ordinance.

not have to proof that the skin was not contaminated. The court in fact found as follows[12]:

"In the absence of any admission or evidence that contaminations, regarding quality and quantity, could affect the percentage alcohol it is difficult to propose what more the State had to prove in a case like this that was actually proved"

[31] Botla was not challenged by the appellant's legal representative that the syringe used was contaminated. In the circumstances of the facts of this case, where no evidence to the contrary was advanced, the presumption finds application in favour of the state. Furthermore, Botla testified that he handed the blood sample kit to Dr Naidoo and that the doctor used what was provided in the blood sample kit. Botla was present when the blood sample was extracted from the appellant. This is thus one of those situations where his testimony would be sufficient to conclude that the sample was free of contamination[13].

[32] The appellant now seems to speculate on the possible source of contamination of the blood sample. This is done in the absence of any evidence or the reasonable existence of evidence that can support an inference. The legal position is trite as established in *S v Malan*[14] and *S v Glegg*[15] that the possibility of contamination is not reasonable without some supporting evidence more or less directly related to the possibility that some substance, which may have been on the accused's skin, had contaminated the specimen of blood taken by the doctor.

[33] Reliance was also placed on *S v Brumpton*[16] and *S v Greef*[17] to drive the point home that it is the duty of the state to prove that the skin area from where the blood was taken was free from substance, and the nature of the agent used to clean the skin of the accused was such that it did not influence the percentage of the alcohol in the blood sample analysed. Both these judgments are distinguishable for the simple reason that in each evidence was presented by medical doctors on the possibility of contamination. Furthermore, neither of these judgments repealed the position as established in *S v Malan* that considering the presumption in s 65(4) of the Traffic Act the appellant must show that contamination resulted because of a particular substance used on the accused's body.

[34] We therefore find that consistent with the evidence before the lower court there was no misdirection with regards to whether the skin of the appellant was contaminated when the blood sample was drawn.

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[12] p 38 paragraph F - G (translated from Afrikaans to English)
[13] *S v Van Wyk* 1977 (1) SA 412 (NK) at 415 A
[14] 1972 (1) PH H (5) confirmed in *S v Francis* 1976 (2) SA 70 (K)
[15] par 36 B
[16] 1976 (3) SA 236 at 240 F
[17] 1970 (4) SA 704 at 706 B – C

The chain of custody of the blood sample

[35] In support of this ground, reliance is placed on various case law to support the proposition that the state had to prove the chain relating to the collection of the blood sample from the SAP 13 register, and the dispatch and delivery to the laboratory analyst, Mr Samuels.

[36] However, this ground is premised on the obscure evidence by Botla that the seals can apparently be removed without being broken. There is no evidence on record that the seals that contained the blood sample of the appellant was broken. In fact, such a proposition was not even put to Botla. Finally, the certificate by Mr Samuels confirmed that the seals were intact when he opened the blood samples for analysis.

[37] The authority of *S v Jantjies and another*[18] is also incontrovertible that if you start with a properly sealed sample and end with that same sealed sample at the laboratory, it is irrelevant where/how; the sample was kept/stored.

[38] The appellant's attempt to rebut the evidence of the state based on some obscure and irrelevant demonstration under cross-examination about the possibility of how the seals may possibly be manipulated amounts to mere theories or hypothetical suggestions and not based on some substantial foundation of fact. In *Trust Bank of Africa Ltd v Senekal* 1977 (2) SA 587 (T)[19] the principle was confirmed that such an approach will not avail a litigant and must the answer in response to prima facie evidence be based on some substantial foundation of fact. On this aspect, the prima facie evidence presented by the state was not rebutted on any substantial factual foundation.

[39] We can therefore not find any misdirection by the magistrate on this aspect of the state's case.

The calibration of the measuring instrument

[40] This ground of appeal relates to the additional information (concerning the apparatus that had been used, its calibration and accuracy) which is included in the s 212(4) blood analysis certificate. The appellant contends that the authority of *S v Ross*[20] should apply in this case.

[41] In the past, the "traditional" 212(4) blood analysis certificates only provided prima facie proof of the results obtained by the analyst. No proof was tendered in the

[18] 1993 (20 SACR 475 (A)
[19] At 593 E - F
[20] 2013 (1) SACR 77 (WCC)

certificate how the results were obtained, and no proof was provided concerning the reliability of the devices used in the analytical process. This position changed when a full bench of this Division[21] in *S v Van der Sandt*[22] held that the State must prove that the measuring instrument gives the correct measurement. This entails that the accuracy of the device be explained and proof provided that it is properly calibrated to official measurements."[23]

[42] Various judgments[24] followed which endorsed the approach adopted in *S v Van der Sandt.* The combined effect of these judgments was that: to succeed in a prosecution for contravening section 65(2)(a) of the Traffic Act the State not only has to prove the results of the blood analysis (via a certificate in terms of section 212(4)), but proof must also be adduced as to how the gas chromatograph operates, how reliable its readings are and that it had been calibrated.

[43] However, the judgment of *S v Ross*[25] found that the additional information in the s 212(4) certificate confirming the calibration and accuracy of the gas chromatograph was inadmissible evidence. The court was of the view that only an affidavit in terms of s 212(10) of the CPA could be adduced as documentary proof of such fact and held that a s 212(4) certificate was inadmissible to prove the calibration of the gas chromatograph.

[44] The aftermath of the *S v Ross* judgment appeared to create controversy since subsequent judgments in this division as well as other provincial and local divisions frequently relied on *S v Ross* in support of the proposition that evidence with regard to the calibration of the gas chromatograph should be presented in the form of an affidavit, failing which, the evidence is rendered inadmissible. The appellant in this matter also elected to rely on the approach adopted in *S v Ross.*

[45] The existence of *S v Ross* has therefore created a degree of uncertainty whether this division is bound to follow it or not, and has led to conflicting decisions. This is borne out by the fact that a full bench of the Eastern Cape Division, Grahamstown in *S v Eke 2016*[26] criticised the approach adopted in *S v Ross.* The imperative of consistency in the law was aptly summarised by the Constitutional Court in *Gcaba*[27] where the Court said that: *"[P]recedents must be respected in order to ensure legal certainty and equality before the law…"*

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[21] Under its previous name
[22] 1997 (2) SACR 116 (W)
[23] 131
[24] See also **Sithole and The State**, (a decision of the High Court North Gauteng Pretoria, case number A 1051/11, delivered on 8 October 2012 by Bam AJ.
[25] 2013 (1) SACR 77 (WCC)
[26] 2016 (10) SACR 135 (ECG)
[27] *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC) at par 62.

[46] In a later decision[28], the Constitutional Court again gave further constitutional imprimatur to the continued principled application of *stare decisis* and stated that:

"The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos."

[47] The practical effect of the doctrine of precedent is that provincial and local divisions are bound by decisions made within their own territorial areas of jurisdiction, and not by other provincial and local divisions of the High Court. However, High Courts are bound by the decisions of the Supreme Court of Appeal and the Constitutional Court[29]. By extension inferior courts, such as Magistrate's Courts, have limited jurisdiction and are bound by decisions of the division of the High Court in a particular province. If no relevant decision exists as regards a specific circumstance, and a decision regarding such a circumstance was made by a High Court in another province, the magistrate will then follow that decision.

[48] Having regard to the above, some definitive pronouncement[30] is thus necessary to clarify the legal significance of the continued reliance on *S v Ross* as a decision of this division. We are of the view that the decision in *S v Van der Sandt* is the prevailing legal position on the issue in this division. We accordingly hold that we are not bound by the decision in *S v Ross*, as it was clearly wrong for inter alia the following reasons:

(a) *S v Van Der Sandt*[31], a judgment of this division, adopted the reasoning that proof of calibration by means of a section 212(4) certificate would be adequate if certain requirements are met.

(b) In *S v Mouton*[32] a judgment handed down during 2010 in this division, the court followed the reasoning in *S v Van der Sandt* and held that the additional information (concerning the apparatus that had been used, its calibration and accuracy) that was included in the section 212(4) certificate was sufficient, and an affidavit was not necessary.

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[28] *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) para 28)
[29] LAWSA para 287
[30] Not that it has not been done, but this does not explain the continued reliance on *S v Ross*
[31] 1997 (2) SACR 116 (W)
[32] case no A 449/10

(c) During 2016 in an unreported judgment of *S v Dandara*[33] Henney J (with Binns-Ward concurring), criticized the decision in *S v Ross* and rather relied on a decision in another division, and highlighted the prominence of *S v Mouton* on the issue as to whether the calibration of the gas chromatograph should be proved by affidavit or certificate.

(d) Section 212(10) of the CPA no longer seems operable or has become redundant[34]. The Minister never published prescribed conditions and requirements in terms of the Trade Metrology Act, 77 of 1973. The Legal Metrology Act 9 of 2014 has in any event repealed the Metrology Act of 1973. This 2014 Metrology Act also provides for the Minister to publish regulations, which was done. The published regulations[35] do not seem to contain a provision that prescribes the '*conditions and requirements which shall be complied with before any reading by such measuring instrument may be accepted in criminal proceedings as proof of the fact which it purports to prove*[36]*'.*

(e) The court in *S v Eke*[37]*,* a different provincial division, rather followed *Van Der Sandt*[38].

(f) The court in *S v Ross* overlooked the fact, on a mere contextual reading of the entire s 212 of the CPA, that there was no evidentiary differences between a certificate in terms of s 212(4)(a) read with s 212(8)(a) or an affidavit in terms of s 212(10), if in operation, if regard is had to s 212(4)(b) and s 212(8)(b)[39] of the CPA. These subsections elevates a certificate to equal status of an affidavit as any false statement in the certificate will result in an offence of perjury and be punished on conviction. A deponent to a false affidavit attracts the same warning.

[49] For the reasons expounded on above we find that *S v Ross* cannot be relied on as support for the proposition that evidence on the issue of the calibration of measuring instruments must be on affidavit. The legal position in this division is rather as per the *S v Van der Sandt* and later the *S v Mouton* judgments*.* We are accordingly of the view that the appellant's reliance on *S v Ross* cannot be sustained. This ground of appeal must therefore fail.

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[33] A186/2016
[34] A similar concern was raised in *S v Eke* 2016 (10 SACR 135 (ECG)
[35] GN 877 of 24 August 2018: Legal Metrology Regulations, 2017 (Government Gazette No. 41854)
[36] The quoted part being the wording of s 212(10) of the CPA
[37] 2016 (10 SACR 135 (ECG)
[38] 1997 (2) SACR 116 (W)
[39] **Both sections read:** (*b*) Any person who issues a certificate under paragraph (*a*) and who in such certificate wilfully states anything which is false, shall be guilty of an offence and liable on conviction to the punishment prescribed for the offence of perjury.

Conclusion

[50] After due consideration of the totality of the evidence we are of the view that the appellant was correctly convicted. We cannot find any misdirection in the magistrate's factual or legal findings. We are not convinced that there is any basis on which to interfere with the findings by the magistrate. We are satisfied that the guilt of the appellant has been established beyond a reasonable doubt. The appeal against conviction ought to be dismissed.

[51] In the result, I propose an order in the following terms:

The appeal is dismissed.

From The Legal Journals

Msaule, R

Throwing the Unlawful Detention Jurisprudence into Turmoil: A Critique of De Klerk V Minister of Police 2020 1 SACR 1 (CC).

PER / PELJ2021(24)

Abstract
Before the judgement in De Klerk v Minister of Police 2020 1 SACR 1 (CC), (de Klerk), a plaintiff could claim damages for unlawful arrest and detention after the first appearance in court if the arresting (or the investigating) officer had conducted himself unlawfully in addition to the unlawful arrest. The conduct of the arresting (or investigating) officer had to be such that it influenced the prosecution and/or the court to deny the plaintiff bail. In De Klerk the majority of the Constitutional Court (CC), after assuming that factual causation had been proven, held the Minister of Police (Minister) liable for the unlawful arrest and detention of the plaintiff (including detention after the plaintiff had appeared in court). This was despite the CC's having found that the conduct of the arresting officer after the appearance of the plaintiff in court had been lawful. The CC held that the arresting

officer foresaw that by not releasing the plaintiff, the plaintiff would be remanded in detention –the unlawful conduct. The arresting officer was aware that the practice in the court where the plaintiff appeared was to remand all first appearance cases without considering the accused for release on bail. This note contends that the CC's decision does not bear scrutiny. The flaw in the CC's decision arose from its assumption that factual causation had been proven in this case. This faulty approach flowed from the CC's unconventional application of the "but-for" test. Instead of substituting the defendant's actual conduct for the hypothetical reasonable conduct, the CC held that it was the defendant's conduct per se that had caused the plaintiff harm. On this application of the "but-for" test, an arresting officer is unlikely to escape liability for an unlawful arrest and detention even if his or her conduct ceases to be unlawful at one stage or another. The Minister was held liable for the blameworthy conduct of the arresting officer up to the time of the plaintiff's appearance in court. The arresting officer played no role whatsoever after the appearance of the plaintiff in court. It is therefore absurd to hold that her conduct was the factual cause of the damage the plaintiff suffered. Ordinarily the Minister would not be held liable for detention after the court appearance. There was nothing extraordinary in the De Klerk case warranting the Minister's being held delictually liable for the post-court-appearance detention. The plaintiff failed to prove that it was the conduct of the arresting officer that caused the plaintiff damage post the court appearance.

The article can be accessed here:
https://perjournal.co.za/article/view/9519/17649

Mabeka, N Q

Pagination of Court Files in Civil Procedure: "A Thing of the Past" in Evolving Digital Technology.

2021 (35) Spec Juris 134

Abstract
Pagination of the court files is a practice that has been used by the courts for centuries. The significance of pagination is shown by incorporating pagination into the rules of the courts. The current rules require legal practitioners to physically or manually paginate the court files. More often than not, candidate legal practitioners are asked to attend to the pagination of the court files. Technology is advancing regularly and the South African courts ought to be abreast with these development. This implies that there comes a time when the rules of indexing and pagination will be "abrogated by disuse". The implementation of the CaseLines system in the courts is a path that strives towards using digital technology in civil proceedings. By introducing

the CaseLines system, the South African courts are showing that they fully appreciate the provisions of the Electronic Communications and Transactions Act 25 of 2002. It appears that South African courts are competing with the United Kingdom's Electronic Working Pilot Scheme, which is regulated by Practice Direction 510. This is an attempt to fully embrace technology in civil procedure in the United Kingdom. This article reviews pagination in the context of the utilization of technology in civil proceedings.

The article can be accessed here:
http://specjuris.ufh.ac.za/sites/default/files/SJ2021-002%20PUBV%20NOMBULELO%20QUEEN%20MABEKA%20Pagination%20of%20Court%20Files%20in%20Civil%20Procedure%20.._.pdf

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

Contributions from the Law School

What does the term 'public' mean in the crime of public indecency?

The old common-law crime of public indecency is not without controversy in the context of the new constitutional dispensation in South Africa. The criminalisation of conduct that is assessed as having offended the sensibilities of the public inevitably limits the right to freedom of expression, protected in section 16(1) of the Constitutional of the Republic of South Africa, 1996. Nevertheless, the operation of this right is qualified by the public's interest in not being confronted with disgusting visual or auditory stimuli (see discussion in Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 272; and Hoctor *Snyman*'s *Criminal Law* 7ed (2020) 384).
A further difficulty with the crime is the breadth and vagueness of its definition. Expressions such as "which tends to deprave the morals of others" and "which outrages the public's sense of decency" run the risk of being regarded to be so vague as to possibly violate the principle of legality. The notion of when the *indecent* act can be regarded as being of a *public* nature presents its own difficulties, particularly in the light of the adoption in the case law of an interpretation which goes beyond the commonplace meaning of the term "public".

Although the roots of the crime of public indecency have been sought in the Roman-Dutch law (see *R v Marais* (1889) 6 SC 367 370; and *R v Hardy* (1905) 26 NLR 165 171), and in particular the discussion of the *crimina extraordinaria* by Voet (*Commentarius ad Pandectas* 47 11 2), it seems clear that the crime is a creation of the Cape courts during the 19th century, under the influence of English law (De Wet and Swanepoel *Strafreg* 2ed (1960) 491; and Hoctor/Snyman 384). Public indecency may be defined as:
"[U]nlawfully, intentionally and publicly committing an act which tends to deprave the morals of others or which outrages the public's sense of decency and propriety" (Milton 271; and Burchell *Principles of Criminal Law* 5ed (2016) 785).

Thus the crime is committed by the intentional commission of an unlawful act which tends to deprave or which outrages public decency, which takes place in public (Milton 274). This discussion will be limited to the last element of the crime, the requirement that the conduct must occur publicly.
The term "public" has been variously interpreted in the context of differing statutory provisions in which it has appeared. As noted in *R v Cohen* (1915 CPD 236 239):
"[T]he meaning of 'public place' or of the word 'public' depends on the particular offence that it is used in connection with, or the particular statute in question, and the evil which the Legislature intended to prevent".

In addition, "publicly" does not have the same meaning as "in a public place", at least if the latter phrase is interpreted literally (Milton 279). It is not required that the crime be committed in a public place (although this is usually the case), but rather in a place where members of the public can perceive the conduct (Burchell 785; Milton 279; and De Wet and Swanepoel 494).
What is meant by the term "public" has been interpreted in a number of cases. In the case of *R v Marais* (*supra*), in which the crime of public indecency was apparently first recognised in South African law, the accused had indecently exposed himself on a number of occasions in the presence of young girls, although never to more than one of them at any one time. It seems that the indecent exposure took place in a private house, but in sight of a place to which the public had access. Significantly, the court (per De Villiers CJ) did not link the word "public" to a place as such, but to the morals that would tend to be depraved by such an act (De Wet and Swanepoel 492). Thus it was concluded, in relation to the "public" nature of the crime, that:
"It is in my opinion of a sufficiently public nature if committed in sight of a place to which the public has access, and it certainly tends to the depravation of morals if seen by only one person" (*R v Marais supra* 370-371).

In *R v Bungaroo* ((1904) 25 NLR 28 30), which followed the *Marais* decision, the crime was held to be committed by "any indecency practised in such a way as to cause the public to see it and possibly be affected by it". A similar approach was followed in relation to analogous statutory provisions. For example, in respect of section 2(2) of Act 38 of 1909 (T) (now repealed), which criminalised indecent

exposure in a public place, it was held that it was not necessary that the act should be committed in a place which is customarily accessed by the public, but merely one to which the public could have access (*R v Cooke* 1939 TPD 69 72-3). Moreover, it was held that although the indecent exposure took place on private property, provided that it was committed in sight of a place to which there was public access, the offence was committed, even if there was no proof that anyone had actually witnessed the exposure (*R v Manderson* 1909 TS 1140 1142).

The nature of the "public" requirement was further amplified in *R v B* 1955 (3 SA 494 (D) 497E-G) (although the appellant's conviction of public indecency on the grounds of indecent exposure was set aside due to reasonable doubt as to the existence of the requisite intention), where (appropriately, given the roots of the crime) following the English Court of Appeal case of *R v Thallman* ((1863) 9 Cox CC 388 390), the court concluded that:

"[I]t is not an essential for a conviction in such cases that it should be shown that a person has indecently exposed himself to view in, or from, a public highway or other place to which the general public has access, but that it is sufficient if he has done so in a situation in which he was, or may well have been, visible to a number of persons who are, so far as he is concerned, ordinary members of the public, even if their only means of seeing him is from the windows of their residences or their offices".

Thus, a person is acting "publicly" provided that his conduct can reasonably be expected to be perceived by members of the public, irrespective of whether those observing or hearing the conduct are in a public or private place at the time of doing so (Milton 279; and Hoctor/Snyman 385). Milton proceeds to state "conversely", citing *R v Arends* (1946 NPD 441), that even if the act occurs in a public place (such as a street), "it does not take place 'publicly' if the circumstances are such that it is improbable that members of the public will hear or see it" (280). This conclusion is problematic however, since the case of *Arends*, where the accused was acquitted after being accused of public indecency for having intercourse on an unlighted public pavement late at night, turned entirely on the question of intention. The court at no stage doubted that the conduct was of a "public" nature, stating that the street was "unquestionably a place to which the public had access", and in that sense was a "public place" (443). Liability for public indecency could therefore have followed, had it not been the case that the accused believed, on reasonable grounds, that she would not be observed.

The liability of the accused is not affected by the fact that the conduct is not actually observed or heard by more than one person (*R v Marais supra* 371; *S v Subeb* 2020 (1) NR 236 (HC) para [37], citing Snyman (for the most recent discussion of this issue in this source see Hoctor/Snyman 384-385), as long as there is a reasonable possibility that such conduct may be perceived by members of the public (*R v B supra* 497; Milton 280; and Hoctor/Snyman 385).

Taking into account the way in which the term "public" has been interpreted in the case law dealing with public indecency, it is evident that the courts have sought to include a very wide range of offensive conduct within the ambit of the crime. It is

submitted that in the light of societal change, along with the need for definitional clarity in terms of the constitutional imperative to protect the accused's procedural rights, it may be necessary for the courts to examine more closely what mischief the crime seeks to prevent (cf *R v Cohen supra* 238), and to draw in the net of liability accordingly.

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Matters of Interest to Magistrates

ENDING CHILDHOOD STATELESSNESS AND DISMANTLING BARRIERS TO BIRTH REGISTRATION IN SOUTH AFRICA

A recent decision by South Africa's apex court has put the focus on an antiquated law that prevented children of unmarried parents accessing birth registration in the same way that children of married parents do. It's a crucial issue for the children affected and their families, because the law as it previously stood was a serious obstacle and the potential cause of statelessness for those denied birth registration. As the writers explain, the decision of SA's Constitutional Court affirms the intrinsic worth and right to birth registration for all children in SA and also does away with several archaic concepts.

"Children are vulnerable members of society, even more so when they are without valid birth certificates" - Victor AJ in *Centre for Child Law v Director General: Home Affairs [2021] ZACC 31.*

Birth registration plays an often unseen but fundamentally important part in the life of a child. Without a birth certificate, children can have difficulty in accessing their rights, become outcasts in their own country, struggle to feel like they belong, and grow up to be disenfranchised and marginalised adults. Crucially, without a birth certificate, children are at a heightened risk of statelessness. While birth registration in itself does not confer nationality, the official record of the child's place of birth and parentage provides critical evidence of the facts that enable a child to assert their

right to a nationality. Lack of birth registration has been identified as one of the primary causes of childhood statelessness and generational statelessness in Southern Africa.

South Africa has ratified the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Both treaties and the SA Constitution, clearly articulate the right of every child to birth registration. The government boasts a reported birth registration rate of nearly 90%, yet thousands of children born in SA struggle to secure their right to birth registration due to barriers in laws, practice and policies.

Progressive

In a recent progressive judgment, the Constitutional Court of SA struck down an antiquated law that prevented children of unmarried parents from accessing birth registration on an equal basis with children of married parents.

This is after the Department of Home Affairs refused to register the daughter of Menzile Naki (a citizen of SA) and Dimitrila Ndovya (a citizen of the Democratic Republic of Congo), who was born in SA. The couple was in fact married in accordance with the culture and customs of the DRC, but the marriage was not “registered” and therefore not recognised in SA. The Department dictated that the registration should take place in terms of Section 10 of the Birth and Deaths Registration Act, which prescribed the birth registration process for children “born out of wedlock”. In terms of this section, a child born to unmarried parents should be registered by the mother or at the joint request of the mother and father, but the Department still refused to allow Ndovya to assist with the registration on the basis that her visa had expired and she could not comply with the regulations.

According to the regulations, it was also compulsory for parents who need to register their children to hold valid documentation in the form of an ID or a passport and visa. Prior to the birth of their child, Ndovya travelled to and from SA and the DRC to renew her SA visa. However, the visa expired shortly before she gave birth and this time she could not travel to renew it because she was at an advanced stage of her pregnancy.

Backlogs

The parents, assisted by the Legal Resources Centre, successfully reviewed the refusal of the Department of Home Affairs to register their daughter in the High Court. Furthermore, the High Court declared the regulations pertaining to documentation unconstitutional to the extent that they barred children of undocumented parents from accessing birth registration. This is significant in a country where access to documentation is an endless struggle, largely owing to corruption, maladministration and huge backlogs at the Department of Home Affairs.

The Centre for Child Law, represented by Lawyers for Human Rights, was admitted as an intervening party in the High Court and sought a further order to challenge the constitutionality of the bifurcated registration procedure between children of married parents and children of unmarried parents, created by Section 10 of the Birth and

Deaths Registration Act. Section 10 stated that a child born to unmarried parents should be registered by the mother or at the joint request of the mother and father, but did not make provision for an unmarried father to register his children where the mother is unwilling or unable to do so. The mother would be unable to register the child in instances where the child is a maternal orphan or has been abandoned by the mother and left in the care of the father. The mother would also be unable to assist with registration if she is undocumented and cannot produce a valid ID, passport or visa, as demonstrated in the case of Naki and Ndovya.
The High Court declared Section 10 unconstitutional and invalid and this order was confirmed by the Constitutional Court.

Problematic
The Constitutional Court found that Section 10 constitutes unfair discrimination against unmarried fathers on the grounds of sex, gender and marital status. The Court further held that this law was problematic because it perpetuated gendered and sexist stereotypes about a father's caregiving role vis-à-vis a mother's, entrenching a long discarded maternal preference rule. The Court noted that the impact on unmarried fathers and their children was clear – the law undermined the ability of unmarried fathers to be active in their children's lives and the explicit reference to children "born out of wedlock" propagated the societal stigma attached to unmarried parents and their children. This impaired the dignity of unmarried parents and their children.
The Court recognised that the term "out of wedlock" was just as abhorrent as the term "legitimate child" or "illegitimate child". To maintain such a distinction between children of married parents and children of unmarried parents was not only in violation of the best interests of the child, but also offended the constitutional values of human dignity and equality and conflicted with the revered principle of *Ubuntu*, which places a "strong emphasis on family obligations". The notion of "family" as a nuclear family stigmatises single parent headed households and all who fall outside of this narrow binary construction of a family. Ruling in favour of a gender-neutral and marital-neutral approach, the Constitutional Court ordered that Section 10 of the Birth and Deaths Registration Act is excised from the Act in its entirety.

Crucial
This judgment is crucial not only because it does away with discriminatory and outdated laws that exacerbate the risk of childhood statelessness; but it also affirms the intrinsic worth and right to birth registration for all children in SA.
It is, however, worth noting that there are a number of barriers to birth registration in South Africa that remain unaddressed. The Department of Home Affairs still requires parents to produce valid documentation in the form of an ID or a passport and visa for birth registration. While fathers can now register their children, the exorbitant cost of DNA testing makes it impossible for poor families to meet the proof of paternity requirement. There is also a growing trend to withhold proof of birth against payment of maternity fees in hospitals and clinics. Proof of birth is an essential part of the birth

registration process; without it, birth registration is almost impossible. It is well documented that difficulties related to birth registration and the acquisition of personal identification (PID) are largely regarded as problems specific to low-income countries and this speaks to the indignity of poverty and living under impoverished conditions.
In essence, more can and should be done to achieve universal birth registration and to put an end to childhood statelessness in SA.

** Co-written by Thandeka Chauke, Statelessness Project Head (Lawyers for Human Rights) and Tšhegofatšo Mothapo, Statelessness Legal Researcher (Lawyers for Human Rights)*

A Last Thought

"Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used."
As per Wallis J A in Natal Joint Municipal Pension Fund v Endumeni Municipality [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 25