e-MANTSHI

A KZNJETCOM Newsletter

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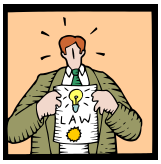
Welcome to the hundredth and ninetieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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, 1985 (Act No. 107 of 1985), read with section 25 of the Small Claims Courts Act, 1984 (Act No. 61 of 1984), with the approval of the Minister for Justice and Correctional Services, made rules for the Small Claims Court. These rules were promulgated in Government Gazette no 47254 dated 7 October 2022. The rules will come into operation on a date to be determined by the Minister. The rules can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202210/47254reg11497gon2573.pdf

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Recent Court Cases

1. S v Roberto In re S v Cumbe (RC07/2021-RC08/2021) [2022] ZAFSHC 133; 2022 (2) SACR 442 (FB) (9 June 2022)

Although informal plea and sentence agreements are relatively common occurrences, they have a number of disadvantages; amongst others, in that the prosecutor and the defence team cannot enter into a binding agreement in respect of the sentence to be imposed without the co-operation of the presiding officer which in the courts view would be unacceptable and should be avoided.

Daffue J

[1] The above two matters came before the High Court on special review. The two accused persons were charged separately in the Regional Court sitting in Ladybrand, each with one count of motor vehicle theft. On 25 February 2022 they pleaded guilty and on the same day they were sentenced to six years and seven years imprisonment respectively in accordance with the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] Shortly after the proceedings the Honourable Acting Regional Court Magistrate JJ van Zyl ("the regional magistrate") recognised that the imposed sentences were not competent and/or according to the law insofar as he could not sentence the accused persons to periods in excess of five years' imprisonment as provided for in s 276(1)(i) read with s 276A(2) of the CPA. Consequently, he sent the matters on special review in terms of s 304(4) and requested that orders be granted setting aside the sentences and to remit the matter to him to sentence the accused persons afresh.

[3] On receipt of the two review files which were allocated to me for consideration, I was quite perturbed when considering the facts and circumstances of the cases and requested the regional magistrate to respond to the following request as set out in my secretary's letter dated 22 April 2022:
"Please take note that the above two review matters have been allocated to Daffue J for consideration. Having done so, the judge seeks more clarity. Will you kindly convey the following to the Honourable Acting Regional Court Magistrate and return the record to him for his comments.
1. Section 276A(2) of the Criminal Procedure Act, 51 of 1977 (as amended) is incorrectly quoted insofar as the reference to section 77 of the Child Justice Act, 2008

should be a reference to section 75 of that Act. This is irrelevant *in casu* as the accused are not children - they are 39 and 37 years old respectively.

2. The following appears from the records in both matters: The accused were represented by the same attorney who drafted statements on their behalf in terms of section 112(2) of the Criminal Procedure Act on 25 February 2022.

2.2 Both accused admitted to stealing similar vehicles, to wit Isuzus, parked in the same street in Clocolan on 14 December 2020.

2.3 Both accused admitted that they acted in concert with another person.

2.4 Both accused admitted that they were on their way to Johannesburg with the stolen vehicles.

2.5 Both accused have previous convictions. Roberto was convicted of theft in 2012 and for contravention of section 37 of Act 62 of 1955 in 2016. In the last case a sentence of 6 years' imprisonment was imposed. Cumbe was convicted in 2018 of theft as well as statutory corruption for which he was sentenced to 8 years' and 5 years' imprisonment which was supposed to run concurrently.

2.6 On the same day, to wit 25 February 2022, the Honourable Acting Regional Court Magistrate sentenced the accused to 6 years and 7 years imprisonment respectively in accordance with the provisions of section 276(1)(i) of the Criminal Procedure Act.

3. Did the Honourable Acting Regional Court Magistrate really intend to sentence the accused in accordance with section 276(1)(i) instead of section 276(1)(a)? [Note: the reference to s 276(1)(a) is incorrect; it should be s 276(1)(b)]

4. Obviously, if the sentences were correctly recorded on the J15 to be in terms of section 276(1)(i), the imposed sentences are not in accordance with the law and should be set aside.

5. Both matters will be considered immediately upon receipt of a response."

[4] The regional magistrate responded on 05 May 2022 as follows and I quote *verbatim*:

"1. On 25 February 2022 the prosecutor in both the matters at hand, as well as the defence attorney, approached myself in chambers and asked to discuss an informal plea arrangement that the state and defence were talking about.

2. They indicated that because the matters were on the roll since March 2021 they were looking to come to an agreement in regard to sentencing if the accused decided to tender a plea of guilty.

3. It was then suggested by the state and the defence that they would like the court to consider a sentence of 5 years imprisonment in terms of Section 276(1) (i) of Act 51 of 1977.

4. I then asked the prosecutor if the state will be proofing any Previous convictions against the accused persons, to which the Prosecutor answered that the state will not proof such. On that basis and taking into consideration that the matter

was on the roll since March 2021 and both accused in custody, I agree to look at such a Sentence.

5. I would like to mention that at that stage the court was waiting for an interpreter to arrive from Thaba Nchu Court, as the accused persons elected to speak Portuguese. When the interpreter had still not arrived at court at about 14:45 the defence attorney informed the court that the accused persons were both able to understand and speak English and that we may proceed without an interpreter.

6. The accused persons pleaded guilty as agreed to by the defence and the state and handed in statements in terms of section 112(2) and was subsequently found guilty on the charges by the court. At this stage the prosecutor, to the amazement of the court got up and proofed previous convictions against the accused persons. At this stage the court felt that 5 years imprisonment would not be an appropriate sentence in light of their previous convictions and felt that a longer period of imprisonment would suffice.

I still had in my mind the conversation with the defence and the state earlier and went ahead to sentence the accused as set out on the J15's in terms of Section 276(1) (i) Act 51 of 1977. The court at that stage intended to sentence the accused persons in terms of section 276(1)(i) of the CPA. After the court adjourned I realised that I had erred in imposing more than 5 years imprisonment in terms of section 276(1) (i) and that the sentences imposed were clearly not in accordance to the law and that the matters would have to be sending on special review.

7. It is there for my humble submission that the sentences as imposed is not accordance to the law and request that the Learned Judge sets aside the sentences and order that sentencing should start afresh.

8. I apologise for the oversight and will make sure that the same error will not occur again."

[5] It now appears that I was correctly perturbed by the manner in which the matters were dealt with. The regional magistrate has set out his reasons why he agreed to consider sentencing the accused persons to 5 years imprisonment in terms of s 276(1)(i). The prosecutor and attorney for the accused persons approached the regional magistrate in chambers. He was informed that they were discussing an informal plea and sentence agreement, bearing in mind that the accused persons had been in custody for nearly a year at that stage. In terms of the agreement the accused persons would plead guilty on condition that the regional magistrate would consider sentences of 5 years imprisonment in terms of s 276(1)(i). The regional magistrate was informed by the prosecutor that the State would not prove previous convictions against the two accused persons. The regional magistrate was apparently amenable to act in accordance with this informal arrangement. Contrary to the prosecutor's assurance in chambers, the State eventually proved previous convictions of a serious nature against both accused persons. At that stage the regional magistrate found himself bound to sentence the accused persons in accordance with the aforesaid sub-section of the CPA. In considering the seriousness of the offences, he decided to impose sentences of six years and seven

years imprisonment respectively which he could not have done and which he afterwards accepted was not in accordance with the law as a maximum period of five years imprisonment could have been imposed.

[6] It is apposite to explain the difference between a sentence of imprisonment in terms of a 276(1)(b) and one in terms of s 276(1)(i). In terms of the first sub-section a court may sentence an accused to such imprisonment as the court's jurisdiction allows, whilst a court sentencing an accused in terms of s 276(1)(i) may not impose imprisonment in excess of five years. In *S v Scheepers*[1] the court held that punishment under s 276(1)(i) should be considered when a custodial sentence is necessary, but a long period of imprisonment is undesirable. The early release of a prisoner is possible as the prisoner can be placed under correctional supervision at the discretion of the Commissioner of Correctional Services. The provisions of the Correctional Services Act[2] must be considered. The main difference between the two sub-sections is the sentenced person's right to be considered for an alternative to imprisonment when a sentence in terms of s 276(1)(i) is imposed. Section 73(7)(a) of the Correctional Services Act ("the CSA") reads as follows:

"7*(a)* A person sentenced to incarceration under section 276 (1) *(i)* of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise."

A prisoner sentenced to the maximum period of imprisonment under s 276(1)(i) is therefore eligible to be considered for placement under correctional supervision after having served only 10 months of his sentence. Contrary to the treatment afforded a prisoner sentenced in terms of s 276(1)(i), s 73(6)(a) of the CSA stipulates that persons sentenced to imprisonment in terms of s 276(1)(b) must in principle serve at least one half of their sentences before being eligible for parole.

[7] The concept of an informal plea agreement is not a new phenomenon. In *Van Heerden v Regional Court Magistrate, Paarl*[3] the court mentioned that informal plea bargaining is an everyday experience in our courts. No doubt, informal plea bargaining is a useful tool to alleviate heavy court rolls in especially our lower courts. Usually, the process provides an opportunity to a prosecutor to obtain a guilty plea on a lesser charge in exchange for the possible imposition of a specific and usually a reduced sentence. Many examples may be provided, but to name one, a person charged with driving under the influence of alcohol may agree to plead guilty on a charge of negligent driving and the imposition of a much more lenient sentence than in the case of drunken driving. Often prosecutors are prepared to accept guilty pleas on culpable homicide where murder charges were levelled at accused persons and agree not to ask for long term imprisonment, but for correctional supervision, a fine or

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[1] 2006 (1) SACR 72 (SCA) and see in general: SS Terblanche, *A Guide to Sentencing in South Africa*, 3rd ed pp 285 - 288

[2] 111 of 1998

[3] (883/2015) [2016] ZASCA 137 (29 September 2016) at para 17 and *S v Phika* 2018 (1) SACR 392 (GJ) at para 17

even a suspended sentence. Problems arise when one of the parties afterwards alleges a misunderstanding or breach of the agreement. Matters get worse when the presiding officer is either part of the negotiations, or incorrect information was provided to him/her in chambers pertaining to what was agreed upon.

[8] Although informal plea and sentence agreements are relatively common occurrences, they have a further disadvantage, other than those mentioned above, in that the prosecutor and the defence team cannot enter into a binding agreement in respect of the sentence to be imposed without the co-operation of the presiding officer.[4] Therefore, plea bargaining has several pit-falls. In the previous paragraph I mentioned the possibility of a misunderstanding – these agreements are most of the time verbal agreements entered into in haste and whilst the court proceedings are about to start - or alleged breach of the agreement by one of the parties. The factual dispute that occurred in *Van Heerden* is an example of what could transpire if appropriate attention is not given to detail and precise recording of an informal agreement. In that case it was alleged on behalf of the accused that the prosecutor had undertaken to support a request for a non-custodial sentence, but contrary thereto, she eventually made submissions in aggravation of sentence.[5] Although the prosecutor may undertake to ask for a lenient sentence, the presiding officer may decide to impose a harsher sentence. It is trite that the parties (the prosecutor in particular) are bound by an informal plea agreement, but they cannot foresee how the presiding officer may exercise his/her discretion relating to sentence, unless he/she has become a party to the agreement which is in my view would be unacceptable and should be avoided.

[9] Section 105A was introduced by the Legislature to provide for a formal plea and sentence agreement procedure and to minimise problems with informal plea agreements, although it is a cumbersome procedure. I do not intend to summarise s 105A, but briefly refer to the following insofar as it would have been relevant *in casu*. The prosecutor must consult *inter alia* with the Investigating Officer and the complainant (or his representatives such as the family in the event of death) and he/she must also consider the previous convictions, if any, and the interest of the community. The negotiations do not include the presiding officer and once an agreement is reached, it must be reduced to writing and contain all relevant information as required by the section, including previous convictions. If the presiding officer is of the opinion that the sentence agreed upon is unjust, the parties are informed accordingly and also which sentence is considered just. The parties may either abide by the agreement, subject to the right to lead evidence and present argument pertaining to sentence, or withdraw from it. If they withdraw from the agreement, the trial shall start *de novo* before another presiding officer, provided that the accused may waive his right to be tried by another presiding officer. Obviously, if

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[4] *Van Heerden loc cit* at para 17

[5] *Ibid* para 22; see also *S v Phillips* 2018 (1) SACR 284 (WCC), a case where factual disputes occurred

the legal representatives followed s 105A procedure *in casu*, the presiding officer would not have been involved in any prior negotiations and the previous convictions would have been on record at the stage when the agreements were to be considered in open court.

[10] Arguments by academics[6] that s 105A procedure is too time-consuming and sets insurmountable barriers do not hold water if the certainty obtained is taken into consideration. The Supreme Court of Appeal has stated on several occasions that the plea bargaining mechanism provided for in s 105A should be encouraged.[7] Plea bargaining still takes place, but once the agreement is formalised and all stakeholders rights have been taken into consideration, it is duly considered by the presiding officer who should only finalise the process if there was due compliance with the strict requirements of the section and if he/she is satisfied with the sentence agreed upon.

[11] Informal plea bargaining has its place in respect of trivial crimes, but again, the presiding officer shall not become embroiled in the negotiations. Digested court rolls may be alleviated by "settling" criminal disputes in this manner. The factual dispute that has arisen in *Van Heerden supra* shall never be forgotten. *In casu,* I foresee that the relevant role players will not be speaking from the same mouth. They will have to be subjected to cross-examination to establish the truth. I can imagine that the prosecutor would not want to be heard that he had misled the presiding officer.

[12] Having taken notice of the differences between the aforesaid two sub-sections of s 276, it is time to consider the previous convictions proven by the State. These are as follows:

12.1 In respect of accused Osorio Junior Roberto:

12.1.1 theft committed on 8 February 2012 to which he was sentenced to R3000.00 or six months' imprisonment, together with a further period of imprisonment of twelve months suspended *in toto* on certain conditions for a period of three years;

12.1.2 transgression of s 37 of Act 62 of 1955 on 30 March 2016 in respect of which he was sentenced to 6 years imprisonment.

12.2 In respect of accused Cartilio Eugenio Cumbe:

12.2.1 theft committed on 23 December 2017 for which he was sentenced to eight years imprisonment;

12.2.2 contravention of the Prevention of Corruption Act, 6 of 1958 for which he was sentenced to five years imprisonment, which sentence had to be served concurrently with the sentence mentioned above. [Note: It should be recorded that Act 6 of 1958 was repealed in 1992, whilst the 1992 Act was again repealed by the present Act, to wit the Prevention and Combatting of Corrupt Activities Act, 12 of 2004.]

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[6] P du Toit, Informal plea bargaining, 2018 SACJ 282

[7] *S v DJ* 2016 (1) SACR 377 (SCA) at para 17

[13] The regional magistrate is correct that the imposed sentences are not in accordance with the law and consequently, both these sentences should be set aside. The crucial question to be considered is whether the matters should be referred back to the court *a quo* to sentence the accused persons afresh. In my view irregularities occurred which cannot be rectified. I explain in the next paragraph.

[14] The accused persons right to fair trials has been transgressed.[8] *In casu* the sentences imposed upon the accused persons are in excess to those agreed upon by their legal representative and the prosecutor on the basis that no previous convictions would be proven and which the regional magistrate was prepared to consider in terms of s 276(1)(i). Whether a misrepresentation was made by the prosecutor, or whether there was no meeting of the minds between the parties – a misunderstanding - the accused persons shall not be kept to their bargain. The irregularities in the conduct of the trials – to prove previous convictions after confirming during plea bargaining that none would be proven – are such that a failure of justice has occurred of such a nature to vitiate the trials. As the full bench has reminded us, one of the elements of the notion of basic fairness and justice is that the State shall be held to a plea bargaining agreement.[9] The only fair and logical outcome of the predicament being faced is to review and set aside the whole proceedings in both matters. The accused persons shall be arraigned again and will have the right to decide how to approach their defence.

ORDERS

[15] Consequently the following orders are made:

In respect of Osorio Junior Roberto:

1. The proceedings in the Regional Court in case RC07/2021 are reviewed and set aside;
2. The conviction of the accused person, Osorio Junior Roberto and the sentence imposed on him on 25 February 2022 are reviewed and set aside;
3. the matter is referred back to the Regional Court for the accused's trial to start *de novo* before a different presiding officer.

In respect of Cartilio Eugenio Cumbe:

1. The proceedings in the Regional Court in case RC08/2021 are reviewed and set aside;
2. the conviction of the accused person, Cartilio Eugenio Cumbe and the sentence imposed on him on 25 February 2022 are reviewed and set aside;
3. the matter is referred back to the Regional Court for the accused's trial to start *de novo* before a different presiding officer.

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[8] Section 35(3) of the Constitution of the Republic of South Africa

[9] *Van Eeden v The Director of Public Prosecutions, Cape of Good Hope* 2005 (2) SACR 22 (C) at para 23

From The Legal Journals

Theophilopoulos, C and Bellengère, A

Relevance, Admissibility and Probative Value in a Rational System of Evidence: A South African Perspective

PER / PELJ 2022(25)

Abstract

In the South African legal system of fact finding and proof the relevance of an evidentiary fact is not governed by the rules of the law of evidence but by a set of extra-legal principles based on the logic of inferential reasoning and probability theory. However, there is no definitive legal definition, or practical test, of what constitutes relevance in a post-constitutional South African curial context, except for an ambiguous pre-1961 reference to a "blend of common sense, judicial experience and logic, laying outside the law". This article critically evaluates the relationship between relevance and admissibility in the adversarial adjudicative process, with particular reference to the peculiarities of the South African legal system, in which the procedural framework of the fact-finding process has been subjected to a post-apartheid constitutional democracy. In addition, this article provides an interpretative synthesis of prevailing international scholarship in the field, develops a functional three-legged practical relevance test for ease of application by all legal practitioners in the courtroom and provides a uniquely different possible statutory definition of relevance and admissibility.

Maphosa, R

Tackling the “shadow pandemic”: the development of a positive duty on adults to report domestic violence

2022 De Jure Law Journal 87

Abstract

When disaster strikes women and young girls are often disproportionately affected in comparison to other societal groups. Over the past three years, it is women that have

shouldered much of the burden that the pandemic placed on health and socio-economic conditions. In addition, the high incidence of violence against women during the pandemic has been alarming. Several studies have already been conducted to highlight the root causes of domestic violence. As such, this paper seeks to contribute to the discourse by examining the manner in which the pandemic has aggravated these factors in South African society. The central thesis here stems from the view that women should be recognised as a vulnerable group due to the high rate of femicide and domestic violence. In order to prevent further violence, there is a need for a combined effort from the state and its citizens. This paper, with reference to measures taken in other jurisdictions, seeks to advance the argument for a legal obligation on all adults to report knowledge of domestic violence. It is argued that not only would such a provision have served as an emergency when victims were unable to seek help during the national lockdown but incorporating such a provision into the law is likely to improve the efficacy of state responses to domestic violence. In response to numerous arguments against such a measure, this article will use psychological studies and case law to demonstrate the importance of mandatory reporting in society.

Khan, F

The psychological effects of Covid-19 and lockdown on parental alienation. Emotional harm as a remedy for an alienated parent?

Abstract

The COVID-19 lockdown has severed many families, where they found themselves having a limited period to decide who would live where and with whom. In other instances, it cemented the divide which already existed for the non-custodial parent. Parents found themselves in a tug-of war over the children and with courts being temporarily closed during this time, travel restrictions and lockdown regulations, it became harder to enforce custody agreements. This worked out somewhat perfectly for the parent who tried to alienate their children from the other parent. Parental alienation is a recurring problem that affects many families who are experiencing high conflict, separation and divorce. Parental alienation can be defined as a process whereby one parent undermines the child's previously intact relationship with the other parent. It creates a situation where the alienating parent teaches the child to reject the other parent, to fear the parent and to avoid having contact with that parent. Although not much has been done to officially recognise parental alienation in South African courts, the law advocates for the best interests of the child in terms of the Children's Act 38 of 2005.

Sizwe Snail ka Mtuze

The convergence of legislation on Cybercrime and Data protection in South Africa: A Practical Approach to the Cybercrimes Act 19 of 2020 and the Protection of Personal Information Act 4 of 2013

OBITER 2022 536

Summary
This article seeks to give a historical background to the development of cybercrime laws in South Africa. It commences with a discussion on the common-law position regarding cyber-criminality then the article goes
on to discuss the Electronic Communications Transactions Act (ECT) and the new Cybercrimes Act. This is followed by a discussion on Protection of Personal Information Act (POPIA) and same converges with the Cybercrimes Act, as well as the POPIA

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/14883/19126

Mujuzi, J D

The role of the Magistrate in extradition proceedings in South Africa: Meaning of "Fair Trial" and "Competent court" in a requesting state.

OBITER 2022 489

Summary
The Extradition Act provides for two general modes of extradition: extradition to foreign states and extradition to associated states. In both cases, a magistrate has to issue a warrant of arrest for the person-to-be-extradited to be brought before him or her to conduct an enquiry to determine whether the person should be extradited. In the case of extradition to foreign states, the Minister responsible for justice has the final say on whether a person should be extradited. The magistrate's role stops at authorizing the detention of the person for the purposes of extradition. However, in the case of extradition to associated states, the magistrate has the final say on whether the person should be surrendered for extradition. In both cases, the magistrate plays a role –he or she has to issue a warrant for the arrest of the person in question. He or she also has to conduct an enquiry. The Constitutional Court held that before issuing a warrant of arrest, the magistrate must be satisfied that the person sought to be extradited has been convicted by a competent court. However, the Constitutional Court does not define or describe a "competent court". The Constitutional Court also held that a person may not be extradited if his or her trial was unfair. However, it does not stipulate the yardstick that should be used to measure the fairness of the trial

in a foreign or associated state. In this article, the author relies on international human rights law and on jurisprudence from South African courts to explain the meaning of "competent court". The author also relies on international human rights law and jurisprudence from different countries to suggest the criteria that could be adopted by the Constitutional Court to determine whether a trial in a foreign or associated state was fair.

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/14881/19122

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

Contributions from the Law School

The impact of the amendments to the Domestic Violence Act 2021

Domestic violence can be viewed as a modern scourge of South African society. Although worldwide statistics suggest that up to 27% of women and girls aged 15 years and older have been the victims of domestic violence, South Africa's current figures suggest that up to one third or even up to 50 % of women have been subject to such abuse (https://www.dailymaverick.co.za/article/2022-06-14-intimate-partner-violence-in-s-africa-the-staggering-stats-and-the-solutions/). What is more concerning than the actual statistics, is the inherent nature of the violence itself and this point was raised in the case of *S v Baloyi* 86 2000 (1) BCLR 86 (CC) where the court noted that domestic violence could be distinguished from other forms of violence based on its "hidden, repetitive character and its immeasurable ripple effects on society". Further the court was of the opinion that this type of violence was "more pernicious because it is often concealed and frequently goes unpunished" (at para [11]). As a result of the nature of domestic violence as well as the ratification of the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) which was the South African governments attempt to eliminate violence against women, it subsequently gave rise to a number of pieces of legislation aimed at protecting women's rights, most notably the Domestic Violence Act 116 of 1998. However, this piece of legislation was fraught with several practical problems relating to the protection of women. As a result, the government sought to refine the laws relating to

gender-based violence. The result of this process was the introduction of the Domestic Violence Amendment Act 2021 which is the subject of this note.

What was noteworthy about the Domestic Violence Act 116 of 1998 was that it sought to define domestic violence as including both physical and non-physical forms of violence. This was an important development as the legislature sought to focus not on the effect form of the abuse but rather its effect (M Reddi "Domestic Violence and Abused Women Who Kill: Private Defence or Private Vengeance" (2007) *SALJ* 33) thereby focusing on 'context' or 'coercive' circumstances in which abuse occurred (Reddi supra). This trend was followed in the Domestic Violence Amendment Act 2021 which sought to expand the definition of domestic violence by acknowledging terms such as 'controlling behaviour', coercive behaviour, as well as 'spiritual' abuse (C Curran 'Details of changes to the Domestic Violence Act' (2022) https://www.mblh.co.za/NewsResources/NewsArticle.aspx?ArticleID=4850).

'Coercive' behaviour is defined as a single act or a pattern of physical abuse (s 1b). 'Controlling' behaviour includes subordination of the victim through isolation from family, exploitation of the victim's resources and a deprivation of the victim's independence. It ought to be noted that this alleged behaviour must be accompanied by the inspiration of the belief in the victim that harm will be caused. 'Spiritual' abuse is defined as where the victim is compelled to adopt the cultural practice of the dominant spouse where party whether due to financial or emotional coercion thereby forfeiting her own practices (Curran *supra*).

The approach taken in the Domestic Violence Act and subsequent Domestic Violence Amendment Act, is consistent with the reasoning of the court a quo in the leading case of *S v Engelbrecht* 2005 (92) SACR 41 (W) where the conduct of the abuser would still qualify as an attack even where defensive measures were taken where the attack was not imminent provided that a pattern of 'coercive' behaviour could be proven over the victim (Reddi supra; *S v Engelbrecht* at para [342]). The Amendment Act also removed the 'imminence' requirement in terms of s 8(4) of the Domestic Violence Act 116 of 1998. From a practical standpoint it means that a victim can report if a protection order is violated without proof that they would be killed if police do not arrest the suspect immediately (K Stone "Will South Africa's domestic violence laws protect survivors?" ISS (2022) https://issafrica.org/iss-today/will-south-africas-domestic-violence-law-protect-survivors.
Whilst the different types of abuse such as verbal, emotional or psychological had to be claimed under one group under s 1 of the Domestic Violence Act 116 of 1998, the Domestic Violence Amendment Act has deleted the word 'and' and replaced it with 'or' widened the scope of applications to include humiliation or insults which dominate the status quo in the relationship. The Act seeks to introduce a digitised system of online applications for protection orders as well as an integrated online repository which is secured (B Mangala and A Mgwaba "The fight against GBV- three new Bills" (2021) Without Prejudice 56). By having a central repository this would also prevent

"perpetrators from hiding their past histories of domestic violence" (ibid). This allows ease of access for victims of domestic violence to remotely apply for protection orders and further provides for instances where electronic service providers can be compelled to provide the court with information under certain circumstances (s 4(1)(b)(i); see further *S v Engelbrecht* supra where the court took note of the concealed or hidden nature of domestic violence in home where it would not be acceptable to require the abused women (and her children to vacate the home) (at para [344]) see also para [355] where court took cognisance of the abused woman's efforts to leave the home such as approaching the SAPS, family violence courts, family and friends), the court should remain cautious in relying on efforts taken by the abused woman to extricate herself from the situation nor should judgment be passed on the fact that she did not take the opportunity. In essence she did not forfeit the right to rely on private defence for having done so (at para [356]).

Whilst the Domestic Violence Amendment Act brings certain welcome changes, it also brings with it several challenges. First by the state seeking to enlist the assistance of members of the public in policing domestic violence and subsequently protecting fundamental rights (s 8(2) Constitution), is that it has the effect of making it a criminal offence for adults who are aware of domestic violence to not report it to the police or social worker. (R Maphosa "Tackling the "shadow pandemic": the development of a positive duty on adults to report domestic violence 2022 *De Jure Law Journal* 99). Further, whether private individuals will be bound is dependent on a number of factors including what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the "potential of invasion of that right by persons other than the state or organs of state"; and, would letting private persons off the net not negate the essential content of the right" (Maphosa supra at 100, citing case of *Daniels v Scribante* 2017 4 SA 341 (CC) at a para [39]; see also Domestic Violence Amendment Act clause 2B(1)(a) which imposed a legal obligation on anyone who has knowledge or reasonable suspicion of act of domestic violence committed against child, disabled or older person). Second, it would also bring into question the discretionary capacity of the victims to report the crimes if the person to whom they make the report is obliged to report and share confidential information (s 2b). Further it is arguable that it could lead to retaliatory conduct on the part of the abuser against the victim. A further proposal of the Amendment Act has been the deletion of stalking as a stand alone provision of domestic violence by incorporating it into the revised definition of harassment . This creates the impression that victims would only have recourse to the Protection from harassment Act 17 of 2011. Section 10(1) of the harassment Act notes that the court may be way of a protection order prohibit the respondent from "(a) engaging or attempting to engage in harassment; (b) enlisting the help of another person to engage in harassment; or (c) committing any other act as specified in the protection order. (2) The court may impose any additional conditions on the respondent which it deems reasonably necessary to protect and provide for the safety or well being of complainant or another party" (B D Lambrechts "Seizure of

weapon (whereby included is firearm) by the Police in terms of Protection from harassment Act 17 of 2011" (2021) *Sevamanus* 66).

Further, the requirement requires that police determine whether harm is about to happen to ensure that an arrest is made timeously (even where a protection order with an attached warrant of arrest is in place) does not always operate well in practice. It has been shown that magistrates have refused to attach suspended arrest warrants with interim protection orders in direct violation of Section 5(7) of the act. In terms of s 5, the magistrates must attach suspended warrant of arrest to the interim protection orders to ensure ease of arrest if order is violated before it is finalised. In terms of the Amendment Act, the interim order and suspended warrant of arrest are supposed to take effect immediately once it has come to the attention of the respondent rather than at time it is served (Stone supra).

Conclusion

Whilst the Domestic Violence Amendment Act can be seen as a step in the right direction, it is clear that certain weaknesses are present in the Act. It is unclear at this point whether law reform will change patterns of non-compliance (https://www.thepresidency.gov.za/press-statements/president-assents-laws-strengthen-fight-against-gender-based-violence). What is apparent is that attention needs to be directed at 'training both police and magistrates and strengthening accountability systems for non- compliance if we are to succeed at protecting the victims of abuse.

S Goosen
Lecturer, School of Law, Pietermaritzburg

Restoring dignity to our courts: the duties of legal practitioners Insulting, inappropriate, vulgar, and disparaging language have no place in litigation

14 September 2022 | By Rishi Seegobin

An ugly trend has recently emerged in our courts, whereby some legal practitioners have taken to making veiled and sometimes direct threats of violence should a certain outcome not be given in a particular case. The murder trial of the late soccer player, Senzo Meyiwa, and the corruption trial of Jacob Zuma are but two examples where this extraordinary type of behaviour has been displayed by legal representatives.

A year ago, a colleague and I penned an appeal judgment in a defamation matter which emanated from a trial that took place in the Magistrates' Court in Pietermaritzburg. Neither the facts nor the outcome of the case are relevant here. What is relevant are the concerns we raised in the judgment about the way the trial was conducted before the learned magistrate by the legal practitioners..

While neither practitioner had conducted themselves in a manner that they could be proud of, it was the conduct of the defendant's counsel that came under particular scrutiny. The appeal record was replete with instances where he was openly hostile and discourteous to the court, to his opponent, and to the plaintiff, who herself is an admitted attorney and officer of the court. This behaviour resulted in an atmosphere that was unduly tense and completely unnecessary. Despite being warned by the court on a few occasions to desist from such conduct, it continued unabatedly, forcing the learned Magistrate at one stage to simply adjourn her court.

This type of behaviour is symptomatic of a general lack of respect on the part of certain legal practitioners towards the bench. The extreme lengths to which some of them will go in order to undermine the legitimacy and functioning of our courts should be a matter of grave concern to us all.

As officers of the court there is a paramount duty on all legal practitioners to conduct themselves with the highest degree of integrity and honesty at all times, to ensure that the dignity and decorum of the court is maintained and to remember at all times, that their first duty is to the court and to no one else. The effective functioning of our courts and the proper administration of justice are highly dependent on how legal practitioners go about discharging this duty. Sadly, the paramountcy of the duty to the court appears to be lost on many legal practitioners of late.

This article focuses on this duty and the need to ensure that it is adhered to at all times. It is informed by my own observations regarding the manner in which some legal practitioners conduct themselves in court, the poor quality of work they produce, and their lack of knowledge of basic legal principles and procedure.

Over time our courts have commented on the role of legal practitioners in the administration of justice. Here are some examples.

More than a 100 years ago in the winter of 1908, Chief Justice Innes, in the matter of *Incorporated Law Society v Bevan 1908 TS 724*, emphasised that legal practitioners in the conduct of court cases, play a very important part in the administration of justice. The learned Chief Justice cautioned that any practitioner who deliberately places before the court, or relies upon a contention or a statement, which he knows to be false, would not be fit to be a member of the legal profession.

In 2007, the Supreme Court of Appeal in the matter of *Van der Berg v General Council of the Bar of SA [2007] 2 All SA 499 (SCA)*, crystallised the role of an advocate in the proper administration of justice. The court wrote:

"Advocacy fulfils a necessary role in the proper administration of justice … It is through the availability of the knowledge and skills of an advocate that a litigant is able to realise the right of every person to have a dispute resolved by a court of law. Its function in the administration of justice at the same time defines the duties of those who practise it. The right of every person to have a dispute resolved by a court of law would be seriously compromised if an advocate were to be required to believe the evidence of his client before being permitted to present it. That would mean that the rights of the litigant would be determined by the advocate rather than by the court …"

In *S v Khathutshelo and Another 2019 (1) SACR 480 (LT)*, the Thohoyandou High Court in Limpopo, after highlighting the exchange between counsel and the learned magistrate, noted:

"[t]he words used by counsel were both unnecessary and unfortunate. They demonstrated acute lack of respect for the court and its role in the administration of justice. Judges and magistrates alike have been entrusted with the most difficult job: to find the truth and administer justice between man and man. They are fallible like all others and, in recognition of this weakness, there is a hierarchy of courts so that mistakes can be corrected on appeal or review … As an officer of the court he is required to assist the court in the administration of justice. Inasmuch as counsel has a duty to advance his/her client's case with zeal, vigour and determination, he should always remember that his primary duty is to the court … He should always maintain the decorum of the court and protect its legitimacy in the eyes of the public, so that its confidence is not eroded in their eyes …"

All legal practitioners in our country are bound by a Code of Conduct as well as all other duties imposed upon them through judgments handed down by our courts from time to time. Legal practitioners are required to be fully aware of what these duties require. The Code of Conduct confirms that although a client's interest is always paramount, such interest must yield to a legal practitioner's duty to the court, adherence to the law, the interests of justice, and the upholding of ethical standards required by legal practitioners.

The various divisions of the High Court, the Supreme Court of Appeal, and the Constitutional Court all have practice directives which regulate the daily functioning of these courts, and to which legal practitioners are required to adhere.

By way of example, an important practice directive that seems to be applicable in all divisions is that which relates to the filing of heads of argument, and a practice note in both civil and criminal appeals as well as opposed motions.

Heads of arguments perform a vital function in ensuring that a party's case is properly presented, that the evidence is properly dealt with, and that relevant case law is referred to. It informs the judicial officer of the nature of the dispute and enables them to read relevant case authorities beforehand so as to assist in a proper understanding of the matter at hand. Unfortunately, it is becoming more and more commonplace for legal practitioners to file heads of arguments late, if at all. More often than not such heads are of such a poor quality that they are of no assistance to the court. Legal practitioners fail to realise that these heads of argument are directly connected to their duty to act in the interests of a client and forms part of their duty to the court. More importantly, from a criminal law perspective, it could negatively impact an accused person's right to a fair trial in appeal matters.

Closely related to this duty, is the duty of a legal practitioner to draw the court's attention to any decided cases which might have relevance to the matter at hand, even if such cases would be detrimental to his or her client's case. A judicial officer should at all times be able to rely on the correctness of any case provided by a legal practitioner.

A growing tendency in recent times is for legal practitioners to use insulting, inappropriate, vulgar, and disparaging language towards judicial officers, court staff and even towards their fellow practitioners.

It is becoming more commonplace for such language to find its way into affidavits and other court documents, with legal practitioners embarking on emotive and unacceptable language rather than stating the facts to advance their case. This ends up setting the tone for the rest of the proceedings.

The Code of Conduct is clear in this regard, and requires legal practitioners to refrain from including such material and unsubstantiated allegations in affidavits and other court documents. Legal practitioners are also expressly required to treat judicial officers, court personnel, and all other people at court with respect and to refrain from uttering personal remarks about their colleagues.

Part of a legal practitioner's duty to the court is not to abuse the court process and to not deliberately cause cases to be delayed. The excessive delays in court proceedings caused by legal practitioners requesting numerous postponements have become a daily occurrence in courts throughout the country. Its prevalence is so widespread that retired Constitutional Court Judge Edwin Cameron, in an article published in De Rebus in 2020, cautioned that such delays serve only to weaken the legal system and impact negatively on the rule of law.

A legal practitioner's duty to the court is not a uniquely South African duty. In 1969, Lord Reid in the UK House of Lords, in the matter of *Rondel v Worsley [1969] 1 AC 191* affirmed that a legal practitioner has an overriding duty to the court, to the standards of the profession and to the public, which may and will often lead to a conflict with his client's wishes or with what the client thinks are their personal interests.

Interestingly, in a speech titled ‘The Duty Owed to the Court – Sometimes Forgotten’ delivered by the Honourable Marilyn Warren AC at the Judicial Conference of Australia Colloquium, in Melbourne in 2009, the learned Justice spoke of the duties of counsel and their role in the proper administration of justice. She highlighted a practitioner’s duty to the court as follows:

“The lawyer’s duty to the court is an incident of the lawyer’s duty to the proper administration of justice. This duty arises as a result of the position of the legal practitioner as an officer of the court and an integral participant in the administration of justice. The practitioner’s role is not merely to push his or her client’s interests in the adversarial process, rather the practitioner has a duty to assist the court in the doing of justice according to law.

The duty requires that lawyers act with honesty, candour and competence, exercise independent judgment in the conduct of the case, and not engage in conduct that is an abuse of process. Importantly, lawyers must not mislead the court and must be frank in their responses and disclosures to it. In short, lawyers must do what they can to ensure that the law is applied correctly to the case.

The lawyer’s duty to the administration of justice goes to ensuring the integrity of the rule of law. It is incumbent upon lawyers to bear in mind their role in the legal process and how the role might further the ultimate public interest in that process, that is, the proper administration of justice. As Brennan J states, ‘[t]he purpose of court proceedings is to do justice according to the law. That is the foundation of a civilised society.’

When lawyers fail to ensure their duty to the court is at the forefront of their minds, they do a disservice to their client, the profession and the public as a whole.”

Legal practitioners are encouraged to take heed of the duties imposed on them by the Code of Conduct, judgments, and relevant court rules and directives, and to ensure that they conduct themselves in a manner that is befitting of the profession. They are required at all times to act with integrity, honesty and respect.

Legal practitioners need to play their part in restoring dignity and decorum to our courtrooms. Ultimately, they are required to comply with their overriding duties to the court, adherence to the law, the interest of justice, and the upholding of the ethical standards, as failure to do so would only serve to bring the entire administration of justice into disrepute.

The writer is a judge of the KwaZulu-Natal High Court.

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A Last Thought

"PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern."

JUSTICE ALBIE SACHS in PORT ELIZABETH MUNICIPALITY V VARIOUS OCCUPIERS (CCT 53/03) [2004] ZACC 7