

e-MANTSHI

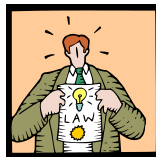
A KZNNJETCOM Newsletter

April 2022: Issue 184

Welcome to the hundredth and eighty fourth 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 Lower Courts Bill, 2022 has been published on the Department of Justice's website for public comment. The purpose of the Bill is to provide for the establishment, composition and functioning of Lower Courts comprising of Regional Courts, District Courts and Municipal Courts; to make provision for the administration of the judicial functions of the Lower Courts; and to provide for matters incidental thereto. The main aim of the Bill is to replace the provisions relating to the Magistrates' Courts, referred to in section 166(d) and 170 of the Constitution of the Republic of South Africa, 1996, in order to renew and align the legislative framework for those courts with the needs and requirements of the modern South African society. Comments on the Bill must be forwarded to MMokulubete@justice.gov.za before 15 June 2022.

The Bill can be accessed here:

<https://www.justice.gov.za/legislation/invitations/invites.htm>

2. The Department of Justice and Constitutional Development invites interested parties to submit written comments on draft determinations and certificates for persons to be appointed as intermediaries. The notice to this effect was published in Government Gazette no 46297 dated 29 April 2022. The purpose is as follows:

(a) Determination of persons or category or class of persons who are competent to be appointed as intermediaries: Criminal Procedure Act, 1977;

(b) determination of persons or category or class of persons who are competent to be appointed as intermediaries: Superior Courts Act, 2013, Magistrates' Courts Act, 1944; and

(c) certificate of competency to be appointed as an intermediary.

The comments on the draft determinations and certificate must be submitted to Ms V Letswalo, on or before Friday 13 May 2022 at Vletswalo@justice.gov.za.

The notice can be accessed here:

<https://www.justice.gov.za/legislation/invitations/20220429-CRMA-Draft-Determinations-Certificate.pdf>



Recent Court Cases

1. **Mkolo v S In re: S v Mkolo and Others (CC40/21) [2022] ZAECBHC 7 (28 April 2022)**

The recusal of a presiding officer should not become standard equipment in a litigant's arsenal, but should be exercised for its true intended objective, namely to secure a fair trial in the interests of justice, in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they serve.

Stretch J.:

[1] The applicant (accused 1) is one of several accused facing charges relating to the commission of various common law and statutory offences, which, according to the indictment, were committed in relation to the procurement of services and goods for memorial gatherings following the passing away, on 5 December 2013, of this country's former president, Mr Nelson Mandela. It was

anticipated that the accused would plead to the charges on 19 January 2022, whereafter the trial itself would commence on 11 April and run for at least two months.

[2] On 19 January pleas of not guilty were entered on behalf of all the accused. On the following day erstwhile accused numbers 10 and 11 applied for a separation of trials which was granted on 28 February.

[3] For various reasons, which I will deal with in due course, the trial did not proceed on 11 April. On 22 April the applicant brought an application for my recusal based on the following three averments made in an affidavit deposed to by his attorney regarding events which had transpired on 20 April 2022:

- a. that I had indicated, in the presence of the applicant's newly appointed counsel and the prosecutor, that I was not prepared to entertain any further applications for the trial to be adjourned;
- b. that I had informed the applicant's attorney that I was not Koen J and that the applicant was not the former president Jacob Zuma;
- c. that during the course of exchanges with accused 2's attorney (who was also motivating for a delay in the commencement of the leading of evidence pending representations which accused 2 was making to the Director of Public Prosecutions), I had said the following:

'You know Mr Schoombee, what concerns me is that this is a serious matter. We all know that it is a serious matter. The media are here. They consider it to be a serious matter. It's been eight months since the final indictment was served, and the accused are taking opportunity after opportunity to come with last minute excuses as to why the trial should not go on. Prima facie I believe that this is a delaying tactic. ... I thought that to traverse this in my chambers this morning was to canvas this with one of your colleagues, and was told that there would then be an application for me to recuse myself. I don't know whether that is still going to be pursued, but the point is simply that this court cannot be seen to approbate and reprobate. It makes a mockery of the rule of law. It makes a mockery of the judicial system. It makes a mockery of President Mandela's funeral and corruption that apparently took place at that time, and I think people should start seeing this a little bit more seriously. And I am not shouting at you Mr Schoombee. I am speaking to everybody in this room.'¹

¹ The excerpt from the court recording quoted in the applicant's attorney's affidavit commences with the words "The accused are taking opportunity after opportunity" and certain portions have been omitted. For the sake of completeness and transparency I have included my entire address on this aspect in the judgment.

[4] The doctrine of recusal has its origin in the rules of natural justice, which require that a person accused before a court should have a fair trial. This common law position has since been entrenched in the Constitution of the Republic of South Africa (“the Constitution”). Section 34 of the Constitution affords everyone in this country the right to have any dispute that can be resolved by the application of law, to be decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Section 35 is similar in that it guarantees a fair trial for persons accused of criminal conduct. Section 165(2) of the Constitution requires courts to apply the law impartially and without fear, favour, or prejudice. The oath of office prescribed by schedule 2 of the Constitution requires a judge to swear that he or she will uphold and protect the Constitution and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law. This is also reflected in article 13 of the Code of Judicial Conduct², which states that a judge must recuse him or herself if there is a real or reasonably perceived conflict of interest, or if there is a reasonable suspicion of bias based on objective facts. The Code further states that a judge shall not recuse him or herself on insubstantial grounds.

[5] The Constitutional Court has summarised guidelines for the recusal of judicial officers as follows:³

‘The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by judges to administer justice without fear or favour, and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.’

[6] In *SACCAWU and Others v Irvin & Johnson Ltd Seafoods Division Fish Processing*⁴ Cameron AJ, in writing for the majority, said that a party applying for the recusal of a judge bears the onus of rebutting this presumption of

² GG 35802 of 18 October 2012

³ In *President of the Republic of South Africa & others v South Africa Rugby Football Union & others* 1999 (4) SA 147 (CC) at [28]

⁴ 2000 (3) SA 705 (CC)

judicial impartiality and must adduce cogent and convincing evidence of a reasonable apprehension of bias on the part of the judicial officer. The judge went on to point out that ‘absolute neutrality’ is something of an illusion in the judicial context. This is because judges are human. They are unavoidably the product of their own life experiences, and the perspective thus derived inevitably and distinctively informs each judge’s performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. Impartiality is that quality of open-minded readiness to persuasion – without unfitting adherence to either party, or the judge’s own predilections, preconceptions and personal views – that is the keystone of a civilised system of adjudication.⁵

[7] Cameron AJ went on to emphasise the requirement of “double reasonableness” which the application of the test for bias imports, namely that not only must the person apprehending bias be a reasonable person, but the apprehension itself must, in the circumstances, be reasonable.⁶ This requirement not only underscores the weight of the burden resting on the person alleging judicial bias or its appearance, but also highlights the fact that mere apprehensiveness on the part of the litigant that a judge will be biased - even strongly and honestly felt anxiety – is not enough. The court must carefully scrutinise the apprehension to determine whether or not it is reasonable.⁷

[8] In *S v Wouter Basson*⁸ the same court emphasised that the perception of the judicial officer’s impartiality is crucial to the administration of justice. A perceived lack of impartiality constituting a reasonable apprehension of bias is occasioned where a judge, during the course of a trial, prejudices a live issue pertinent to the defence of an accused.⁹ Para [53] of *Basson* reads as follows:

‘It must follow that a recusal challenge also involves a virtually identical inquiry, namely “the social judgment of the Court” applying “common morality and common sense” in deciding whether the reasonable person, in possession of all the relevant facts, would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case.’

[9] Relying on cases such as *Basson* (above) and *S v Le Grange & others*¹⁰, Kollapen J identified three core principles in *S v Djuma & others*¹¹ when addressing the issue of the impartiality of judicial officers:

⁵ *SACCAWU* (above) [13]-[14]

⁶ Par [15]

⁷ Par [16]

⁸ 2007 (1) SACR 566 (CC) at [27]

⁹ See *S v Lameck & others* 2017 (3) NR 647 (SC) at [57], [78]-[82]

¹⁰ 2009 (1) SACR 125 (SCA)

¹¹ Unreported GP case no A423/2015, 12 April 2017, at [14]

- a. that there is a presumption in our law against partiality of a judicial officer. This is largely based on the recognition that legal training and experience prepare judges to determine where the truth may lie in the face of contradictory evidence;
- b. that the presumption of impartiality is not easily dislodged. Cogent and convincing evidence is necessary in order to do so;
- c. that fairness requires a judge to be actively involved in the management of the trial, to control proceedings and to ensure the proper utilisation of resources. It goes without saying that this sometimes involves assertiveness and the adopting of robust stances.

[10] At the end of the day, the vital ingredient of a fair trial is that justice must be done and be seen to be done. In *S v Booysen*,¹² Goosen J pointed out that in *S v Roberts*¹³ the SCA, in assessing the ‘reasonable-suspicion-of-bias test, stated that a conclusion may be drawn that a reasonable suspicion of bias exists when it is shown that the accused, as a reasonable person, and based on reasonable grounds, does in fact suspect that the judge might be biased. In other words, the onus is on the applicant to show on a balance of probability that a reasonable apprehension exists that he, as an objective person, reasonably perceives or believes (relying on the correct facts), that the presiding judicial officer is not impartial.¹⁴ In *Minister of Safety & Security v Jongwa & another*¹⁵, Pickering J, relying on *S v Dube & others*¹⁶, held that there was no need to lay down a general rule as to what should require a recusal. Pickering J held that in *Dube*, the court had required a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain an apprehension of bias. The enquiry, it was held, involved a value judgment of the court applying prevailing morality and common sense.¹⁷

[11] In *Take & Save Trading CC & others v Standard Bank of South Africa Ltd*,¹⁸ Harms JA stated that a judge:

‘ ... is not simply a silent umpire... fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted ...’

¹² 2016 (1) SACR 521 (ECG) at [14]

¹³ 1999 (2) SACR 243 (SCA) at [32]-[33]

¹⁴ See also *S v Thomas & another* 2018 (1) NR 88 (HC) at [15]

¹⁵ 2013 (2) SACR 197 ECG

¹⁶ 2009 (2) SACR 99 (SCA)

¹⁷ *Jongwa* (above) [7]

¹⁸ 2004 (4) SA 1 (SCA)

[12] In the course of dismissing a recusal application in *Bennett and Another v The State*,¹⁹ Spilg J remarked that more and more of these applications were being brought as strategic or tactical tools or simply because a litigant did not like the outcome of an interim order made during the course of a trial. Spilg J added that the seeming alacrity with which legal practitioners brought or threatened to bring recusal applications was cause for concern. The recusal of a presiding officer ... should not become standard equipment in a litigant's arsenal, but should be exercised for its true intended objective, namely to secure a fair trial in the interests of justice, in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they serve.²⁰ The court observed that judges were expected to be stoic and thick-skinned. What was expected of presiding judges was clear, as was the right of litigants to raise improper conduct by judges and, without fear, to seek recusal. But litigants and their legal representatives at the same time bore a responsibility not to seek recusal as a tool. Ongoing unfounded aspersions cast on judges could bring about a loss of faith in the judiciary and bring it into disrepute.²¹

[13] Judicial officers must apply an objective standard and measure the facts against that standard. In *S v Shackell*²² the SCA articulated the test for reasonable apprehension of bias as follows:

'The ultimate test is whether, having regard to (all the relevant facts and considerations) the reasonable man would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case. The norm of the reasonable man is, of course, a legal standard.'²³

[14] In that matter Brand AJA went on to say that what was required of a judge was judicial impartiality and not complete neutrality. It is accepted that judges are human and that they bring their life experiences to the bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What judges are required to be is impartial, that is, to approach matters with minds open to persuasion by the evidence and the submissions of counsel.²⁴

[15] As cited by the applicant's legal practitioners in the heads of argument in *Shackell*:

¹⁹2021 (2) SA 439 GJ

²⁰ At [113]

²¹ At [114]-[115]

²² 2001 (2) SACR 185 (SCA) [19]-[25]

²³ See also *S v Basson* 2005 (1) SA 171 (CC)

²⁴ *Shackell* (above) [22]

‘...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question, and obtaining thereon the required information ... [The] test is what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.’²⁵

[16] Against this backdrop, the applicant bears the onus of proving the alleged bias on the part of this court. I now turn to the triad of so-called “factual events” upon which the applicant’s two counsel rely in their heads of argument, which call for this court, as presently constituted, to recuse itself from the instant proceedings.

[17] The first factual event appears to be linked to an assertion which I had made in chambers in the presence of the prosecutor and one of the applicant’s two counsel who were appearing before me for the first time in this matter, to the effect that I was not desirous of entertaining any further applications for the trial to be adjourned. The factual event, according to an affidavit deposed to by the applicant’s attorney (who was not present in chambers), is described in his affidavit as follows:

‘On the morning of the 20th April 2022, when trial was set to commence, the Court was engulfed by the unending turns of load-shedding which necessitated the matter to be stalled and arranged to start at 12:00 midday. During the course of waiting for the period of load-shedding to pass practitioners requested to see her Ladyship Madam Justice Stretch in Chambers to iron out a few pre-liminary issues.

Of the pre-liminary issues, there were three proposed applications for postponements in respect of accused number 1, 2 and 4. The essence of the application in respect of accused number 1 was the reconsideration of representation by the National Director of Public Prosecutions as outlined by section 22(2)(c) of the National Prosecuting Authority Act, 32 of 1998.

A message and an intention to see the judge in chambers was communicated to her Ladyship’s secretary Ms Delene Matroos ... A few minutes later Ms Matroos relayed a message from the judge that her Ladyship only requires to see only one counsel in her chambers to act as a mouth piece for the rest of the defence legal representatives. The rest of the defence counsel nominated Mr. Matotie, leading counsel for accused number 1, to go see her ladyship in chambers and lend an ear for them.

Mr. Matotie, together, with Ms Ulrike De Klerk (Prosecutor) showed faces in her Ladyship’s chambers. He relayed the proposed intentions of all the relevant defence

²⁵ *Committee for Justice and Liberty et al v National Energy Board et al* [1978] 1 SCR 369

counsel to her ladyship in chambers. On his arrival in chambers, he informed her Ladyship of what the 4-defence counsel's intention was regarding the conduct of the matter and the intended applications for postponements. I must respectfully state that *we were awestruck and startled* [emphasis added] by the truculent response received from her Ladyship.

In no uncertain terms, her Ladyship informed the defence counsel that she was not going to entertain any applications for postponement today at all. She further uttered that the trial was to proceed today without delaying tactics or excuses. What is rather baffling with this response is that her Ladyship already formed a preconceived judgment not to hear any applications for postponement without ventilating what the applications entailed. Moreover, that her Ladyship perceived this application to be merely a delaying tactic without hearing the substance and the basis for the application for postponement.

On the glaring legal position, *this further indicated to me* [emphasis added] that her ladyship formed an opinion, prior to actual knowledge, that the proposed applications were merely dilatory tactics to stall trial from proceeding. *I do not understand it* [emphasis added] to be the case that a judicial officer would pre-judge an application and refuse it without hearing no matter a belief they had. *To me* [emphasis added] this stood in the way of fair trial and fair administration of justice.'

[18] I must at the outset point out that the attorney who has deposed to the affidavit in support of the application, and the applicant himself, who has deposed to a brief statement headed "confirmatory affidavit", did not accompany counsel when I was approached in chambers. Indeed, as the papers stand, there is no reliable evidence on oath before me as to what transpired in chambers. The description on oath purporting to relay first-hand knowledge of, and a reaction to what transpired in my chambers constitutes inadmissible hearsay. Differently put, the attorney has on oath, described an effect on him caused by words which he did not hear and a series of events which he did not witness. To this end he has perjured himself. I need say no more on the subject.

[19] When the application was argued before me two days later, the prosecution, in traversing the facts, correctly pointed out that there is a lengthy background to this matter to which neither of the accused's newly appointed counsel were privy. On the other hand, the applicant and his attorney, who deposed to the affidavits which I have made reference to, despite having been intimately aware of these proceedings since they commenced, elected not to deal with the background at all. I now turn to sketch a brief timeline setting out this background:

[20]

Timeline

28 July 2021: The present indictment is served on the accused.

22 September 2021: A case management conference, attended by the applicant's present attorney, is held before Tokota J. The parties agree that the matter must be set down for trial for the second term of 2022.

22 October 2021: A second case management conference, attended by the applicant's present attorney, is held before Tokota J. It is emphasised that all "logistics" should be finalised before the hearing of the main trial during the second term of 2022. In particular, it is recorded in the minutes that all requests for further particulars are to be made by 5 November 2021 and that the State should respond by 29 November 2021.

29 November 2021: A third case management conference, attended by the applicant's present attorney, is held before this court as presently constituted. There at, the applicant's attorney records that he has been instructed to brief two counsel from Johannesburg (Messrs Hodes SC and Ngcangisa) and that they would be available to deal with the plea proceedings set down during the period 19 to 21 January 2022, but that Hodes SC would thereafter only be available in August 2022. Mr Fredericks (for accused 2) advises that Buffalo City Municipality ("BCM") has taken the decision, subject to developments in "the Zuma matter" not to fund the trials of any of the municipal officers charged. Those affected were contemplating review proceedings purportedly in terms of governing municipal legislation. Mr Maseti (for accused 4, 5 and 6) confirms this. The following is recorded in the minutes: 'Judge Stretch informed all the practitioners present (including accused no. 7) to advise their clients to ensure that practitioners instructed to represent the accused are available on 19, 20 and 21 January 2022 (for pleas and a previously postponed application by accused nos 10 and 11 for a separation of trials), as well as for the entire second term (from 11 April to 17 June 2022). Should plea proceedings and the separation application not be finalised on 21 January 2022, the accused and their representatives must be available for a continuation during the period 28 February to 2 March 2022.'

10 December 2021: a fourth case management conference, attended by the applicant's present attorney, is held before the court as presently constituted. Mr Hodes SC, who was to represent accused nos 1, 12 and 13, records that he will not be available for the entire second term and asks to be excused. The applicant's present attorney indicates that he will arrange to brief counsel who will be available for all the periods designated previously and will liaise with the prosecutor by 15 December 2021. It is further recorded that the applicant intends filing a request for

further particulars (despite Tokota J's directive that all requests had to have been filed by 5 November 2021). The prosecutor records that no requests have been received and that the State and the other accused are prejudiced by the delay. The applicant (and by implication any other accused) is granted an indulgence to deliver his request for further particulars by 15 December 2021. Mr Fredericks and Mr Maseti repeat the intention of their clients to take the decision of BCM, not to fund their criminal trial, on review. I made it clear that any proposed civil litigation by four of the 14 accused (as they then were) would not be permitted to delay the commencement, the prosecution and the finalisation of the criminal trial. The following relevant directives were issued:

- a. All requests for further particulars must be filed with Ms de Klerk by no later than 15 December 2021.
- b. All information pertaining to the final status of the legal representation of accused nos 1, 12 and 13 (whose attorney is Mr Diniso) must be conveyed to Ms de Klerk by no later than 15 December 2021. All communications must be confirmed in writing for record purposes.

13 January 2022: a fifth case management conference, attended by the applicant's present legal representative, is held before this court as presently constituted. The prosecutor records that my previous directive has not been complied with, and that she has still not been informed as to who would be representing the applicant and accused nos 12 and 13. The applicant's attorney advises that Mr Ngcangisa from the Johannesburg Bar is "still on board" but that he was undergoing a medical procedure and as such his clients would not be in a position to plead on 19 January 2022. I once again emphasise that it is of vital importance that all the accused are in a position to plead to the charges as envisaged, on 19 January. Mr Diniso indicates that he will make alternative arrangements and revert. The prosecutor records that she indeed received a request for further particulars from the applicant and accused nos 12 and 13 on 15 December 2022, and that she reverted by 12 January 2022.

Due to ongoing delays regarding legal representation the prosecution pressed upon me to make an order in terms of s 73 of the Criminal Procedure Act 51 of 1977, that those accused who had not secured representation conduct their defences in person. I was reluctant to do so as the conference was being held virtually, and I could not satisfy myself that all the accused were attending. I however, reiterated that my previous admonishments and directives had the same effect, viz, that the accused must all be ready to proceed with the trial as previously planned. In particular I made a directive that those accused who desired legal representation but could not afford private services, should approach the Legal Aid Board forthwith, and if this should happen, an official from that office should attend court on 19 January 2022. It subsequently transpired that by 19 January 2022, none of the accused had approached the Board.

19 January 2022: The accused plead not guilty to all the charges in open court. The applicant is not present when this happens. In the exercise of my discretion I condone his absence and stay the warrant which I had authorised for his arrest, accepting an undertaking that he would appear the following day. Mr Maseti enters not guilty pleas on his behalf, which he graciously confirms when he attends court the next day.

20 January 2022: Accused nos 10 and 11 bring a substantive application for a separation of trials, repeating their lengthy plea explanations on oath, and annexing to their motion papers detailed affidavits deposed to by potential prosecution witnesses (and in particular a witness who pleaded guilty and was convicted on counts involving corruption such as fraud and money laundering associated with the proposed memorial services which form the subject matter of the prosecution's indictment). According to the motion papers these documents were made available to the present applicant's attorney as far back as 30 August 2021. The attorney was also present when the application for a separation of trials was made.

28 February 2022: This court as presently constituted delivers a 27-page judgment, granting accused nos 10 and 11 a separation of trials.

11 April 2022: The leading of evidence is due to commence, but intercepted by a full day power outage. Mr Quinn SC informs the court that he has been instructed by the applicant through the applicant's present attorney to bring an application for the leading of evidence to be suspended pending a response from the DPP to representations for the stopping of the applicant's prosecution which the applicant had delivered the previous day.

12 April 2022: In the exercise of my discretion, and because the envisaged delay would be relatively short and the applicant had filed his representations before the trial was due to commence, I granted the application and adjourned the matter for trial to 20 April 2022, on which date it transpired that the applicant's representations to the DPP were unsuccessful, and that he now wished to escalate the matter to the NDPP, and also wished to raise with the NDPP the question as to why he was being prosecuted when the DPP had previously decided to withdraw the charges. It also transpired on 12 April 2022 that accused 2 also wished to make representations to the DPP in connection with information which she had recently discovered and which could potentially exonerate her. I was also informed that accused nos 4 and 6 had approached the Legal Aid Board (albeit at a very late stage) and that they had anticipated that someone from the Legal Aid Board would be present at court. To that end the matter was adjourned to 22 April 2022 for a representative from the Board to be present and for the applicant to bring his application for my recusal as previously mentioned.

22 April 2022: It becomes obvious that resistance to a further delay would be futile as the Legal Aid Board reasonably required a week to consult with successful

applicants accused nos 4 and 6. The application for my recusal is nevertheless pursued and judgment is reserved.

[21] Having set out this timeline, and having illustrated how this court has on a number of occasions in the exercise of its discretion bent over backwards to accommodate the applicant and his co-accused, I have some difficulty in understanding on what basis the applicant's attorney, even if his evidence in this regard were to be admissible, can suggest that this court was not going to be persuaded any differently. The mere fact that I entertained the application on behalf of the second accused for an adjournment pending representations, and that I accepted that the Legal Aid Board was making its best endeavours to prepare for trial and consult with accused numbers 4 and 6 over a very short period of time, culminating in a situation where everyone would be ready to proceed on 3 May 2022, simply dispels any such notions that anyone may have harboured. I have no doubt that if the applicant's newly engaged counsel had been briefed properly on the history of this matter going back to the first case management conference on 22 September 2021, they would have harboured a different view of this court's expression of exasperation (as aptly described by the prosecutor) at the prospect of more applications for a delay. As stated in *Djuma* (above) the court, in regulating its own proceedings, may from time to time have to be assertive and adopt a robust stance.

[22] But this is also not the end of the matter. It is the applicant himself who must allege and prove bias or perceived bias. Although described as a confirmatory affidavit, his affidavit does not, and indeed cannot confirm that of the instructing attorney. The attorney, in his affidavit, in the main deals with his own emotions and perceptions. He does not even attempt to describe the perceptions of his client. This is why the applicant's affidavit could not be drafted in the usual form of a confirmatory affidavit, confirming what is stated about him in the main affidavit. All it says is that the applicant has granted his attorney authority to depose to an affidavit in support of his application. His affidavit thereafter reads as follows:

'During the hearing of this matter I have consulted with both Counsel and my Attorney of record and I have also witnessed the remarks made by Ladyship Strech [sic] regarding the conduct of the proceedings at hand as well as her confirmed stance which is reflected on the record of proceedings that she was not willing to entertain any postponements of the current proceedings as well as her remarks relating to my attempt to stall and delay proceedings at hand.

I have also taken note and witnessed her Ladyship's comments regarding the fact that she was not Koen J and that I will not be the former President Zuma in the current proceedings which glaringly reflects my alleged attempt to cause a Stalingrad process in the current proceedings.

Moreover, during the course of the hearing when Mr. A Schoombie [sic] was addressing the Court on the applications for postponement a further remark was made by her Ladyship which trampled on the presumption of innocence of accused persons. I say so because her Ladyship in her remarks to Mr. Schoombie [sic] made another preconceived judgment on the apparent corruption that took place during President Mandela's funeral.

I must indicate that her remark trigger discomfort as well as an element of partiality in the current proceedings. For that reason, I hold a view her Ladyship should recuse herself.'

[23] As I have said, the applicant's affidavit does not speak to the history of the matter, is not informed by what exchanges took place in chambers, and cannot complain of bias either direct, indirect, perceived or otherwise. Indeed, the facts establish that it is as a result of this court having been persuaded by his previous counsel to exercise its discretion and grant a short adjournment, that the matter was indeed adjourned at his instance. The facts further establish that this court, despite its bona fide expression of exasperation and frustration with the fact that some of the accused persons were once again attempting to shift the goal posts, nevertheless weighed the prejudice of a further delay against the potential curtailment of the right of two of the accused who had been granted legal aid at the 11th hour, to properly consult with their legal practitioner, and at the end of the day the knee-jerk reaction of counsel to this expression of exasperation had become moot, and can best be described as an *ex post facto* storm in a teacup. On the contrary, as described in *SACCAWU*, all this court can be accused of is an open-minded readiness to persuasion, without *unfitting* adherence to its own predilections.

[24] The second factual event which the applicant's attorney refers to in his affidavit is that this court outrightly and manifestly informed him that she was not Koen J and that the applicant was not the former President Jacob Zuma. Despite having perjured himself in this respect, the attorney nevertheless embarks on an exposition of what he refers to as the "wide meaning" which he extracted from comments which he was not privy to. In this respect he makes the following astounding comment:

'This comment and utterances carry a connotation that Koen J, was very generous to have devoted time and heard a dilatory delaying application. This at best reasonably creates an image *in a practitioner's mind* [emphasis added] that her Ladyship Madam Justice Stretch pre-judged the situation and that Koen J to have let time gone to waste by entertaining an application of that nature. In the end, her Ladyship pre-judged the applicant's application as having been similar to that of former President Jacob Zuma without ventilating the issues to be raised in the application.

The utterance that her Ladyship was not Koen J, triggers an early judgment on the applicant's matter without hearing. I submit with respect that this does not accord with the proper administration of justice and fair hearing. It is further submitted with respect that her Ladyship already made an early judgment on the legally presumed innocence of the applicant.

On the second aspect to the utterances, President Jacob Zuma was widely and publicly described to have gone to extraordinary lengths to prevent investigators from accessing information likely to incriminate him in criminal activity. When that failed and he was charged, Zuma again went to extraordinary lengths to stop the prosecution, recycling many of the same "irrelevant" or "speculative" claims "not founded on fact" or based on "hearsay" in an attempt to stop his prosecution and to convince the public that it should ignore the evidence against him.

Ultimately, President Jacob Zuma lost every single legal battle aimed at achieving either of the goals set out above, with his counsel on several occasions conceding that Zuma's arguments had no legal merit.

I must indicate that it leaves a bitter taste in the mouth that the very same Court which is yet to try the applicant *equates him* [emphasis added] to a Stalingrad stuntman. Its baffling that when her Ladyship sees the applicant sees a model or demonstration of what the former president did during his legal battles without hearing the application.

Mrover [sic], during trial in the open Court Mr Matotie once again raised these glaring concerns to her ladyship when the proposed application was canvassed on behalf of accused number 1. Of significance is that on record, her Ladyship repeated or rather confirmed on record, the remarks she had made in chambers. Both myself and the client heard and highlighted the same utterances directly from herself.

During this session in Court and her Ladyship was engaging Mr Matotie on the comments she made, she sought to lay out the basis for her justified position to make these remarks. This occurred during the hearing of this matter when trial resumed after load-shedding. Her Ladyship did not refute these allegations but rather sought to stand by them and deal with them in this application.'

[25] Much can be said about the context in which the applicant's attorney complains about this second factual event. I will make my best endeavours to keep my comments brief and relevant.

[26] It goes without saying that the applicant's attorney is only entitled (in the absence of evidence from the parties who approached me in chambers) to depose to an affidavit regarding what transpired in his presence. That would

then limit his views and commentary to what transpired in open court, when the applicant's counsel placed on record that this court had, in chambers, expressed the view (which happens to be factually correct), that this court is not presiding over Mr Zuma's trial, and that the applicant is also not Mr Zuma. I cannot understand at all why the applicant's attorney would form a view that a statement which distinguishes one case from another, can have the effect of equating the one scenario with the other. On the contrary, had counsel who must have conveyed these sentiments to his attorney and/or the applicant, been part of the history of this matter, or had counsel made an attempt to elucidate what this court meant, I have no doubt once again, that any perceptions of unfairness would have been dispelled. This is so for the following reasons. Each court is deemed to assume control of its own process. On an interpretation of *Zuma*,²⁶ it transpires that the presiding judge was constrained to determine a special plea raised in limine, and that the main trial could not proceed before that has been dealt with, whether on the papers, or by the leading of oral evidence or in a separate trial. That is not what this court has before it. There are no special pleas which require my determination and there is accordingly no compelling reason why the leading of evidence should not follow forthwith. At the risk of repeating myself, and which repetitions the applicant and his attorney are aware of, there is no compelling reason why representations to the DPP and the NDPP should stall this process. This court is not called upon to determine those representations, unlike a court, such as the one in *Zuma*, which is seized with a special plea. As this court has pointed out many times before in this matter, the prosecution can be stopped at any time before judgment, should representations to the DPP and/or the NDPP succeed. But there is no reason why this trial should not run *pari passu* with those representations. Ergo this court's statement that this trial *cannot be equated with Zuma*.

[27] Repeated applications for repeated adjournments pending the outcome of repeated collateral representations should not be granted simply because witnesses may enter the witness box in the interim and say nasty things about the accused. As pointed out by counsel for accused number 7 who also opposed any further adjournments: There have been in the region of 27 postponements in this matter. It has been on the roll for about eight years. Co-accused are entitled to exercise their rights to a speedy trial which is constitutionally guaranteed. The indictment is part of a public record. The negative things which are being said about the accused form part of the indictment and are very much in the public domain in any event.

[28] As I have mentioned, on this aspect the applicant merely says the following:

²⁶ *S v Zuma and Another* (CCD30/2018) [2021] ZAKZPHC 89

'I have also taken note and witnessed her Ladyship's comments regarding the fact that she was not Koen J and that I will not be the former President Zuma in the current proceedings which glaringly reflects my alleged attempt to cause a Stalingrad process in the current proceedings.'

[29] This court cannot go to any further lengths to explain the obvious. The accused are in any event not charged with delay. But more importantly, it simply begs the question as to whether the applicant would have been more comfortable if this court had equated him with Mr Zuma, as opposed to having distinguished his case from Mr Zuma's matter.

[30] I now turn to the third factual event relied on for my recusal. It seems that the applicant and/or his legal team are of the view that I have already decided not only that corruption did take place during the preparations for the late President Mandela's memorial services, but also that the applicant is guilty thereof. This appears to stem from my reference to delays in bringing this matter to finality after so many years making a mockery of the funeral and "corruption that apparently took place at that time", when I was addressing accused 2's attorney about her application for an adjournment.

[31] It seems that this is the only one of the three factual events which the applicant has elected to spend some time on in his affidavit. He says this:

'Moreover, during the course of the hearing when Mr A Schoombie [sic] was addressing the Court on the applications for postponement a further remark was made by her ladyship which trampled on the presumption of innocence of the accused persons. I say so because her Ladyship in her remarks to Mr Schoombie [sic] made another preconceived judgment on the apparent corruption that took place during President Mandela's funeral.

I must indicate that her remark trigger discomfort as well as an element of partiality in the current proceedings.'

[32] It suffices to say, as conceded by the applicant's counsel, that one is here at best dealing with linguistics. If the word "apparent" triggers discomfort, it was not intended to do so. This court intended to use a word referring to averments which had been made. It is the custom of this court to use the word "alleged" in this type of exchange. Indeed, when counsel raised this further trigger with me, I was convinced that I had used the word "alleged" and had to be persuaded by the court recording that I did not. Be that as it may. It is really not necessary for a presiding officer to proceed every step of the way as if he/she is walking on eggshells. The fact is that all the accused have pleaded

to the indictment. The indictment does not beat about the bush. It says in no uncertain terms:

‘The Director of Public Prosecutions for the Eastern Cape Division of the High Court, Grahamstown, who prosecutes for and in the name of the State, hereby *informs* [my emphasis] this Honourable Court that [the applicant and his co-accused in this matter] *are guilty* (my emphasis) of the following crimes’

[33] I can give the applicant and his legal team my full assurance that when I traversed the rather robust wording of the indictment (as indictments are wont to be) I did not conclude that the applicant has in fact committed these offences. This court has over three decades of experience in criminal litigation and trials, having successfully read for a degree in the law before that. It can safely be accepted that this court knows that an accused person is innocent until proven guilty, no matter what the indictment says, and no matter what witnesses have said or are about to say. This court is alive to the process that is to be followed and that the prosecution carries an onus to prove the guilt of persons it accuses beyond a reasonable doubt. The applicant and his legal team are also invited to digest the concept that the word “apparent” (as conceded by his counsel), has different meanings depending on the context in which it is used. I find it strangely amusing that both counsel for the applicant and the State had to resort to a dictionary in order to attach either an innocent or guilty meaning to the obviously innocuous words used by this court. The applicant’s counsel presses for an interpretation that suggests that it is “clearly visible” that there was corruption (which as a matter of fact the indictment rather clearly spells out). The prosecutor, on the other hand, presses for the more common definition of “seemingly real or true, but not necessarily so”. According to the Collins Dictionary one is inclined to use the term “apparently” to indicate that the information one is giving is something that one has heard (say from the indictment), but one is not certain that it is true e.g. “*Oil prices fell this week, apparently because of over-production*”. Synonyms such as “seemingly”, “outwardly” and “ostensibly” come to mind.

[34] Whatever the position, it can never reasonably be suggested that because this court referred to “corruption that apparently took place at the time” it has “trampled” on the presumption of innocence. It can also hardly be suggested that a reasonable, objective, informed person in the position of the applicant would reasonably perceive bias upon hearing such a statement.

[35] The law relating to judicial recusal and bias is settled and certain. There will always be disgruntled litigants and/or legal practitioners who will attempt to navigate through what appears to them to be loopholes and areas of subjective interpretation in the law of judicial recusal. In the process they sometimes deceive themselves on both the facts and the law. As stated by G.

Hammond in the foreword to *Judicial Recusal, Principles, Process and Problems*²⁷:

'Recusal – an odd word signifying withdrawal, originating in the religious concept of a recusant – is both an assurance of impartiality of justice and a field of opportunity for manipulation. If not, only every litigant who thinks that the judge is going to be against him but every party who has waited for a judgment and lost can scout for objections and with the luck secure a new Court, the already massive cost of litigation will become uncontrollable, legal certainty will become a cinema and the principle that litigants cannot handpick the court will be shot through with exceptions.'

[36] In my view this application is not supported by the facts or by context and seems to have been drafted in rather a hurry without proper consideration if only to preserve the proceedings of 20 April 2022 in a vacuum. Having also carefully satisfied myself once again that all the accused will be in a position to continue with the trial by no later than 3 May 2022, I make the following order:

1. The application for this court as presently constituted to recuse itself from presiding over this criminal matter is refused.
2. The accused are warned to appear before this court, sitting at Bisho, at 09h30 on 3 May 2022 for the continuation of this trial.
3. The Director of Public Prosecutions and/or the National Director of Public Prosecutions as the case may be, are requested to urgently consider the representations made by accused numbers 1 and 2 in connection with this matter, and to make earnest endeavours to convey the outcome of the representations to the prosecution before 3 May 2022.

2. Gumbo v S (41/1099/17) [2022] ZAGPJHC 227 (21 April 2022)

Although the prosecutor informed the court that the services of an interpreter were not necessary the court has to confirm with the accused or his legal representative that the accused was able to follow the proceedings in English.

Mabesele, J:

[1] The accused, a Zimbabwean national, pleaded guilty in the Johannesburg magistrate's court to three counts of fraud. He was subsequently convicted and sentenced to a period of five (5) years' imprisonment on all counts, taken together, in terms of Section 276(1)(i). He was declared not unfit to possess a firearm in terms of

²⁷ Oxford and Portland, Oregon (2009)

section 103(1) of the Act²⁸

[2] Aggrieved by the decision of the magistrate, refusing him leave to appeal his sentence the accused approached this court by way of petition, for leave to appeal.

[3] Having perused the record of the proceedings we are of the view that the accused was not placed in a position to clearly understand the charges preferred against him so that he was able to properly exercise his right with regard to a plea. It is also clear from the record that the accused was not made aware that he is expected to plead to each charge and not all charges at the same time. What transpired at the trial is the following:

[4] First, the record of the proceedings shows that the prosecutor informed the court that the services of the interpreter were not necessary whereas there was no indication from the accused or his legal representative that the accused was able to follow the proceedings in English. The magistrate did not enquire from the accused whether he was able to follow the proceedings in English.

[5] Second, the prosecutor did not put all the charges to the accused for him to plead. After the prosecutor had put the first charge to the accused and before the accused answered, the prosecutor intervened and informed the court that he and the legal representative of the accused had agreed that it was not necessary for the two remaining charges to be put to the accused because his legal representative had already explained them to him. After the legal representative of the accused had confirmed to the magistrate that he explained the charges to the accused, the magistrate asked the accused whether he understood all three charges. After the accused had confirmed to the magistrate that he understood the charges the magistrate asked the accused to plead to all the charges²⁹ and the accused pleaded guilty to all the charges. Thereafter the statement of the accused which was prepared in terms of section 112(2) of the Criminal Procedure Act³⁰ was read into the record of the proceedings in respect of all the three counts.

[6] Section 35(3) of the Constitution³¹ provides that every accused person has a right to a fair trial, which includes the right-

- to be informed of the charge with sufficient detail to answer it³²
- to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language.

²⁸ 60 of 2000

²⁹ The accused was asked to plead to all the charges at the same time

³⁰ 51 of 1977

³¹ Act, 1996

³² Section 105 of Act, (51 of 1977) provides that the charge shall be put to the accused by the prosecutor before the trial of the accused is commenced and the accused shall be required by the court to plead thereto

[7] The proceedings were conducted in English and not interpreted to the accused, a Zimbabwean national. No effort was made to enquire from the accused whether he understood English. The accused was asked to plead to all the charges at the same time. Other charges were not put formally to the accused by the prosecutor. For these reasons we are of the view that leave to appeal against convictions be granted, in the interests of justice. It follows that leave to appeal against sentence should also be granted.

[8] In the result, the following order is made:

Leave to appeal against convictions and sentence is granted.



From The Legal Journals

Jeewa, T R & Bhima, J

Discriminatory Language: A Remnant of Colonial Oppression

Constitutional Court Review 2021 Volume 11, 323–339

Abstract:

Speech carries tremendous power. It shapes our realities, influences our consciousness and, often, the chance for any real change requires changing the way we speak. In South Africa's post-apartheid constitutional state, remnants of colonial oppression surround us, not only in tangible aspects, but also through speech. This paper argues that the way hate speech has been developed through jurisprudence has rendered the concept of hate speech sterile within a South African context. Specifically, this paper uses the tenets of critical race theory and its accompanying endorsement of an intersectional approach to critique the reasonable man test as contained in section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('Equality Act') and as formulated by the courts through its jurisprudence. The argument proposed is that the courts' formulation of the legal test for hate speech under section 10 of the Equality Act does not and will not protect previously (and currently) disadvantaged groups because the present test fails to take cognisance of the fact that 'objectivity' is a tainted principle where apartheid and colonialism has shaped laws and its adjudicators. This paper explores aspects of race and law and the way in which 'colour-blindness', non-racialism and the apparent

neutrality of the law constitute a veil behind which implicit biases are left unchecked to the detriment of Black people. Importantly, this paper engages with the harms that arise from applying laws that are, and so we argue, 'conceived through the white eye', and we attempt to demonstrate the resulting fallacious nature of the 'reasonable man' test. Ultimately, this paper seeks to question: Who is the reasonable person? Is the reasonable person a member of the group of persons targeted by the speech? Or is the reasonable person akin to the utterer of speech? Or, yet again, is the reasonable person a neutral third party who is assumed to be aware of the South African context but belongs to no racial group?

Watney, M

No title to prosecute: Grasping at straws or tactical move?

2022 TSAR 405

Kehrhahn, F H H & De Lange, J C

Guilty of being deaf. *Kruse v S* — Paying lip service to the fair trial rights of hearing-impaired accused persons

2022 SALJ 157

Abstract

This article considers the case of Kruse v S, where the right to a fair trial of a deaf accused was infringed owing to the poor communication and translation of the trial proceedings. This article considers the methods available to translate court proceedings to a deaf or hard of hearing accused and demonstrates an appreciation that the deaf community is not homogeneous and that a single interpreting method cannot accommodate every deaf person. In raising the question as to which method is best suited to a specific accused, the article indicates that the culture and history of the deaf accused should be indispensable factors to consider. The article explores the rights of deaf accused in the South African criminal justice system by considering the Constitution, national legislation, and judicial norms and standards which relate to the interpreting of trial proceedings to the deaf accused. The existing laws and safeguards that protect these rights are poorly implemented at a grassroots level, which calls for better training of stakeholders and more effective policy implementation. A concerted effort on the part of the government is required to ensure that the rights of the deaf accused are protected.

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



Contributions from the Law School

Presiding officers are expected to play a substantial role in reducing crime through judicial activism and not to try to find unconvincing reasons to disbelieve complainants in rape cases.

In *S v TM* 2022 (1) SACR 151 (LP), a child offender was charged with robbery, and rape in contravention of s 3 of The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007. He was convicted of the charge of robbery in accordance with his plea of guilt. He was acquitted on the charge of rape. His defence was that the sexual intercourse with the complainant was consensual (paras [1],[3]).

The case came before the high court as an automatic review in terms of s 85 of the Child Justice Act 75 of 2008 read with s 304 of the Criminal Procedure Act 51 of 1977.

The review court was satisfied that the conviction and sentence on the charge of robbery was in accordance with justice but found that the acquittal on the charge of rape was not justified on the evidence (para [3]). The trial court correctly applied a cautionary rule to the complainant's evidence and acquitted the child offender of rape on the basis of the contradictions between the complainant and her mother's version, and the discrepancies between the complainant's evidence and what was recorded in the J88 form (para [15]).

The review court found that the contradictions and discrepancies did not go to the heart of the matter, which was whether the sexual intercourse had been consensual or not (para [19]; in reference to *S v Mafaladiso* 2003 (1) SACR 583 (SCA) ([2002] 4 All SA 74; [2002] ZASCA 92) at 593e – 594h). It noted that the complainant's version was consistent with the accused's s 112(2) statement (para [18]), and that the injuries recorded on the J88 form were consistent with rape (para [19]). Most importantly, however, the review court noted that: '[t]he child offender's version was completely destroyed during cross-examination' (para [21]). In response to a question put to the child offender during cross-examination, the child offender replied that the complainant did not consent to sexual intercourse with him. During re-examination, the child offender was again asked whether there had been consent and he replied in the negative. The question was repeated twice but the answer remained the same – that the complainant had not consented to having sex with him (para [13]). The review court stated that because the absence of consent was repeated multiple times, including during re-examination, there was no chance that the child offender might have mistakenly given that answer due to the pressure of cross-examination (para [21]). The review court held that in conceding that the complainant had not

consented to sexual intercourse with him, the child offender was effectively giving up his defence and that it was tantamount to him changing his plea from not guilty to guilty (para [19]).

The review court held that the court a quo had been 'at pains to find grounds on which it could rely to acquit the child offender ... [and that] ...this [was] concerning if one has regard to the prevalence of the gender-based violent crime in [South Africa]' (para [23]). The court held further that it was 'quite disheartening to find presiding officers, who are expected to play a substantial role in reducing this level of crime through judicial activism, instead trying to find unconvincing reasons to disbelieve complainants in rape cases' (para [23]).

The proposition that presiding officers (even in the magistracy) are expected to play a substantial role in reducing the high levels of gender-based violent crime in the country through judicial activism is interesting.

It is necessary to first consider what the term 'judicial activism' means. It is not a term which lends itself to a single precise definition. In one article, the authors say '[i]t has variously been defined as a philosophy advocating that judges should interpret the Constitution to reflect contemporary conditions and values, when courts do not confine themselves to reasonable interpretations of the law but instead create law, or when courts do not limit their ruling to the dispute before them...At the core of the concept is the notion that ... judges may reform the law if the existing rules or principles appear defective, and may seek to give effect to contemporary social conditions or values' (EK Quansah & CM Fombad 'Judicial activism in Africa: Possible Defence Against Authoritarian Resurgence' available at <http://ancl-radc.org.za/sites/default/files/Judicial%20Activism%20in%20Africa.pdf> (accessed on 15 March 2022) at pg 4).

Mathebe states that '... the widespread use of the term 'judicial activism' suggests that it does not lend itself to a precise and defined meaning, but most legal scholars and writers seem to accept a very broad definition of the term, where a court of law that goes far beyond anything that the founders of the constitution, any constitution, had formerly thought and written when it interprets the law... can be considered to be involved in judicial activism. In [this] article ... I use the two terms 'judicial activism' and 'living constitution' interchangeably to refer to the reflexive (voluntaristic) component in modern jurisprudence, which has given effect to issues of change and transformation in constitutional norms, expanding the legal basis for the rights they protect' (L Mathebe 'The Constitutional Court of South Africa: Thoughts on its 25-Year-Long Legacy of Judicial Activism' 2021 56:1 *Journal of Asian and African Studies* 18-33 at pgs 19-20).

Corder has suggested that in South Africa, judicial activism of a special type applies due to South Africa's history and the transformatory foundation laid down in the Constitution, particularly s 39 of the Constitution. He explains that s 39 is not synonymous with judicial activism but that it does make it easier for a judge to adopt an activist stance (H Corder 'Judicial Activism of a Special Type: South Africa's Top Courts Since 1994' in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts*, Oxford, Oxford University Press (2007) p 323-362).

In the context of securing convictions and imposing sentences, judicial activism cannot be understood as suggesting that presiding officers can deviate from the law in order to increase convictions and/or sentences to serve the broad social interest of deterring others from committing crime. I would suggest that in the context in which the judge in *S v TM* (supra) made the statement about presiding officers needing to engage in judicial activism to deter crime, judicial activism simply means that presiding officers must not interpret the law, apply the law, or evaluate the evidence, in a way that results in a factually guilty accused being acquitted, such as in the case before the court. To the contrary, presiding officers must develop, interpret and apply the law in accordance with the Constitution, 1996 and in a manner that ensures that justice is done and that guilty accused are not acquitted.

Some examples of such 'judicial activism' can be found in the following cases. In each of these cases, had the presiding officers not been innovative in the manner they interpreted and applied the law, an accused who was factually guilty of the rape of a minor child would have likely had his conviction by the lower court overturned by the higher court. In *S v B* (2003 (1) SACR 52 (SCA)), the court found that there need not be a formal enquiry into whether the child witness understands the nature and import of the oath before administering the admonishment to the child witness. The court held that the presiding officer could form that opinion simply on the basis of the youth of the child witness. It therefore found that the child witness had been properly admonished despite the lack of a formal enquiry and the accused's conviction was upheld. In *S v BM* (2012 (2) SACR 507 (FB)), the court found that it was acceptable for the magistrate to satisfy himself of the competence of the child witness through questions put to the child through an intermediary. The conviction of the accused was therefore not set aside on the basis that the child witness's competence to testify had not been properly established. In *S v Sangweni* (2019 (1) SACR 672 (KZP)), the court approved of the very simple manner in which the court a quo had established that the child witness could appreciate the difference between truth and lies, thus finding that the competence of the child witness was properly established and that there was no basis to set aside the conviction of the accused.

In conclusion, in the *S v TM* case (supra) the review court confirmed the child offender's conviction and sentence for the charge of robbery. Although it had found that the child offender had been wrongly acquitted of rape, it held that it was not within its power to overturn the acquittal and replace it with a finding of guilty. This was because 's 310 of the Criminal Procedure Act 51 of 1977 creates the mechanism whereby the prosecution may correct judicial misdirection which may have resulted in an acquittal' (para [25]).

**Nicci Whitear-Nel,
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Matters of Interest to Magistrates

AFRICAN COMMISSION FINDS JUDICIAL DISMISSAL BY ESWATINI VIOLATED AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

Since 2011, Thomas Masuku has been in a kind of judicial limbo following a decision by the authorities in Eswatini to remove him from office as a judge. He was, however, welcomed with open arms in Namibia, where he serves on the high court bench. Now, in an extraordinary development, the African Commission on Human and Peoples' Rights has found that his removal from office by Eswatini violated key articles of the African Charter. The commission has also urged that the government of Eswatini compensate Masuku for the violation of these rights and that it take other steps to amend the situation.

Any reader of the decision by the African Commission on Human and Peoples' Rights on the complaint by jurist Thomas Masuku is taken back in time to the era when controversial, disgraced judge, Michael Ramodibedi, was Chief Justice in Eswatini. Ramodibedi, who died in 2019, left behind judicial chaos in Eswatini and in Lesotho, where he was also Chief Justice, with the judiciary in both still struggling to repair reputational damage. In Eswatini particularly, where the run-in with Masuku came to a head, Ramodibedi committed gross errors that have now come under the magnifying glass of the African Commission. Perhaps one of the gravest of these errors was his blatant lack of independence in relation to King Mswati III, seen partly in the way he recast the judiciary as a servant of Mswati in both his personal capacity and as political head of state.

In June 2011, Ramodibedi, whose position as CJ meant he headed Eswatini's Judicial Service Commission (JSC), laid charges against Masuku, and had him suspended pending an inquiry. Then, during September 2011, Masuku was removed as a high court judge by Mswati on the recommendation of the JSC.

'Forked tongue'

That JSC inquiry, conducted in camera despite Masuku demanding a public hearing, involved Ramodibedi as complainant and as judge. One of the counts on which Masuku was charged at the JSC, and one which came to prominence again in the African Commission's decision, concerned a remark made by Masuku in the course of a judgment, using the words 'forked tongue' when writing about Mswati. It obviously didn't matter to the JSC that what Masuku actually wrote was that Mswati did *not* speak with a 'forked tongue'.

Here's how the JSC dealt with it in finding Masuku guilty: Although the judge had written in the judgment that he 'did not believe that the king could speak with a "forked tongue", it is the very use of those words which constitutes an insult. ... Such inappropriate and uncalled for language can only be explained on the basis of malice'.

One of the complaints made by Masuku to the African Commission was exactly this: he had been removed for something that formed part of a written judgment. In response, the commission said it was of the view that instituting disciplinary proceedings against a judge based on language used in a judgment did not constitute 'serious misbehaviour' – the only grounds for which judges may be suspended or removed from office. 'Rather, this charge amounts to interference with (Masuku's) judicial independence.'

Violated

Charging him with behaviour so serious that it warranted removal from judicial office partly on the basis of language which he used in a written judgment, 'amounts to exerting influence or pressure' on him, thus undermining his judicial independence.

But, added the commission, it also amounts to pressuring the rest of the judiciary, 'given that this action may cause other members of the judiciary to fear disciplinary or other consequences if they use language which is similarly questioned, while in the exercise of their judicial functions.'

The commission therefore concluded that charging Masuku with serious behaviour warranting removal from office, partly on the basis of words he used in a written judgment, 'is an action which directly threatened' the judicial independence of both Masuku and the rest of the judiciary. Thus, it was clear that Article 26 of the African Charter, on the independence of the courts among other issues, had been violated.

Compromised

The African Commission also dealt, at some length, with Masuku's claim that he could not 'exhaust local remedies' before he turned to it for help, as required by the commission's normal procedure. Again, Ramodibedi stood at the heart of the problem: he had instituted a practice directive barring any legal action from being brought against Mswati: 'Summonses or applications for civil claims against His Majesty the King and iNgwenyama, either directly or indirectly, shall not be accepted in ... any ... court'.

Since Masuku had been dismissed by an act of Mswati, it was not possible to bring any legal action to challenge it. The African Commission was satisfied that this practice directive by the CJ meant there were no 'domestic remedies' available to Masuku, and the requirement to 'exhaust local remedies' did thus not apply.

One of the most interesting aspects of the decision is the response of Eswatini to the claims brought against it by Masuku. It urged the commission not to find in Masuku's favour, saying Eswatini had in the meantime changed the rules so that impeachment hearings of judges would be held in public as Masuku had requested. Eswatini said this change to the rules could be seen in the impeachment process against

Ramodibedi himself along with another judge, 'who were found to have compromised the independence of the judiciary'.

'Progressive steps'

Eswatini also quoted other 'progressive steps' that it had meanwhile made to strengthen the independence of the judiciary in that country, including 'the removal from office of the then Chief Justice', 'found to have compromised the independence of the judiciary', as well as removing the practice directive that prohibited litigation against Mswati.

Eswatini further asked the commission to recommend that the parties resolve the dispute 'amicably at the domestic level', since it involved a 'contractual' matter, rather than agreeing to Masuku's request for reinstatement.

In the end, however, the African Commission found three articles of the African Charter had been infringed in the way that Masuku had been treated, and 'urged' the government of Eswatini to compensate him 'a fair and equitable amount' for the 'violation of his right to a fair trial in the JSC disciplinary proceedings'. The commission also urged Eswatini to request that the JSC 'review the charges' it brought against Masuku. This is presumably something that Masuku would want so his name could be officially cleared in Eswatini.

Outside of Eswatini, however, the decision of the African Commission will merely confirm what has been long understood and accepted in other jurisdictions: Masuku's sacking was a gross violation of his rights as well as a blow to judicial independence; further, it underlined his own integrity and his commitment to both human rights and the independence of the judicial institution.

By Carmel Ricard. The above article was published on the *Africanlii.org* website on 21 April 2022. The judgment of the African Commission on Human & Peoples Rights' can be accessed here:

<https://media.africanlii.org/files/judgments/achpr/2021/518/2021-achpr-518.pdf>



A Last Thought

“The transcript reveals that the learned judge referred to Mr Mampane’s evidence as follows: ‘It is sh...t’. Assuming that this transcription is accurate, it warrants this Court noting its disapproval. It is unacceptable for a judicial officer to use profane language in a judgment. It is offensive, to say the least. As judicial officers, we need to show decorum and respect to everyone, irrespective of their station in society or the nature of the evidence they give. Nothing stopped the judicial officer from making credibility findings if he did not believe in the veracity of Mr Mampane’s testimony.”

Per Mbatha JA in *David Papiki Komane v The State* (51/2019) [2022] ZASCA 55 (20 April 2022) Par 25