e-MANTSHI

A KZNJETCOM Newsletter

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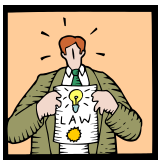
Welcome to the hundredth and eighty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 *Criminal Procedure Amendment Act 16 of 2021* which amends section 154 of the Criminal Procedure Act 51 of 1977 has been put into operation with effect from 9 February 2022. The notice to this effect was published in Government Gazette no 45893 dated 9 February 2022. The amendment act amends section 154 to prevent publication of information of children as accused and witnesses.

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Recent Court Cases

Makhala & Another v S (438/20) [2022] ZASCA 19 (18 February 2022)

Section 3(1)*(c)* of the Hearsay Act can find application to the admission into evidence of extra-curial statements made by a section 204 state witness, who, when testifying, recants such statements that incriminate him or herself and the accused in the commission of the offence or offences in question.

Meyer AJA (Mocumie, Makgoka and Mothle JJA concurring)

[105] I have had the benefit of reading the judgment of our colleague Unterhalter AJA (the first judgment). I agree with its summation of the pertinent facts and issues on appeal and with the reasoning and conclusions reached that the two statements in question were not obtained in violation of Luzuko Makhala's rights; the trial was not rendered unfair by the admission of the statements; nor was there anything done in securing the statements that constituted any material detriment to the administration of justice; that the trial court correctly declared Luzuko Makhala to be a hostile witness; that he was not denied a right to choose to be represented by an attorney and he did not make a case as to the substantial injustice he would suffer if an attorney was not provided for him at state expense before he was declared hostile; that the trial court properly applied the cautionary rule applicable to the evidence of an accomplice; and that there was sufficient corroborative evidence to convict the appellants.

[106] I further agree that the trial court applied s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Hearsay Act) and concluded that the two statements should be admitted in the interests of justice and with the ultimate conclusion that:
'[t]he two statements made by Luzuko Makhala to the police were not unlawfully obtained and the two statements were correctly admitted into evidence. That evidence afforded proof of the appellants' complicity in the murder of Mr Molosi and the further charges associated with his murder. There was no failing on the part of the trial judge in cautioning himself against the frailties of the evidence of Luzuko Makhala as an accomplice, nor in his declaration of Luzuko Makhala as a hostile witness. The trial court correctly found that there was sufficient evidence to corroborate the statements of Luzuko Makhala and that, upon a consideration of all the evidence, the State had discharged its burden of proof.'
I, therefore, agree with the order proposed in the first judgment that the appeal be dismissed.

[107] However, I am respectfully unable to agree with the conclusion in the first judgment that s 3(1)*(c)* of the Hearsay Act finds no application to the admission into

evidence of extra-curial statements made by a s 204 state witness,[1] who, when testifying, recants such statements that incriminate him or herself and the accused in the commission of the offence or offences in question, and the reasoning in reaching that conclusion (the s 3(1)*(c)* conclusion). These are my reasons:

[108] The common law definition of hearsay evidence is 'any statement other than one made by a person while giving oral evidence in the proceedings, and presented as evidence of any fact or opinion stated'.[2] With effect from 3 October, 1988 the Hearsay Act redefines hearsay and allows for a more flexible discretionary approach to the admissibility of hearsay evidence. Section 3 of the Hearsay Act reads thus:

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

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

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

(c) the court, having regard to-

(i) the nature of the proceedings;

(ii) the nature of the evidence;

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

(iv) the probative value of the evidence;

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

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

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

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1)*(b)* if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph *(a)* of subsection (1) or is admitted by the court in terms of paragraph *(c)* of that subsection.

(4) For the purposes of this section- "hearsay evidence" means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any

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[1] Section 204 of the Criminal Procedure Act 51 of 1977. That is a witness who is called on behalf of the prosecution at criminal proceedings and who is required by the prosecution to answer questions which may incriminate such witness regarding an offence specified by the prosecutor, and who may be discharged from prosecution in respect of the offence in question if he or she 'in the opinion of the court, answers frankly and honestly all questions put to him' or her.

[2] P J Schwikkard and S E Van der Merwe *Principles of Evidence* (2009) 285.

person other than the person giving such evidence; “party” means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.’

[109] The first judgment is to the effect that the prior decisions of this Court in *S v Rathumbu*[3] and in *S v Mamushe*[4] are clearly wrong. In those judgments, the safeguards provided for in s 3(1)*(c)* of the Hearsay Act were applied to the admission into evidence of a prior inconsistent extra-curial statement made by a s 204 state witness who, when testifying, recants such statement that incriminates him or herself and the accused in the commission of the offence or offences in question. As I will demonstrate, the application of s 3(1)*(c)* to such inconsistent extra-curial statements of a s 204 state witness is sound, and this Court, in my view, should not depart from those previous decisions.

[110] We are not dealing in the present case with the admissibility of extra-curial hearsay admissions against co-accused persons in criminal cases. This Court, in *Ndhlovu and Others v S* ,[5] in principle decided in favour of the admission of this category of evidence on a discretionary basis in terms of s 3(1)*(c)* of the Hearsay Act. Thereafter, this Court started to question the wisdom of this approach[6] and held that an extra-curial admission could under no circumstances be admissible against a co-accused. Instead, we are dealing with the situation where a prosecutor calls a s 204 witness to testify on the strength of the state witness’s extra-curial statement, and the state witness performs an about-turn in the witness box and testifies in favour of the defence or develops a sudden case of amnesia. The question then arises whether the trial court has a discretion in terms of s 3(1)*(c)* of the Hearsay Act to admit the evidence if it is of the opinion that it is in the interests of justice to do so, having regard to the various factors enumerated in the section and ‘any other factor which should in the opinion of the court be taken into account’.

[111] It is a long-standing rule of our common law, derived from English law that in such cases, the state witness’ extra-curial statement may be used solely for the purposes of impeaching him or her and may not be tendered into court as proof for the facts contained therein. Bellengère and Walker[7] searched for the rationale of the common law rule in our jurisprudence and that of other jurisdictions and concluded that ‘as far as South African law is concerned, the rule rested on a dual foundation;

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[3] *S v Rathumbu* [2012] ZASCA 5; 2012 (2) SACR 219 (SCA).
[4] *S v Mamushe* [2007] ZASCA 58; [2007] SCA 58 (RSA); [2007] 4 All SA 972 (SCA).
[5] *Ndhlovu and Others v S* 2002 (2) SACR 325 (SCA); 2002 (6) SA 305 (SCA); [2002] 3 All SA 760 (SCA).
[6] See S v *Balkwell and Another* [2007] 3 All SA 465 (SCA); *Libazi v S* [2010] ZASCA 91; 2010 (2) SACR 233 (SCA); [2011] 1 All SA 246 (SCA) and *Litako and Others v S* [2014] ZASCA 54; [2014] 3 All SA 138 (SCA); 2014 (2) SACR 431 (SCA); 2015 (3) SA 287 (SCA).
[7] Adrian Bellengère and Shelley Walker ‘When the truth lies elsewhere: A comment on the admissibility of prior inconsistent statements in light of *S v Mathonsi* 2012 (1) SACR 335 (KZP) and *S v Rathumbu* 2012 (2) SACR 219 (SCA)’ (2013) 26 *SACJ* 175.

namely: (1) the traditional objections to hearsay evidence; and (2) the notion that no probative value can be attached to contradictory evidence'.[8]

[112] The learned commentators point out that the rationale behind the admission of hearsay evidence is based on the common law conception and rendered redundant in 1988 when our law concerning hearsay was amended by the Hearsay Act.[9] Insofar as the contradiction rationale is concerned, the learned commentators state:[10]

'The objection that, faced with a contradiction between a witness's viva voce evidence and what he said on an earlier occasion, the court cannot give credence to either version, is equally groundless. The old maxims *"falsus in uno, falsus in omnibus"* (false in one thing, false in everything) and *"semel mentitus, semper mentitur"* (once a liar, always a liar) are not part of the South African law of evidence (*R v Gumede* 1949 (3) SA 749 (A) at 576A).

Certainly a witness's contradictions may cast doubt on his credibility (and commonly do), but this is a matter for the court to determine, in light of all the available evidence. Thus, the mere fact that a witness has contradicted himself is no reason to disregard or exclude his evidence in entirety. This applies irrespective of whether the witness has contradicted himself in his viva voce evidence, or on some other occasion (*S v Mathonsi* 2012 (1) SACR 335 (KZP) at paras [34] to [37] and further authorities cited therein).'

[113] The learned commentators continue to state:[11]

'It would be evident from the above that there is no longer any valid reason for the retention of the rule. On the contrary, its only contribution in most cases has been to exclude relevant evidence, which would have assisted the court in determining the truth. In the circumstances, it is hardly surprising that the rule has been abolished, not only in England and Wales (s 119 and 120 of the Criminal Justice Act 2003), but also in Australia (s 60 of the Evidence Act 2 of 1995), Canada (*R v B* (supra) [*R v B* (K.G.) [1993] 1 SCR 740]), American federal law (s 801(d)(1) of the Federal Rules of Evidence 1975) and a number of individual American states, such as Alaska, Arizona, California, Indiana, Kentucky, North Dakota, West Virginia and Wisconsin (SM Terrell "Prior Statements as Substantive Evidence in Indiana" *Indiana LR* (1979) 12(2) 495, 502-517); jurisdictions whose law of evidence, like that of South Africa, was originally derived from English law.

In light of the two recent cases referred to above [*Mathonsi* and *Rathumbu*], it appears that South Africa is at last following suit'.

[114] I subscribe to the views expressed by the learned commentators, Bellengère and Walker. It may be argued, which argument found favour with the first judgment, that the contents of a 204 state witness' prior inconsistent statement are not hearsay evidence, since their probative value depends on the state witness' credibility, who,

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[8] At 175-177.
[9] Ibid at 177-178.
[10] Ibid at 178.
[11] Ibid at 178-179.

him or herself, is testifying.[12] However, although a s 204 state witness is compelled to give his or her evidence under the sanction of an oath, or its equivalent, a solemn affirmation, and be subject to cross-examination by the accused person or persons against whom he or she is called to testify and who had access to all evidence in possession of the state prior to the trial, there seems to be a compelling rationale for our courts to treat the disavowed prior inconsistent statement as hearsay evidence within the meaning of s 3(4) of the Hearsay Act. Treating such statement as hearsay enables the trial court to subject such evidence to the preconditions required in s 3(1)*(c)* of the Hearsay Act and to admit such evidence only if the court 'is of the opinion that such evidence should be admitted in the interests of justice'. Such interpretation of 'hearsay evidence' as defined in s 3(4) of the Hearsay Act promotes 'the spirit, purport and objects of the Bill of Rights' contained in chapter 2 of the Constitution of South Africa,[13] and particularly an accused person's fundamental constitutional 'right to a fair trial', enshrined in s 35(3) of the Bill of Rights, because the effectiveness of the cross-examination of a state witness who denies having made the prior inconsistent statement or cannot remember having made it, may in a given case be compromised.[14]

[115] In *Rathumbu,* this Court held that a disavowed prior written statement of a state witness is essentially hearsay evidence, that the probative value of the statement depends on the credibility of the witness at the time of making the statement, and that the central question is whether the interests of justice require that the prior statement be admitted despite the witness's later disavowal thereof. In *Mamushe,* this Court held that the extra-curial statement by a state witness is not admissible in evidence against an accused person under s 3(1)*(b)* of the Hearsay Act unless the prior statement is confirmed by its maker in court. This Court declined to admit the state witness' prior statement, which she disavowed in court, under s 3(1)*(c)* of the Hearsay Act, inter alia because 'the identification evidence deposed to by Ms Martin in her statements appears to be of the most unreliable kind'. The doctrine of precedent also binds courts of final jurisdiction to their own decisions unless the court is satisfied that a previous decision of its own is clearly wrong, which is not so in this case.[15] Like the courts of foreign jurisdictions, this court has laid down

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[12] See BC Naude 'The substantive use of a prior inconsistent statement' (2013) 26 *SACJ* 55 at 59-61.
[13] Section 39(2) of the Constitution enjoins a court to 'promote the spirit, purport and objects of the Bill of Rights' when 'interpreting any legislation'.
[14] *Ibid* BC Naude fn 38 at 61-63.
[15] *Camps Bay Ratepayers' Association & Another v Harrison & Another* 2011 (2) BCLR 121 (CC); [2010] ZACC 19 (CC); 2011 (4) SA 42 (CC) paras 28-30. See also *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; 2013 (9) BCLR 989 (CC); 2014 (2) SA 228 (CC); *Firstrand Bank Limited v Kona and Another* [2015] ZASCA 11; 2015 (5) SA 237 (SCA); *BSB International Link CC v Readam South Africa (Pty) Ltd* [2016] ZASCA 58; [2016] 2 All SA 633 (SCA); 2016 (4) SA 83; *Standard Bank of South Africa Limited v Hendricks and Another; Standard Bank of South Africa Limited v Sampson and Another; Standard Bank of South Africa Limited v Kamfer; Standard Bank of South Africa Limited v Adams and Another; Standard Bank of South Africa Limited v Botha NO; Absa Bank Limited v Louw* [2018] ZAWCHC 175; [2019] 1 All SA 839 (WCC); 2019 (2) SA 620 (WCC); *Firstrand Bank Ltd t/a*

its own safeguards before admitting the conflicting extra-curial statement of a state witness who performs an about-turn in the witness box and testifies in favour of the defence or develops a sudden case of amnesia.

[116] Finally, in *Mathonsi*[16], the high court held that the common law rule that a witness' prior inconsistent statement may be used solely to impeach him or her and may not be tendered into court as proof for the facts contained therein must be replaced by a new rule recognising the changed means and methods of proof in modern society. Madondo J then approved and applied the decision of the Supreme Court of Canada in *R v B (KG)* [1993] 1 SCR 740, and held that the prior inconsistent statement of a hostile state witness may be used as evidence of the truth of the matter stated in the statement if the trial court is satisfied beyond reasonable doubt that the conditions referred to in para 49 of the first judgment are fulfilled as well as the sixth condition which he added.

[117] However, the common law principle that a state witness' extra-curial inconsistent statement may be used solely for the purposes of impeaching him or her and may not be tendered into court as proof of the facts contained therein no longer finds application in our law. In this country, we have our definition of hearsay evidence and legislative instrument prescribing the factors or safeguards that the court must consider in deciding whether the extra-curial inconsistent hearsay statement of a state witness should be admitted as evidence in the interests of justice. Our courts, therefore, are not permitted to substitute our statutory prescripts with common law principles or statutory provisions of foreign jurisdictions in deciding whether such hearsay should be admitted as evidence. Therefore, the decision in *Mathonsi* is wrong.

[118] I have mentioned that our Hearsay Act allows for a more flexible discretionary approach to the admissibility of hearsay evidence than the common law did. In deciding whether hearsay should be admitted in the interests of justice, the court is not limited to the factors listed in s (3)(1)*(c)*(i) to (vi) but empowered in terms of s 3(1)*(c)*(vii) to have regard to 'any other factor which should in the opinion of the court be taken into account'. If in deciding whether hearsay should be admitted in the interests of justice in terms of s 3(1)*(c)* of the Hearsay Act in a given case, the trial court is of the opinion that a factor taken into account in another jurisdiction when admitting hearsay into evidence should additionally be taken into account, it is by virtue of s 3(1)*(c)*(vii) empowered to do so.

[119] It is within this limited ambit that I support the order of the first judgment dismissing the appeal.

First National Bank v Moonsamy t/a Synka Liquors [2020] ZAGPJHC 105; 2021 (1) SA 225 (GJ) and *Investec Bank Limited v Fraser NO and* Another [2020] ZAGPJHC 107; 2020 (6) SA 211 (GJ).

[16] *S v Mathonsi* 2012 (1) SACR 335 (KZP).

(The above is the majority judgment. As the minority judgment is in many respects confirmed by the majority it also has to be read and can be accessed here: http://www.saflii.org/za/cases/ZASCA/2022/19.html).

2. Manyaka v S (434/2020) [2022] ZASCA 21 (23 February 2022)

A court of appeal is entitled to consider new evidence in exceptional cases where circumstances have changed after conviction and sentence in terms of s 316(5) of the Criminal Procedure Act 51 of 1977.

Carelse JA (Mocumie and Mabindla-Boqwana JJA concurring):

[1] This is an application for special leave to appeal that came before this Court, some 15 years after the incident, some 13 years after the applicant was convicted and sentenced by the Pretoria Magistrate's Court, and some 11 years after his appeal against sentence was heard by the Gauteng Division of the High Court, Pretoria (full bench). This application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 and, if granted, the determination of the appeal itself. A party seeking special leave must show that special circumstances exist to warrant a further appeal.

[2] There are two further applications before this Court – an application for condonation for the long delay in bringing this application and an application to lead further evidence on appeal in terms of s 316(5) of the Criminal Procedure Act 51 of 1977 (CPA).[17] The organs of the State involved with this applicant have not filed any answering affidavits. There are accordingly no disputes of fact.

[3] The incident giving rise to the criminal charges against the applicant arise out of a motor vehicle collision that occurred on the night of 30 June 2006 on Garsfontein Road, Pretoria, when the motor vehicle driven by the applicant, who was attempting to overtake a motor vehicle, collided with a motor vehicle being driven in the opposite

[17] Section 316(5) of the Criminal Procedure Act 51 of 1977 (CPA) provides:
'*(a)* An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.
(b) An application for further evidence must be supported by an affidavit stating that –
(i) further evidence which would presumably be accepted as true, is available;
(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
(c) The court granting an application for further evidence must –
(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.'

direction, killing its two occupants. At the time of the collision and according to the post-mortem report, the two occupants of the other motor vehicle involved in the collision were both under the influence of alcohol. At his trial the applicant faced three charges. Counts 1 and 2 were culpable homicide arising out of the death of the two occupants of the other motor vehicle that was involved in the collision. Count 3 was that of negligent or reckless driving in terms of s 63(1) of the National Road Traffic Act 99 of 1996 (the RTA) in that the applicant had driven through a 'red robot, overtook on solid line'. The applicant was found guilty on counts 1 and 2. On count 3 the magistrate found that the traffic light was red and that in 'driving over a red robot (the applicant) was reckless and he is found guilty of reckless driving'.

[4] The evidence on count 3 included that of Sergeant Bekker who was on the scene. He said that the traffic light in question was 1.7 kilometres from the accident scene. Jacobus van der Walt, who also gave evidence on this issue, said that there was a set of traffic lights at the intersection of Garsfontein Road and De Villebois Road. He was travelling from west to east on Garsfontein Road. He was stationary at the traffic light which was red for him. He saw the applicant's vehicle turning right from De Villebois Road into Garsfontein Road where he skipped the red robot just before the light became green 'for me to drive on'. From there he drove behind the applicant from which vantage point he witnessed the accident some 80 metres further.

[5] Before sentencing the applicant, the magistrate was told of a letter written by the applicant to the parents of the deceased, in which he had expressed his remorse to them and in which he sought their forgiveness. He repeated these sentiments in evidence. The magistrate also took into account that the applicant was 20 years old when the accident happened and that he was in the second year of his tertiary education and, at the time of sentencing, the applicant had completed his tertiary education.

[6] On count 1, the applicant was sentenced to three years' imprisonment in terms of s 276(1)*(i)* of the CPA.[18] This meant that the applicant had to serve a minimum of one sixth of the sentence imposed on him before he could be considered for correctional supervision. On count 2, he was sentenced to three years' imprisonment, wholly suspended for five years on condition that he was not convicted of culpable homicide involving the driving of a motor vehicle. On count 3, he was sentenced to a fine of R20 000 – or eighteen months' imprisonment, wholly suspended for five years on condition he was not over the period, convicted of a contravention of s 63(1) of the

[18] Section 276 (1)*(i)* of the CPA provides:
'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –
(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

RTA. His license was suspended for five years. And lastly, he was declared unfit to possess a firearm in terms of the Firearms Control Act 60 of 2000.

[7] The magistrate granted the applicant leave to appeal on the sentence he imposed. On 8 March 2010, the full bench, in the exercise of its powers of review, set aside the conviction and sentence on count 3 on the ground that 'there is no evidence of any reckless or negligent driving. There is no evidence that anybody's life, or property were in danger, related to the applicant '"skipping" the robot'. In other words, the applicant's act did not result in any *dolus directus* or *dolus eventualis,* meaning the skipping of the red traffic light did not endanger anyone's life or property. There was no appeal by the State against this order, as questionable as it may be. On counts 1 and 2 the full bench found that there was a misdirection in that the two counts should have been taken as one for the purpose of sentence and that there was only one incident that resulted in two deaths. In the result, the full bench set aside the two sentences and replaced them with a sentence of four years' imprisonment in terms of s 276(1)*(b)* of the CPA, of which one year was suspended for five years on condition that during the period of suspension the applicant was not convicted of culpable homicide involving the driving of a motor vehicle. The net result of the appeal was that, instead of the applicant serving a possible one sixth of his sentence in prison, he would have to serve a three year period in prison, this being done without notice to the applicant of the full bench's intention to increase the sentence imposed. From a reading of the whole judgment, it appears that the increase in sentence was erroneous and not that which may have been intended by the court.

[8] In his affidavit in support of his applications (for condonation, to lead further evidence on appeal and special leave to appeal), the applicant stated that after the full bench delivered its judgment on 8 March 2010, he complied with a directive to hand himself over to the Voortrekker Correctional Centre (the Correctional Centre) within 48 hours. Accompanied by his brother in law, he presented himself at the Correctional Centre and was informed by an official that they were not in possession of his court records and could therefore not detain him. He was told to go home and once they were in possession of his records, they would arrange to have him transported to the correctional centre. The applicant provided his home address to the officials in this regard. The applicant stated that he remained at this address. In the six and a half years that followed this encounter, the applicant got married and at the time of the urgent application, his wife was expecting their third child. He is gainfully employed. None of this evidence is disputed.

[9] On 7 September 2016, some six and a half years later, a warrant was issued for the applicant's arrest. The State, and the relevant organs it controls has failed to explain this extraordinary delay. On 22 September 2016, having been served with the warrant, the applicant brought an urgent application in the Gauteng Division of the

High Court, Pretoria (the high court) to stay the warrant pending an application to reconsider the sentence imposed by the full bench. Neukircher AJ who heard the urgent application, and on 27 September 2016 made the following order:
'34.1 The applicant is to deliver his application for reconsideration of the appeal under case number A576/2009 (or whatever process he be so advised) *within 15 days of date hereof to whoever person or court he is so advised.*
34.2 Pending finalisation of the proceedings set out in 34.1 (supra) the warrant of arrest issued by Magistrate Mncube on 7 September 2016 authorising the arrest of the applicant is stayed.
34.3. Pending finalisation of the proceedings set out in 34.1 (supra) the respondents are hereby interdicted and restrained from arresting the applicant and handing him over for the purpose of serving his sentence.
34.4 Should the provisions of paragraph 34.1 (supra) not be carried out within 15 days of date hereof; this order will lapse immediately.
34.5 Each party shall pay their own costs of this application.' (Emphasis added.)

[10] Pursuant to this order the applicant brought an application to this Court for special leave to appeal the judgment and order of the full bench. The applicant did not comply with paragraph 34.1 of Neukircher AJ's order of 27 September 2016. It is unnecessary to detail the explanation particularly because the State conceded that the applicant has good prospects of success in his appeal against the order of the full bench based on the irregularity committed by the full bench which was to increase the sentence without giving notice. For these reasons the condonation application ought to be granted.

[11] The reasons set out in paras 8 and 9 above, amount to exceptional circumstances. Accordingly, the application to lead further evidence should be granted, as well as the application for special leave to appeal to this Court.

[12] It is not disputed that the full bench misdirected itself materially by increasing the applicant's prison sentence without notice to him. (See *S v Bogaards*).[19] As a

3. In *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC), Khampepe J acknowledged that a court of appeal is empowered to set aside a sentence and impose a more severe one. She said that at common law there was no formal requirement for an appeal court to give an accused person notice when that court was considering an increased sentence on appeal. The Constitutional Court held that it was necessary to develop the common law so as to require notice to an applicant where an increase in the sentence is being contemplated by the court of its own accord. Khampepe J said the following at para 72:
'It is worth emphasising that requiring the appellate court to give the accused person notice that it is considering an increase in sentence or imposing a higher sentence upon conviction for a substituted offence, does not fetter that court's discretion to increase the sentence or to impose a substituted conviction with a higher sentence. The court may clearly do so in terms of s 22(b) of the Supreme Court Act and s 322 of the CPA. Elevating the notice practice to a requirement merely sets out the correct procedure according to which the court must ultimately exercise that discretion. The notice requirement is merely a prerequisite to the appellate court's exercise of its discretion. After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition of a higher sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires.'

result of that, the sentence in respect of counts 1 and 2 cannot stand. For different reasons set out below, the magistrate's order on sentence in respect of these counts cannot be reinstated, as was submitted on behalf of the State.

[13] In *Jaftha v S*[20] , this Court held:
'. . . that new evidence ought to be admitted to show that the sentence imposed ten years previously is now inappropriate. Ordinarily, of course, only facts known to the court at the time of sentencing should be taken into account but the rule is not invariable. Where there are exceptional or peculiar circumstances that occur after sentence is imposed it is possible to take these factors and for a court on appeal to alter the sentence imposed originally where this is justified.'[21] (Footnotes omitted.)
The new evidence that the applicant requests this Court to consider is not disputed.

[14] In what follows, I will have regard to the material facts known to the trial court when sentence was imposed on 2 December 2008 and the undisputed additional facts that the applicant has placed before this Court some 13 years later. On 30 June 2006 when the applicant negligently caused the deaths of the deceased, he was 20 years old, which is relatively young. He had no previous convictions and was in his second year of his tertiary education. Prior to him being sentenced, he had written to the families of the deceased to express his remorse and to seek their forgiveness for what had happened.

[15] The applicant is not the cause of the inordinate delay that followed since the collision on the night of 30 June 2006. Over the intervening 15 years, the applicant who is now a 35 year old adult, has married. In September 2016 his wife was expecting their third child. He is currently gainfully employed. There is nothing to rebut the fact that over the 15 years the applicant has led a socially responsible and crime free life. As a licensed driver there is nothing to suggest that some 15 years on in his life, his driver's license should be suspended. However, this remains a serious offence. It is without doubt that the applicant cannot go unpunished. I agree with the magistrate that direct imprisonment was the appropriate sentence at the time, but due to the special circumstances of this case, which I have outlined above, I am of the view that correctional supervision will be most appropriate.

[16] Correctional supervision takes into account the seriousness of the offence committed, the interests of society, particularly those of the two families as part of society at large. It incorporates principles of restorative justice which are based on the rehabilitation of an offender outside of prison. This is to ameliorate the harshness of direct imprisonment in circumstances presented to this Court, after a very long delay in implementing the order of committal. The delay cannot be attributed to the conduct of the applicant but to the relevant government department officials. It takes

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See also *S v De Beer* [2017] ZASCA 183; 2018 (1) SACR 229 (SCA).
[20] *Jaftha v S* [2009] ZASCA 117; 2010 (1) SACR 136 (SCA) (*Jaftha*) para 15.
[21] *S v Karolia* [2004] ZASCA 49; 2006 (2) SACR 75 (SCA) para 36.

into account the personal circumstances of the applicant which came into existence after this long delay.

[17] It has been stated over and over again in a number of cases[22] that sentences of correctional supervision in terms of s 276(1)*(h)* of the CPA[23] are not foreign to the offence of culpable homicide committed while driving a motor vehicle, that led to devastating consequences. *S v Naicker*[24], a case of culpable homicide involved a 30 year old appellant who was a first offender and in regular employment at the time of the commission of the offence, and whose parents depended on him for support; in this case it was found that the circumstances were appropriate for a fresh sentence of correctional supervision to be considered. Referring to the decision of *R v Swanepoel,*[25] the Court held:
'In reaching the conclusion that the appellant's conduct did not warrant a sentence of imprisonment I have not overlooked the fact that a death and serious injury resulted from the appellant's negligence.

[18] In the present case it is the changed circumstances that warrant a reconsideration of the sentence imposed. Reference to case law is simply to illustrate a point that the imposition of correctional supervision has been considered in cases of culpable homicide, where appropriate. The advantages of correctional supervision have been mentioned in a number of cases, in particular *S v R*[26] where the court stated:
'. . . As to the suitability of a sentence of correctional supervision: Professor Louis P Carney (Adjunct Professor of Sociology, Chapman College, Orange County, California) writes as follows:
"No one can dispute the need for strict justice, nor can anyone with a modicum of reason challenge the premise the society must show its disapproval of criminal behaviour by criminal sanction. But when punishment is taken to an inflexible extreme, or when a reconstructive purpose is denied because of the punishment philosophy, then criticism is warranted. Criminal justice thinking has been distressingly preoccupied with the belief that treatment and punishment are polar opposites, and never the twain shall meet. They are, on the contrary, inseparable. The necessity of punishment equally affirms the necessity of redemption. We punish

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[22] *S v Naicker* [1996] ZASCA 138; [1997] 1 All SA 5 (A)*; S v Omar* 1993(2) SACR 5 (C). *R v Swanepoel* 1945 AD 444 at 448. *S v R* 1993 (1) SA 476 (A) at 480F-J. See also *S v Kruger* 1995 (1) SACR 27 (A) at 31b-f.
[23] Section 276(1) of the Criminal Procedure Act 51 of 1977 provides that: (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed on a person convicted of an offence namely
(a) . . .
. . .
(h) correctional supervision;
(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'
[24] Footnote 7 paras 3 -14.
[25] Footnote 7 para 15.
[26] Footnote 7.

for several different reasons, but essentially to impel an offender towards a more appropriate norm of behaviour. Inflexibly brutal punishment is not consonant with restoration of the individual. A balanced correctional philosophy recognises that some criminal behaviour is so outrageous or so persistent as to be beyond positive influence at a given time. Protracted incarceration of this type of offender may be in order. But most offenders should be quickly decarcerated to offset the inimical prison experience and dealt with in the community".'

[19] Correctional supervision can be imposed with appropriate conditions to constitute a suitably severe sentence.[27] It allows a person to serve a non-custodial sentence, promotes the integration of a person back into the community and has rehabilitative benefits.[28] The exceptional circumstances of this case and the favourable personable circumstances of the applicant would render correctional supervision appropriate, if the applicant is found to be a suitable candidate. And albeit distinguishable from *Jaftha*, it falls within that category of exceptional circumstances envisaged in s 316(5) of the CPA and in a long line of cases that followed *Jaftha*, namely that new circumstances that were presented long after the imposition of sentence, were considered by this Court and a different sentence to that imposed by the court of first instance, and the full court was imposed.

[20] Section 276(1)*(i)* of the CPA[29] is also an alternative sentencing option which must also be weighed. A sentence of direct imprisonment under s 276(1*)(i)* of the CPA (in the discretion of the Commissioner of Correctional Services) may have been appropriate 13 years ago when the applicant was initially sentenced. A sentence of direct imprisonment under s 276(1)*(i)* (in the discretion of the Commissioner of Correctional Services) would mean that the applicant would have to serve a term of direct imprisonment when other appropriate sentences are available for his peculiar circumstances. Suffice to state that to imprison the applicant at this stage, even for a sixth of the three years' imprisonment, as Schippers JA proposes, will not (after this long delay) be in the interests of justice.

[21] The long delay in bringing finality to the matter and not knowing when the officials would come has hung like a sword over the applicant's head. Imprisonment at this time would result only in retribution, which is not in the interests of justice. In reaching this conclusion, I have not overlooked the fact that two young men have died as a result of the applicant's conduct; it is unfortunate that intervening circumstances which cannot be ignored have arisen in this case, through no fault of the applicant.

[22] In conclusion, the Department of Correctional Services, which is responsible for implementing correctional supervision, did not file a report as required under s

[27] *S v Ingram* 1995 (1) SACR 1 (A) at 9E-F.
[28] Section 50(1)*(a)* of the Correctional Services Act 111 of 1998.
[29] Footnote 8.

276(1)*(h)* of the CPA which, in my view, is the most appropriate sentence. Without a report from a probation officer or a correctional official, this Court would not be in a position to impose a sentence under section 276(1)(*h*) of the CPA. However, in line with the approach adopted in *S v Ningi*[30] as well as the exceptional circumstances in this case, it is appropriate to remit the matter to the magistrate to obtain a pre-sentence report and consider imposing a sentence afresh, under s 276(1)*(h)* of the CPA.

[23] This approach was recently reaffirmed by this Court in *S v Botha*[31] as follows:

'In *S v Samuels* the following was stated: 'Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences'. The appellant certainly does not fall within the category of persons who need to be removed from society. . . . I am of the view, in all the circumstances, that consideration should be given to the imposition of a sentence under s 276(1)(*h*). Since the provisions of s 276A(1)(*a*) of the CPA must be complied with before consideration of such a sentence can take place, it is necessary to remit the matter to the court a quo to comply with these provisions and to consider the sentence afresh.'

[24] In the result the following order issues:

1 The application for condonation is granted.

2 The application for special leave to appeal is granted.

3 The application to lead further evidence is granted.

4 The appeal on sentence in respect of counts 1and 2 is upheld.

5 The order of the Gauteng Division of the High Court, Pretoria is set aside on counts 1 and 2.

6 The matter is remitted to the magistrate to impose sentence afresh, in respect of those counts, after due compliance with the provisions of s 276A(1)*(a)* of the Criminal Procedure Act 51 of 1977.

7 A report of a probation officer and/or a correctional official, must be obtained within six weeks of delivery of this judgment.

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[30] *S v Ningi* 2000 (2) SACR 511 (A) para 9.

[31] *Botha v S* (901/2016) [2017] ZASCA 148 para 46.

From The Legal Journals

Magobotiti, C D

"An assessment of sentencing approaches to persons convicted of white-collar crime in South Africa"

Journal for Juridical Science 2021:46(2):102-119

Abstract

Assessing court sentencing approaches to persons convicted of white-collar crime is a complex task. For the purposes of this article, this research task involved assessing the appropriateness of sentences imposed within the proportionality principle during the period 2016 to 2021 in South Africa. This further involved the empirical use of both qualitative and quantitative methodologies, in order to determine how commercial courts – in this case, the Bellville Commercial (Regional) Court – impose a sentence on white-collar criminals. The article establishes that, in South Africa, categories of white-collar crime such as corruption, racketeering, fraud and money laundering are increasingly reported by the media, independent institutions and government. There is a public perception that courts are generally lenient in sentencing white-collar offenders. This article aims to determine the appropriateness of a sentence, within the principle of proportionality, for white-collar criminals, in order to deter this type of crime.

This article can be accessed here:
https://journals.ufs.ac.za/index.php/jjs/article/view/5826/4250

Tshehla, B

"Police officers' discretion and its (in)adequacy as a safety valve against unnecessary arrest"

Journal for Juridical Science 2021:46(2):80-101

Abstract

The Supreme Court of Appeal has ended the recent uncertainty on whether there is a need for the fifth jurisdictional fact in the process of arrest. The result is that South African law is back at the well-known four jurisdictional facts that must be present before a lawful warrantless arrest may take place. This article assesses whether, after the demise of the fifth jurisdictional fact, police discretion can adequately protect the right to liberty. The discussion starts with a contextual background outlining the role of the jurisdictional facts and the emergence and demise of the fifth jurisdictional fact. This is followed by an outline of the legislative framework applicable to arrest, pointing out that the law bestows wide discretion on police officers in the exercise of their duties, including securing the court attendance of accused persons. Relying on relevant decided cases, it is submitted that the courts focus on the police discretion exercised at the point of arrest, not in the process preceding that stage (for example, the choice of method). The central submission is that, given that the only viable pre-court appearance protective mechanism against unnecessary arrests is the proper exercise of police discretion, focus on the exercise of discretion at the point of arrest is not the most prudent and/or effective approach in the quest to protect the right to liberty.

This article can be accessed here:
https://journals.ufs.ac.za/index.php/jjs/article/view/5825/4249

Ally, N; Beere, R & Moult, K

"Red flags: Disciplinary practices and 'school-to-prison' pathways in South Africa"

SA CRIME QUARTERLY NO. 70 • 2021 2 – 33

Abstract

Testing positive for drug use at school turned into a horror story for four learners, who were channelled into the criminal justice system by their school and detained for months under 'compulsory residence orders' at child and youth care facilities. This occurred even though the referral of children to the criminal justice system following a school-administered drug test is explicitly prohibited by legislation. S v L M & Others draws startling attention to the failure of school officials, prosecutors and magistrates to comply with legislation, and the devastating impacts that a direct 'school-to-prison' pipeline can have on children. The case also raises red flags around broader punitive and exclusionary school disciplinary mechanisms, which – even where lawful – may also adversely affect children and potentially contribute to school-to-prison pathways in South Africa. We argue that S v L M highlights the need for restorative and preventative approaches to school discipline, which can transform not only learners and schools but society more broadly.

This article can be accessed here:
http://www.scielo.org.za/pdf/sacq/n70/03.pdf

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

Contributions from the Law School

Drunk in court?

As David Pannick ('Drunk in charge of a brief' in *I have to move my car: Tales of unpersuasive advocates and injudicious judges* (2008) 113) points out, there may be many reasons why a lawyer is unable to effectively represent his or her client's interests in court, including lack of preparation, nerves, incompetence, or simply that the case is so hopeless that nothing useful can be said. One rather extraordinary reason for inability to perform is that counsel was intoxicated.

While so remarkable as to invariably be subject to a report in the news media, unfortunately it seems that such a situation has indeed arisen on a number of occasions. The most recent reported example in South African law occurred in the review case of *S v Mugera* 2022 (1) SACR 53 (LP), where the accused were facing charges of fraud and money-laundering. During cross-examination of her client, counsel for first accused was observed by the magistrate to be acting in a 'somewhat peculiar' manner, leading the magistrate to suspect that she was under the influence of an intoxicating substance. Despite counsel responding that she was well and fit to continue, the magistrate *mero motu* decided to stand the matter down, raising concerns that counsel was not able to proceed with the trial. Counsel then requested that the matter be stood down until the following day, when she would 'come to court intelligent, proper and fit', but proceeded to ask for forgiveness from the court, stating that 'she was a conveyancer, she did not know court things, she was very drunk, and she thought that the court would not have picked it up'.

Noting counsel's absence from court without reasonable explanation until her attendance was finally secured, and her failure to ask questions or put her client's version to the state witnesses, the presiding magistrate brought the matter as a special review, asking whether the accused represented by counsel had had his right to a fair trial infringed. The High Court on review concluded that this was indeed the case, confirming the accuracy of the magistrate's observations. The court held that the accused had effectively been unrepresented at trial, and that in fact if he had indeed been formally unrepresented, he would have been in a better position, as the magistrate would then have been under a duty to assist him. Counsel's self-

acknowledged lack of forensic competence, seriously aggravated by her inability to follow proceedings as a result of not being in her sound and sober senses due to intoxication, tainted the whole proceedings such that they were required to be set aside, and the matter was ordered to be remitted for a trial *de novo* before another magistrate. The court further ordered that a copy of its judgment be brought to the attention of the Legal Practice Council for it to investigate the conduct of counsel during the trial.

The *Mugera* case is not the first of its kind in South African law. A notable instance of where the question arose as to whether counsel was intoxicated may be found in *Duffey v Munnik* 1957 (4) SA 390 (T), where Mr Duffey, an attorney, became annoyed upon being informed by the magistrate that a question which he had put to the witness had already been answered. Duffey persisted in asking the question. On further observing Duffey's behaviour, the magistrate came to the conclusion that Duffey was under the influence of alcohol, and convicted him of contempt of court in terms of s 108(1) of the Magistrates' Court Act 32 of 1944. In review proceedings, it was contended that the magistrate erred in simply relying on his own observation of Duffey's condition, as fatigue or illness may have caused his behaviour. The court agreed that – even though Duffey's described behaviour in court was certainly consistent with intoxication - given that Duffey did not have the chance to make any explanation as to his conduct, which he later explained in terms of exhaustion, the conviction should be set aside, as not being in accordance with justice.

Cases in other jurisdictions have provided even clearer cause for intervention. There is the Indiana lawyer who was representing a defendant charged with armed robbery who 'staggered when walking before the jury, and fell asleep several times during the course of the morning proceedings' before failing to return after lunch, only to be discovered in his vehicle, 'either asleep or passed out' (*In the matter of Douglas D Seely Jr* 427 NE 2d 879 (1981) cited by Pannick 114). Or the Hong Kong lawyer Roderick Murray, who arrived 40 minutes late to the hearing in which he was representing seven defendants charged with having unpaid cigarette duty of millions of dollars, and then giggled, mumbled, clapped, put on his sunglasses, and drummed his fingers on his desk during proceedings. He was reprimanded several times by the judicial officer, and admitted to being 'drunk as a monkey', after a long lunch which included 'two dry martinis and a couple of beers' ('Lawyer "drunk as a monkey" in court in https://mg.co.za/article/2004-08-10-lawyer-drunk-as-a-monkey-in-court/ accessed 22/2/22). Or the Las Vegas lawyer Joseph Caramagno who showed up to court smelling of alcohol and slurring his words, which behaviour he explained in several different ways at once, including sustaining a head injury in a car crash on the way to court. When he turned to his 'ex-girlfriend Christine' for corroboration, it was discovered that in fact the woman's name was Josephine, and that she was not an ex-girlfriend, but had been with him 20 minutes earlier at a nearby bar. Despite the Breathalyzer test immediately ordered by the judge revealing that he was just below the legal limit, the judge declared a mistrial on the case that Caramagno was there to argue, because as a result of his intoxication the judge doubted that Caramagno could 'tell a straight story' (John G Browning 'Let these incidents serve as a

cautionary tale about practicing law while drinking' at https://finance.yahoo.com/news/let-incidents-serve-cautionary-tale-052946740.html accessed 22/2/22). Some lawyers clearly manage better than others. In 2017 one David Gray delivered an hour-long closing argument in a Kentucky court, during which address the judge was very concerned about his 'demeanour and performance'. After the jury found against his client, the judge asked Gray to submit to a Breathalyzer test, which revealed a reading of 0.337. Emergency medical personnel were summoned, and Gray was taken by ambulance to a local hospital (ibid).

What of the delicious irony of lawyers contesting a drunk driving charge themselves being under the influence of alcohol? Pannick recounts the story of the barrister Rodney Pritchard, prosecuting in a case of alleged drink-driving, where the traffic police officers present before the trial could smell alcohol on his breath, and noted that his speech was slurred and his eyes were rolling. The case was then adjourned by the Crown Prosecution Service, on the basis that Pritchard had 'fallen unwell' (Pannick 113, reported in *The Times* 18 April 2003, and in the *Daily Telegraph* 18 April 2003). Or John Higgins, a defence attorney dealing with a drunk driving charge in New Mexico, whose condition became clear to the judge partly because Higgins showed up to the wrong courtroom. Higgins was taken to hospital when a Breathalyzer test confirmed that he was over the legal limit, but not before he was found to be in contempt of court for disrupting the court proceedings (Browning op cit).

There are other disturbing examples. What about turning up intoxicated at your own disciplinary hearing? When lawyer Justin Holstin appeared before the Kansas Board for Discipline of Attorneys, he was discovered to have a blood alcohol level of 0.2. And what of judges? Judge Emily Dean was suspended from the Iowa Supreme Court following an incident where she was too intoxicated to actually sit on the bench; Judge Jacqueline Schwartz resigned from the Miami-Dade County bench after two incidents of public drunkenness, one at a restaurant where she argued with a waiter who refused to serve her more alcohol, and one at the courthouse, where she was unsteady on her feet, slurring her words and unable to concentrate, and finally could not remember her own address after being driven home (these incidences cited by Browning op cit).

What do we make of these incidences of lawyerly intoxication? What should the response of a court be when such an incidence arises? At the very least the body of legal professionals should be alerted to the situation (as was the case in *Mugera*), but should a conviction for contempt always follow? As the anecdotes above indicate, this has not always been the case in various jurisdictions. But if not, then when? And what is the responsibility of professional legal bodies in respect of the well-being of those these bodies represent? As Browning points out, there are many in the legal profession who 'prioritise success over personal well-being, and who don't always exhibit healthy coping skills to deal with the stress' of the profession. Not only do lawyers have to cope with many stresses, but for many lawyer's social life revolves around a bottle. As a result, substance abuse all too often becomes a chronic

problem, one which can wreak havoc with the lives of lawyers, just as it can do in other spheres of life. This should be recognized both in the disciplinary committees of the professional bodies, as well as in the programmes and support which such bodies should ensure are in place to assist where, as Pannick puts it (115), the practitioner is spending 'more time at the bar than at the Bar'.

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Matters of Interest to Magistrates

WHY CONTEXT MATTERS: CONSTITUTIONAL COURT LEAVES THE HATE SPEECH THRESHOLD OPEN TO JUDGES' INTERPRETATION

Last week, the Constitutional Court finally handed down judgment in a hate speech case argued before that court almost 2½ years ago. But for those of us who had hoped that the court's earlier hate speech judgment in the Jon Qwelane matter would provide guidance on what constitutes hate speech and would lead to more predictable outcomes in hate speech cases, the recent judgment comes as a bit of a disappointment.

It was somewhat surprising that a unanimous Constitutional Court last week endorsed a finding by an Equality Court that a vicious attack on Zionism and Zionists constituted hate speech based on Jewish ethnicity and religion because the offending speaker mentioned Hitler in his attack on Zionists. I had assumed that the Constitutional Court would accept the view (also advanced by experts testifying before the Equality Court) that criticism of Zionism, the state of Israel, or its government cannot, *per se,* be equated with anti-Semitism. (I assume many Zionists and supporters of Zionism and the Israeli state and/or government might see things differently.)

In South Africa, few legal-political questions elicit as much heat and as little light as arguments about whether specific controversial speech acts constitute hate speech or not. This is not only because extreme political polarisation and widespread intolerance of differences in our society stir up irrational passions on such matters. It is also because the concept is not well understood by most people who participate in these "arguments". (Many people wrongly conflate "hate speech" with speech that they find disagreeable, hurtful or irritating, or with utterances made by politicians or other public figures they disagree with or actively hate.)

It has not helped that different courts had often interpreted and applied the hate speech provision in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act (Pepuda) in radically different ways, leading to radically different outcomes in cases dealing with similar kinds of speech. It is perhaps telling that the hate speech judgment delivered during this period that really got to the heart of the matter was written not by a judge of any of our higher courts, but by DM Thulare, the Chief Magistrate of Cape Town. In that judgment, the court rejected the argument that a work of art titled *Fuck White People* was hate speech, at least in part because the magistrate concluded that a reasonable person would have understood that the work of art was intended to spark self-reflection and positive change, not to cause harm.

The irrational fury caused by the *Fuck White People* artwork and many other forms of challenging expression also suggests that when people argue about what constitutes "hate speech" and what does not, they often seem to be arguing about (or also about) something else entirely: about history and how the past should be remembered or forgotten; about dignity, identity and belonging; about power and the loss of power; about responsibility and the avoidance of responsibility; and, of course, about whose grievances, prejudices, hatreds and fears should weigh heavier in the eyes of the law.

I had assumed that the Constitutional Court's judgment in *Qwelane v South African Human Rights Commission* (handed down late last year), in which that court provided a "definitive" interpretation of section 10 of Pepuda would clarify the legal position on hate speech, and that this would reduce the confusion – at least among lawyers – about what kinds of speech could reasonably be expected to amount to hate speech. But the most recent judgment of the Constitutional Court in *SAHRC obo South African Jewish Board of Deputies v Masuku* suggests that the outcome of hate speech cases will remain difficult to predict. Not that this will deter, say, outraged AfriForum leaders and follows from pretending that it is outrageous for anyone to suggest that their most recent "Kill the Boer" case against Julius Malema might not be the slam dunk win they think (or pretend to think) it is.

After *Qwelane,* section 10(1) of Pepuda prohibits any person from publishing, propagating advocating or communicating "words that are based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to be harmful or to incite harm and to promote or propagate hatred".

Section 10 *only* regulates speech that targets a group based on specific listed and analogous grounds such as race, sex, gender, sexual orientation, religion ethnicity, language, culture, HIV status and the like. It does not regulate speech that targets "unprotected" groups such as farmers, accountants, politicians or, for that matter, AfriForum or EFF members. Moreover, the test is objective, which means how the members of the targeted group may have viewed or experienced the speech is irrelevant. The test is also fact and situation specific. The same words (or song) could amount to hate speech in one context, and not amount to hate speech in another.

This is why it would be wrong for a court to impose a blanket ban on the song or other types of speech.

As the Constitutional Court confirmed in its *Masuku* judgment, a reasonable person would consider "who the speaker is, the context in which the speech occurred and its impact, as well as the likelihood of inflicting harm and propagating hatred" against a protected group, as well as the broader historical context, including "the reality of our past of institutionally entrenched racism". This is why, depending on the context and other circumstances, it is more likely that a person wearing a "Fuck Black People" T-shirt would be guilty of hate speech than a person wearing a "Fuck White People" T-shirt. (But where the T-shirt is worn, who it is worn by, and other relevant factors pointing to the intention of the wearer will obviously also be important.)

Hate speech cases are particularly difficult to resolve (and the outcome difficult to predict) when the speech does not explicitly target a protected group. This problem arose in the *Masuku* case as Masuku did not explicitly target people because of their Jewish religion or ethnicity (protected groups), but instead targeted Zionists. In *Masuku* the Constitutional Court accepted that a reasonable person would not conclude that people were targeted because of their Jewish religion or ethnicity, merely because the majority of Jewish people were also Zionists. Something more is needed. What made the difference in this case was the reference to "Hitler" which, the court held, would have led a reasonable person to conclude that the statement was based on Jewish ethnicity and not merely on a Zionist political orientation.

It is interesting to note that the court held that a reasonable person would not have concluded that other statements (including one referring to any family "who sends its son or daughter to be part of the Israel Defence Force (IDF)") had targeted individuals based on their Jewish religion or ethnicity, despite the fact that "only Jewish families would send their children to join the IDF". The court justified this conclusion by pointing out that it was unlikely that a Jewish person would join the IDF if they were not a Zionist supporter.

One way to make sense of this conclusion is to assume that statements targeting a non-protected group (including Zionists) would not constitute hate speech merely because the majority of that group are also members of a protected group (including Jewish people). Other evidence would be required for a reasonable person to conclude that an attack on Zionists was in fact an attack on Jewish people. But it is not that clear from either the *Qwelane* judgment or the *Masuku* judgment exactly what kind of evidence would suffice.

A party like AfriForum that complains about the singing of a song targeting farmers, or perhaps apartheid supporters, or perhaps white supremacists, will have to convince the court that there are other factors that would convince a reasonable person that the singing of that song at a particular event in fact targeted a racial group and not a group of people based on their political views. It would then further have to convince the court that given the specific event where the song was sung, the identity of the person who sung it, and other relevant factors, a reasonable person would conclude that the intention of the singer was to be harmful or to incite harm and to promote or propagate hatred against white people.

(The above article has been slightly shortened and appeared on the *Constitutionally Speaking* blog of Prof Pierre De Vos on the 24th of February 2022)

A Last Thought

"The question of what will give rise to a "reasonable apprehension of bias" requires some interrogation. This test does not mean that any Judge who holds certain social, political or religious views will necessarily be biased in respect of certain matters, nor does it naturally follow that, where a Judge is known to hold certain views, they will not be capable of applying their minds to a particular matter. The question is whether they can bring their mind to bear on a case with impartiality. To do so plainly does not require a Judge to absolve himself or herself of his or her human condition and experience. As Cardozo J put it: "absolute neutrality on the part of a Judicial Officer can hardly if ever be achieved"[32] for—

"[t]here is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs . . . . In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.
. . .
Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or Judge."[33]

It is true that a Judge does not exist in a vacuum. In fulfilling his or her adjudicative function, he or she brings personal and professional experiences and, what is more,

[32] Cardozo J in *The Nature of the Judicial Process* (Yale University Press, New Haven 1921) at 12-3 and 167, which is quoted with approval by L'Heureux-Dube J and McLachlin J in *R v S (RD*) above n **Error! Bookmark not defined.** at para 34, as cited by this Court in *SARFU* above n **Error! Bookmark not defined.** at para 42.
[33] *SARFU* above n **Error! Bookmark not defined.** at para 42.

"it is appropriate for Judges to bring their own life experience to the adjudication process".[34] This Court has said that in "a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that Judicial Officers should share all the views and even the prejudices of those persons who appear before them".[35]

What an applicant raising an apprehension of bias must prove is that there is some connection between the views, opinions or experiences of a Judicial Officer and the subject matter they are to be seized with. So, proving that a Judicial Officer holds a particular view is not, without more, sufficient to establish a reasonable apprehension of bias.

In *Goosen*, this Court, dismissing the recusal application, emphasised that -

"[i]t is unnecessary for a Judge to occupy a place of utter isolation from an issue or from even a party for that matter. Judges do not recuse themselves when the banking institution which keeps their money is sued and comes before them. Similarly, holding shares in a public company quoted on the stock exchange does not trigger bias or a perception of bias unless the value of the shareholding is substantial and likely to be affected by a judgment."[36]

This Court went on to emphasise that more is needed before the test for recusal will be satisfied:

"There must be an articulation of a logical connection between the matter and the feared deviation from the course of deciding the case on the merits. The bare assertion that a Judge has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making is articulated."[37]

Ultimately, then, the test for reasonable apprehension of bias requires more than mere association with a matter. The relevant connection must call into question the ability of the Judge to apply their mind in an impartial manner to the case before them."

Per Khampepe, J in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* [2022] ZACC 5 at para 66 to 69

[34] Id.
[35] Id at para 43.
[36] *Ex parte Goosen* 2020 (1) SA 569 (GJ) (*Goosen*) at para 25.
[37] Id at para 29.