e-MANTSHI

A KZNJETCOM Newsletter

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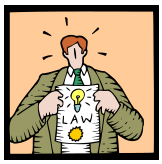
Welcome to the hundredth and eighty seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Rules Board for the Courts of Law has under section 6 of the Rules Board for Courts of Law Act, Act 107 of 1985 and with the approval of the Minister of Justice amended the rules regulating the conduct of the proceedings of the Magistrates' Court. The amendments relate to Part 1 to 4 of Table A of Annexure 2 to the Rules. The notice to this effect was published in Government Gazette no 47055 dated 22 July 2022. The amended rules come into operation on 24 August 2022.
The amended rules can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202207/47055rg11461gon2298.pdf

2. Under section 31 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021 (Act No. 13 of 2021), the President has fixed

31 July 2022 as the date on which the said Act shall come into operation. The notice to this effect was published in Government Gazette no 47105 dated 29 July 2022. The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202207/47105rg11463proc79.pdf
The Amendment Act can be accessed here:
https://www.justice.gov.za/legislation/acts/2021-013.pdf

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Recent Court Cases

1. S v Paulse (208/22;29/22;15/932/2021) [2022] ZAWCHC 145 (29 July 2022)

Section112(1)(b) of Act 51 of 1977 does not provide for the conviction of the accused merely because he himself believes that he is guilty. The court not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions.

Henney, J

[1] This matter comes before me as an automatic review in terms of the provisions of section 302 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The accused appeared in the Magistrate's court of Cape Town on several occasions, after being arrested on 9 September 2021, during which time she was represented by an attorney appointed by Legal Aid South Africa.

[2] After being released on bail, she absconded and her legal representative as a result withdrew from record. Upon her arrest, on 27 May 2022, her rights to legal representation and legal aid were again explained by the Magistrate. She elected to conduct her own defence. On 6 September 2022, her rights were again explained and she elected to conduct her own defence. The accused pleaded guilty to the offences as charged.

[3] The Magistrate proceeded to question the accused in terms of the provisions of section112 (1)(b) of the CPA and she was accordingly convicted on two counts of contravention of section 4 (b) of the Drugs and Drugs Trafficking Act 140 of 1992 ("the DDTA"), which she committed on 6 September 2021 and 19 April 2021.

[4] On 7 June 2022, the court took both counts together for the purpose of sentence, and the accused was sentenced to a fine of R3000 or 90 days imprisonment which was suspended for a period of five years, on condition that she is not convicted and sentenced for possession of drugs in contravention of section 4 (a) or (b) of act 140 of 1990 committed during the period of suspension.

[5] The proceedings by the Magistrate in terms of S112 (1)(b) of the CPA were recorded as follows:

In respect of count 1:

"Accused: I will speak for myself

The State request the court to make the provisions of section 112(1)(b). These are explained to the accused and she understands and elects to answer the Courts questions.

COUNT NO 1:

Court: Your plea of guilty to these two courts, is it done freely and voluntarily so or were you influenced or intimidated to plead guilty?

A No, it's freely and voluntarily done.

Court: The incident you are about to relate to curt, did it occur on the 06/09/2021?

A Yes.

Court: In your own words explain to court what happened that led to your arrest?

A That day I was in my room, with the lolly in my hand and the pipe was on the table, I heard someone tapping on my shoulder, (accused demonstrates) and when I looked back it was the police, they told me to stand up, there was about 6 police officers, when I stood up I was searched by a female police officer with dreds. They found the lolly in my hand and put it into a bag, the found the pipe with Mandrax on the cupboard and they put it in the packet they arrested me and I was hand cupped. Tik is methamphetamine.

Court: Do you know how much tik was there?

A No, the ½ Mandrax pill, it was Mandrax.

Court: Did you know that Mandrax and Methamphetamine (tik) are undesirable

dependence producing substance?

A Yes, Sir

Court: Did you know that drugs are punishable by Law?

A Yes, Sir

Court: What was your intention with these substances?

A I was going to smoke it

And in respect of count 2:

Q: Do you plead guilty freely and voluntarily so or were you influenced or intimidated to plead guilty?

A: No Sir, I plead guilty freely.

Court: Did it occur on 19/04/2021 at Main Road, Green Point?

A: Yes Sir.

Court: Tell me what happened which led to your arrest?

A: We were walking towards the Spar the van stopped a lady police officer came out and came straight towards me, she asked to see what is in my hand. I had a pipe glass pipe, she took it and searched my body, she found nothing on me and put me in the van and took me to the police station. We were standing in the parking, a van came and stopped next to me, the boyfriend, I had a small bag under my jersey. He told me to take it out as he wants to see what was inside, he found 3 units of Tik and the ½ (half) Mandrax.

Court: Did you know that Mandrax and Tik are undesirable dependence producing substances?

A: Yes Sir

Court: Did you know that possession of Tik and Mandrax is punishable by law?

A: Yes Sir

Court: What were you going to do with there?

A: I was about to smoke it Sir

The State: I accept the plea on both charges as being accordance with the State case.

The Court: I am satisfied that accused intended to plead guilty on both counts had no valid defence and therefore pleaded guilty correctly.

The accused is found guilty on both count 1 & 2."

[6] Having considered the section 112(1)(b) proceedings, I had serious concerns whether the said proceedings were in accordance with justice and raised the following queries with the Magistrate.

""*The Magistrate is required to answer the following queries:*

1. *On what basis in respect of both charges did the court conclude that the accused possessed an undesirable dependence producing substance as* listed in Part 3 of Schedule 2 of the Drugs and Drug Trafficking Act 140 of 1992 ("DDTA") being methaqualone and methamphetamine, based solely on the questioning of the accused in terms of the provisions of section 112 (1)(b) of the Criminal Procedure Act 51 of 1977.

    a. *The Magistrate's attention is drawn to the following cases,* S *v Naidoo*[1] *and a full bench decision of this court to which he is bound of* S *v Adams*[2]*.*

2. *The Magistrate should also give reasons as to why he did not request the prosecutor to present the section 212(4)*[3] *certificate to him to ascertain the correctness of the admissions the accused made with regard to the fact*

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[1] 1986(3) SA 733 (C).985(2) SA 32 (N)
[2] 1986(3) SA 733 (C).
[3] Section 212 (4) *{a)* Whenever any fact established by any examination or process requiring any skill-
(i) in biology, chemistry, physics, astronomy, geography or geology;
(ii) ... ;
(iii) .. ;
(iv)... ;
(v) ... ; or
(VI) ... ,
is or may become relevant to the issue at criminal proceedings, a document purporting to be an affidavit made by a person who in that affidavit alleges that he or she is in the service of the State or of a provincial administration or any university in the Republic or any other body designated by the Minister for the purposes of this subsection by notice in the Gazette*, and that he or she has established such fact by means of such an examination or process, shall, upon its mere production at such proceedings be* prima facie *proof of such fact: Provided that the person who may make such affidavit may, in any case in which skill is required in chemistry, anatomy or pathology, issue a certificate in lieu of such affidavit, in which event the provisions of this paragraph shall* mutatis mutandis *apply with reference to such certificate.*

whether the accused indeed were in possession of the undesirable dependence producing substances as listed in the act, before finding the accused guilty of the provisions of the DDTA."

[7] In reply the Magistrate conceded that he based his finding that the accused possessed an undesirable dependence reducing substance as listed in Part 3 of Schedule 2 of the DDTA as being methaqualone or methamphetamine solely on the admissions made by the accused.

[8] The Magistrate also conceded that an expert statement in terms of section 212 of the CPA was required to assist the court in coming to such a conclusion and no such certificate was shown to him to have concluded that the accused were in possession of an undesirable dependence producing substance as listed in the DDTA. He further submitted that he "erroneously failed to request this evidence from the state".

[9] This is not the first matter with similar charges that came before me on automatic review where the Magistrate failed to adequately appraise him/herself as to the correctness of an admission made by the accused. In view of the latter, it is perhaps necessary to restate the law on this issue. In S *v Adams* supra, this court said the following in respect of a plea of guilty on the charge of contravention of section 2 (a) of act 41 of 1971 (the predecessor of the current Act 140 of 1992):

"Where an accused is charged with contravening s 2 (a) of Act 41 of 1971 in respect of a *prohibited dependence-producing substance such* as *Mandrax, and he pleads guilty and makes the admission that the substance* is *indeed Mandrax, the court will normally be entitled to convict him where he* is *represented by* a *legal representative. Where, however, the accused is an inexperienced person who is unrepresented, the position is different. In such an event, the court may not simply accept his admission of an unknown fact. There would have to be additional grounds on which the court could rely that the admitted fact is true before the court can be satisfied that the accused is guilty. The assurance concerning the acceptance of* a *fact which is admitted but which is beyond the personal knowledge of such an accused can be obtained in different ways, for example, by closer questioning of the accused in order to determine the strength of the knowledge on which he has made the admission, or what his knowledge of the matter and the surrounding circumstances are, or by examining the relevant certificate of analysis of the substance. Whether there is then sufficient evidence for the Magistrate to convince him that the accused is guilty will depend on the facts of the particular matter. What however must still be borne in mind,* is *that it is the court's duty to convince itself of the accused's guilt and that the court is not relieved of this duty in this regard merely by such an unrepresented and inexperienced accused admitting* a *fact which is beyond his knowledge."*

The decision of *S v Adams* (supra) was based on the decision of *S v Naidoo 1985 (2) SA 32 (N)* where *Thirion J* at 37 G - H said:

"But before it can convict the accused, the court has to be satisfied, on the facts stated by the accused, that the accused is indeed guilty. The court therefore not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions. Only if the court is satisfied as to the reliability of the admissions of fact and that they are sufficient to establish all the elements of the offence may the court convict the accused. Where an accused admits facts which are within his personal knowledge, no difficulty ordinarily arises. In such a *case the presumption of fact that what an accused admits against himself may be accepted as the truth would operate and, provided the accused makes the admission with full knowledge of its implications, there would be no reason why the court should not be satisfied about its correctness and reliability."*

And in *S v Chetty*[4] this court held:

"In the ordinary course the State can and should hand in a *certificate of an analyst which proves itself and causes no problems that what has been found is what it is alleged to be. There may of course be other methods by which the questioner could satisfy himself that the accused had good reason to accept that the pills he intended dealing in were what they purported to be or did contain the drug in question - perhaps because he had purchased them from* a *"reliable" source, or had tried one himself, or that some of his own experienced customers were satisfied with their purchases from the batch in question."*

[10] The learned authors Du, Tait, DeJager, Paizes, Skeen and Van der Merwe state the following in this regard at RS64 Ch 17 page 21-22[5]

"The general rule in our law of evidence is that a *court may accept and rely upon an admission of an accused despite the fact that the fact admitted falls outside the personal knowledge or experience of the accused ... It would seem, however, that the High Court has adopted a more cautious approach with regard to the plea procedures in terms of ss 112 and 115 where admissions are made by undefended accused ...*
It should further be borne in mind thats 112(1)(b) does not provide for the conviction of the accused merely because he himself believes that he is guilty ...

In S *v Nixon* *2000 (2) SACR* 79 *(W) 86f-g Wunsh J accepted the need for* a *cautious approach to s 112 where admissions are made by an undefended accused.*
The weight of authority favours the view that an admission that does not have its factual foundation in the personal knowledge of the accused can be accepted if the court is satisfied that the admission is a *reliable one...*

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[4] 1984 (1) SA 411 (C)
[5] *Commentary on the Criminal Procedure Act*

In S v Naidoo 1985 (2) SA 32 (N) 37G-H a full bench held that with regard to s 112(1)(b) the court 'not only has to ascertain whether the admitted facts, if accepted as correct, would establish all the elements of the offence but it also has to pass judgment on the reliability of the admissions'. The court treated admissions in terms of s 112(1)(b) as admissible informal admissions which, in terms of our common law, can be given such weight as the court may consider appropriate in the light of the circumstances of the case. The 'enquiry' remains a factual one-the sufficiency and probative value of the admission depending on the circumstances of the particular case' (at 37J- 38A). The source from which the accused derives his knowledge is an important factor (at 36H). In this case-which was a prosecution under s 140(2)(a) of Ordinance 21 of 1966---the prosecutor furnished the accused with the certificate relating to scientific analysis of the blood sample taken from the accused. Thirion J concluded (at 40J):

'In my view this is a case where the accused was constrained to plead guilty by the force of the evidence available to the State. The Magistrate satisfied himself of the accused's guilt on an examination of the sources of the accused's knowledge on the strength of which the accused had made his admissions and the probative force of those sources was sufficient to establish the reliability of the admissions. '

In S v Adams 1986 (3) SA 733 (C) a full bench adopted the approach in S v Naidoo (supra) ...

It is evident from the above that the prosecution can facilitate matters by timeously allowing the accused to have access to certificates pertaining to scientific analyses. In S v Goras 1985 (4) SA 411 (0) 412F Brink J took the view that in prosecutions under s 140(2)(a) of Ordinance 21 of 1966 an accused should be given the opportunity of studying the certificate concerning the concentration of alcohol in his blood before he is asked whether he admits the alleged concentration of alcohol in his blood."

[11] It is clear from the authorities cited that where an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate[6] in terms of the provisions of section 212 of the CPA to satisfy itself that during the s 112 (1)(b) admission was correctly made. In this case, the accused admitted to being in possession of an undesirable dependence producing substance, in contravention of section 4 (b) of the DDTA, and the court convicted the accused without satisfying itself by means of the scientific evidence in the form of the section 212 certificate that such an admission was correctly made.

[12] There may well be cases where a court may convict a person without the production of such a certificate, if from the questioning of an accused, and the subsequent

[6] *This would also be applicable in cases where there is a guilty plea by an undefended accused charged with contravening of section 65(2) of the Road Traffic Act 93 of 1996; driving with an excessive amount of alcohol in one's blood.*

admissions made, the court can come to such a conclusion. See S *v Adams* in this regard. Where for example, an accused person during the section 112 (1)(b) questioning states:

1) that such an accused is a regular user and is addicted to the undesirable dependence producing substance;
2) that the accused on a previous occasion acquired the alleged undesirable dependent producing substance from a particular source which had the desired effect on such an accused.
3) that such an accused had already used some of the substance that was found the possession of such an accused at the time of the arrest.

In this particular case, the court had no such information from which he could safely conclude that the accused were in possession of a dependence producing substance as prohibited by the act.

[13] This in my view, is not an exhaustive list of circumstances and factors that can be used to test or confirm the reliability of an admission that an accused had knowledge that the substance in his or her possession was an undesirable dependence producing substance. The most reliable source of information would always be the section 212(4) certificate and Magistrates are under a duty to request that it be produced before them, before convicting an accused during the section 112 (1)(b) questioning as pointed out in Adams and the other cases.

[14] In view of the number of cases that had been sent on automatic review where Magistrates had great difficulty in applying the guidelines as laid down in S v Adams, it is herewith directed that the Chief Registrar forward a copy of this Judgment to the Chief Magistrate of Cape Town as well as Wynberg to bring this Judgment to the attention of the Magistrates in their respective administrative regions of the Western Cape.

[14] In the absence of any further information or evidence to satisfy itself that the accused were indeed in possession of an undesirable dependence producing substance as listed in Part 2 of schedule 3 of the DDTA, the conviction in the respect of both charges were improper and falls to be set aside.

[15] In the result therefore, I would make the following order:

"That the conviction and subsequent sentence in respect of both charges are set aside".

2. Robiyana v Minister of Police (423/18) [2022] ZAECELLC 18 (26 July 2022)

It is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result.

Tokota J

Introduction:

[1] The plaintiff instituted an action against the defendant claiming payment of R600 000.00 for damages arising from the alleged unlawful arrest and detention. The parties agreed that liability be separated from quantum of damages, and an order to that effect in terms of Rule 33(4) of the Uniform Rules of Court was accordingly made. Therefore, at this stage, the Court has to determine the issue of liability only. The claim is resisted by the defendant.

Factual matrix:

[2] Avis Car Rental is conducting a business of hiring out its vehicles to the general public. The vehicles that are hired at its branch in East London airport are parked in front of the airport. Other vehicles are parked at the back yard. These are said to be vehicles with minor dents having been slightly damaged.

[3] Between 1 and 2 May 2017 it was discovered in the morning that thirty tyres were stolen from the vehicles that are kept at the back yard. The police were called and they responded. They visited the crime scene. Fingerprint experts lifted finger prints from the vehicles whose tyres were stolen.

[4] Sergeant Myeki was allocated the docket as the investigating officer in the matter. He received the docket on 3 May 2017. Upon receipt of the docket he visited the crime scene where he interviewed the complainant. There was no clue about the suspects and the docket was archived.

[5] On 25 May 2017 the fingerprint expert compared the scene of crime prints, marked LCRC 33/5/2017 with the linked impression fingerprint image of suspect Monwabisi Robiyana and found the prints to be corresponding with the his left middle finger. The expert came to the conclusion that both prints belonged to the same person.

[6] On 19 July 2017, Myeki got the docket back and started working on it. On 25 July 2017 he received a fingerprint link from the Local Criminal Record Centre, East London. The plaintiff's finger print was linked to one of the vehicles from which the

tyres were stolen.

[7] On 4 August 2017 at about 3h15 am, Myeki together with his colleagues visited the house of the plaintiff. They found the plaintiff at his house. Myeki introduced himself and informed the plaintiff of the purpose of his visit. He enquired from the plaintiff if he had been to Avis, at any stage, and the plaintiff replied in the negative. The plaintiff informed Myeki that he had never been to Avis car rental and had never worked there. Myeki informed the plaintiff of the theft from Avis and that his finger print was linked to one of the vehicles from which the tyres were stolen. He asked him to explain how it happened that his finger print was found there and warned him of his rights. In his warning statement the plaintiff is recorded as having said: "*I deny the allegations against me. I never went to Avis nor work (sic) or steal at Avis premises. I drive a taxi as my work. I do not do crime. That's all I wish to state."*

[8] Myeki was not satisfied with the response from the plaintiff and concluded that he must have been involved in the theft of the tyres. He asked him where the tyres were. The plaintiff denied any knowledge of tyres. Myeki informed him of his constitutional rights and arrested him. The plaintiff was arrested on 4 August 2017 and appeared in Court on the following week on Monday, 7 August 2017 on which day he was released on bail. The case against the plaintiff was subsequently withdrawn by the State on his third appearance.

[9] The evidence of the plaintiff was mainly the denial of the allegations against him. He testified that what was written in the warning statement was all that he said to Myeki. However, he testified further that Myeki mentioned the name of his friend Myataza and that reminded him of the fact that, at some stage, he accompanied Myataza who was hiring vehicles, to collect or drop the vehicles at Avis. Myataza was not called as a witness.

[10] The defence of the defendant was that Myeki arrested the plaintiff on reasonable grounds of suspicion of having committed an offence referred to in schedule 1 of the Criminal Procedure Act 51 of 1977 (the Act). Myeki was therefore entitled to arrest him without a warrant in terms of section 40(1)(b) of the Act.

Discussion:

[11] Section 40(1)(b) provides:
'A peace officer may without warrant arrest any person -
(a) . . .
(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1, other than the offence of escaping from lawful custody.'
The jurisdictional facts for a section 40(1)(b) defence are that (i) the arrestor must be a peace officer; (ii) the arrestor must entertain a suspicion; (iii) the suspicion must be that the suspect (the arrestee) committed an offence referred to in Schedule 1; and

(iv) the suspicion must rest on reasonable grounds.[7] Myeki is a peace officer; theft is a Schedule 1 offence.

[12] The sole enquiry in the matter is whether Myeki reasonably suspected the plaintiff of having committed theft at the time he arrested him at his house on 4 August 2017. As was said by Lord Devlin in *Shaaban Bin Hussien and Others v Chong Fook Kam and Another*[8]:

'Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; "I suspect but I cannot prove". Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.'

This passage was quoted with approval in *Duncan v Minister of Law and Order*[9] and the Full Bench of this Division.[10] The suspicion must be reasonable and the test for such reasonableness is objective[11]: Myeki was required to act *'as an ordinary honest man would act and not merely act on wild suspicions but on suspicions which have a reasonable basis'*.[12]

[13] In considering whether Myeki's suspicion was reasonable, regard must be had to, *inter alia,* what was said by Jones J in *Mabona and Another v Minister of Law and Order and Others* [13] where the Learned Judge said:

'It seems to me that in evaluating his information a reasonable man would bear in mind that the section authorises drastic police action. It authorises an arrest on the strength of a suspicion and without the need to swear out a warrant, i.e. something which otherwise would be an invasion of private rights and personal liberty. The reasonable man will therefore analyse and assess the quality of the information at his disposal critically, and he will not accept it lightly or without checking it where it can be checked. It is only after an examination of this kind that he will allow himself to entertain a suspicion which will justify an arrest. This is not to say that the information at his disposal must be of sufficiently high quality and cogency to engender in him a conviction that the suspect is in fact guilty. The section requires suspicion but not certainty. However, the suspicion must be based upon solid grounds. Otherwise, it will be flighty or arbitrary, and not a reasonable suspicion.'

[14] Myeki's suspicion was based on the following:

(a) He received a report from the Local Criminal Record Centre that the finger

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[7]*Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 818G – H.;*Minister of Safety & Security v Sekhoto* 2011 (5) SA 367 (SCA) (2011 (1) SACR 315; [2011] 2 All SA 157; [2010] ZASCA 141) para.6

[8][1969] 3 All ER 1626 (PC) at 1630

[9]*Duncan* Footnote 1 at 819I;*Minister of Law & Order v Kader* 1991 (1) SA 41 (A) ([1990] ZASCA 111) at 50H

[10]See also *Minister of Police vPike* (CA235/2017) [2018] ZAECGHC 100 (16 October 2018)

[11]*R v Van Heerden* 1958 (3) SA 150 (T) at 152E; *Duncan v Minister of Law and Order* 1986 (2) SA 805 (A) at 814E); *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at G 579F-

[12]per Jones AJP in *Rosseau v Boshoff* 1945 CPD 135 at 137;*S v Purcell-Gilpin* 1971 (3) SA 548 (RA) at 553G-H

[13]1988 (2) SA 654 (SE) at 658F-H

prints of the plaintiff were linked to the vehicle from which the tyres were stolen.
(b) On 4 August 2017 he proceeded to the plaintiff's house and interviewed the plaintiff. The plaintiff denied that he had ever been at Avis, thus, raising questions as to how it came about that his finger prints happened to be there where the theft was committed.
(c) The explanation did not account for the finger print found in the vehicle.

[15] Mr *Mafu,* appearing for the plaintiff, argued that Myeki should have taken further steps by conducting further investigations before effecting the arrest. He argued that even if he was entitled to arrest he had a discretion whether or not to arrest and he failed to exercise that discretion. Mr *Pretorius,* who appeared for the defendant, relied heavily on the unreported case of *Pike* referred to above and submitted that *Pike's* case is on all fours with the present matter.

[16] The submission by Mr *Mafu,* can only be based on the premise that the plaintiff informed Myeki about Myataza. Myeki denied that the plaintiff ever mentioned the name of Myataza. He said he was hearing the name for the first time in Court. There are certain features which militate against the credibility of the evidence of the plaintiff in this regard. In his written statement which he made to Myeki he never mentioned Myataza. He confirmed that the statement was correct. Moreover, Myataza was never called as a witness. He did not even specify as to when he accompanied Myataza to Avis either to collect or to drop the hired vehicles. He did not say what make of the vehicle(s) that were hired by Myataza. His version falls to be rejected in this regard. On the other hand, Myeki's evidence was straight forward. He impressed me as an honest and credible witness.

[17] The decision to arrest must be based on the intention to bring the arrested person to justice. It has been held that the validity of an arrest is not affected by the fact that the arrestor, 'in addition to bringing the suspect before court, wishes to interrogate or subject him to an identification parade or blood tests in order to confirm, strengthen or dispel the suspicion.'[14]

[18] Once the jurisdictional facts for an arrest in terms of s 40(1)(b) are present, the discretion arises. The question of whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute. The learned Judge of Appeal Van Heerden JA said the following in *Duncan*[15]

"*If the jurisdictional requirements are satisfied, the peace officer may invoke the power conferred by the subsection, ie, he may arrest the suspect. In other words, he then has a discretion as to whether or not to exercise that power (cf Holgate-Mohammed v Duke [1984] 1 All ER 1054 (HL) at 1057). No doubt the discretion must be properly exercised. But the grounds on which the exercise of such a discretion can*

[14] *Duncan* supra at 818B – C.
[15] Ibid At 818H-J

be questioned are narrowly circumscribed. Whether every improper application of a discretion conferred by the subsection will render an arrest unlawful, need not be considered because it does not arise in this case."

[19] When exercising such discretion, the arresting officer must ask himself whether (a) the person he is about to arrest is guilty of the offence; (b) whether there are any reasonable grounds for that suspicion; and (c) must comply with principles laid down in *Shidiack's* case[16]where it was said:

'Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. . .. There are circumstances in which interference would be possible and right. If for instance such an officer had acted mala fide or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his discretion at all, or if he had disregarded the express provisions of a statute — in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

[20] The purpose of the arrest must be to bring the suspect to justice. Therefore, the arrested person must be taken to Court within the prescribed period of 48 hours for the Court to further deal with him. Once the arrested person has been taken to Court, the authority to detain, that is inherent in the power to arrest, is exhausted. The authority to detain the suspect further is then within the discretion of the court.[17]

[21] In *casu* the plaintiff was arrested on Friday and taken to Court on Monday, which was the next available Court date. He was released on bail on the same day, which is an indication that the arresting officer did not object thereto.

[22] It has been held that the enquiry to be made by the peace officer is not how best to bring the suspect to trial: but only whether the case is one in which that decision ought properly to be made by a court (or the senior officer). 'Whether his decision on that question is rational naturally depends upon the particular facts, but it is clear that in cases of serious crime — and those listed in Schedule 1 are serious, not only because the legislature thought so — a peace officer could seldom be criticised for arresting a suspect for that purpose. It is sufficient to say that the mere

[16]*Shidiack v Union Government (Minister of the Interior)* 1912 AD 642 at 651 – 652.

[17]*Sekhoto* note 1 para. 42; c/f*De Klerk v Minister of Polic*e 2021 (4) SA 585 (CC) para.72

serious nature of the offence which ordinarily are capable of attracting sentences of imprisonment may justify the arrest for the purpose of enabling a court to exercise its discretion as to whether he should be detained or released, and, if so, on what conditions, pending the trial.'[18]

[23] Once the jurisdictional facts have been established, it is for the plaintiff to prove that the discretion was exercised in an improper manner.[19] In *casu* the plaintiff did not plead that the discretion was improperly exercised nor did he so contend. Mr *Mafu* merely submitted that Myeki did not exercise his discretion.

[24] In my view there were reasonable grounds upon which the suspicion was based. The plaintiff did not inform Myeki that he used to collect or drop cars at Avis on behalf of one Myataza at the time of his arrest. He flatly denied having been at Avis at any stage. The name of Myataza only came up during the trial. This must have been mentioned in order to explain away the presence of his finger print in one of the vehicles from which the tyres were stolen. Furthermore, Myataza was never called as a witness and when I asked Mr *Mafu,* during the debate, as to why Myataza was never called as a witness he could not provide an answer. That leaves us with a suspicion that he would not support the evidence of the plaintiff hence he was not called.

Conclusion:

[25] In all the circumstances I am of the opinion that the defendant has discharged the *onus* resting on him in that all the jurisdictional facts as envisaged in section 40(1)(b) have been met. Accordingly, the plaintiff's claim cannot succeed.

[26] In the result I make the following order:

The plaintiff's claim is dismissed with costs.

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[18] *Sekhoto* footnote 1 supra, at para 44

[19] *Duncan* at 819B-E; Sekhoto ibid para.49

From The Legal Journals

Lötter, C

Judging the Holy Cow: Examining the Role of Implicit Bias in Judicial Rulings – An Analysis of the Decision in *Mbena v Minister of Justice and Correctional Services*2015 4 All SA 361 (ECP)

PER / PELJ 2022(25)

Abstract

This contribution is an investigation into the role of implicit (as opposed to explicit) biases in judicial rulings by examining the judgment of Chetty J in Mbena v Minister of Justice and Correctional Services 2015 4 All SA 361 (ECP). Implicit bias refers to prejudice on a visceral level, namely unconscious bias, of which the bearer, to wit the judicial officer, is unaware. I suggest that exploring implicit bias in judicial rulings in the context of South Africa's harsh stigmatising shaming culture driven by incarceration as its dominant sentencing regime, will introduce a valuable window in identifying, as well as possibly illuminating and eliminating, unjustified and harmful biases. In this contribution I specifically focus against the generalised bias against ex-offenders in South Africa's harsh stigmatising shaming culture (which I distinguish from integrative shaming cultures found in Japan, China and many African societies) which attitude perpetuates the marginalisation, stigmatisation and discrimination on offenders which exceed their court-sanctioned punishment. I attempt to outline the reasons as to why the isolation and elimination of social biases of this nature are important since, in the view of many criminologists but particularly John Braithwaite, stigma is counter-productive and criminogenic as it leads to enhanced recidivism rates. To this end, I analyse the salient features of the case within a broad social context (including a consideration of phenomena such as the prison-industrial complex on South African soil) which exceeds a narrow legal framework. My roadmap for the paper encompasses a consideration of the salient, albeit disputed, facts of the case with a view towards an alternative, if plausible reading based on the probabilities of the two sets of conflicting facts presented by the opposing parties. I highlight the significance of the judgment before recommendations for improved public policy formulation are proffered.

The article can be accessed here:
https://perjournal.co.za/article/view/12743/18827

Contributions from the Law School

Attestation of an affidavit by a commissioner of oaths: what constitutes an 'interest' in the matter disqualifying the commissioner of oaths from attesting to the affidavit – the SCA considers and reconciles conflicting authorities.

In the case of *Kouwenhoven v Minister of Police* (2022 (1) SACR 164 (SCA)), the appellant appealed against the high court's dismissal of an application for the review and setting aside of a warrant of arrest issued for him. The warrant of arrest had been issued in terms of s5(1)(b) of the Extradition Act 67 of 1962 at the request of the government of the Netherlands after the conviction of the appellant there of complicity in war crimes.

The unanimous judgement by the Supreme Court of Appeal was penned by Wallis JA.
In this discussion, I will only deal with one of the appellant's grounds of appeal which was that an affidavit by Warrant Officer Van Der Heever of the Pretoria National Central Bureau of Interpol was invalidly attested to and was therefore inadmissible. The argument was that the attesting officer, Sgt Van Hagen, was employed in the same office as Van Der Heever and that she therefore had an interest in the litigation to which the affidavit related, which disqualified her from acting as a commissioner of oaths with regard to his affidavit (para [28]).

The basis for this challenge to the attestation of the affidavit was regulation 7(1) of the Regulations Governing the Administering of an Oath or Affirmation (published in terms of s10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 under GN R1258 of 21 July 1972, as amended, published in GG 3619 of 21 July 1972) (the regulations)). Regulation 7(1) provides that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which they have an interest. In terms of regulation 7(2), regulation 7(1) does not apply to an affidavit or declaration mentioned in the schedule to the regulations. Item 2 of the schedule to the regulations provides for 'a declaration taken by a commissioner of oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty' (para [28]). The statutory position is thus that a commissioner of oaths who is not an attorney is not forbidden from attesting to an affidavit relating to a matter in which they have an interest which is no more than which would automatically arise in the course of their employment and duties.

The Supreme Court of Appeal considered the jurisprudence concerning regulation 7(1), in the first place referring to the case of *Royal Hotel, Dundee v Liquor Licensing Board, Area no. 26; Durnacol Recreation Club v Liquor Licensing Board, Area no. 26* (1966 (2) SA 661 (N)) where the court pronounced, at 667A, that regulation 7(1) required commissioners of oaths to be independent in the exercise of their duties (para [29]).

In *Tambay v Hawa* (1946 CPD 866) and *Louw v Riekert* (1957 (3) SA 106 (T) at 111), it was held that an interest as contemplated in regulation 7(1) must be a 'pecuniary interest, or some interest by which the legal rights or liabilities of the commissioner [of oaths] are affected' (para [29]).

In the case of *The Master v Benjamin NO* (1955 (4) SA 14 (T)), the court sought to expand the meaning of the term 'interest.' It relied on *R v Brummer* (1952 (4) SA 437 (T) at 439) as authority for this stance. However, the Supreme Court of Appeal pointed out that the *Brummer* case (supra) had been overruled in the case of *R v Rajah* (1955 (3) SA 276 (A) at 282-283) and that the *Benjamin* case (supra) could therefore not be taken as expanding the scope of what was meant by the term 'an interest' in regulation 7(1) beyond a pecuniary interest or an interest affecting the legal rights and liabilities of the commissioner of oaths (para [29]).

Counsel for the appellant relied on the case of *Papenfus v Transvaal Board for the Development of Peri-Urban Areas* (1969 (2) SA 66 (T)) to advance the argument that Van Der Heever's affidavit was inadmissible. The Supreme Court of Appeal therefore considered the *Papenfus* case (supra) in some detail (para [31]). In the *Papenfus* case (supra, at 198-199), the court dealt with a challenge to the admissibility of the respondent's affidavit on the basis of two legs. First, that the requirement of regulation 7(1) was not met because the commissioner of oaths had an interest in the matter. Second, that there was an old rule of evidence derived from English law to the effect that attorneys may not act of commissioners of oaths where they represent a party in the proceedings or where they have an interest in the subject matter of the affidavit. An affidavit attested to by an attorney in those circumstances would be inadmissible. (In the *Royal Hotel, Dundee* case (supra) Caney J traced the history of this rule in Natal (para [40])). In the *Papenfus* case (supra, at 69H-70A) the court found that the affidavit in question had been properly attested to in terms of the regulations, finding that the regulations should be interpreted so as not to preclude a legal adviser from acting as a commissioner of oaths in litigation in which his employer is concerned because the 'interest' held by the commissioner of oaths by virtue of that reason alone was too remote to fall within the ambit of regulation 7(1). This position was consistent with other similar decisions, namely *Tambay v Hawa* (supra), *Royal Hotel, Dundee* case (supra), *S v Van Schalkwyk* (1966 (1) SA 172 (T) at 174H-176F) (discussed in *Kouwenhoven* (supra) at para [31]). However, the court in *Papenfus* (supra) ruled that the affidavit was inadmissible in terms of the

exclusionary rule of evidence referred to above (*Kouwenhoven* (supra) at para [37]). The court thereby extended the ambit of the exclusionary rule from applying not only to attorneys attesting to affidavits in the circumstances described above but also to legal advisers doing so.

In considering the *Papenfus* case (supra), Wallis JA reached the conclusion that there was no justification for the invocation, and extension, of the old exclusionary rule of evidence referred to in that case, and even less justification for extending the rule even further to exclude Van Der Heever's affidavit in the case before him (*Kouwenhoven* (supra) at para [41]). Wallis JA observed that the *Papenfus* case (supra) was the first court to use that rule of evidence to exclude affidavits properly executed before a competent commissioner of oaths in accordance with the regulations (*Kouwenhoven* para [40]). Wallis JA concluded that "what once was a rule of evidence is now dealt with by the detailed provisions of the regulations governing the commissioning of affidavits" (para [41]).

As regards whether the affidavit of Van Der Heever was commissioned in accordance with the regulations, regulation 7(1) in particular, the Supreme Court of Appeal noted two judgements in which it was held that police officers investigating crime had a disqualifying interest in relation to affidavits signed by witnesses in the course of their investigations (*R v Brummer* (supra), and *R v Du Pont* (1954 (3) SA 79 (T)). However, the Supreme Court of Appeal pointed out that they were both overturned by *S v Rajah* (supra) and therefore could not be relied on by the appellant to support his argument (*Kouwenhoven* (supra) at para [32]).
In the *Royal Hotel, Dundee* case (supra), it was held that item 2 in the schedule to the regulations appeared to cover police officers (para [32]). Despite this, in the case of *Dyani v Minister of Safety and Security* (2001 (1) SACR 634 (Tk)), three affidavits deposed to by police officers were held to be inadmissible because they had been attested to before commissioners of oaths who were themselves police officers. A fourth affidavit was excluded because the commissioner of oaths was a police officer and an employee of the respondent (para [21], discussed in *Kouwenhoven* (supra) para [32]).

In the case of *S v Sihlobo* ([2004] JOL 12831 (Tk) at paras [10]-[21]), Pakade J carefully considered the regulations, especially regulation 7(2), which provides that the prohibition on commissioners of oaths attesting to affidavits in which they have an interest in regulation 7(1) does not apply to affidavits mentioned in the schedule to the regulations (which includes affidavits taken by commissioners of oaths who are not attorneys and whose only interest in the matter arises in the course of their employment and duties). Pakade J concluded that *Dyani* (supra) was clearly wrong insofar as it held that a policeman could not act as a commissioner of oaths in relation to the affidavit of another police officer (*Kouwenhoven* (supra) para [33]). Pakade J's decision was subsequently followed in *Van Rooyen v The Minister of Police* (2019 (1) SACR 349 (NCK) paras [29] – [37]) and in the unreported case of

Grammaticas Pty Ltd v Minister of Police 50538/2017 (12/12/17) (*Kouwenhoven* (supra) para [33]).

In light of the conflicting decisions discussed above, the Supreme Court of Appeal found it necessary to resolve the uncertainty in this regard. It held that regulation 7(2) read with item 2 of the schedule makes it clear that the performance of a commissioner of oath's functions arising out of their employment and in the course of their duties is not prohibited. The court explicitly overruled *Dyani* (supra) to the extent that it decided otherwise (*Kouwenhoven* (supra) para [35]).
In applying the law to the case before it, the Supreme Court of Appeal found that the facts fell squarely within item 2 of the schedule. The commissioner of oaths who commissioned Van Der Heever's affidavit commissioned it because she was a police officer and was readily available to do so (*Kouwenhoven* (supra) para [36]). She had no knowledge of the case to which the affidavit pertained and although, like Van Der Heever, she was stationed at the Interpol Bureau in Pretoria, she had no involvement in extradition matters such as the *Kouwenhoven* case (supra).

The Supreme Court of Appeal therefore found that there was no basis for excluding Van Der Heever's affidavit because the argument that the commissioner of oaths who had attested it had an interest in the matter because she was also a police officer had no merit (*Kouwenhoven* (supra) para [36]).

The certainty which the Supreme Court of Appeal has brought to this contested terrain is to be welcomed, and I support the Supreme Court of Appeal's approach in this case.

Nicci Whitear-Nel,
University of KwaZulu Natal, Pietermaritzburg

Matters of Interest to Magistrates

MAJOR NEW GLOBAL RESEARCH SHOWS JUDGES UNDER STRESS – AND WITHOUT HELP TO COPE

Carmel Ricard

A significant new report on judicial well-being has been published by the Global Judicial Integrity Network. It's the result of a survey involving 758 judges from 102 countries across all parts of the globe. The high response rate is seen as indicating that the topic is one of great interest to judges generally. The report gives important data about the causes of stress among judges and the consequences of that stress; judicial responses to the changes forced by Covid-19, and what could be done to ensure better mental well-being among judges in the future.

Major new research by the UN Office on Drugs and Crime and its Global Judicial Integrity Network, shows a strong link, worldwide, between judicial well-being and judicial integrity.

Compilers of the report set it against the backdrop of the Bangalore Principles of Judicial Conduct. These principles emphasised that a judge should have 'sufficient time to permit the maintenance of physical and mental well-being', and, added the writers of the report, 'The stress of fulfilling judicial duties is increasingly being recognised.'

That stress, and the need to respond to it, was obvious from the input received. Of the 758 judges who completed the research form, almost all – some 97% – said they believed more attention should be paid to the importance of promoting judicial well-being. And well over 90% said that their judicial workload brought them stress sometimes, frequently or always.

Anxiety

Asked about their colleagues who might be experiencing stress or anxiety, 89% said they knew of such cases, but almost 70% said they felt that talking about mental health or stress 'was taboo when it comes to members of the judiciary'.

The most commonly-reported results of this lack of well-being were that it led to overall bad performance, to procedural errors and errors in judgment and that it caused a lack of concentration and diminished cognitive abilities.

Other associated problems included a lack of empathy, a tendency to be biased or to resort to stereotyping, and judgments that weren't fully researched, or that were hastily written. It also led to impatience, irritability interpersonal problems – and to anger.

Workload

So great was the pressure that even when training was offered, some judges were hesitant to accept it, saying it could add even further to their workload and their sense of never being able to catch up.

The survey involved judges from judiciaries around the world, with eight percent of the total participants coming from Africa. But despite the size and reach of the global responses, there was little difference between the responses based on gender, age and geographical region.

Across the board, the first finding was that more than 75% of survey participants felt they didn't have enough time to maintain 'optimal physical and mental well-being'.

Satisfaction

An overwhelming majority felt that their judicial work brought them sometimes, frequently or even always, feelings of fulfilment, happiness and satisfaction. But the negative feelings were just as strong.

About 75% of participants said that their judicial work 'sometimes, frequently or always' contributed to or created in them a physical exhaustion. Other feelings reported were emotional exhaustion (72%), anxiety (63%), and even sadness (54%).

What contributed to this stress, sadness and anxiety? Without any doubt, the heavy judicial workload lay behind most of the problem. But inadequate resources, institutional systems and structures – along with Covid 19 – all played their part in stress creation.

Quantity over quality

Another serious problem that led to a lack of well-being, was increasing demands and pressure from management to complete more cases and to 'prioritise quantity over quality'. And the vast majority of answers dealt in some way with excessive workloads, growing backlogs and the inability to control the volume of work.

All of this left judges with a feeling that they were always behind with their work, that their long out-of-office working hours weren't recognised and that they were unable to maintain a balance between their work and the rest of their lives.

As one anonymous respondent put it, 'We have to deal with many cases within the day and there is not enough time after work for studying and writing. All work of decision-making is done at home, with the result that no time is left for personal well-being and family.'

Institutional blindness

More than half of the survey participants said that their judiciary did not offer 'any form of support' to promote the well-being of judges. There was a kind of 'institutional blindness' to the impact of excessive workloads and the resulting constant pressure on judges, they said.

What about the impact of Covid? Nearly half of those who participated said that their mental well-being had deteriorated as a result of the pandemic. This was because of the changes that had to be made to the usual way of living and working. In particular,

it was because of the lack of personal contacts with colleagues and court users, because of health issues or fear of health issues, because of the adjustment that had to be made to new technologies, the growing backlog of cases, the longer working hours.

But on the other hand, many found their physical or mental well-being had actually improved during the pandemic. This group appreciated the flexible working hours, the modernised work systems and processes, the improved work efficiency because of few interruptions. This group referred to the better time management that was possible, to fewer interruptions, to the fact that there was more time to concentrate and catch up on paperwork and writing judgments or to the time saved by not having to commute to work. Some even felt personally safer while working remotely. They also commented on the fact that there was more time for physical exercise and a better work-life balance.

Flexibility

What of the benefits experienced during Covid could be maintained after the pandemic? Many appreciated the flexibility that some of the pandemic-related measures had created, and the fact that the pandemic forced judiciaries to reconsider the systems in place, allowing for mechanisms and systems to be introduced that were significantly more efficient and effective and so could be maintained in the future.

Though they understood the importance of in-person court sessions, many felt it would be helpful if they could work remotely at least some of the time, to catch up with administrative matters, applications and judgment writing.

‘A hybrid model of both in-person and remote work was considered by many participants as a means to improve time management and allow more opportunities for well-being activities, such as exercising, mindfulness or family time.’

Knock-on effect

Most participants believe that when the well-being of judges isn’t attended to, it creates a knock-on effect, with limitations on efficiency as well as impacting on the quality of decisions and judgments, public trust, and confidence in the judiciary, among other problems.

Many felt that if judges weren’t functioning optimally, both physically and mentally, it would be unlikely ‘that they will be able to perform in an ideal manner and that their relationships with colleagues, court users and others will be optimal.’

What help in relation to wellness would participants like in the future? Many said they were more interested in practical help and tips than in theory. But, as some noted, they aren’t getting anything at the moment, and they would thus welcome any form of support.

Peace

For many, the first step should be to acknowledge the problem and raise awareness about the negative impact of stress and mental health issues on judicial functioning.

This would help remove stigma and stereotypes. Many emphasised the importance of an enabling work environment and a positive working culture, and that 'when people work with peace and happiness, they can concentrate better and achieve better performance.'

Judicial leadership was also seen as crucial in promoting judicial well-being, and participants said that judicial leaders should address the topic and tackle existing taboos on the subject, as well as showing compassion, listening and being committed to supporting and guiding their staff. Judicial institutions, they said, needed to give employees the same care that is given to court users.

Some participants also emphasised the need for psychological support to maintain or improve mental well-being, but added that the specialists involved should be experts on the specific stressors linked to judicial functions`

(The above article appeared on the *africanlii.org* website on 7 July 2022. The report can be downloaded here:
https://africanlii.org/sites/default/files/Global_Report_Judicial_Well-being.pdf)

A Last Thought

In Mnyandu v Padayachi 2017(1) SA 151 (KZP) para 68 Moodley J, in trying to interpret the provisions of harassment by having regard to a comprehensive study and analysis of international legislation, cases in other jurisdictions, as well as the research conducted by the South African Law Reform Commission, came to the following conclusion, with which I agree, regarding the definition of harassment in terms of the *Protection from Harassment Act (Act 17 of 2011):*

'*Based on its examination of international legislation, the SALRC recommended that the recurrent element of the offence should be incorporated in the definition of "harassment". The definition in the Act states that "harassment" is constituted by "directly or indirectly engaging in conduct". However, although the definition does not refer to "a course of conduct", in my view the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.'*

Per Henney J in S[....] v P[....] and Others (A177/21) [2022] ZAWCHC 42; 2022 (2) SACR 81 (WCC) (24 March 2022)