e-MANTSHI

A KZNJETCOM Newsletter

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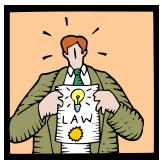
Welcome to the hundredth and eighty third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. A Draft Older Persons Amendment Bill, 2022 was published for general comment in Government Gazette no 46032 of 11 March 2022. The purpose of the bill is to amend the Older Persons Act, 2006, so as to insert new definitions; insert new provisions relating to the monitoring and evaluation of all services to older persons and for the removal of older persons to a temporary safe care without a court order which has to be confirmed by the court within 48 hours; to tighten up the existing implementation and compliance measures; to effect some textual amendments for greater clarity and to provide for matters connected therewith. The bill can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202203/46032gon1872.pdf

2. A Magistrates Bill has been published in Government Gazette no 46088, dated 25 March 2022 for public comments before 29 April 2022. The purpose of the Bill is to

provide for the establishment, constitution, objects and functions of the Magistrates Commission; to regulate the appointment and remuneration of, and vacation of office by, magistrates; to provide for the remuneration and conditions of service of magistrates; and to provide for matters in connection therewith. The main aims of the Bill are threefold: Firstly, it aims to replace the current Magistrates Act, 1993 (Act No. 90 of 1993) in order to ensure the autonomy of the lower court's judiciary from the Executive. Secondly, it aims to incorporate all the provisions relating to the appointment of judicial officers of the lower courts in the Bill itself, since some provisions are presently contained in the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). Thirdly, it aims to bring the procedure for dealing with complaints about magistrates' conduct in line with the dispensation applicable to judges in the superior courts. The Bill can be accessed here:

https://www.justice.gov.za/legislation/bills/2022-MagistratesBill%20[20220309].pdf

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Recent Court Cases

1. Johnstone v Shebab 2022 (1) SACR 250 (GJ)

Despite the rule relating to the evaluation of factual disputes on application papers, a court always had to be cautious about deciding probabilities in the face of conflicts of fact in affidavits in Domestic Violence matters. Affidavits were drafted by legal advisors with varying degrees of experience, skill and diligence, and a litigant should not pay the price for an advisor's shortcomings.

Windell J (Twala J concurring):

Introduction
[1] This is an appeal against the granting of a final protection order in terms of the Domestic Violence Act 116 of 1998 (the Act).

[2] The respondent (complainant in the court a quo) is a 21year old female, employed as an au pair. She applied for an interim protection order against the appellant, a 26-year-old male and her erstwhile boyfriend (the respondent in the court a quo). An interim protection order was granted against the appellant on 20 October 2017 and

confirmed on 13 August 2018. No oral evidence was called for by the court a quo and the matter was decided on affidavit.

[3] It is common cause that the appellant and the respondent were in a romantic relationship. Although the relationship ended in May 2017, the parties decided to keep contact and to 're evaluate' their relationship in January 2018. After some time passed, the relationship between the parties turned sour and the respondent requested the appellant to stop any further contact with her. Despite several requests to stop any communication, the appellant continued to send the appellant numerous WhatsApp messages per day and phoned her continually. After ultimately threatening her on 13 September 2017 that he would 'make her life hell', and that he had 'more than enough', two fake Instagram accounts were opened in the respondent's name, false Gumtree advertisements were posted with her personal details, her parents were reported and investigated by the South African Police Service (the SAPS) for possession of unlicensed firearms, and, on 18 October 2017, a complaint was made against her at St Benedict's School that she assaulted the child she was looking after. The respondent averred that the appellant was responsible for all these actions and that they amounted to harassment. She consequently approached the magistrates' court for an interim protection order on 20 October 2017.

[4] The appellant admitted that he sent the respondent hundreds of WhatsApp messages, phoned her constantly, tracked her phone, and that he threatened her on 13 September 2017 that he would make her life hell. He, however, contended that his actions did not constitute harassment and that he stopped communicating with the respondent weeks before she applied for the protection order. He submitted that his behaviour was normal, and the communication exchanged between them was part and parcel of their relationship. He regretted threatening the respondent on 13 September 2017, but said that he had apologised to her for his behaviour on the same day. He denied that he was responsible for any of the subsequent events and contended that one of the respondent's old school friends might be responsible for bullying her.

[5] The court a quo found that the communication between the parties (during and after the relationship) had a certain volatility to it and that the texts, on a balance of probabilities, showed that the appellant committed 'acts of domestic violence'. The magistrate further found that in the absence of a court order the appellant would have continued committing acts of domestic violence and that he only stopped when the interim order was granted against him. The court a quo consequently issued a final protection order for the appellant not to commit the following acts of domestic violence: stalking, harassment, controlling and/or abusive behaviour towards the respondent and not to communicate with the respondent directly or indirectly in any way whatsoever. It is this finding that is the subject of this appeal.

[6] The Act came into operation in 1998. In the preamble the purpose of the Act is described as a measure —
'to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of this Act, and thereby to convey that the State is committed to the elimination of domestic violence . . .'.

[7] The Act recognises, inter alia, that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; and that it may be committed in a wide range of domestic relationships. The Act defines domestic violence as —
'*(a)* physical abuse;
(b) sexual abuse;
(c) emotional, verbal and psychological abuse;
(d) economic abuse;
(e) intimidation;
(f) harassment;
(g) stalking;
(h) damage to property;
(i) entry into the complainant's residence without consent, where the parties do not share the same residence; or
(j) any other controlling or abusive behaviour towards a complainant,
where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant; . . .'.

[8] The Act provides for a very simple, inexpensive procedure. Any person in a 'domestic relationship', complaining about an act of domestic violence, can approach a magistrates' court and apply for urgent relief. A standard form is completed and on receipt of the complaint the magistrate has two choices: if the court is satisfied, firstly, that there is prima facie evidence that the respondent is committing or has committed an act of domestic violence and, secondly, that undue hardship may be suffered by the complainant as a result of the violence if an order is not issued immediately, an interim order must be issued. If not so satisfied, the respondent is called to court to show reason why a final protection order should not be granted. If the respondent appears on the return date to oppose the application, a hearing must take place. The court must consider any evidence previously received, as well as further affidavits or oral evidence as it may direct. After the hearing the court must issue a protection order if it finds, on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence.

[9] The respondent approached the magistrates' court at Boksburg for urgent relief in terms of s 5(2) of the Act. The respondent was, at the time, unrepresented. She completed the standard form provided for in terms of the Act, wherein she set out the reasons why she was seeking a protection order against the appellant. She stated

that during her relationship with the appellant he was very possessive and controlling, and would some days WhatsApp and call her more than 100 times if she didn't answer her phone. He would track her phone to check where she was and would question her if she switched off her phone. After she ended the relationship in May 2017, the incessant messaging and phoning continued, and when she requested the appellant to stop contacting her, he refused to leave her alone. When she blocked him on WhatsApp, he would send her messages on 'iMessage'. She threatened to take the appellant to court, but he told her that she did not have enough money or that the 'court would throw it out'. On 13 September 2017 during a phone call the appellant told the respondent that he would ruin her life. She confronted him in a WhatsApp message and asked him what he meant by ruining her life. He answered: 'I won't tell you I will do it I have more than enough.' A few days later a fake Instagram account was opened in the respondent's name. As they had unfollowed and blocked each other on all social media platforms, i.e. WhatsApp, Facebook and Instagram, she knew it had to be the appellant who was responsible for the fake Instagram account, as some of the photos that were posted originated from his phone. Some of the other photos that were posted on Instagram were taken from her father, cousin, and current boyfriend's Facebook pages. The Instagram account was removed by Instagram on 17 October 2017 after she laid a complaint. False adverts on Gumtree for boilermakers and technical assistants with her name and telephone number were also posted during this period, and on 18 October 2017 the principal at St Benedict's School received an email from a mom, complaining that the respondent was hitting the boy she was looking after, including the respondent's full name and particulars of the motor vehicle she was driving. After speaking to her employer and the principal it was determined that the personal particulars of the 'mom' referred to in the email received by the principal was not in their records. The respondent's parents were also suddenly being investigated by the police for possession of unlicensed firearms. She suspected that the appellant was the one who called the police and told them that her parents had unlicensed firearms because he was the only person that knew about the firearms. She stated that: 'It is clear from everything that he has done or we suspect he has done that he has intentionally and willingly spent many hours thinking this through and auctioning every one of these false actions to either harass or personally attack my character, my emotional state and my family. During our relationship he threatened to kill himself if I left him. This played on my emotions and only now do I realise that he was emotionally blackmailing me as he had told me that he had tried it once before. I know for a fact that he was institutionalized for that.'

[10] Attached to the application the respondent attached a 'Report on Impersonation Account on Instagram', various WhatsApp messages, Gumtree adverts, screenshots of Instagram photos, and posts.

[11] The appellant filed an answering affidavit wherein he admitted that he sent the respondent several WhatsApp messages a day, but denied that he was harassing her. He stated that they had broken up by consent and that he attempted 'in his own

way and fashion to repair the damage', as he did not want the respondent to 'feel low or unwanted'. He also wanted some closure and to move on. He stated that the respondent would keep him 'hanging' or would not respond to questions that he was posing and hence further clarity was required, and explains the large amount of messages received. He admitted that she asked him to stop messaging her, and that she was, at times, unfriendly and aggressive towards him, but that he did not know how to react, as she was constantly 'blowing hot or cold'. He admitted that the respondent would, on occasion, block him on WhatsApp and that he phoned her on many occasions, but that she did not answer the calls.

[12] According to the appellant, the messages should be looked at in context. They were boyfriend and girlfriend; if he phoned too much he would be in trouble and if he phoned too little he would be in trouble. He admitted that he tracked the respondent's phone movements, but stated that it was done by mutual consent, and she tracked him as well.

[13] He submitted that the respondent could have easily blocked him on WhatsApp if she found his messages abusive. He admitted that his messages were, on occasion, rude, but it was when he had been provoked by her, as she sent him rude and aggressive messages in which she swore at him. He admitted that she told him on many occasions to leave her alone. He explained it as follows:
'Although I sent her multiple messages in August and September and I concede that on occasion she would not reply I would repeat my messages and that she also on occasion requested me to stop messaging her. I repeated my messages as I did not get a response or a proper response from her and she would frustrate me.'

[14] The respondent blocked the appellant on WhatsApp on 30 August 2017 and unblocked him on 11 September 2017. She blocked him again on 14 September 2017 and unblocked him on 19 September 2017. On 20 September 2017 she blocked him and did not unblock him again. The appellant admitted that during one of the 'block periods' and on 31 August 2017 he communicated with the respondent via iMessage and asked her why she was not responding. He sent her four messages. He further admitted that she threatened him with court and that he said that he did not believe that he committed an act of domestic violence.

[15] He denied setting up two fake Instagram accounts or placing adverts on Gumtree. He further denied that he was the one who emailed St Benedict's School or the person responsible for contacting the SAPS and reporting that the respondent's parents were in possession of unlicensed firearms. He stated that, when the respondent applied for the interim order, he had already stopped communicating with her in any way or format.

[16] The respondent stated that the appellant had always been obsessive, manipulative and controlling. To substantiate these allegations, all the WhatsApp

communication between the parties from February 2017 to September 2017 was made available to the court a quo. There are thousands of messages. The communication pre breakup shows a disturbing pattern of obsessive and jealous tendencies from the appellant. The examples are far too many to form part of this judgment, but, as an example, and to illustrate the manner in which the appellant communicated with the respondent, the messages exchanged during the weekend of 19 March 2017 to 21 March 2017, when the respondent attended a family wedding without the appellant, are set out below. On 19 March 2017 the appellant sent the following messages:
'15:52.46: Can I please have photos of your room
15:53:23: Can you please send me photos of yourself
15:53:27: Full long photo
15:55:09: Glen, I'm in the middle of a wedding and you call like that
15:56:26: Are there no photos of you with your shoes a full photo of you please??
15:56:35: And photos of your room
15:56:41: Can I please have photos of your room
15:56:51: Can you please send me photos of yourself
15:56:55: Full long photo of you
15:57:17: Please I am asking nicely for these photos
15:57:52:?
15:58:23: Did you take photos of your room?
15:58:25: (emoji)
16:01:02: Why you ignoring me now
15:57:17: Please I am asking nicely for these photos
15:57:52:?
15:58:23: Did you take photos of your room?
15:58:25: (emoji)
16:01:02: Why you ignoring me now
16:01:06: (emoji)
16:01:08: ???
16:01:17: Are there no photos of you with your shoes a full photo of you please??
16:01:27: And photos of your room
16:01:34: Can you please send me photos of yourself
16:01:42: Full long photo of you
16:01:52: Please I am asking nicely for these photos
16:02:09: Why do you read and ignore me now?
16:02:58: (emoji)
Sasha: I'm not in the mood for 100 messages and calls
16:24: Well you won't if you answer me now?
16:24:03: And not ignore me??
16:25:29: Are there no photos of you with your shoes a full photo of you please
16:25:37: And photos of your room
16:26:58: Can you please send me photos of yourself

16:29:02: You said you will send me photos of your room and of how you look and you had a fight with me about it even
16:29:05: Sasha please
16:29:08: Don't fight with me
16:29:11: (emoji)
16:29:56: I don't understand this
16:34:07: *Image sent*
16:36:21: And the bathroom babe? Can you please ask your aunt to take a full photo of you?? Like with Shani or alone please.'
[Emphasis added.]

[17] The messages continued in the same fashion for the rest of the weekend. During this weekend alone the appellant sent the respondent approximately 700 WhatsApp messages, monitored her activity on social network and phoned her constantly. Although the respondent asked the appellant to stop the messaging and telephone calls so that she could spend some time with her family, he simply ignored her requests and instead questioned her every movement.

[18] After the breakup in May 2017 the barrage of messages and the controlling and manipulative pattern of the messages did not stop. The appellant constantly wanted the respondent to share her location with him and would get upset if she did not do so immediately. He would then accuse her of wanting to hide things from him. He continued to stalk her on social media through any means (including the intervention of third parties). He made sexually charged and/or inappropriate comments and played on the respondent's emotions. Over and over, both during the course of the relationship and after the breakup, the respondent would ask the appellant to stop messaging and phoning her, but he didn't. 'No' clearly did not mean no to the appellant. He disregarded the respondent's express wishes and had no respect for boundaries. The frequency, extent and magnitude of the messages and telephone calls paint a picture of a man desperate for attention, yet scorned by rejection.

[19] The court a quo only took into consideration the WhatsApp messages post breakup and issued a final protection order for the appellant not to stalk, harass or to engage in controlling and/or abusive behaviour towards the respondent, and not to communicate with the respondent directly or indirectly in any way whatsoever.

[20] Harassment and controlling or abusive behaviour (where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant) constitute acts of domestic violence. The Act defines harassment as follows:
'"(H)arassment" means *engaging in a pattern of conduct that induces the fear of harm* to a complainant including —
(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to
be;

(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant; . . .'.
[Emphasis added.]

[21] There is no definition for 'harm' in the Act, but the Protection from Harassment Act, which has a much broader term for 'harassment', defines harm as 'any mental, psychological, physical or economic harm'. There is no reason why 'harm' in the Act should mean anything different. The Act defines 'emotional, verbal and psychological abuse' as —
'a pattern of degrading or humiliating conduct towards a complainant, including —
(a) repeated insults, ridicule or name calling;
(b) repeated threats to cause emotional pain; or
(c) the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant's privacy, liberty,
integrity or security; . . .'.
This is not an exhaustive list and it is a court's task to objectively view each case on its own merits and determine whether a specific conduct complained of induced any mental, psychological or emotional harm to a complainant.

[22] The court a quo held that, as the versions of the appellant and the respondent were materially different, it could only rely on the objective evidence in the form of the text messages. The court a quo seemingly held that, as there were two versions of the events after 13 September 2017, that a finding could not be made on the papers as they stood, and consequently did not have regard to the incidents that occurred after 13 September 2017.

[23] Section 6 of the Act provides for the court to conduct a hearing on the return date. In *Omar v Government of the Republic of South Africa and Others (Commission for Gender Equality, Amicus Curiae)* the Constitutional Court referred to the procedure that must be followed by the court in establishing whether a final protection order should be granted. In para 38 van der Westhuizen J stated the following:
'The procedure provided for to obtain a protection order is not uncommon for situations where a party who feels threatened by the immediate conduct of another approaches a court for urgent relief without giving notice to the respondent. Interim relief is granted by courts on a daily basis and respondents are called upon to appear before the court on a specified return date to show cause why the interim relief should not be made final. On the return date the court, after a proper hearing, decides whether to discharge an interim order or to grant final relief. It is also quite common that the return date may be anticipated by the respondent and that an interim order can be varied or set aside. It is not surprising that the Legislature has opted to utilise established and well known procedures for dealing with emergency

situations, to adapt these to meet the needs related to domestic violence and to codify them in a statute.'

[24] In *Omar* the Constitutional Court made reference to the matter of *S v Baloyi* where Sachs J said the following about the interdict process in the Act:
'The ambivalence of the victim and the reluctance of law enforcement officers to ''take sides'' in family matters, coupled with the intimate and potentially repetitive character of the violence, is highly relevant to the *creation of a special process for the issuing of domestic violence interdicts*. The interdict process is intended to be accessible, speedy, simple and effective. The principal objective of granting an interdict is not to solve domestic problems or impose punishments, but to provide a breathing space to enable solutions to be found; not to punish past misdeeds, but to prevent future misconduct. At its most optimistic, it seeks preventive rather than retributive justice, undertaken with a view ultimately to promoting restorative justice.' [Emphasis added.]

[25] It is clear from the above that the procedure created by the legislature in the Act is sui generis. Section 6 of the Act therefore provides a wide discretion to the magistrate to decide what evidence must be provided. The magistrate in a domestic violence hearing should for that reason take control of the matter and play an active role, and dictate how the hearing is to be conducted, even if both parties are legally represented. Once all the evidentiary matter has been adduced, only then will the court be in a position to determine the extent of the protection that is needed.

[26] Reporting on the first year of the Act's operation, Joanne Fedler observes the following:
'(T)he strange alchemy of violence within intimacy lends domestic abuse a unique quality as a legal problem, for there are no stark realities, no one dimensional solutions.
. . .
(T)he lawyering of domestic abuse [therefore] requires skills and understanding not commonly required.'

[27] Although a court dealing with domestic violence should therefore avoid a formalistic and technical approach to the evidence, it is still required to evaluate the evidence and to make a finding on the probabilities. The approach to be taken to factual disputes on application papers was set out in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* by Corbett JA, to the following effect:
'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real,

genuine or *bona fide* dispute of fact . . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross examination under Rule 6(5)*(g)* of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so farfetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . . .'

[28] It is so, however, that a court must always be cautious about deciding probabilities in the face of conflicts of fact in affidavits. Affidavits are settled by legal advisors with varying degrees of experience, skill and diligence, and a litigant should not pay the price for an advisor's shortcomings. Judgment on the credibility of the deponent, absent direct and obvious contradictions, should be left open. It remains then to establish whether the averments in the answering affidavit are such that they are clearly untenable and can be rejected outright on the papers, or whether they give rise to a genuine factual dispute relating to the subsequent events.

[29] The respondent averred that the appellant is responsible for all the events that transpired after 13 September 2017. She averred that, after she blocked the appellant on WhatsApp on 20 September 2017, a fake Instagram account was opened in her name. She averred that the appellant was responsible for the opening of the fake account, because one of the photos posted was taken with the appellant's phone. She then posted a message on a Facebook group called 'Get Up Women' wherein she posted the following:
'Hi ladies, my ex created a fake Instagram account pretending to be me. I've tried everything and Instagram will not shut it down. Any advice? I'm literally considering hiring someone to hack the account.'

[30] The appellant responded by sending the respondent a message on her iPhone which stated: 'Sasha you have no physical proof.' This is quite a telling message. She did not mention any names in the Facebook post and at that time the appellant had been blocked from the respondent's social media platforms. It clearly shows the appellant was still monitoring the respondent's posts on Facebook. The appellant further made mention of two fake Instagram accounts in his answering affidavit, whilst the respondent only made mention of one fake account in her application form. If the appellant realistically knew nothing of these fake Instagram accounts, he did not explain as to how he knew that there were two fake Instagram accounts.

[31] Furthermore, some of the photos used in the fake Instagram account were photos originating from the appellant's phone, and the posts accompanying the photos were calculated to cause emotional harm towards the respondent, as the

photos and comments were in connection with the respondent's deceased grandfather, with whom she had had a very close relationship.

[32] After the respondent obtained an interim protection order all further incidents of the same nature stopped. The only ineluctable inference and logical conclusion are that he was the person responsible for the acts.

[33] The events after 13 September 2017 were clearly designed to cause the respondent emotional and psychological harm, and constitutes harassment. In this regard, the court a quo was perfectly entitled and should have adopted the robust, common sense often spoken about approach, enunciated in *Soffiantini v Mould*, wherein the following was held:
'"A bare denial of applicant's material averments cannot be regarded as sufficient to defeat applicant's right to secure relief by motion proceedings in appropriate cases. Enough must be stated by respondent to enable the Court to conduct a preliminary examination . . . and to ascertain whether the denials are not fictitious intended merely to delay the hearing." (or for some other purpose)
"The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after *viva voce* evidence has been heard." See also the case of *Prinsloo v Shaw*, 1938 AD 570.
If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the simplest and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in affidavits.'

[34] There are a number of highly improbable aspects of the appellant's version which, taken together, would have justified the court a quo to reject it as untenable and hence did not raise a genuine factual dispute. The appellant provided such an implausible explanation for the coincidental acts of domestic violence, namely that an unknown person from the respondent's high school days was secretly harassing the respondent. The appellant cannot realistically expect to be believed that an unknown third person would suddenly appear from nowhere, two years later, and start launching fake social media accounts, place false adverts, lay complaints with the school and police, without any reason or provocation, coincidentally days after the appellant made a threat. It is improbable that anyone except the appellant could have been responsible for the subsequent events.

[35] The appellant averred that the court a quo erred in considering the WhatsApp messages and that the communication stopped long before the respondent

approached the court for a protection order. The appellant also contended that the messages did not induce the 'fear of harm', because if they did, the respondent would have applied for a protection order after the threat was made on 13 September 2017.

[36] The fact that the respondent did not immediately approach the court for a protection order after the appellant made the threat on 13 September 2017 is, in my view, not a reason to conclude that there was no harm caused. It was ultimately not this threat alone that moved the respondent to apply for a protection order. In *S v Engelbrecht* Satchwell J held that the wide definition of 'domestic violence' in the Act is an unequivocal recognition by the legislature of the complexities of domestic violence and the multitude of manifestations thereof. In paras 342 – 343 the learned judge stated:
'It must be accepted that domestic violence, in all manifestations of abuse, is intended to and may establish a pattern of coercive control over the abused woman, such control being exerted both during the instances of active or passive abuse as well as the periods that domestic violence is in abeyance. There is indeed compelling justification for focusing, not only on the specific form which the abuse may have taken over time and in particular circumstances, but pertinently on the impact of abuse upon the psyche, make up and entire world view of an abused woman.'

[37] Keeping in mind the complexities of domestic violence, there can accordingly be many reasons why a complainant does not seek help immediately. In a further affidavit, provided for in s 6(2)*(b)* of the Act, the respondent explained that she started dating the appellant when she was 18 years old and that he was her first boyfriend. They shared deep feelings for each other. During the initial stages of the relationship the appellant showed signs of controlling and possessive behaviour which the respondent did not like and found disturbing. She stated that, given her inexperience and her feelings for him, she tolerated the harassment and controlling and abusive behaviour. As the relationship developed, his behaviour increased to such an extent that he would call and text her throughout the day to see whom she was with and what she was doing.

[38] In the replying affidavit the respondent also accused the appellant of physically and sexually assaulting her during the course of their relationship. She stated that the reason why she did not make mention of this before was because she was embarrassed and ashamed, and she only now realised that she did not speak up under the misguided notion that, the appellant being her boyfriend, and she being his girlfriend, she had no rights. She was also fearful that he would do something to himself. She stated that after she terminated the relationship, the respondent would emotionally manipulate her into meeting with him and forcing conversation. All this was done to emotionally abuse her and exercise sway over her. At times he would threaten to send nude photos of her to her mother.

[39] She further stated that she enabled the 'Find Friends' feature on her iPhone to enable the appellant to ascertain her whereabouts in case of an emergency, but he abused it. He would track her movements without her knowing it and when she switched the feature off, he would complain and nag her until she switched it back on. He would use this feature to deliberately lock her phone and would play sounds on it to insist that she speak to him. (The respondent annexed emails from iPhone as proof.) The appellant would then ask questions about her whereabouts to test whether she was honest with him.

[40] If regard is had to the extracts of the WhatsApp messages, coupled with the events after 13 September 2017, it is apparent that the appellant, over an extended period, committed numerous acts of domestic violence, including emotionally and psychologically abusing the respondent, as well as harassing her. If the text messages and facts are taken as a whole, and taking into consideration the great lengths the appellant would go to control and abuse the respondent, the granting of a final protection order was warranted.

[41] In the result, the following order is made:
The appeal is dismissed with costs.
(The footnotes have been omitted from the above judgment)

2. Moroe v Director of Public Prosecutions, Free State and Another (4506/2020) [2021] ZAFSHC 54; 2022 (1) SACR 264 (FB) (10 March 2021)

An application for putting into operation a suspended sentence is not a mere formality but entails a fully-fledged exercise of judicial discretion. It requires as much consideration and judicial discretion as the imposition of sentence.

M Opperman, J

INTRODUCTION

[1] This is an unopposed review in terms of section 22[1] of the Superior Courts Act 10 of 2013 (SC Act) read with Rule 53 of the Uniform Rules of the High Court. Reliance is placed on a gross irregularity in the proceedings in terms of section 22(1)(c) of the SC Act.

[2] The Applicant was sentenced by the Regional Magistrate Bloemfontein on 10 October 2017 to:

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[1] Section 22 of the Superior Courts Act 10 of 2013:
'Grounds for review of proceedings of Magistrates' Court.—(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—
(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings; and
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.'

‘8 (eight) years imprisonment that is suspended for five years on condition:

1. The accused is not convicted of fraud or theft committed during the period of suspension

and

2. The accused pay ABSA Regional Office and/or their representative the cash amount of R167 912.58 on or before 02/07/2018. The full details of the Bank Account to be provided to the accused by Captain Martin Barker.

The accused is further warned that should he fail to pay the money by the 2/7/18 then the suspended portion of the sentence will be put into operation.’

[3] He did not comply with the second condition of suspension. On 5 October 2020 the suspended sentence was put into operation.

FACTS

[4] The Applicant stood trial in the Regional Court, Bloemfontein charged with 359 counts of fraud, alternatively theft, involving a total amount of R366 060.00.

[5] On 10 October 2017 he pleaded guilty to the fraud charges. He was legally represented during the plea and sentencing proceedings in the Regional Court.

[6] He repaid some of the monies, but was unable to repay the full amount of compensation within the eight months. He was not employed and was reliant on the assistance of family members. He was brought back to court on 17 September 2018 where he appeared in person. He requested additional time to pay the compensation amount. This was allowed. The matter was postponed to 18 September 2018. He was represented, on that day, and the matter was struck off the roll.

[7] On 28 November 2018 he entered into an agreement with ABSA. An amount of R148 412.58 was still outstanding. He signed an acknowledgment of debt to pay a monthly instalment of R6 200.00 and thus repay the balance of the compensation over a period of 24 months commencing on 1 December 2018. He did not adhere to the payment conditions set out in the acknowledgment of debt.

[8] Subsequent to noncompliance with the court order and the acknowledgment of debt the Regional Magistrate issued an order of apprehension. The Applicant appeared in court and was ultimately represented by Mr. Giorgi. Mr. Giorgi requested a postponement to pay the outstanding balance. The Applicant did not pay the outstanding balance.

[9] On 5 October 2020 Mr. Giorgi placed the following facts and circumstances on record:

9.1 R70 000.00 of the initial compensation ordered had been paid;

9.2 R97 000.00 was outstanding;
9.3 R40 000.00 was to be paid on that day;
9.4 The balance of R57 000.00 would be paid off monthly within the next 24 months;
9.5 Mr Giorgi requested the Regional Magistrate to remand the matter for one day so that proof of payment of R40 000.00 may be presented to court and in order for him to then address the Regional Magistrate on the outstanding amount.
9.6 It was specifically placed on record that the Covid-19 pandemic and the resultant hardships directly contributed to the non-payment during the period since January 2020;
9.7 The submission was that at no time did the Applicant wilfully or negligently fail to comply with the conditions of suspension relating to compensation.

[10] The grounds of review are in essence that the Regional Magistrate failed to appreciate that he was essentially engaging in a sentencing process which should be conducted according to the principles relevant to a fair trial. He misconceived the nature of the process and/or his duties in connection therewith. Thus, he committed a reviewable irregularity.

[11] During the hearing we were informed that an amount of R45 000.00 was available in his legal representative's trust account to pay towards the outstanding amount. We were subsequently informed that the aforementioned amount was paid into the complainant's Bank Account, which brings the outstanding amount to R52 786.58. Some of the Applicant's family members were in court and indicated via his counsel that R3 500.00 a month would be available to liquidate the arrear amount.

THE LAW

[12] The Supreme Court of Appeal[2] declared on 12 December 2018 that the putting into operation of a suspended sentence is an inherent element of the criminal process and where a court orders that a suspended sentence be made operational, it assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of punishment and cannot simply have a person imprisoned as would a clerk keeping a register. When the liberty of a person is at stake, grounds must exist before such liberty is taken away. In fact, the second court is nothing else but an extension of the trial court when it considers putting a suspended sentence into operation.

[13] Section 297(7) of the Criminal Procedure Act 51 of 1977 reads:

'A court which has—

(a) postponed the passing of sentence under paragraph (a) (i) of subsection (1);

[2] Stow v Regional Magistrate, Port Elizabeth NO and Others 2019 (1) SACR 487 (SCA) at paragraph 45.

(b) suspended the operation of a sentence under subsection (1)(b) or (4); or
(c) suspended the payment of a fine under subsection (5), whether differently constituted or not, or any court of equal or superior jurisdiction may, *if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, further postpone the passing of sentence or further suspend the operation of a sentence or the payment of a fine, as the case may be, subject to any existing condition or such further conditions as could have been imposed at the time of such postponement or suspension.*'(Accentuation added)

[14] Section 297(9) prescribes:

'(a) If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question—
(i) was imposed under paragraph (a) (i) of subsection (1), be brought before the court which postponed the passing of sentence or before any court of equal or superior jurisdiction; or
(ii) was imposed under subsection (1) (b), (4) or (5), be brought before the court which suspended the operation of the sentence or, as the case may be, the payment of the fine, or any court of equal or superior jurisdiction, and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such postponement or suspension, may then, in the case of subparagraph (i), impose any competent sentence or, in the case of subparagraph (ii), put into operation the sentence which was suspended.
(b) A person who has been called upon under paragraph (a) (ii) of subsection (1) to appear before the court may, upon the order of the court in question, be arrested and brought before that court, and such court, whether or not constituted differently than it was at the time of the postponement of sentence, may impose upon such person any competent sentence.'

PROCEEDINGS IN TERMS OF SECTION 297 OF THE CRIMINAL PROCEDURE ACT 51 OF 1977: PUTTING INTO OPERATION OF A SUSPENDED SENTENCE

[15] The judgment shows that the Regional Magistrate did not apply his mind to the sentence. It reads, all in all, that:

'Mr Moroe the Court sentenced you on this matter on the 10th of October 2017, its three years ago. Then Ms Sipato adjourned the matter on the 4th of August, it was two months ago.
You have run out of time. Unfortunately, I have granted you too much leeway in this matter. This matter is long outstanding.

The deal was that you would have paid the complainant initially by the 2nd July 2018, 2019, 2020 – two years. It's just delayed unnecessarily over and over and over again. It stops today.
I cannot grant you any more latitude or any more delays in the matter and it's for that reason that the eight years' imprisonment is now put into place, you understand?
Due to the accused's non-compliance with the suspended sentence imposed on the 10th of October 2017 in case number 17/35/2017 the suspended sentence imposed on the 10th October is now put into operation due to the accused's non-compliance which is one of EIGHT YEARS IMPRISONMENT.'[3]

[16] The Regional Magistrate did not follow a proper process before putting the suspended sentence into operation. The correct process would have been for him to apply his discretion judicially in accordance with the law. He should have considered the following factors.[4]
16.1 The first aim of a condition of suspension is to keep the convicted person out of prison.
16.2 *An application for putting into operation a suspended sentence is not a mere formality but entails a fully-fledged exercise of judicial discretion*. *It requires as much consideration and judicial discretion as the imposition of sentence*.
16.3 *In certain respects, the consideration of implementation requires even more careful consideration than the original imposition of sentence.* In the first place, the original trial and the reasonableness of the relevant condition of suspension, which possibly was imposed by another judicial officer of equal status, must be assessed afresh. If the condition was *ab initio* unreasonable, the sentence should not be put into operation.
16.4 The circumstances of the precipitating non-compliance must be considered. If it was, for instance, a trivial or merely technical breach, a heavy suspended sentence should not be put into operation because of it.
16.5 *The condition must be assessed in the light of events since its imposition.* If implementation will no longer serve any substantial deterrent or reformatory purpose, it should not be ordered (**S v Hendricks** 1991 (2) SACR 341 (C) at 346d–g).
16.6 The court is at all times obliged to consider judicially the issues listed in subsections (7) and (9) respectively. In **S v Paulse** 1990 (1) SACR 341 (W) the court emphasized that there is no justification for thinking away the time that has lapsed since the original sentence. *The putting into operation of a suspended sentence does not follow automatically and remains a matter for careful judicial consideration.*

[17] The Regional Magistrate did not record the factors he considered before putting the suspended sentence into operation. He did not enquire from the Applicant's legal representative what exactly the changed circumstances were. The Applicant was gainfully employed but this did not receive proper consideration. The

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3 Record page 66 at line 6 and further.
4 Hiemstra's Criminal Procedure, *supra* at Page 28–85.

Regional Magistrate did not grant a one-day postponement to enable the Applicant to pay in a substantial amount (R40 000) of the arrears. It is clear that the Regional Magistrate did not exercise his discretion judicially. He was irritated and impatient. One can understand his frustration due to the noncompliance with the court order but that is no reason to act capriciously. The Regional Magistrate's order ought to be set aside. He should have suspended the sentence further, in light of all the facts and circumstances before him.

[18] The Regional Magistrate has in the meantime been transferred to another province. It would be impractical to remit the matter to him to reconsider the issue, because he would not be able to urgently deal with the matter. The Applicant is in custody. This matter must be disposed of as soon as possible. We are in a position to reconsider the sentence because we have all the facts before us.

[19] **ORDER**

In result it is ordered that:

1. The order made by the Regional Magistrate on 5 October 2020 under Regional Court case number 17/35/17, putting into operation the suspended sentence of eight years' imprisonment, is reviewed and set aside and replaced with the following:

'The sentence of eight (8) years' imprisonment suspended for five (5) years on certain conditions imposed on 10 October 2017 under case number 17/35/17 is further suspended for two (2) years on condition that:

1.1 The accused is not convicted of fraud or theft committed during the period of suspension; and

1.2 The accused to pay into ABSA Bank Office Account number 4050003165 the amount of R52 786.58 (Fifty-two thousand seven hundred and sixty-eight Rands and fifty-eight cents) in instalments of R3500.00 (Three thousand five hundred Rands) per month. The first instalment to be paid on or before the 1st of May 2021 and thereafter on or before the 7th of each succeeding month until the total amount is settled.'

2. No order as to costs is made.

From The Legal Journals

Sutherland, R
The Dependence of Judges on Ethical Conduct by Legal Practitioners: The Ethical Duties of Disclosure and Non-Disclosure.

SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL VOLUME 4, ISSUE 1, 2021 47

The full volume can be accessed here:
https://www.judiciary.org.za/images/SAJEI/SAJEI_JOURNAL_VOL._4_-_ISSUE_1_-_2021.pdf

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

Contributions from the Law School

Double inchoate offences

The category of inchoate (or incomplete) offences incorporates attempt, conspiracy and incitement. While the rules relating to attempt liability are relatively settled, there have been recent doubts raised concerning the correctness of the traditional approach to conspiracy liability adopted in *R v Harris* (1927 NPD 330) in the case of *S v Ngobese* 2019 (1) SACR 575 (GJ), and the majority of the Constitutional Court has held that the statutory form of incitement contained in s 18(2)(*b*) of the Riotous Assemblies Act 17 of 1956 is too broad, and needs to be limited to 'serious' offences in *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] SACC 25 (for critique of this decision, see Hoctor *Snyman's Criminal Law* 7ed (2020) 255-257). This short note seeks to discuss whether it is appropriate to make use of so-called 'double inchoate offences', which in essence consist of a combination of

inchoate offences (such as, for example, to attempt to conspire with someone to commit a crime, or to incite someone to attempt to commit a crime).

The use of such 'double inchoate' formulations to establish liability has been criticized as a 'logical absurdity' in a number of US cases, since the influential 19th century decision of *Wilson v State* 53 Ga. 205 (1874) 206, where it was held that the phrase 'attempt to attempt to act' had no practical basis, and could be compared with 'conceiving of the beginning of eternity or the starting place of infinity'. This 'logical absurdity' argument postulates that (i) double inchoate offences allow for the possibility of criminal liability to be based on mere acts of preparation (Robbins 'Double Inchoate Crimes' 1989 *Harvard Journal on Legislation* 1 65), and (ii) that offenders do not attempt to attempt a crime, attempt to conspire to commit a crime, or attempt to incite a crime, but instead attempt to commit a completed offence (Zimmerman 'Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act' 2000 *Northern Illinois University LR* 219 238).

A further criticism of double inchoate formulations raised by Zimmerman (ibid 239) is that these may infringe the principle of legality, since penal provisions ought not to be formulated vaguely or nebulously (for further discussion of this, the *ius certum* principle, see Hoctor 36). Double inchoate crimes have further been criticized for being cumbersome and unnecessary (Robbins 1989 *Harvard Journal on Legislation* 80ff), and for over-extending the moral limits of the criminal law, resulting in over-criminalisation (Zimmerman 2000 *Northern Illinois University LR* 247), with all the problems that this can cause.

On the other hand, there are weighty policy arguments in favour of allowing double inchoate formulations. These formulations can be justified on the grounds of judicial efficiency, providing for easier convictions and providing for greater scope for prosecutorial plea bargaining (Zimmerman 2000 *Northern Illinois University LR* 245-246). The need for such liability moreover derives from the predictive and preventive purposes of inchoate liability, along with the deterrent value of such crimes (Robbins 1989 *Harvard Journal on Legislation* 116).

The idea of having double inchoate offences has been criticized in other jurisdictions, most notably the US and Canada. Not all formulations have received equal criticism. In the context of US law, Robbins has indicated the negative approach to formulations such as 'attempt to attempt' (ibid 37-38) and 'attempt to conspire' (ibid 55), but points out that 'conspiracy to attempt' has been used on a number of occasions (ibid 58-62), while the 'attempt to solicit' (i.e. attempt to incite) formulation has been adopted into the legislation of some states (ibid 114; see *State v Lee* 804 P 2d 1208 (Or.Ct.App. 1991). In the case of *Dery v The Queen; Attorney General of Canada et al, Interveners* [2007] 213 CCC (3d) 289 (SCC) the Canadian Supreme Court specifically took a negative view of attempted conspiracy, but also in general terms was not amenable to an argument which allowed the provisions governing inchoate liability to be 'stacked one upon the other, like building blocks' (par [40]) to establish criminal liability. (For discussion of this case, and a broader analysis, on which the current brief note is based, see Hoctor 'Double inchoate crimes: Serving a

useful purpose or double trouble? *Déry v The Queen; Attorney General of Canada et al, Interveners* [2007] 213 CCC (3d) 289 (SCC)' *Obiter* (2008) 29(1) 124-131).

However, in South Africa double inchoate formulations, though not commonly applied, appear to be generally acceptable. Thus 'attempt to incite' has been approved by the Appellate Division in *S v Nkosiyana* 1966 (4) SA 655 (A) (see 659A; 659F). Attempted conspiracy was regarded as a sound basis for conviction in the *Harris* case (supra 347), and in *S v Kekana* 2013 (1) SACR 101 (SCA), as well as in the Namibian case of *S v Hoff* 2018 JDR 0046 (Nm). To attempt to incite is not only criminalized in the context of s 14(1)(*d*) of the Communal Property Associations Act 28 of 1996 and s 104(13) of the Defence Act 42 of 2002, but the validity of such a conviction is also evident from a number of cases which cite the conviction of one Krause for 'attempt to solicit the crime of murder' in England (*Ex parte Krause* 1905 TS 221; *Society of Advocates of SA (Witwatersrand Division) v Fischer* 1966 (1) SA 133 (T) 137G-H; *Incorporated Law Society, Natal v Hassim (also known as Essack)* 1978 (2) SA 285 (N) 291E; and *Natal Law Society v Maqubela* 1986 (3) SA 849 (N) 855J). Burchell moreover expresses support for both incitement to conspire and incitement to commit an attempt founding criminal liability (*Principles of Criminal Law* 5ed (2016) 538-9).

On the other hand, in *S v P and J* (1963 (4) SA 935 (N) 937 *in fin*-938A), the court seeks to avoid a construction which would amount to 'an attempt to attempt' to commit the offence in question. Burchell agrees that 'obviously there cannot be an attempted attempt' (564, see also De Wet *Strafreg* 4ed (1985) 172).

There is a danger in using double inchoate formulations that, in the words of Ashworth (*Principles of Criminal Law* 5ed (2006) 469), '[t]he reach of criminal liability is pushed further and further, without a specific justification or an overall scheme'. In addition, any court imposing liability for a double inchoate offence should be aware of the need to do so consistent with the principle of legality, and in particular the right to be informed of a charge with sufficient detail to answer it (s 35(3)(*a*) of the Constitution, 1996).

Nevertheless, it can be argued that these formulations have a useful role to play in the apprehension of potential harm to the community. Just as the punishing of anticipatory conduct by means of single inchoate offences is justified by the preventive and reformative theories of punishment, so too criminal liability based on double inchoate offences is justified on this basis. Moreover, such liability is consistent with the prevailing psychological approach to liability in South African law. It may indeed be that formulations such as 'attempt to attempt' or 'conspire to conspire' are of extremely limited practical utility (in addition to raising philosophical conundrums). Nonetheless, it may be concluded that double inchoate offences play a useful and necessary role – some formulations being particularly beneficial – in supplementing the basic inchoate offences.

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Matters of Interest to Magistrates

REPORT SHOWS PROPORTION OF WOMEN JUDGES VARIES STRONGLY

By Carmel Rickard

A report by the United Nations' Special Rapporteur women judges and prosecutors finds that the proportion of women on the bench varies a great deal from one country to another, and that in some jurisdictions women, if they are in fact appointed to the bench, serve on family or juvenile courts, rather than on commercial or criminal courts, where the bench tends to be reserved for male judges. The report makes a number of recommendations about how to improve the current situation.

The proportion of women on the judicial bench varies widely between countries according to a report by the Special Rapporteur on the independence of judges and lawyers, Diego Garcia-Sayan.

The report, 'Participation of women in the administration of justice', recommends that each country should take steps to ensure a target of at least 50 percent of women at the various levels of the judiciary and prosecution services by 2030, as part of the 2030 Agenda for Sustainable Development.

However, the report indicates that in some jurisdictions, the proportion of women is already higher than 50 percent. Across Europe, women form an average of 54 percent of judges, a figure boosted by, for example, Latvia (81 percent) and Romania (79 percent). But there are sharp contrasts: in Nepal women form six percent of judges and magistrates, while in Pakistan, Egypt and the United Arab Emirates, women judges represent less than one percent of the bench. In Kuwait, Oman, Saudi Arabia and Somalia, there were, at 2019, no women judges at all.

Pakistan

Another marked feature of the report's findings is that women judges are often clustered around courts that deal with issues thought appropriate for this gender: family courts, for example. A stark indicator of this tendency comes from Pakistan where 'all family court judges are women'.

The report is further concerned about the fact that women are seriously under represented in the higher echelons of the judicial system. It notes that, in countries where entry to the judiciary is by 'public competition' and where written and oral exams are held, with scoring based on objective criteria, 'there is greater participation and appointment of women' as judges. But this did not necessarily carry through in relation to promotion, 'especially in the appointment of women judges to the higher courts.'

Where women are appointed, however, it sometimes takes place in a way that does not dislodge systemic and cultural discrimination. For example, ‘gender stereotypes influence the allocation of tasks to women judges, who are often relegated to social, family or juvenile courts, thereby excluding them from other offices and limiting their access to leadership and decision-making positions.’

Disparity

The report notes that patriarchal patterns and gender stereotypes were a major factor responsible for perpetuating inequality and disparity in the proportion of women judges, with criminal, business and national security courts tending to be heavily weighted in favour of men.

As in many other professions, women in the judiciary and the prosecution services experience problems trying to manage work and family life. Being largely responsible for child-rearing, family care and housework means that women are often disadvantaged with obstacles to resuming judicial work and to promotion because their family commitments mean they ‘do not have the number of years or the seniority necessary to compete on equal terms.’

Women in the judiciary are not shielded from problems experienced by women in other fields, and ‘regardless of their region, women judges have reported being victims of workplace or sexual harassment at some point in their careers.’ Associations of women judges tend to include methods to deal with such problems among their objectives.

Sexual harassment

‘The Special Rapporteur urges States to adopt clear and safe procedures for women judges and prosecutors to report acts of violence or sexual harassment in safety and without fear of retaliation, unjustified dismissal or stigmatisation. States must take the necessary measures to ensure that such acts do not go unpunished.’

The report also acknowledges the efforts being made by a number of countries to try to ensure gender equality in the judicial and prosecutorial system. ‘Substantial results have been achieved, but they are still insufficient.’

‘States must redouble their efforts because, according to the World Economic Forum, at the current rate of change, it will take nearly a century to achieve equality. This time lapse is unacceptable.’

Family responsibilities

And it’s not just a question of promoting equality policies: ‘Above all, it is necessary to guarantee a work-life balance that makes the acceptance of greater professional responsibilities compatible with family responsibilities, a deficiency that often constitutes the structural causal factor in the lower presence of women.’

Among the report’s recommendations is that a quota system should be implemented to ensure that, by 2030, half of public positions, both in the judiciary and the prosecutions services, are held by women.

It also urges that stereotypes be eliminated that pigeonhole women in specific areas of law or at certain levels within the judicial hierarchy.

(The above article appeared on the 11th of March on the *africanlii.org* website. The report which is referred too may be accessed here:
https://documents-dds-ny.un.org/doc/UNDOC/GEN/N21/196/61/PDF/N2119661.pdf?OpenElement

A Last Thought

"An inspection *in loco* achieves two purposes, the first being to enable the court to follow the oral evidence. The second is to enable the court to observe real evidence which is additional to the oral evidence. [P J Schwikkard et al *Principles of Evidence* 4 ed (2015) para 19.6. See also *Newell v Cronje* 1985(4) SA 692 (E) at 697-698; *Kruger v Ludick* 1947(3) SA 23 (A) at 31; *Bayer South Africa (Pty) Ltd and Another v Viljoen* 1990 (2) SA 647 (A) at 659-660.]"

Per Nicholls JA in Abdullah v S (134/2021) [2022] ZASCA 33 (31 March 2022) at para 24