e-MANTSHI

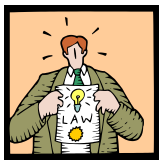
A KZNJETCOM Newsletter

September 2022: Issue 189

Welcome to the hundredth and eighty-ninth 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 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 Courts of South Africa. The notice in this regard was published in the Government Gazette no 46839 dated 2 September 2022. The amendments are to rule 5, 43, 67 and annexure 2 to the rules. The rules came into operation on 8 July 2022. The amendment can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202209/46839rg11483gon2434.pdf

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Recent Court Cases

1. *Solomons v The State* (Case no 1292/21) [2022] ZASCA 124 (26 September 2022)

When reliance is placed on domestic violence in sentencing proceedings there must be evidence to substantiate any such claims.

Siwendu AJA (Petse DP and Mothle and Hughes JJA and Chetty AJA concurring);

[1] This appeal is against the substituted sentence of the Northern Cape Division of the High Court, Kimberley (the high court) of the sentence imposed by the Northern Cape Regional Court sitting in Carnarvon. It involves an appropriate sentence in the context of reciprocal intimate partner violence and domestic violence.[1]

[2] The regional court convicted Ms Dawida Solomons (the appellant) for the murder of Mr Barnwell Sebenja (the deceased), her partner of 15 years. The deceased was 34 years old and the father of two of the appellant's children.

[3] The conviction carried a prescribed minimum sentence of 15 years as the crime falls within Part 2 of Schedule 2 of the Criminal Law Amendment Act 105 of 1997. However, on 8 November 2018, the trial court sentenced the appellant to 8 years' imprisonment. Accordingly, it found that there were substantial and compelling circumstances, based on her personal circumstances, justifying a lesser sentence.

[4] The appellant successfully petitioned the high court for leave to appeal against the conviction and sentence. The high court confirmed her conviction, but set aside the sentence. It imposed a sentence of 8 years' imprisonment, 3 years of which were conditionally suspended for 5 years, rendering an effective 5-year imprisonment.

[5] The high court found that the evidence of domestic violence and abuse at the hands of the deceased, as alleged by the appellant, was scant. She had not adduced

[1] The World Health Organization's definition of the term 'domestic violence' is used in many countries to refer to partner violence but the term can also encompass child or elder abuse, or abuse by any member of a household. On the other hand, 'Intimate partner violence' includes physical, sexual, and emotional abuse and controlling behaviours by an intimate partner (see the information sheet by the World Health Organization and Pan American Health Organization 'Understanding and addressing violence against women: intimate partner violence' 2012 page 1).

any medical evidence of hospital treatments to support the allegations of assault by the deceased. It found that the domestic violence interdict she had obtained did not mention the physical abuse. It criticised the appellant for not laying charges against the deceased.

[6] Throughout the proceedings, the State placed emphasis on the events of the day of the incident, contending that the appellant's conduct was consistent with the conduct of 'a woman scorned'. The high court found the assessment a logical one. Despite the identified shortcomings, the high court concluded there was some evidence of abuse in the protection order obtained by the appellant, which could not be ignored. It ameliorated the sentence in light of the perpetual violence which had marred the relationship with the deceased.

[7] Dissatisfied with that outcome, the appellant petitioned this Court for and was granted special leave to appeal against the sentence. The appeal was disposed of in terms of s 19*(a)* of the Superior Court Act 10 of 2013 without the hearing of oral evidence.

[8] The primary grievance is that the high court misdirected itself by underemphasising the domestic violence and abuse she suffered at the hands of the deceased. The appellant contends that this Court must take account of the persistent threats by the deceased to leave her for another woman, whenever she refused to comply with his demands as a facet of emotional abuse. The high court ignored this.

[9] Her second ground for appeal is that the high court minimised her personal circumstances when it imposed a custodial sentence. She places an emphasis on her position as a primary caregiver of the minor children as well as her role as the sole breadwinner. She contends that imprisonment will have a devastating effect on them.

[10] In essence, the appellant seeks an order setting aside the custodial sentence imposed and for the matter to be remitted to the trial court for consideration of a sentence of correctional supervision in terms of s 276(1)(*h*) of the Criminal Procedure Act 51 of 1977,[2] alternatively for this Court to impose a suitable sentence of correctional supervision with conditions.

Background

[11] The facts leading to the appellant's conviction are not contested. Despite a difficult upbringing, the appellant established a home at [....] Bonteheuwel Carnarvon, where she lived with her children. Her home is a typical municipal semi-detached house comprising a two-roomed house. From the trial exhibits, it is no more than 40 square meters.

[2] Section 276(1)*(h)* provides that '[s]ubject to the provisions of this Act and any other law and of the common law' various sentences may be passed upon a person convicted of an offence, including a sentence for correctional supervision.

[12] The appellant was 47 years old at the time of the offence. She had stable employment working as a cleaner and a part-time assistant librarian at Carnarvon Kareeberg for several years. She is the sole primary caregiver and breadwinner for her family. Her children with the deceased were 15 and 11 years respectively at that time.

[13] Even though the deceased was employed, he frequently asked the appellant for money to buy alcohol. The appellant often yielded to his demands. The trial court was informed that in addition to alcohol, the deceased often smoked dagga. He had a relationship with another woman, a public fact known by the appellant.

[14] The trial evidence was that the deceased would stay with the appellant for a few months, then leave to stay with his other partner for another few months. The night before the incident, the deceased and the appellant drank together. The deceased stayed overnight at the appellant's home.

[15] On 13 February 2016, the deceased left at about 5 am to go to the shebeen, leaving the appellant behind. At around 10 am, the deceased and the appellant met at Nevos Tavern, where they drank more beers. The appellant testified that the deceased swore at her, demanding money to buy more alcohol. The appellant relented once more and gave him R50.

[16] After a while, she left Nevos Tavern with a friend, Belsaar, to fetch food parcels from Belsaar's father. Thereafter, Belsaar provided her a lift to Spar, where she brought groceries. Despite evidence that the deceased had sworn at her, the appellant entrusted her house key to the deceased.

[17] The sole witness for the State, Mr Meckock (also known as Oom Klass), a mutual friend of the deceased and the appellant, testified that he had been drinking with the deceased that morning. He was not present when the deceased swore at the appellant. However, that afternoon, he met with the appellant and the deceased at Annie's house, the semi-detached house next to the appellant's house.

[18] He confirmed that the appellant returned from town with two bags of groceries from Spar and a crate with cold meats but without her house keys. The appellant had sent her neighbour's child, Jasmine, to fetch her house key from the deceased. They waited for the key at Annie's house. The deceased arrived at Annie's house with Jasmine.

[19] The trial evidence is that the appellant had asked Mr Meckock, but not the deceased, to assist in carrying her groceries to her house next door, which he did. At this time, the deceased took a polony roll from the crate of cold meats without asking the appellant. This upset the appellant. An argument ensued and migrated to the

appellant's house. Given the proximity of the houses and permeable sound, Mr Meckock overheard the exchange. The appellant used harsh and foul language.

[20] The deceased, who was described as a softly spoken person, demanded his backpack, clothes and work boots from the appellant. He threatened to leave the appellant for the other woman. The appellant first asked the deceased to lie down. When he did not, she told the deceased to take his clothes and leave. Mr Meckock disputed that the deceased swore back or shouted at the appellant.

[21] Mr Meckock testified that he returned to Annie's house to wait for the deceased but later came out to check on the deceased. He found the deceased standing at the doorway of the appellant's house, his back towards Mr Meckock, facing the appellant, who was inside the kitchen. The deceased had his boots and backpack over his shoulder.

[22] Mr Meckock saw the appellant come from the kitchen towards the deceased and stab him once with a knife. The deceased had staggered backward towards Mr Meckock, who caught him from behind. The post-mortem report shows that the appellant inflicted a 24 mm cut in the anterior thorax just left of the midline over T5 with a 10 mm exit wound on the right ventricle posterior and pericardium of the deceased's heart.

[23] As already alluded to above, the appellant testified about previous incidents of violence at the hands of the deceased. She showed the trial court three facial injuries to her cheek, chin, and forehead caused by stab wounds which she claimed were inflicted by the deceased. She testified that she was hospitalised on each of these occasions. Her evidence was that she did not lay charges against the deceased because she was scared of him. It is, however, common cause that in February 2015, the appellant obtained a domestic violence interdict against the deceased premised on emotional abuse.

[24] It bears mentioning that even though they did not testify at the trial, a letter from the family of the deceased was admitted into evidence. His family disputed that the deceased assaulted the appellant. They claim that the appellant and her elder son, who was not born out of the relationship with the deceased, perpetually 'hurt the deceased in so many different ways, it is impossible to describe.' As a result, the deceased relocated back to his family home.

[25] The appellant's version was that she acted in self-defence on the day because the deceased had assaulted her first. Dr van Zyl had examined her. The high court confirmed the trial court's view that the absence of physical injuries sustained on her body that day militated against self-defence.

The appeal on sentence

[26] The issue in this appeal is whether the high court misdirected itself in the exercise of its discretion to warrant an interference with the sentence as contended. The complaint centres on the court's approach to the evidence of domestic violence and abuse at the hands of the deceased. A second issue pertains to the imposition of a custodial sentence and in particular whether appropriate considerations were taken into account given that the appellant is a primary caregiver.

[27] The appellant relies on the pre-sentencing report prepared at the trial court. The report points to an intergenerational cycle of abuse and violence in her family of origin. It reveals that the appellant grew up in an abusive environment. Her father abused her mother, which fractured her family of origin. Her brother, left home at a young age to live with their grandparents because of the abuse. Her parents finally divorced.

[28] The main contention by the State is that the appellant failed to meet the threshold in *S v Engelbrecht*.[3] The State contends that the finding by the trial court was not that the appellant was 'a victim' in the relationship but that the relationship was marred by violence. The argument is that the domestic violence interdict obtained by the appellant in February 2015 did not mention 'physical assaults' inflicted by the deceased. In addition, the appellant had not reported these incidents to the probation officer. The State argues further that the trial court took judicial notice that both men and women could be perpetrators of violence. This may be so.

[29] Something must be said about the submission by the State. Implicit in it is that there must have been evidence that the appellant suffered physical harm. That approach is contrary to the Domestic Violence Act 116 of 1998, which provides a wide definition of domestic abuse. [4] However, for present purposes nothing turns on this.

[30] The pre-sentencing report depicts a history of the intergenerational cycle of domestic violence in the appellant's family of origin, a significant contributor to the pervasive scourge. The impact of this history, and factors that propelled the appellant to stay with the deceased, who she claims humiliated her, were never tested by the trial court or on appeal. Moreover, her legal representative did little to counter the impression that her conduct was synonymous with that of 'a woman scorned' (a

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[3] *S v Engelbrecht* 2005 (2) SACR 163 (W) para 47 where the court held that where a party relies on domestic violence to ameliorate a sentence, it must discharge an extra ordinary evidentiary burden of proving the existence, the extent, the nature, the duration and the impact of the domestic violence.

[4] Section 1 of the Domestic Violence Act provides that the term 'domestic violence' means—
'(*a*) physical abuse;
. . .
(*c*) emotional, verbal and psychological abuse;
(*d*) economic abuse;
. . .
or
(*j*) any other controlling or abusive behaviour towards a complainant'.

pejorative term). As a result, the evidence on sentence was in the main narrowed to the fateful single incident of February 2016.

[31] It is trite, based on a long line of decided cases,[5] that an appellate court may only interfere with the sentencing discretion of the trial court on limited grounds; if it is satisfied that the discretion was not properly exercised or the sentence was shockingly inappropriate or disproportionate.

[32] In addition to the shortcomings above, the appellant did not testify in mitigation of her sentence. She does not explain the failure to do so. The threshold in *Engelbrecht* can only be met if evidence is adduced before the court. Despite the submissions by the State, and the paucity of evidence as to the extent and impact of the history of domestic violence, the high court took cognisance of the protection order as an indication of the existence thereof, correctly, in my view. It ameliorated the severity of the sentence within the evidence available before it.

[33] The last complaint pertains to the appropriateness of a non-custodial sentence, considering the appellant's role as a primary caregiver. In this instance, the trial court weighed up and took account of the imperatives required when sentencing a primary caregiver propounded in *MS v S (Centre for Child Law as amicus curiae)*.[6]

[34] The issue on appeal essentially pivots on the adequacy of the care found for the children. At the time, placement of the children was found in the care of Ms Agnes Sebenya, a relative of the deceased. The appellant was unhappy with this, contending it was not in the best interest for the children without substantiating the basis for her dissatisfaction.

[35] Significantly, the above issues have been overtaken by various events. The appellant has been on bail pending the appeal since 2018. At the time of the probation report in September 2018, her children were 15 and 11 years, respectively. One child has reached the age of majority and the younger child is 16 years.

[36] I am satisfied that the high court exercised its discretion appropriately. The sentence is not disproportionate given the seriousness of the offence. Thus, there is no basis to interfere with the sentence imposed.

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[5] See *S v Rabie* 1975 (4) SA 855(A) at 865B. See also *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469; [2001] 3 All SA 220 paras 12-13 and *S v M* (*Centre for Child Law as Amicus Curiae*) 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC); 2007 (2) SACR 539 (CC) para 113.

[6] *MS v S (Centre for Child Law as amicus curiae)* 2011 (2) SACR 88; [2011] ZACC 7; 2011 (7) BCLR 740 (CC) para 45; the court held that the fact that the children will be adversely affected by the incarceration of their mother who is a primary care giver does not on its own impose an obligation on the sentencing court to protect the children at all costs from the consequences of an incarceration. All that is required is that the court must pay proper attention to these issues and take measures to minimise damage when weighing up the competing needs of the children, on the one hand, and the need to punish the appellant for her misconduct, on the other.

[37] In the result, the following order is made:
The appeal against the sentence is dismissed.

From The Legal Journals

Bekker, T

The apportionment of legal costs in South Africa: a comparative analysis

TSAR 2022 .3 457

Choma, H, Kgarabjang, T & Tshidada, T

A Credit Provider's Right to Set-Off under Credit Agreement Regulated by the National Credit Act 34 of 2005

African Journal of Law and Justice System Volume 1, Number 1, June 2022 Pp 49 - 58

Abstract
The article critically analyses the High Court decision in National Credit Regulator v Standard Bank of South Africa Limited especially the interpretation and application of the provisions of the National Credit Act 34 of 2005. The decision defines the primary purpose of the Act as the protection of the interests of consumers and in that light ousts the right of set off which the credit providers enjoyed at common law. On the other hand, the court emphasises the need to maintain a balance between the interests of the credit providers and the consumers in the application of the relevant provisions of the Act. The paper argues that ensuring that such balance is maintained would require the blending of the legal instrument with the factual situations in each case so that justice is attained based on the peculiarities of each case.

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

Contributions from the Law School

Sentencing trends in public violence cases

Public violence is often committed in the following contexts: faction fighting, riots, violent resistance to the police acting lawfully, forcible coercion by strikers of other workers, breaking up or taking over a meeting, stone throwing, disruption of traffic and gratuitous group attack on members of the public or their property (JRL Milton *South African Criminal Law and Procedure vol II: Common Law Crimes* 3 ed (1996) 88-89). These contexts have also become the categories into to which case law on public violence is classified.

Case law that emerges from the various public violence contexts mentioned above has produced not only the substantive principles of the crime of public violence, but also the sentencing policy in public violence cases. In the earliest public violence cases, the sentencing policy seems to have been the imposition of a fine only (see *R v Tshayitsheni* 1918 TPD 23; and *R v Dabee* 1928 NPD 50). In both these cases, the imposition of fines was upheld on appeal notwithstanding the fact that the members of the groups that were involved in factional violence were armed and had inflicted serious injuries on each other. In *R v Tshayitsheni*, the fight between the two factions had even resulted in the death of a person.

The court in *R v Mjoli* 1934 EDL 236, however, upheld the sentence of a fine and alternative imprisonment in the event of the failure to pay the fine. It was for the first time that alternative imprisonment was added alongside the sentence of a fine in a faction fighting case. The imprisonment sentence imposed in *R v Mvelase* 1938 NPD 239 marked a departure from the sentence of a fine that had been imposed in the two cases on which the court had relied, these being *R v Tshayitsheni* (*supra*) and *R v Dabee* (*supra*). In fact, it was for the very first time that the court imposed direct imprisonment as a sentence in a public violence case of the faction fighting type.

The court in *R v Ndaba* 1942 OPD 149 followed the direction taken in *R v Mvelase* (*supra*) when, on appeal, it confirmed the appellants' conviction of public violence, as well as the sentence of direct imprisonment. Imprisonment sentences were also imposed in the subsequent faction fighting cases of *R v Xybele* 1958 (1) SA 157 (T) and *S v Usayi* 1981 (2) SA 630 (ZA). The considerations that informed the policy shift from the imposition of fines to the imposition of imprisonment were not explained by the courts in *R v Mvelase* (*supra*) and *R v Ndaba* (*supra*), as the courts in these cases simply dismissed the appeals and confirmed the convictions and sentences by the magistrates. It is only in *R v Ngubane* 1947 (3) SA 217 at 219 that an indication of the considerations informing the sentence of direct imprisonment, is provided:

‘As to the sentences, the magistrate points out that the incident was a characteristic nucleus of more widespread tribal disturbances which are common in his district. In addition, Duze was very severely injured - he received, *inter alia*, five head wounds and might easily have been killed … The magistrate mentions that in his experience monetary fines are of no avail in cases such as the present, as the various factions almost invariably club together to pay each other's fines.’

In *S v Usayi* (*supra* at 634), the court justified the imprisonment sentence as follows:

‘This is a serious case of a deliberate flouting of legitimate authority, and as the magistrate has said, the area in which it occurred was suffering from a general breakdown in law and order. The conduct called for a deterrent sentence for the benefit of the people as a whole, although it is unfortunate that hitherto blameless persons, two of whom are over 50, have to be sent to prison.’

The then new approach to sentencing public violence offenders seems to have been carried over to the sentencing jurisprudence in riot and stone throwing cases which characterised the resistance against the apartheid government in the 1980s (see *S v Dingiswayo* 1985 (3) SA 175 (Ck); *S v Malinga* 1986 (4) SA 296 (E); *S v Samaai* 1986 (4) SA 860 (C); *S v Solani* 1987 (4) SA 203 (NC); and *S v Maseko* 1988 (4) SA 1 (A). Around the mid-1980s, judges began to realise the over-emphasis of the seriousness of the crime of public violence and the scant regard to the personal circumstances of the offender, which led to the imposition of harsh imprisonment sentences. As a result, the move away from imprisonment sentences started to gradually emerge (see *S v Mangcola* 1987 (3) SA 791 (C); *S v Mbuyisa* 1988 (1) SA 89 (N); *S v Quandu* 1989 (1) SA 517 (A); and *S v Abrahams* 1990 (1) SACR 172 (C)). The foregoing cases gave rise to a pattern of suspended sentences, coupled with one or more of the following: (a) a whipping, (b) a fine, (c) payment of damages, or (d) community service.

Even the eminent criminal law scholars became critical of the harsh imprisonment sentences imposed for public violence. In this regard, Lund (‘Sentencing’ 1988 *SACJ* 172 at 173-174) notably argued:

‘But it must be asked whether such sentences do not often reflect an over-reaction by the courts to public violence, with general deterrence being over-emphasised in the interests of the state while insufficient or no weight is given to considerations such as the degree of the offender's participation and his personal circumstances. An example of such an over-reaction is *S v Dingiswayo* 1985 (3) SA 175 (Ck) in which the court's approach to public violence committed by university students appears to have led it to ignore a number of established sentencing principles and to misdirect itself in various respects.’

The shift away from the imposition of imprisonment sentences was accepted with much admiration in academic circles. This shift is even observed by Plasket (in C Plasket ‘A fresh approach to sentencing in public violence cases’ 1991 *SACJ* 194 at 199) to be in line with the following sentiment of Justice Kriegler:

‘No judicial officer can restore law and order to society, and no combination of judicial officers, by whatever sentences they wish to impose, can achieve that object. Law,

order and stability in society are maintained and restored by society at large' (J Kriegler 'Sentencing in times of unrest' 1988 *SACJ* 447 at 449).

In as much as the public violence sentencing policy of the colonial and apartheid era had been revamped for the better particularly by cases in the riot and stone throwing context, the post-apartheid courts nonetheless seem to be starting sentencing on a clean slate. This started as an innocuous approach of the Supreme Court of Appeal (SCA) in *S v Whitehead* 2008 (1) SACR 431 (SCA), where the majority of the SCA, without considering any of the old case law authorities, upheld the conviction and sentence of five years imprisonment, with two years suspended. The offenders were members of a group that planned and launched indiscriminate physical attacks on unsuspecting municipal workers who were on strike.

The case of *S v Le Roux* 2010 (2) SACR 11 (SCA), the second and last reported public violence case in post-apartheid South Africa, confirms that the courts are starting sentencing public violence cases on a clean slate. This is because the court, in upholding the trial court's sentence of six years imprisonment (with conditional suspensions in respect of each of the appellants) had regard to the guidance on sentencing offered only in the case of *S v Whitehead* (*supra*), and justified this on the basis of the case being '[t]he most recent exposition of the approach to the sentencing of people convicted of public violence' (*S v Le Roux supra* par 36). In the *S v Le Roux* case, the convictions of public violence flowed from an incident at a restaurant in which the appellants, upon slight provocation, went on a rampage and attacked other patrons and damaged property.

The possibility that the courts are open to a fresh sentencing jurisprudence in public violence cases is to be welcomed because, in appropriate public violence contexts, adherence to the culture of the imposition of harsh sentences, such as imprisonment sentences, has to be done away with. The courts therefore have the opportunity to identify those public violence contexts in respect of which harsh sentences are not appropriate, and also determine the appropriate alternative sentences.

Direction as to the appropriate alternative sentences is provided in some of the old cases. Such alternative sentences could be a combination of any of the following: fines, suspended sentences, correctional supervision and payment of damages (see *S v Mangcola* (*supra*) and *S v Mbuyisa* (*supra*)). Terblanche has put on the table the possibility of the use of a restorative justice approach following his suggestion that the case of *S v Le Roux* (*supra*) was 'an excellent opportunity for a restorative justice approach' (S Terblanche 'Sentencing' 2010 *SACJ* 427 at 438). In justifying this submission, Terblanche op cit 437-438) argues thus:

'It is submitted that the judgment as far as sentence is concerned in *Le Roux* is problematic in several respects, the most important of which is the 'translation' of the seriousness of the crime into a sentence of (in this case) six years' imprisonment (see *S v Nyathi* 2005 (2) SACR 273(SCA) at para 15). As mentioned above, the Court highlighted as an aggravating factor the wanton and violent assaults. However, many other factors that are relevant to the establishment of the seriousness of the crime of public violence are not referred to in the judgment. Examples include the size of the group, the duration of the attack, and the extent of the damage caused. The

comparison of the facts in *Whitehead* is also rather unfortunate. Apart from the fact that the latter case probably involved a planned action by the perpetrators (in explicit contrast to the situation in *Le Roux* at para 15) and that it was a racist attack by white people on black people, the most important difference is that the attack in *Whitehead* resulted in the death of one of the victims. In fact, nine victims were left 'lying on the grass' following the attack in *Whitehead*, although in total 22 people sustained injuries.'

He (Terblanche op cit 438) further adds that:

'There is no indication in *Le Roux* that *any* of the victims were as severely injured as *any* of these nine. Therefore, it is submitted, there is every indication that a considerably lighter sentence than that imposed in *Whitehead* is indicated in the case of *Le Roux* and not, as happened, more severe sentences. It is also unfortunate that the judgment in *Le Roux* does not refer to any of the personal circumstances of the appellants. One does not know whether their actions on the day were part of a pattern or whether it happened only once, to mention one example.'

Terblanche (op cit 438) then ends with a suggestion that:

'[T]his crime would have been an excellent opportunity for a restorative justice approach. Even retribution would have been served if the offenders were given the opportunity to explain their actions, to apologise (evidently only if this was done truthfully) to the victims and to compensate the victims for their losses. Instead, the Court did not even address what purpose the sentences of imprisonment were expected to serve in this case.'

Dr Khulekani Khumalo, Senior Lecturer,
University of KwaZulu Natal, Pietermaritzburg

Matters of Interest to Magistrates

A discussion on the debt review process and conflicting judgments from South African courts

There have been several conflicting judgments pertaining to the debt review process. The conflicting judgments pertained to whether –

- a High Court has inherent jurisdiction to declare a consumer 'no longer over-indebted';
- courts have power to terminate the process;
- a High Court can be a court of first instance in matters of debt review; and
- a High Court can use its inherent power to put words into a text of legislation, which words are neither expressed nor implied by the legislature.

In *Magadze v ADCAP*, *Ndlovu v Koekemoer* (GP) (unreported case no 57186/2016, 2-11-2016) (Neukircher AJ), the applicants applied to be declared over-indebted in terms of s 86(1) of the National Credit Act 34 of 2005 (the Act). However, their applications were never confirmed in terms of s 87(1), that is in terms of a court order of the magistrate's court, but nonetheless they made necessary payments to their creditors and settled two of their debts, which resulted in an improvement of their finances. They sought to –

- terminate the debt review process;
- be declared no longer over-indebted; and
- remove their debt review status from the credit bureau.

Neukircher J enquired whether a s 71 remedy of a clearance certificate has the same effect as the court order envisaged in s 88(1)(*b*) of the Act. She found that a s 71 clearance certificate has the consequence of expunging a consumer's record from the credit bureau, whereas a s 88(1)(*b*) court order does not result to the expungement thereof. She thus held that, granting an order that falls short of expunging a credit record *in toto* would mean that s 71 carries more weight than an order of the court and such a situation would be untenable. In rejecting this, she held that the inherent jurisdiction of the High Court permits the declaration of no longer over-indebted, and the expungement thereof. Notably, at the time the order was granted, there was never an existing order that confirmed over-indebtedness. Accordingly, the court's order signalled that a High Court, by virtue of its inherent jurisdiction, can be a court of first instance in matters of this nature.

In *Mokubung v Mamela Consulting and Others* (GP) (unreported case no 87653/2016, 14-6-2017) (Mbongwe AJ) and in *Manamela v Du Plessis t/a Debt Safe and Others* (GP) (unreported case no 78244/2016, 21-6-2017) (Mbongwe AJ), Mbongwe AJ held that there is no provision for a withdrawal of a debt review in the

Act but the National Credit Regulator's Guidelines for the Withdrawal from Debt Review, February 2015 (Withdrawal Guidelines), does provide a procedure of the withdrawal thereof. The tragedy he found was that the guideline is neither a supplement nor an amendment to the Act. Regardless of that, he confined himself with it and further exercised the High Court's inherent jurisdiction in granting the orders.

In *Du Toit v Benay Sager (NCRD2484) t/a Debt Busters and Others* (WCC) (unreported case no 16226/17, 17-11-2017) (Thulare AJ), the facts and prayers sought were similar to the cases above. It was argued that the Act did not accommodate situations summarised above thus creating a *lacuna* and warranted a High Court, by its inherent jurisdiction, to intervene. Following Mbongwe AJ in *Manamela,* counsel in the proceedings invoked the Withdrawal Guidelines, to advance his arguments. The court held that obtaining a clearance certificate in terms of s 71(5) of the Act enables the removal of the record of debt re-arrangement from the National Credit Register. However, a clearance certificate is not a withdrawal from debt review and even if a debt counsellor would attempt to withdraw a debt review process, he would be acting *ultra vires* (*Rougier v Nedbank Ltd* (GJ) (unreported case no 27333/2010, 28-5-2013) (Nobanda AJ)). Secondly, it found no *lacuna* in the Act by reasoning that there was a deliberate decision by the legislature and where a debt counsellor does not come to assist the consumer with the assessment in order to issue a clearance certificate, a Tribunal can be approached. In situations where there is no existing court order declaring over-indebtedness due to failure of a debt counsellor to bring the proposal to the attention of the court for judicial oversight and the consumer's financials improve, it was held that the magistrate court's power to declare over-indebtedness is by implication conferred when it is given the jurisdiction by the Act. Therefore, a consumer can with the leave of the magistrate's court, in terms of s 86(9) apply for a hearing and 'must demonstrate circumstances and reasons that show that it is necessary, in the interests of justice and equity that the investigation should shift from the statutory body to the judicial authority, in its discretion' (*Du Toit* at para 26). In doing so, the consumer can produce evidence that would persuade the court to reject the findings of the debt counsellor.

It was further held that a debt counsellor; the National Credit Regulator; the National Consumer Tribunal and the magistrate's courts are central to consumer related matters. It therefore follows that statutory remedies must firstly be exhausted before approaching the courts. Thus, it was held that a High Court is not the forum of first instance on matters which both the Tribunal and the magistrate's courts should deal with. The tone of the judge, appeared to suggest that he could have granted the application, had the applicants first exhausted the available domestic remedies.

In *Phaladi v Lamara* 2018 (3) SA 265 (WCC), Binns-Ward J held that where an area of law is regulated by a statute, a court is under duty to interpret and apply the legislative enactments in a manner that promotes the spirit, purport, and objects of the Bill of Rights and in doing so it cannot demolish the language used by a legislature in a legislative text.

He held that where applicants have fulfilled all their obligations under their credit agreements that are subject to debt rearrangement that are not long-term agreements, they are entitled to obtain a clearance certificate in terms of s 71 of the Act and the effect of which is the expungement of the record of debt rearrangement from the records in the credit bureau. Endorsing Thulare AJ in *Du Toit,* he held that when they encounter any hurdles in attaining the clearance certificate, they have to approach the Tribunal as it is a forum of first instance. Counsel for the applicant, sought to argue by relying on s 88(1)(*b*) of the Act that 'the court has determined that the consumer is not over-indebted' would require to be read as 'the court has determined that the consumer is no longer over-indebted', thereby necessitating the word 'not' to be deleted and be replaced by 'no longer'. The judge espoused a contextual approach that the provision does entice that an application can be made to declare a consumer 'not over-indebted' and 'no longer over-indebted' and it neither envisages that a court can culminate a debt review process as the process is administrative, not *iudicialis*. He rejected the argument that 'not' over-indebted could be equated to 'no' longer over-indebted, under reasoning that if it would be construed so, he would be reading words into a statute where it is not necessary. The judge further endorsed Thulare AJ in *Du Toit,* when it was held that a magistrate's court is conferred with power to reject the proposal and a consumer is not presented from providing evidence that would be opposed to the initial findings of a debt counsellor in order to persuade the court to reject the debt counsellor's recommendations. Whereas, where a debt rearrangement has been confirmed, in whatever manner, the only way to exit it is in terms of s 71 read with s 88(1)(*c*) of the Act. The judge, however, unlike Thulare AJ, strictly confined himself to the requirements of s 71 when he said that 'to the extent that they do not qualify for relief under that provision, they are remediless. The courts are not empowered to craft a remedy that the statute does not allow for'.

In *Botha v Koekemoer t/a The Debt Expert 2 and Others*; *Mafakane v MSA Consultants t/a Consumer Financial Services and Others* (LP) (unreported case no 7723/2017; 750/2018, 11-5-2018) (Muller J) Muller J, contrary to Neukircher AJ in *Magadze* found that there is no provision in the Act which entitles a consumer to terminate the process once it has commenced. Secondly, the judge found that the Act neither implies nor expressly allows withdrawal of a debt review process. However, he further opined that a court cannot disregard a consumer's desire to withdraw from the process. Reinforcing the views of Binns-Ward J in *Phaladi* and those of Thulare J in *Du Toit* in paras 25 – 26, he said that a debt counsellor being intermedial to the process can provide a subsequent substantial information asserting a variation to the consumer's financial circumstances in order for the court to reject the application in its entirety. In dismissing the application, the judge, following *Phaladi* held that, 'courts do not have the inherent jurisdiction to disregard statutory provisions' and 'the applicants were at no time declared to be over-indebted by a competent court'.

The inconsistency in the judgments highlighted above landed in the hands of the Gauteng Division Judge President who in terms of s 14(1)(*a*) of the Superior Courts

Act 10 of 2013 referred the uncertainties to the Full Court of the Division in the matter of *Van Vuuren v Roets and Others (Banking Association of South Africa and Others as* amici curiae*)* [2019] 4 All SA 583 (GJ). The Full Bench endorsing *Phaladi* and *Du Toit*, held that where there is no debt rearrangement order by the court despite findings of over-indebtedness by a debt counsellor, a consumer can submit additional information about his revived fortunes, whereupon the magistrate must conduct a hearing and thereafter decide whether to reject the recommendation or conclude that a consumer is not over-indebted.

Where there is an existing order, a consumer can exit by settling all his debts and can also by issue of a debt clearance certificate by a debt counsellor in terms of s 71 (provided that requirement of s 71(1)(*b*) are met) and if a debt counsellor refuses to issue same, the consumer may lodge a complaint with the Tribunal. Likewise, the court was also critical that if a consumer can satisfy s 71(1)(*b*) requirements, he can exit the debt review process, other than that, one cannot. The essence thereof was that no court has jurisdiction or power to order a release of a consumer from debt review. It was also held that neither the purpose nor the language of the text suggests a termination of a debt review process by any court. The Act merely created power for any court, by s 85, to set in motion a debt review process or itself to order a re-arrangement of a debtor's obligations.

Conclusion

It has been now settled that to withdraw from a debt review process subsequent to material change in finances, but where there is no debt rearrangement order from the magistrate, a consumer can apply and produce evidence in his favour, which would be contrary to the findings of a debt counsellor. A magistrate after conducting a hearing may rule in favour of the consumer. When there is an existing debt re-arrangement order and a consumer's financial position also changes to the better, in order for a consumer to exit the debt review, they can only approach their debt counsellor for a debt clearance certificate in terms of s 71 of the Act, provided that the requirement set out in s 71(1)(*b*) is strictly met and if a debt counsellor refuses, a complaint can be laid with the Tribunal as it is a forum of first instance. Lastly, a High Court is not a court of first instance in respect of debt review processes, as the Act confers no jurisdiction to it and it can neither use its inherent jurisdiction.

Limnandi Mtshemla *LLB (UFH) Compliance Management (UCT)* is a legal practitioner at Squire Smith & Laurie Inc in King William's Town.

(This article was first published in *De Rebus* in 2022 (Sept) *DR* 18.)

A Last Thought

Order

[100] The following order is made:

1. The order of the High Court, declaring section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 to be inconsistent with the Constitution and invalid to the extent that it criminalises the use and/or possession of cannabis by a child, is confirmed.

2. The operation of the order in paragraph 1 is suspended for a period of 24 months to enable the Parliament to finalise the legislative reform process.

3. During the period of suspension referred to in paragraph 2, no child may be arrested and/or prosecuted and/or diverted for contravening section 4(b) of the Drugs and Drug Trafficking Act insofar as it criminalises the use and/or possession of cannabis by a child.

4. A child apprehended for the use and/or possession of cannabis may be referred to civil processes, including those found in the Children's Act 38 of 2005 and the Prevention of and Treatment for Substance Abuse Act 70 of 2008.

5. Where a court has convicted a child of a contravention of section 4(b) of the Drugs and Drug Trafficking Act for the use and/or possession of cannabis, the criminal record containing the conviction and sentence in question, of that child in respect of that offence may, on application, be expunged by the Director-General: Justice and Constitutional Development or the Director-General: Social Development or the Minister of Justice, as the case may be, in accordance with section 87 of the Child Justice Act 75 of 2008.

6. If administrative or practical problems arise in the implementation of paragraph 5 of this order, any interested person may approach the High Court for appropriate relief.

7. The second respondent must pay the applicant's costs in this Court.

Per Mhlantla J in *Centre for Child Law v Director of Public Prosecutions, Johannesburg and Others* [2022] ZACC 35