e-MANTSHI

A KZNJETCOM Newsletter

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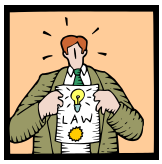
Welcome to the hundredth and eighty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP.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

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

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



New Legislation

1. The South African Law Reform Commission (SALRC) is making a renewed call for comment on its Discussion Paper on alternative dispute resolution in family matters (Discussion Paper 148) by 31 July 2022. The Discussion Paper includes a draft Family Dispute Resolution Bill. Discussion Paper 148 is available on the Commission's website at https://www.justice.gov.za/salrc/dpapers/dp148-prj100D-ADR-FamilyMatters-Nov2019.pdf .The aim of the draft Family Dispute Resolution Bill is to further the development of a family justice system that will provide better access to justice; provide appropriate resolution of all family related disputes, allow the voices of children, parents and other family members to be heard; and to reduce legal costs. Alternative dispute resolution processes such as mandatory family mediation, family arbitration, collaborative dispute resolution and parenting coordination are regulated in the Bill. The Bill further acknowledges the importance of providing parties with the necessary information and education in order to ensure an awareness of their own rights and obligations as well as insight into how the family law system

works. Respondents are requested to submit written comments or representations on the discussion paper and draft Bill to the SALRC by no later than 31 July 2022. There is no need to re-submit submissions that have already been submitted during the first call for comments.

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Recent Court Cases

1. S v Nojozi (3/2022) [2022] ZAECBHC 3 (17 March 2022) 2022 (1) SACR 662 (ECB)

What was required before an arrest for allegedly committing the offence referred to in s 17*(a)* of the Domestic Violence Act 116 of 1998 was justified, was that there had to be reasonable grounds to suspect the complainant might suffer imminent harm as a result of the alleged breach by the respondent, and the violation had to be one that was serious and did damage to the object of the Act.

Hartle J

[1] This matter came before me by way of automatic review.

[2] The accused was charged with contravening section 17 (a), read with section 7 (1) of the Domestic Violence Act, No. 116 of 1998 ("DVA"). Section 17 (a) provides as follows concerning the nature of the offence:

> "17. Offences
> Notwithstanding the provisions of any other law, any person who—
> (a) contravenes any prohibition, condition, obligation or order imposed in terms of section 7;
> …
> is guilty of an offence and liable on conviction in the case of an offence referred to in paragraph (a) to a fine or imprisonment …"

[3] The court's powers in respect of protection orders is set out in section 7 of the DVA as follows:

"(1) The court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from—

(a) committing any act of domestic violence;

(b) enlisting the help of another person to commit any such act;

(c) entering a residence shared by the complainant and the respondent: Provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;

(d) entering a specified part of such a shared residence;

(e) entering the complainant's residence;

(f) entering the complainant's place of employment;

(g) preventing the complainant who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or

(h) committing any other act as specified in the protection order."

(Emphasis added)

[4] An act of domestic violence is defined in section 1 of the DVA as meaning:

"(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;"

(Emphasis added for present purpose.)

[5] Emotional, verbal and psychological abuse is defined in section 1 of the DVA as meaning:

"a pattern of degrading or humiliating conduct towards a complainant, including-

(a) repeated insults, ridicule or name calling;"

[6] The accused pleaded guilty and after the magistrate questioned him in terms of section 112 (2) of the Criminal Procedure Act, No. 51 of 1997 ("CPA") he was convicted and sentenced to twelve months imprisonment of which six months is suspended for a period of three years on condition that he is not found guilty of the violation of a protection order (contravening section 17 (a) of the Domestic Violence Act, 116 of 1998) committed during the period of suspension.

[7] I was concerned upon reading the record of the plea proceedings that what the accused was admitting to, and what conduct on his part he was alleged to have committed in the charge sheet, were at cross-purposes. The prosecutor made no comment regarding the facts admitted by him and the magistrate was ostensibly satisfied that the accused's plea of guilty properly amounted to an admission of guilt in respect of all the essential elements of the offence.

[8] I further had reason to doubt that his conviction was proper, given that the accused appeared to have admitted to insulting the complainant, but evidently not to her face, and in circumstances where the insult was perhaps not of the kind sought to be prohibited by the relevant protection order.

[9] In the result I addressed a query to the magistrate in the following terms:

"The Magistrate is required to URGENTLY comment on the following aspects regarding the plea proceedings in this matter:

1. Although the correct section is alluded to in the court's recordal of the conviction of the accused, is it competent for the state to have charged him with an offence of having contravened "the provisions of section 7 (1) read with section 17 of the Domestic Violence Act 116 of 1999"?

2. The Protection Order, the terms of which the accused was alleged to have breached, was ostensibly only introduced "into evidence" after he was convicted. Should he not have been afforded an opportunity before he was convicted to have identified it and confirmed its contents insofar as it related to the alleged breach of its terms?

3. The breach of the Protection Order is described in the charge sheet as an insult by the accused in calling his mother “a witch” and “by her private parts,” yet his admission was confined to having said (evidently of and not *to*) his mother that she had a “bad heart, a devil’s heart.” According to him this was said after he had already been arrested, and to the officers who arrested him, which he believed to be fair comment. I assume that the state accepted (without any obvious clarification) that this was the insult that was taken to constitute the contravention of the protection order, but if that was so, what then led to the arrival of the police? It seems (based on the fact that the police were summoned at all) that the accused must have said or done something before the arrival of the arresting officer to warrant his arrest in terms of the protection order in the first place. In respect of this period however, that is before the arrest, he claimed to have not uttered any insult to his mother. Indeed, he lamented the fact that he had only asked her for spice and was firm that he had not been in the wrong in any respects in his interaction with her. Therefore, if the admitted words uttered by him (under the circumstances which he says prevailed) constituted “the offence”, can it be said that this amounted to an act of domestic violence in breach of the protection order? Furthermore, did he have the requisite *mens rea* to commit the offence?

4. Assuming that the act of the accused saying what he did when he did, warranted the conviction, was the sentence imposed for a first offender a fair one in all the circumstances and, if so, why?

5. Further and in any event, should the fact that the accused was held in custody from 22 January 2022 until his conviction awaiting trial not have been taken into account in reducing the time that he will serve in prison?

Given the fact that the accused is already serving a custodial sentence, the magistrate is requested to respond to this query by email addressed to the registrar on fmenze@judiciary.org.za by 16h00 on Wednesday, 9 March 2022.”

[10] He replied as follows:

“In response to your minute dated 07 March 2022 (your ref review 3/2022), I respectfully comment as follows:

1. I concede that the charge should rather read "contravention of Section 17*(a)* read with provisions of Section 7(21) of Domestic Violence Act 116 of 1998". This issue will be brought to the attention of the Control Prosecutor.
2. I concede I have made an oversight by admitting the copy of the protection order after conviction, however the protection order was not in dispute.

3. Accused understood the charge when it was put to him. He pleaded guilty. During his explanation he never denied the allegations, instead he added more information. I humbly submit that he had the intention to commit the offence as he was aware of the conditions of the protection order.
4. It is my respectful submission that the sentence is fair in all circumstances. The protection order which was granted against the accused should have acted as a warning and deter the accused from abusing the complainant. It is clear that the intention of the legislation is that, people who commit domestic violence must get heavy sentence, that is gleaned from the penal clause of the domestic violence act. Secondly, there are many incidents of domestic violence in our district and in the whole of South Africa. The courts has a duty to make sure that their orders (protection orders) are respected.
5. The fact that the accused was in custody was considered that is why half of the sentence is suspended."

[11] I am grateful for his instant response which reflects our mutual concern for the fact that the accused is already serving his custodial sentence.

[12] Despite the magistrate's input, a careful perusal of the review record suggests that although the accused begrudgingly conceded that the complainant would have been insulted by him saying the words which he admitted to having said, or felt hurt, by what he said of her, it is not clear that he uttered the insult to the complainant herself or that it is the kind of insult intended to be covered under the protection order.

[13] Evidently the objective of the protection order is to protect the complainant from an insult constituting an act of domestic violence committed by the accused against her as specifically described in the order. The expressed object of the DVA is "to provide for the issuing of protection orders *with regard to domestic violence*". Therefore not only must there be an insult in violation of the protection order, but it must in my view be the same kind of insult prohibited by the protection order.

[14] The interim protection order (which was confirmed on 9 April 2021) reads as follows:

"3. ORDER BY COURT AND PARTICULARS OF ORDER

3.1 The Court orders that :

3.1.1 *The application for a Protection Order is dismissed; or[1]

3.1.2 *An Interim Protection Order is granted; and the Respondent is ordered-

3.1.2.1 *not to commit the following act(s) of domestic violence

(1) Insult or harass the applicant and Simamkele Nojozi.
(2) Assault or threaten the applicant and Simamkele Nojozi."

[15] It would in my view be far reaching to suggest that any insult concerning the accused's mother uttered to someone else about her, would constitute a breach of the terms of the protection order or amount to an act of domestic violence as described in the DVA. The terms of the order are very specific to the parties and the acts sought to be contained by the protection order must be of the kind that harm, or may cause imminent harm, to the safety, health or wellbeing of the complainant within the contemplation of the meaning of an act of domestic violence.

[16] Section 8 (4) of the DVA confirms that what is required before an arrest for allegedly committing the offence referred to in section 17 (a) is justified is that:

"there are reasonable grounds to suspect that the complainant may suffer imminent harm as a result of the alleged breach of the protection order by the respondent."

[17] Subsection (5) is also of relevance and provides as follows:

"(5) In considering whether or not the complainant may suffer imminent harm, as contemplated in subsection (4)(b), the member of the South African Police Service must take into account-
(a) the risk to the safety, health or wellbeing of the complainant;
(b) the seriousness of the conduct comprising an alleged breach of the protection order; and
(c) the length of time since the alleged breach occurred."

[18] Both these sections confirm to my mind that the violation (the breach) must be one that is serious, and does damage to the object of the DVA.

[1] The issuing magistrate appears not to have made any election here, but since the "interim protection order" was made final, the application was obviously not dismissed.

[19] Further, and self-evidently so, if the accused admitted to the fact that he uttered an insult *of* the complainant (as opposed *to her*), I cannot accept that he formed the requisite intention to have committed an offence by violating the terms of the protection order.

[20] My concern is demonstrated by the follow excerpt from the transcript which follows after the accused's explanation to the court of what had happened up to the point of the arrival of the arresting officers. This prequel involved an intervention by his uncle and an apology to his mother for whatever else he might have said to her, which was not canvassed by the court's questioning:[2]

"ACCUSED: But I was surprised when … [indistinct] arrived there.
COURT: Who are they?
ACCUSED: The arresting officers.
COURT: Are they police officers?
ACCUSED: Yes
COURT: And then what happened on their arrival?
ACCUSED: It is then that I said something wrong, Your Worship, saying that she had a bad heart, a devil's heart.
COURT: Who was having a bad heart?
ACCUSED: I was referring to my mother, Your Worship.
COURT: Yes
ACCUSED: That was all and I was then arrested.
COURT: When you were uttering those words that she has a bad heart, a devil's heart?
INTERPRETER: Sorry, Your Worship?
COURT: When he was uttering those words that she has a bad heart, a devil's heart, was he not insulting her?
ACCUSED: I was insulting her but I did not understand it at the time.
COURT: What caused you not to understand it?
ACCUSED: It is because I didn't know that she can call the police for me because of spices.
COURT: Did you know that you were uttering insults when you call a person that she has got a devil heart?
ACCUSED: I didn't understand then, Your Worship, but I understand it now. I didn't go there … [indistinct] but I said she has a devil's heart.

[2] The accused describes his mistake, up to that point, being that he argued back, or responded to the provocation of his mother's insults of him and his father. He did not however admit to any wrong or violation of the protection order that would have justified the suspended warrant for his arrest being carried into effect. I fear therefore that his arrest may have been effected for an unauthorised purpose under the guise of the provisional warrant for his arrest (see section 8 (1) of the DVA), although the police may have been summonsed for a different reason. These facts would however obviously have been within the purview of the prosecutor and ought if relevant to have been brought to the attention of the magistrate since the admitted facts seem different from what the charge sheet indicates.

COURT: Yes, this is exactly what I am asking. When you say to a person he has got a devil's heart, are you not insulting that person?
ACCUSED: Because I am a believer, it is not an insult there at my church.
COURT: It is not an insult?
ACCUSED: Now that I understand it, Your Worship, that this is against the law, Your Worship.
COURT: No, I was just asking you is that the correct way of talking to a person?
ACCUSED: No, Your Worship.
COURT: When you were uttering those words, what was your purpose?
ACCUSED: I thought that I would feel better, Your Worship.
COURT: And how did you expect her to feel?
ACCUSED: It was not my intention to abuse her, Your Worship.
COURT: Do you think that she will feel happy?
ACCUSED: I only understand it now, Your Worship, that it was …. [indistinct] her, Your Worship.
COURT: Now that you now realise, what do you think those words did to her?
ACCUSED: I think they hurt her. That's the reason why I am pleading guilty.
COURT: And you were aware that according to the conditions of the protection order, you are not supposed to insult her?
ACCUSED: Yes.
COURT: And before you uttered those words, you were reminded by your uncle about the conditions of the protection order.
ACCUSED: Yes, Your Worship, I apologised, she accepted the apology but later called the police for me. That's why I say that … [indistinct].
COURT: And you were aware at that time that if you contravene a protection order, that is punishable by law?
ACCUSED: Yes, it was explained to me, Your Worship.
COURT: Mr Nojozi, the Court is satisfied that indeed you are pleading guilty to the offence of violating the conditions of the protection order. You are found GUILTY as charged."

[21] Whilst I appreciate that acts of domestic violence are egregious and fall to be sentenced appropriately - I agree with the magistrate that the sentence would have been justified upon a proper conviction, I am not satisfied on the admitted facts that it can be established that the accused committed a breach of clause 3.1 of the protection order or that he had the necessary criminal intention to violate the terms of the order.

[22] I accept, given the magistrate's response above, that perhaps something may have been lost in the English translation.[3] It therefore appears necessary in my view and in the interests of justice (given the seriousness of the offence) for the

[3] There was but a vague suggestion, implied in the accused's concession that this is not a correct way "of talking to a person" that he did mean to admit that he insulted the complainant directly. The question remains however, why would the utterance made under those circumstances amount to an insult prohibited by the protection order?

conviction to be set aside and for the matter to be referred back to the magistrate's court for fresh plea proceedings to be undertaken, should the prosecution wish to do so.

[23] In the result I issue the following order:

1. The conviction and sentence are set aside; and
2. The matter is referred back to the magistrate's court for proceedings to commence *de novo*, should the prosecution wish to do so.

2. Khuboni v S (AR315/2020) [2021] ZAKZPHC 73; 2022 (1) SACR 470 (KZP) (20 August 2021)

In a judgment it is not sufficient for a court to merely come to a decision, the reasons for such a decision must be articulated as well.

Mossop AJ (Bedderson J concurring):

[1] This appeal, unfortunately, has become focussed on the quality of the judgment delivered by the regional magistrate of Ixopo. The appellant was one of four people who stood trial in the Ixopo Regional Court on a charge of murder, a charge of attempted murder, a charge of public violence and two charges of kidnapping. The appellant was granted a discharge at the end of the State case in respect of one of the counts of kidnapping. At the end of the trial, he was acquitted on the charge of public violence but he was convicted on the count of murder, the count of attempted murder and the surviving count of kidnapping. For the purpose of sentence, the counts of murder and kidnapping were taken as one and he was committed to prison for 15 years. On the attempted murder count he was sentenced to 10 years imprisonment. The sentences were not ordered to run concurrently and accordingly he was condemned to an effective 25 years in prison.

[2] The appellant was granted leave to appeal in the court a quo against convictions and sentences. He is the only one of the four accused who is before us. The appellant was represented on appeal by Miss Franke and the State was represented by Mr Gula. They are both thanked for their helpful submissions.

[3] The events that led to the conviction of the appellant occurred at the Mahehle location, near Ixopo on 28 December 2018. Essentially, the events relate to an incident of mob justice. It was believed by the community of that location that one Khehla Mokoena, the deceased in the murder charge, referred to hereafter as 'the deceased', had previously been involved in a murder himself. He was fetched from

his place of residence, beaten, questioned, and as a consequence of what he said, Mr Sphesihle Mbhele (Mr Mbhele) was fetched from his abode. Mr Mbhele was the victim in the attempted murder charge. Both the deceased and Mr Mbhele were thereafter beaten further and the deceased was ultimately killed. Mr Mbhele suffered extensive injuries, but survived, and was subsequently hospitalised for nine months.

[4] In convicting the appellant, the regional magistrate briefly summarised the evidence he heard from the State witnesses. The emphasis here is on the word 'briefly': the summary of all the evidence was dealt with in approximately a page of the transcript of evidence. The regional magistrate dealt with all the evidence of the accused and their witnesses in one sentence:

> 'They admitted they were on the scene, but each denied assaulting the deceased or complainant. That was the evidence for the defence.'

[5] The regional magistrate after briefly considering the nature of the onus on the State, went on to state the following:

> 'The Court is satisfied that all four State witnesses were good, reliable witnesses, that the Court can rely on their identification of the perpetrators.
> I also find honesty in their evidence in that they said number 4 was there, but he was not part of it. They could easily have lied and said he also assaulted the people.
> Therefore the Court accepts evidence of the four State witnesses as the truth.
> I find the accused versions as false.'

[6] There was no attempt made whatsoever to consider the appellant's version or the version of his witness or to provide the reasons behind the conclusion reached regarding the trustworthiness of the State witnesses evidence.

[7] I have a fundamental difficulty with the regional magistrate's conclusion that the evidence of the State witnesses was the truth and could accordingly be accepted by him because the State witnesses did not all adhere to a single version. There were contradictions in the State case that needed to be explained and dealt with in the judgment of the court:

(a) The first State witness, Mr David Xaba (Mr Xaba) was the brother of the deceased in the murder count. He had been present at all material times and had observed the death of his brother and the assault of Mr Mbhele. As regards the assault of Mr Mbhele, the following exchange occurred when Mr Xaba was being cross-examined:

> 'Who assaulted him? --- As I have said, Your Worship, I will not be able to explain as to who did what, because I do not know their names.
> Not any of the accused? --- No, Your Worship, no one from the accused before Court.'

However, the victim of that vicious assault, Mr Mbhele, stated that the appellant had struck him with a knobbed stick. No attempt was made by the court to analyse and explain this difference. Obviously, both versions cannot be the truth and the court was not in a position to accept both versions. In accepting the truthfulness of all the State witnesses, this is what the regional magistrate did.

(b) Mr Xaba went on to state in cross examination that the appellant had assaulted the deceased in the presence of the station commander of the South African Police Services at Creighton, who had come to the scene. However, that station commander, Lieutenant-Colonel Dwaga, who gave evidence, indicated that he would not say that any of the accused hit the deceased or Mr Mbhele;

(c) Beatrice Dlamini (Ms Dlamini) was the sister of the deceased in the murder count. For some unexplained reason, the regional magistrate referred to her as 'Patrick Dlamini' in his judgment. Ms Dlamini testified that the appellant carried 'something like a stick'. When the appellant testified, he pointed out that other witnesses had said that he carried a knobbed stick. He was correct in this regard (the appellant's version was that he did not carry either a knobbed stick or a stick). The regional magistrate intervened and said

> 'There's no difference. Next question.'

With due respect, there is a difference. The previous witnesses had been clear that it was a knobbed stick. This difference needed to be explored and considered by the regional magistrate.

[8] Besides these external contradictions, there was also a significant internal contradiction in the evidence of Mr Xaba. In his evidence in chief, he testified that the appellant had struck the deceased, his brother, with a knobbed stick. However, when cross examined, he stated as follows to a question put to him by accused two's legal representative:

> 'Okay, you agree with me that those people who physically assaulted your brother leading to his death, they are not before court, they are still out there? --- That is correct, Your Worship, they are not here.'

No attempt was made by the court to explain how it dealt with this aspect of the evidence of Mr Xaba or how, having accepted his evidence, he then found the appellant guilty on the count of murder.

[9] As regards the conviction of the appellant by the regional magistrate on the remaining charge of kidnapping, being the kidnapping of the deceased, there was not a scintilla of evidence that indicated that the appellant was ever present at, or involved in, the kidnapping of the deceased. As Mr Xaba explained, the appellant made his appearance at the hall, where the deceased was already tied up. He could not have been involved in the taking of the deceased from Mr Xaba's home nor his removal from the granny's home to the hall. He ought to have been acquitted on that count at the stage that he applied for his discharge in terms of section 174 of the Criminal Procedure Act, 51 of 1977.

[10] In rejecting the appellant's evidence, the regional magistrate ignored his evidence that he had been at a traditional marriage ceremony on the day in question and that when he arrived back at the area of his homestead he noticed a crowd over at the hall. Having alighted from his transport, the appellant was carrying a bag and some plastic bags. Spying three boys from his area, he roped them in to help carry his bags to his homestead. No disrespect is meant by the use of the word 'boys': this is how they were described in the transcript of evidence and no mention was made of their respective ages. They may well thus have been boys. The boys were named by the appellant and one of them, Siyanda Radebe, was later called to give evidence on behalf of the appellant. Someone told them that there were people at the hall because a young man had been caught who had killed a girl that was pregnant. The appellant and his helpers went to the appellant's homestead, left the parcels on his bed and repaired to the hall to see what was going on there.

[11] At the hall they found the deceased 'sleeping' in the middle of the road, as the appellant described it, and his wrists were tied with rope. The appellant knew the deceased as he had previously gone fishing with him. He could see that the deceased was injured and he went and spoke to him, asking him if he had been involved in the killing of the young lady. The deceased allegedly admitted that he had and that he had been drunk and with Mr Mbhele when the young lady was killed. Mr Mbhele was then fetched and brought to the hall. Mr Mbhele was asked whether he had been involved in the death of the young lady but denied that he had been. He was then assaulted. The appellant, on his version, allegedly tried to intervene and stop the assault. He then told the boys who had gone with him to the scene that should leave and they all withdrew. He denied striking either the deceased or Mr Mbhele with a knobbed stick.

[12] The appellant was hardly cross examined by the State, the cross examination filling just under two and half pages of the transcript of evidence.

[13] Siyanda Radebe testified on behalf of the appellant. He confirmed the evidence of the appellant in all material respects, including that the appellant spoke to the deceased while he lay on the ground and that the appellant did not carry anything and therefore did not assault either the deceased or Mr Mbhele.

[14] Again, as with the appellant, Mr Radebe was barely cross examined by the State, the cross examination filling less than one and half pages of the transcript of evidence.

[15] The regional magistrate indicated in his judgment that it was the court's duty to weigh up the evidence of the accused persons. He was undoubtedly correct in this regard. In saying so, he must have included a weighing up of the evidence of the appellant and his witness. Having acknowledge that such evidence had to be considered and evaluated, the regional magistrate then did not do that as his 'weighing up' merely consisted of him pondering on the likelihood of the State witnesses knowing who had carried out the assaults, especially Mr Mbhele who had been close to his assailants.

[16] It is trite that the State is required to establish the guilt of an accused person beyond reasonable doubt. The accused person is entitled to be acquitted if there is a reasonable possibility that his version may be true. In dealing with the relationship between these two concepts, the court in In *S v Van der Meyden*,[4] explained that:
'These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.'

[17] It is also trite that a conviction can only follow upon a proper evaluation of the evidence led before the court. Only then can it be concluded that there exists a prima facie case for an accused person to answer. The failure by the regional magistrate to properly evaluate the evidence adduced in the State case but to accept it all, including the contradictions previously alluded to, and his failure to consider the appellant's evidence at all but to nonetheless reject, places this court in an invidious position. No specific credibility findings were made by the regional magistrate. This is

[4] *S v Van der Meyden* 1999 (2) SA 79 (W) at 80I-81B.

not surprising because in the absence of a proper evaluation of all the evidence, no credibility finding can be made.

[18] It is not sufficient that a court comes to a decision: the reasons for that decision must be articulated as well. In *Schoonwinkel v Swart's Trustee*,[5] De Villiers JP stated the following:

> 'This court, as a Court of appeal, expects the court below not only to give its findings on the facts, but also its reasons for those findings. It is not sufficient for a magistrate to say, "I believe *this* witness, and I did not believe *that* witness". The Court of appeal expects the magistrate, when he finds that he cannot believe a witness, to state his reasons why he does not believe him. If the reasons are, because of inherent improbabilities, or because of contradictions in the evidence of the witness, or because of his being contradicted by more trustworthy witnesses, the Court expects the magistrate to say so. If the reason is the demeanour of the witness, the Court expects the magistrate to say that; and particularly in the latter case the court will not lightly upset the magistrate's finding on such a point.'

Whilst this dictum was intended for a civil case it is equally applicable to a criminal case.

[19] In *S v Singh*,[6] Leon J opined as follows:

> 'Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the state witnesses that, therefore, the defence witnesses, including the accused must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and demerits of the State and defence witnesses but also to the probabilities of the case. It is only after so applying its mind that the court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond reasonable doubt. The best indication that a court has applied its mind in the proper manner in the above-mentioned example is to be found in its reasons for judgement including its reasons for the acceptance and rejection of the respective witnesses.'

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[5] 1911 TPD 397 at 401.
[6] 1975 (1) SA 227 (N) at 228.

[20] A trial court's failure to substantiate the judgment and engage in a proper evaluation of the evidence infringes upon the appellant's right to a fair trial, which includes the right to have his appeal properly adjudicated on by a higher court. In *S v Molawa; S v Mpengesi,*[7] the court stated:

> 'There is indeed a further compelling reason why reasons for judgement ought to be furnished. The right to appeal or review is entrenched constitutionally for every accused person. In this regard s35(3)(O) of the Constitution of the Republic of South Africa, 1996, provides as follows:
>
> > "(3) Every accused person has the right to a fair trial, which includes the right –
> > …
> > (o) of appeal to, or review by, a higher court"
> > These are certainly important rights that should not be overlooked'.

[21] In addition to the aforegoing, section 93 *ter* (3)(e) of the Magistrates' Courts Act[8] provides as follows:

> 'It shall be incumbent on the court to give reasons for its decision or finding on any matter made paragraph (d).'

[22] It appears as if the regional magistrate acted in the exact manner cautioned against in *Singh*.[9] He accepted the State's evidence and therefore rejected the appellant's evidence without considering its merits. The judgment appealed against gives us no assurance that the court gave due consideration to the matter and did not act arbitrarily. The conviction on the count of kidnapping is particularly worrying for the reasons previously explained. We are therefore placed at a distinct disadvantage. We do not know how the regional magistrate reconciled the differences in the State case or why he disbelieved the appellant and his witness. It follows that we do not know on which facts the regional magistrate based his decision to come to a finding that the appellant's guilt had been established beyond a reasonable doubt.

[23] The regional magistrate had the opportunity of observing all the witnesses and their demeanour when giving evidence. Demeanour is an important factor in weighing up the credibility of a witness. Demeanour was not addressed at all by the regional magistrate and while we know what decision he came to, his reasons for doing so remain unknown. We do not have that advantage and the judgment does not assist us in any way in this regard.

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[7] 2011 (1) SACR 350 (GSJ) at para 15.

[8] Act 32 of 1944.

[9] 1975 (1) SA 227 (N) at 228.

[24] However, after considering all the evidence placed before us, it seems to me that the appellant's evidence and that of his witness could reasonably possibly have been true. Certainly, there were no discrepancies in the evidence of the appellant and that of his witness, Mr Radebe. The ineffectual cross examination of the appellant and his witness in no way undermined the appellant's version. In my view, the State did not prove the guilt of the appellant beyond reasonable doubt on any of the counts that he faced.

[25] One final aspect of the matter needs to be mentioned. It is implicit in our constitutional dispensation that all persons have inherent human dignity.[10] This includes those who come before a court, be they witnesses or accused persons. Such persons are to be treated with dignity by a judicial officer. All are human beings and are entitled to be treated politely and respectfully. It is so that very often accused persons will impress upon a court to accept a fanciful defence in order to escape conviction. When faced with such versions, it is incumbent upon the judicial officer to maintain his equanimity and continue to treat the accused with respect, even if he does not believe or accept the accused's version. Unfortunately, it seems to me that this did not occur in this matter. I mention the following instances harvested from the transcript of evidence:

(a) Accused one had just been cross examined when the following exchange occurred between the court and him:

> 'COURT' Who assaulted them? --- Assaulted who?
> Sir, don't make a fool of me here. We are talking about the deceased and a second complainant --- I don't know because I am saying that I did not see.'

(b) Later with the same accused, the court asked the following:

> 'And why are only the four of you pointed out? --- I cannot explain that, Your Worship, because sometimes it happens that a person would harbour some hate towards you.
> Ag please, don't come up with that type of rubbish. Thank you. Stand back.'

(c) After the appellant had been cross-examined, the court engaged in the following exchange with him:

> 'Oh? Did you call an ambulance? --- I was not able to call an ambulance

[10] Section 10 of the Constitution of the Republic of South Africa, 1996.

> You see how ridiculous your answer is? You contradict yourself in the very next question.'

[My underlining]

[26] These are injudicious remarks that should be made to an accused person by a presiding officer. They display an unnecessary aggression towards the accused and give the impression that the court has already come to a decision that the accused is guilty. This impression must not be created and exchanges of this kind must not be repeated.

[27] I would accordingly propose the following order:

(a) The appeal is upheld and the convictions and sentences of the appellant on all the counts, being those of murder, attempted murder and kidnapping are set aside;

(b) That a copy of this judgment be sent to the Regional Court President of KwaZulu-Natal by the Registrar of this court.

From The Legal Journals

Visser, Jo-Mari

Independent judicial research of forensic evidence in criminal trials – A South African perspective

2021 SACJ 415

Abstract
As forensic scientific evidence becomes not only more advanced but progressively more important in criminal trials, so too does the pressure on presiding officers to accurately assess such evidence, not only for admissibility but also reliability. In the United States of America (USA), judges are mandated to act as gatekeepers of expert opinion and as such are tempted to engage in independent judicial research of

science and medicine to accurately fulfil this gatekeeping duty. This temptation is intensified by the information explosion on the Internet and the vast array of available information, both legal and non-legal in nature. While courts are entitled to conduct legal research in deciding disputes, controversy and ambiguity exist on whether judicial research on facts should be allowed. In South Africa, the Constitutional Court in S v Van der Walt 2020 (2) SACR 371 (CC) focused on procedural fairness and held that independent judicial research violates accused persons' right to challenge evidence in terms of s 35(3)(i) of the Constitution. But a blanket prohibition on this type of judicial research excludes many significant advantages that could potentially secure more accurate decisions. This article considers the legal positions on independent judicial research in the USA and South Africa, reviews the pros and cons of such research, and finds that a flexible approach might alleviate some dangers and exploit some advantages.

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

Contributions from the Law School

Reflections on the Domestic Violence in South Africa

In 2021, Statistics South Africa released a report, Crimes Against Women in South Africa which indicated that one in five women are the victims of abuse by intimate partners. In 2016 it was noted that every four hours a women was killed whereas in 2015, the femicide rate was half that of the global figure (https://www.newframe.com/talking-about-gender-based-violence-is-not-)
These high statistics and frequent reoccurrence of abuse (*Seria v Minister of Safety and Security and Others* (9165/2004) ZAWCHC 26 at 2) requires us to examine the rules set in place by the South African legal system to determine its suitability in protecting victims of domestic violence. The focus of this note will be on the *Domestic Violence Act* 116 of 1998 as well as a brief discussion of whether the law effectively

protects victim of domestic violence against ‘cyber-bullying’. Before this Act came into effect, certain measures were put in place to deal with instances of domestic violence in South Africa. Most notably *The Prevention of Family Violence Act* 113 of 1993. However, this Act suffered from several deficiencies: most notably the inadequate protection of abused persons due to the minimal protection that it afforded victims. This was the result of the narrow definition of domestic violence. For instance, the Act was not applicable in cases where the parties were not married (South African Law Commission Research Paper on Domestic Violence (1999) Report Pretoria).

With the passing of the 1996 Constitution, it became clear, that domestic violence infringed several of the victims of domestic violence constitutionally guaranteed rights. These include the right to life (s 11), the right to dignity (s 10), the right to bodily integrity (s 12(2)(b) and the right to be treated equally (s 9(3)). Since the Constitution is binding law in the Republic, the state has a duty to protect rights of citizens to be free from domestic violence (s 39(1); see also *S v Baloyi* 2000 (2) SA 425 (CC at par [11]). In addition, South Africa has a duty in terms of its international obligations, to protect victims of domestic violence (see for instance article 1(g) of the Protocol on African Charter of Human and Peoples Rights 2005 of Women in Africa which requires enactment of legislation to define domestic violence, as well as indicate the types of acts that women are protected against (article 1 j such as economic harm, psychological harm or even arbitrary restrictions on fundamental freedoms; including threats to commit such acts.) Therefore, in order to cure the deficiencies in the Prevention of Family violence Act, and to protect constitutional rights of the victims, the Domestic Violence Act 116 of 1998 was implemented. However, this Act was not without shortcomings. In order to understand these deficiencies, it is necessary to understand how the Act defines the term domestic violence.
According to section 1 of the Domestic Violence Act, domestic violence is defined as “physical abuse; sexual abuse, emotional, verbal and psychological abuse; economic abuse; intimidation, harassment, stalking; damage to property; entry into the complainant’s residence without consent where the parties do not share the same residence or any other controlling or abusive behaviour towards the complainant where such conduct harms or may cause imminent harm to the safety, health or wellbeing of the complainant”.

S 2 of the Domestic Violence Act further provides that the police must provide assistance at the scene of a domestic violence incident if it is required. This may necessarily include finding suitable accommodation or include medical treatment. Further s 3 states that the police must arrest a suspect, if it is reasonably suspected that the person has committed an act of domestic violence. This can be done without a warrant (A Spies “Continued State Liability for Police Inaction in Assisting victims of domestic violence: A reflection on the implementation of South Africa’s domestic violence legislation” (2019) *Journal of African* Law 55). Further in terms of s 8, if a protection order has been issued and breached, it is within the discretion of the police

to arrest the abuser, if the complainant will suffer imminent harm otherwise (55-56). It is also the duty of police to as per the National Instructions of the DVA to maintain records of domestic violence complainants and to keep copies of protection orders an arrest warrants (at 56) and also correctly advise complainants. Failure to do so is determined by the standard of the reasonable person which may lead to the Minister of Police being vicariously liable (see further *Minister of Safety and Security v Venter* 2011 (2) SACR 67 (SCA) where the police incorrectly explained the process of obtaining a protection order, by telling the plaintiff that he required a case number before he could get an interdict).

However, several problems exist with the definition set out in section 1 of the Domestic Violence Act, three of which this discussion notes. First, s 1 of the Act does not make domestic violence a crime. Rather the abuser is likely to be charged with several common law offences such as assault with intention to do grievous bodily harm. Second, s 1 does not clarify whether threat of economic abuse is tantamount to a criminal offence. Only actual deprivation of resources amounts to abuse and is subject to penalty under the Act. This would mean that South Africa is in breach of its international obligations since according to article 1 j of the Protocol on African Charter of Human and Peoples Rights 2005 states that threats of economic abuse constitutes a form of violence (G Keaorata Shortcomings of the South African Domestic Violence Act 116 of 1998 in comparative perspective" LLM 24).
Last, the issuing of issuing of protective orders under the Act, which are limited in application. In theory, the perpetrator is required to stay a specific distance away from victim and her children and places they may frequent. Would the Domestic Violence Act protect victims in instances of 'cyber-violence'? Cyber-violence 'refers to repeated abuse committed by one person (the abuser) against a current or former intimate partner through the use of digital technology' (H Al-Alosi "Cyber-Violence: Digital Abuse in the Context of Domestic Violence" (2017) *University of South Wales Law Journal* 1573). Through the use of technology, it has afforded the abusers the opportunity to maintain abuse both during the relationship and after the separation (Al-Alosi supra).
Cyber violence can include but not be limited to the following types of behaviour: 'revenge porn' (distribution of images of an intimate nature of partners without consent), location tracking via smartphones as well as harassment on social media platforms such as Facebook (at 1573). A study conducted in SmartSafe Project involving 46 female victims identified the following technology and online platforms as being most commonly used by abusers to commit cyber-violence: smartphones (82 %), mobile phones (82%), Facebook (82%), email (52%), and Global Positioning Systems (GPS tracking (29%) (at 1580). Certain spyware software facilities key-logging records keystrokes entered into a computer and allows the installer to collect personal information including addressing passwords and banking information. Remote keystroke technology does not require physical access to the victim's personal device and can be installed using email with software attached. Once the person downloads the attachment the abuser then automatically has access to

monitor the victims' online activities (Al-Alosi supra at 1584; see further Casana and Antipov [No 3] [2016] FamCa 653, 12; see also Roncevic v Boxx [2015] ACTSC 53).
What is noteworthy is that courts around the world are starting to recognize certain types of behaviour as domestic abuse. This is particularly salient where the victim does not make the connection between behaviours such as monitoring cell phone use, or viewing the abusers 'constant checking up' as actual abuse (Al-Alosi supra at 1586). In Australian Courts for example, the position seems to be accepted that the uploading of material onto Facebook does constitute family violence within the broad definition (Al-Alosi supra; see further Lackey and Mae Neville [2013] FMCAfam 284, [9]-[10]; see also Harrell and Hancock-Harrell [2016] FamCa 831, at 59] where father continued sending bullying and verbally abusive, offensive harassing emails despite the existence of a protection order).
Previously, South Africa adapted common law principles to address online offences resulting in a fragmented approach (D Sive & A Price "Regulating Freedom on Social Media" (2019) *South African Law Journal* at 69). The present position as it pertains to the right to freedom of expression (s 16) is vigorously protected in our law and extends to both the content of expression but also the means of dissemination (Sive and Price supra at 57; see further *Print Media South Africa v Minister of Home Affairs* 2012 (6) SA 443 (CC at para [53]; see also *Ahmet Yidirim v Turkey* [2012] ECHR 2074. However, this does not leave the victim of abuse without remedy. The right to freedom of expression must be tempered with the overarching values set out in the Bill of rights when developing the common law (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para [33]); at 66). Therefore, it could be argued, that s 16 does not extend to propaganda for war, incitement of imminent violence and advocacy of hatred based on a prohibited ground. This point is clearly demonstrated in ongoing developments in the law of delict (Dive and Price supra at 67).

It is therefore arguable that South African law, already has infrastructure in place to effectively regulate online content. This can be achieved in one of two ways. Current common law remedies utilized by the courts that are proving effective include convictions under the common law crime of *crimen iniuria*, that is the unlawful and intentional impairing of dignity or privacy of another person (Dive and Price supra at 59; see further *ANC v Sparrow* [2016] ZAEQC1), interdicts ordering persons to remove defamatory statements from Facebook (Heroldt v Wills 2013 (2) SA 530 (GSJ)). In addition, the courts are also regulating freedom of expression through focusing on electronic communications and transactions (Electronic Communications and Transactions Act 25 of 2002), cyberstalking (Protection from Harassment Act of 2011), the protection of privacy and personal information (Protection of Personal Information Act 4 of 2013) and the interception of monitoring of online communications (The Regulation of Interception of Communications and Provision of Communication Related information Act 70 of 2002; Dive and Price supra at 68). In addition, the Cybercrimes Act 19 of 2020 has adapted existing offences and created new offences which are associated with revenge porn (Dive and Price supra at 68). For example s 16. (1) states that: " Any person (''A'') who unlawfully and intentionally

discloses, by means of an electronic communications service, a data message of an intimate image of a person (‘‘B’’), without the consent of B, is guilty of an offence. (2) For purposes of subsection (1)— (a) ‘‘B’’ means— (i) the person who can be identified as being displayed in the data message; (ii) any person who is described as being displayed in the data message, irrespective of the fact that the person cannot be identified as being displayed in the data message; or (iii) any person who can be identified from other information as being displayed in the data message; and (b) ‘‘intimate image’’ means a depiction of a person— (i) real or simulated, and made by any means in which— (aa) B is nude, or the genital organs or anal region of B is displayed, or if B is a female person, transgender person or intersex person, their breasts, are displayed; or (bb) the covered genital or anal region of B, or if B is a female person, transgender person or intersex person, their covered breasts, are displayed; and (ii) in respect of which B so displayed retains a reasonable expectation of privacy at the time that the data message was made in a manner that— (aa) violates or offends the sexual integrity or dignity of B; or (bb) amounts to sexual exploitation.

In addition, the distribution of online data messages that threaten physical violence against a person is also criminilised (at 69). For instance, s 15 states that “a person commits an offence if they, by means of an electronic communications service, unlawfully and intentionally discloses a data message, which— (a) threatens a person with— (i) damage to property belonging to that person or a related person; or (ii) violence against that person or a related person; or (b) threatens a group of persons or any person forming part of, or associated with, that group of persons with— (i) damage to property belonging to that group of persons or any person forming part of, or associated with, that group of persons”.

Conclusion

While certain advancements have been made it theoretically possible to punish domestic violence on online platforms, the Domestic Violence Act will need to be revised to address some of the shortcomings listed in terms of the Act, in order for South Africa to fully meet its international obligations in terms of the Protocol on African Charter of Human and Peoples Rights of which South Africa is a signatory.

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Matters of Interest to Magistrates

STATE OF THE JUDICIARY: NEW REPORT ON MALAWI, NAMIBIA, SOUTH AFRICA

For many judges it will come as a relief to hear some good news for once, in the form of largely positive public perception about the judiciary and its role in society. The good news emerges from a just-published report on the state of the judiciary in Malawi, Namibia and South Africa. Every member of the bench in those three countries will be only too well aware of the short-comings of their own judicial system, exacerbated by the restrictions imposed by the Covid pandemic, among a number of other problems. But the three-part report by the Democratic Governance and Rights Unit of the University of Cape Town's law school found generally positive views by court users about how judges in these jurisdictions are doing their work. Another key finding is that perceptions of corruption in the court are significantly lower in the closely-targeted court user surveys, than had been found in opinion surveys of the general public.

One of the key issues on the minds of everyone concerned about justice in the three countries examined by the new report, Malawi, Namibia and South Africa, is the extent of corruption, perceived or real, in the legal system, the courts and the judiciary.

Judges are easy targets for unscrupulous politicians and others. They may make allegations about corruption, without proof, to sow doubt in the public mind about the legitimacy of judicial decisions. The resulting rumours and speculation may work to the benefit of those spreading the allegations, but they weaken public trust in the judiciary, and, ultimately, in the rule of law and the entire democratic system.

Sometimes there may even be truth in claims of judicial corruption: tribunals to investigate such allegations against individuals are hardly unknown in the region, with the latest such tribunal about to be set up in Kenya to investigation claims against a high court judge.

Participate

With this in mind, I turned eagerly to the section of the new report that deals with public perceptions of corruption.

In previous research by Afrobarometer, the respected African opinion-gauger, it turned out that people interviewed in Tanzania, Cape Verde and Mauritius had the most positive views of judges and magistrates, with only one in 10 respondents

saying that most or all judges and magistrates are corrupt. At the other end of the scale, people interviewed from Gabon (58%), Cameroon (60%) and Mali (62%) had the most negative perceptions of judicial corruption. Somewhere in the middle come Malawi (30%), South Africa (36%) and Namibia (23%).

But the researchers who put together the new report wondered about the experiences of those who actually use the courts: members of the public and legal professional. Have they been asked to participate in corruption? If so, what was their response?

Gift

From their interviews it emerged that five percent of the Namibians and South African interviewed at the courts reported that they, or someone they know, had been asked to pay a bribe, give a gift or do a favour for a court official to get the help they needed. In Malawi the figure was higher (14%).

And what about legal professionals? In Namibia five percent of professionals reported that they paid a bribe to get the help they needed – exactly the same percentage as among lay users of the courts. In SA, 11% of legal professionals admitted having to 'engage in this type of behaviour', while in Malawi the figure was even higher, standing at 32%.

But being asked for an unlawful payment isn't the end of the matter. The researchers wanted to establish whether those exposed to corruption felt empowered to report illicit behaviour, so they asked whether the respondents would report requests for a bribe, gift or favour. Overall, between 78% and 87% said they would report.

Negative repercussions

If so, to whom would the report be made? And if not, why not?

Most court users in Namibia (55%) and SA (42%) said they would report to the police. Respondents in Malawi were less keen on reporting to the police (29%).

It may come as a surprise to readers to discover that a large proportion of lay court users said they would 'also report to the Judge President or the head of the court administration.'

And why would those who said they would not report any request for a bribe, take that decision? Some 13% of Malawian lay court users said it 'would not make a difference'. Far more gave as their reason that they were worried about potentially negative repercussions of reporting any corrupt behavoiur.

Reprisal

In addition, a large proportion of Malawian lay court users (46%) said they did not know where to report it.

Faced with this figure, the writers of the report said it seemed that there were a surprisingly large number of people 'who might benefit from additional information about what to do when faced with a difficult situation like this.'

The percentage of lay court users in SA (57%) and in Namibia (61%) who felt reporting would make no difference was rather higher than in Malawi, while it turned

out that the percentage of SA legal professionals who would be worried about reprisal was the same as in Malawi.

Public information drive

The researchers conclude: 'The number of lay court users who felt that reporting would not make a difference, and were unaware of who to report to, suggests that a public information drive in all the countries would be beneficial. It would also be helpful for instances where corruption was successfully prosecuted … to be publicised.'

More generally, the researchers noted that even though the faith of Malawians and South Africans in the courts had lessened over the past decade, 'the judiciaries in both countries remain the most trusted branches of government.'

By contrast, in Namibia, the most trusted branch of government has, for some time, been the presidency (68%), followed by the courts (54%) and then the legislature (45%).

Must-read

The three-part report (which also comes with a fulsome summary) ranges over a number of other critically important issues, and I found the comparative section – contrasting the number of judges in the three countries, the number of women judges, the composition of the Judicial Service Commission and the way these commissions operate, for example – among the many of particular interest.

It's a must-read for judges, lawyers, and academics in the three target countries, but it will also be important reading for jurists elsewhere: they may well recognise many of the problems with which they are struggling and find helpful ideas from the detailed recommendation section of the report.

Carmel Ricard

The above article appeared on the *africanlii.org* Website on 5 May 2022. The report referred to can be accessed here:
https://www.judgesmatter.co.za/wp-content/uploads/2022/04/SUMMARY_State-of-Judiciary_Malawi-South-Africa-and-Namibia_FINAL-2022.pdf

A Last Thought

"The functions of a magistrate go beyond merely adjudicating matters in court. Magistrates have a duty in terms of the Constitution and the law to make sure that the orders of their court and matters relating thereto are implemented and given effect to. They should not sit idly and take it for granted that the administrative component and the clerk of the court at the various magistrates' offices will implement and give effect to their orders. They should supervise and make sure that effect be given to it. Their judicial authority is founded in terms of s 165 of the Constitution of the Republic of South Africa Act 108 of 1996… [They must ensure] that no incomplete or incorrect record is sent on review, because this would lead to delays, as has happened in this matter. Should this happen, the magistrate would be clearly negligent in executing his/her duties and functions imposed by the law, especially s 303 of the Criminal Procedure Act 51 of 1977."

Per Henney J in S v Nyumbeka 2012 (2) SACR 367 (WCC) at para 20-21