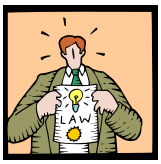
e-MANTSHI

A KZNJETCOM Newsletter

November 2022: Issue 191

Welcome to the hundredth and ninety first 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 of the Government Employees Pension Fund has been amended in terms of section 29 of the Government Employees Pension Law 1996 (Proclamation number 21 of 1996) by the Board of Trustees. The amendment was published in Government Gazette no 47534 of 18 November 2022. The amendments deal with the management of the fund and the election of trustees. The notice can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202211/47534gen1437.pdf

2. Notice has been given of the publication for comment of an Interim report on the proposed rationalisation of areas under the jurisdiction of the Divisions of the High Court of South Africa. The notice was published in Government Gazette no 47552 of

21 November 2022. Comments must be submitted before 31 January 2023, to Mr Makena Z Moagi (Email: MakMoagi@justice.gov.za) or Adv Seakamela (Email: SSeakamela@justice.gov.za) .The report can be accessed here:

https://www.justice.gov.za/legislation/invitations/20221115-InterimReport-Rationalisation-HighCourtDivisions.pdf

3. Draft Regulations in respect of the Extension of Security of Tenure Act 1997 (Act 62 of 1997) by the Minister of Agriculture, Land Reform and Rural Development was published for comment in Government Gazette no 47472 of 8 November 2022. These regulations can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202211/47472gen1388.pdf

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Recent Court Cases

1. S v White (R19/2022) [2022] ZAFSHC 173; 2022 (2) SACR 511 (FB) (17 June 2022)

Section1(1)*(a)* of the Intimation Act 72 of 1982 should not be used for a trivial incident, but the section should only be used in the case of deservingly serious matters.

Daffue J

Special review in terms of section 304 of the Criminal Procedure Act, 51 of 1977

I INTRODUCTION

[1] The accused was arraigned in the Hertzogville Magistrates' Court on a charge of contravening s 1(1)(a) of the Intimidation Act.[1] He pleaded guilty and was sentenced to payment of a fine in the amount of R1000.00 (One thousand Rand) or 6 (six) months' imprisonment, wholly suspended for a period of 5 (five) years on

[1] 72 of 1982

condition that he is not found guilty of contravention of section 2 and 3 of Act 72 of 1982, committed during the period of suspension. The Senior Magistrate of Welkom sent the matter to the High Court as a special review in terms of s 304(4) of the Criminal Procedure Act[2] ("the CPA"). I shall deal with the Senior Magistrate's concerns under the next heading where after I shall consider the factual background.

II THE GROUNDS FOR REVIEW

[2] The Senior Magistrate confirmed that the accused was legally represented, that he pleaded guilty on a charge of contravening s 1(1)(a) of the Intimidation Act, that his statement in terms of s 112(2) of the CPA was handed in where after he was convicted and sentenced.

[3] The Senior Magistrate referred to *S v Motshari*[3] and stated that:

"…the offence created in section 1(1)(b) of the Act (the Intimidation Act) was discussed as well as the specific purpose why this offence was enacted. The view was expressed that in matters involving private quarrels the prosecution should rather charge the accused person with an offence such as assault where fear was induced. It appears that the ambit of the offences created in the Act is very wide."

The Senior Magistrate clearly suggested, although not expressly conveyed, that this court should consider interfering with the conviction on review and continued as follows:

"Should the Honourable Judge however be satisfied with the conviction, the aspect of the sentence imposed needs to be addressed."

The suspension condition refers to ss 2 and 3 of the Intimidation Act which is clearly incorrect insofar as these two sections deal with the repeal of laws and the short title of the Act. The Senior Magistrate had referred the matter to the trial magistrate before sending the matter on review who confirmed in writing that she made an error in referring to ss 2 and 3 instead of s 1(1)(a) of the Intimidation Act. The review court was requested to make an appropriate order.

[4] I agree that an obvious error has been made and that the sentence should be reviewed and corrected as suggested. The more important question is whether this court should interfere with the conviction. This will be dealt with once some case law and legal articles have been considered hereunder. Before then, I am constrained to deal with the factual matrix first. The Senior Magistrate did not deal with the aspects to be mentioned and the trial magistrate's input was also not obtained. But the facts speak for themselves.

III FACTUAL BACKGROUND

[5] The charge sheet which I quote *verbatim* reads as follows:

"THAT the accused is/are guilty of the crime of contravening the provisions of Section 1(1)(a) read with Sections 2 and 3 of the Intimidation Act No 72 of 1982 – Intimidation

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[2] 51 of 1977

[3] 2001 (1) SACR 550 (NC)

IN THAT on or about 10/12/2021 and at or near Hertzogville in the District of Boshof the accused did unlawfully and with intend to compel or induce any person(s), namely Tebogo Seboka to do or to abstain from doing any act or to assume or abandon any standpoint, to wit not to date Palesa Dichakane by assaulting, injuring or causing damage to such person(s) or threatening to kill, assault, injure or cause damage to such person(s)."

[6] The accused appeared in court on 20 January 2022. The typed record indicates that the prosecutor put the charge to him and the operative part thereof reads as follows:

"Intimidation: in that upon or about 10 December 2021 and at or near Hertzogville in the district of Boshoff the accused did unlawfully with the intent to compel or induce any person namely, Tebogo Seboka to do or abstain from do any act or to assume or abandon any standpoint to wit not to date or speak to Palesa Dichakane by threatening to kill said Tebogo Seboka."

If the charge sheet and the record are compared, the prosecutor intended to delete the words "assaulting, injuring or causing damage" as well as the words "assault, injure or cause damage" as they appear on the charge sheet. This was not done. As strange as it may appear, the words "or threatening to kill" were underlined. This is confusing. A prosecutor should ensure that charge sheets are properly prepared. Those words that did not apply should have been deleted. More importantly, the prosecutor failed to apply his/her mind to the facts of the case and ensure that the statutory provisions are properly recorded. The operative part of the charge sheet should have read as follows:

"….the accused did unlawfully and with intent to compel Tebogo Seboka to abstain from dating Palesa Dichakane by threatening to kill him."

The words "to do" and "to abstain from doing" an act are opposites. The same applies to the words "to assume" and "abandon" any standpoint. It must be either the one or the other. In any event, no "standpoint" is applicable *in casu*. Matters got worse. In court the same mistake was made when the charge sheet was read out, but the prosecutor also added the word "speak." Therefore, it was alleged that the accused threatened to kill the complainant, not only for dating Palesa Dichakane, but also speaking to her.

[7] The accused pleaded guilty. His legal representative prepared a statement in terms of s 112(2) of the CPA. He regurgitated the wording of the charge sheet to a certain extent. I quote from paragraph 3.2:

"I did unlawfully and with intent to compel or induce the complainant namely, T.S. Seboka to abstain from not dating Palesa Dichakane or he will kill him by assaulting, injuring or causing damage to such person or threatening to kill him."

Does this make sense? Certainly not. The accused also stated the following:

"2.1 On the 10/12/2021 I was hiking to Bloemfontein.

2.2 I met the complainant and we had argument and I told him that I will kill him

2.3 …

2.4 When I had argument with the complainant, I was very angry and told him that I will kill him because he interferes in the relationship affairs of the girlfriend."

[8] The accused was convicted based on his plea of guilty and sentenced to payment of a fine of R1000.00 or six months' imprisonment, wholly suspended for a period of five years on condition that he is not found guilty of contravening ss 2 and 3 of Act 72 of 1982 committed during the period of suspension. As mentioned, the Senior Magistrate of Welkom sent the matter to the High Court on review and pointed out that the suspension condition was incorrectly worded. He also raised a concern about the statutory offence with which the accused was charged and the consequent conviction. I shall now refer to authorities in order to consider the applicability of s 1(1)(a) in somewhat trivial matters and/or where a common law offence is applicable.

IV LEGAL PRINCIPLES

[9] I shall explain later herein that s 1(1)(b) of the Intimidation Act has been declared unconstitutional, but it is apposite to quote s 1(1) in full. It reads as follows:

"**1 Prohibition of and penalties for certain forms of intimidation**

Any person who-

(a) without lawful reason and with intent to compel or induce any person or persons of a particular nature, class or kind or persons in general to do or to abstain from doing any act or to assume or to abandon a particular standpoint-

(i) assaults, injures or causes damage to any person; or

(ii) in any manner threatens to kill, assault, injure or cause damage to any person or persons of a particular nature, class or kind; or

(b) acts or conducts himself in such a manner or utters or publishes such words that it has or they have the effect, or that it might reasonably be expected that the natural and probable consequences thereof would be, that a person perceiving the act, conduct, utterance or publication-

(i) fears for his own safety or the safety of his property or the security of his livelihood, or for the safety of any other person or the safety of the property of any other person or the security of the livelihood of any other person; and

(ii) .....

shall be guilty of an offence and liable on conviction to a fine not exceeding R40 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment."

[10] In *S v Motshari*, the judgment referred to by the Senior Magistrate, the accused was charged with contravention of s 1(1)(b) of the Intimidation Act. It should immediately be recognised that the accused was not charged with contravening this sub-section, but it is worthwhile to consider what was stated in this regard. Notwithstanding the accused's plea of not guilty in *Motshari*, he was convicted and sentenced to three years' imprisonment. In that case it was alleged that the accused threatened to kill his girlfriend. On review, the review court was concerned that the charge was triggered by a "domestic quarrel between live-in-lovers which took place within the confines of their dwelling." The court contrasted the facts in that case with a

case involving "riotous behaviour pertaining to an assembly of people or a security situation or some industrial action."[4]

[11] Kgomo J with whom Hefer AJ concurred, held in *Motshari* that the Intimidation Act had its genesis in the Riotous Assemblies and Criminal Law Amendment Act,[5] that s 1(1)(b) of the Intimidation Act was introduced through the Internal Security and Intimidation Amendment Act,[6] that the draconian penal provisions strongly militate against trivial and ordinary run-of-the-mill cases having been within the contemplation of the Legislature, that the provisions of the Intimidation Act were not applicable to the accused's case, that the common law sanctions should have been resorted to and that the case could in any event have been dealt with under the broad provisions of the Domestic Violence Act.[7]

[12] Wallis JA, the scribe of the majority judgment in *Moyo and another v Minister of Justice and Constitutional Development and others,*[8] dealt with the offence of intimidation. He held that intimidation was a single offence which may occur in various ways, but it did not detract from the fact that all of its manifestations under both ss 1(1)(a) and (b) deal with intimidation and therefore the penalties for offences under either sub-section (a) or (b) are the same.[9]

[13] Although the majority held in *Moyo* that s 1(1)(b) was not unconstitutional, this judgment has been overruled by the Constitutional Court. That court declared s 1(1)(b) unconstitutional and invalid.[10] The Constitutional Court was not called upon to consider the constitutionality of s 1(1)(a) and consequently merely referred to this sub-section in one sentence. I quote:[11]

"The context of the provision (s 1(1)(b)) lends even less support to the notion of an "imminent harm" qualification. In the legislative scheme itself, harm seems to be accounted for in s 1(1)(a). There the specific classes of physical harm of death, injury or damage are listed."

[14] In *S v Holbrook*[12] Leach J commented (Jennett J concurring) as follows, again pertaining to s 1(1)(b), although two decades prior to the *Moyo* judgment:

"This section is so widely couched that it may well be construed that the person who throws a cat into a swimming pool may well be guilty of an offence if the owner of the cat or any other person, pre-viewing the event, would fear for the cat's safety."

The learned judge emphasised his viewpoint in the following words: "It certainly seems that relatively trivial cases may easily fall foul of the provisions of the sections, and more than ten years ago the late Prof Matthews warned of the danger of that occurring – see AS Matthews *Freedom, State Security and Rule of La*w at 56 – 59.

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[4] *Motshari loc cit* at 551 F - G
[5] 27 of 1914
[6] 138 of 1991
[7] 116 of 1998 and see paras 3, 6, 7, 8 & 13 on pp 551(i) – 556(c) of the judgment
[8] 2018 (2) SACR 313 (SCA)
[9] *Ibid* para 93
[10] *Moyo & Another v Minister of Police & Others*; *Sonti & Another v Minister of Police & Others*; 2020 (1) SACR 373 CC (22 October 2019) at para 81
[11] *Ibid* para 68
[12] [1998] 3 All SA 597 (E) at 601c

Moreover, as was remarked by Plaskett and Spoor in their article *The New Offence of Intimidation* (1991) 12 *ILJ* 747 at 750, the section may potentially impact on normal and acceptable political campaigning and debate, labour relations and everyday life. For what it is worth, our prima facie view is that the section is an unnecessary burden on our statute books and its objectives could probably be attained by the enforcement of common-law sanctions."

[15] I agree with the general tenor of the *dicta in Holbrook.* It is not necessary to completely do away with sub-section 1(1)(a), but it should be utilised in line with the purpose of the Legislature, bearing in mind the long title of the Intimidation Act, that is to prohibit certain forms of intimidation, the extreme sentences that may be imposed, the context in which the Act was promulgated, and the language used. There is certainly a place for it, but to use it in trivial matters as *in casu* is unimaginable.

[16] The authors of *South African Criminal Law and Procedure*[13] point out, approving the comments of the late Prof Mathews, that the offence created by s 1(1)(a) covers a "spectrum of human activity ranging from relatively innocuous conduct at one end to serious behaviour at the other" and that much of the conduct falling within the ambit of the offence is already subject to common law crimes such as assault, extortion and malicious injury to property.

[17] Prof CR Snyman[14] makes the point that it is well known that intimidation is rife in South Africa. According to him it is a pity that very few people seem to be prosecuted for the crimes created in the Intimidation Act. He suggests that "one of the reasons for this is that many people who would have been subjected to intimidation are, precisely because of the intimidation, afraid of laying criminal charges of intimidation or of testifying about the commission of the crime in a court."

When one considers Prof Snyman's discussion on the subject, one cannot, but think that the crime of intimidation was never intended to be applicable to the usual threats that appear every day between members of the public, but with no real consequences or harm. According to Prof Snyman the purpose of the crimes of intimidation "is to punish people who intimidate others to conduct themselves in a certain manner, such as not to give evidence in a court, not to support a certain political organisation, not to pay their municipal accounts or to support a strike action." If one considers the examples given by the learned author, he also has in mind serious issues and not the normal run-of-the mill threats.

[18] The dearth of reported cases pertaining to s 1(1)(a) is indicative of the approach by the prosecution not to use the Intimidation Act to charge an accused if any of the common law offences such as assault, extortion or malicious damage to property apply to the unlawful actions of an accused person. Such an approach would be correct. One does not need a 10 kg sledgehammer to kill a fly. If the prosecution is allowed to charge all persons in terms of the Intimidation Act instead of with appropriate common law offences, these common law offences may just as well be done away with. There is no reason at all for this.

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[13] South African Criminal law and Procedure, vol III: Statutory Offences, Jutastat e-publications, chapter HA1, pp 1 - 4

[14] Criminal Law 6th ed at p 455

[19] The only other reported case dealing with s 1(1)(a) is *S v Ipeleng.*[15] It was not necessary to deal with the purpose of s 1(1)(a) in this case, although the enquiry was whether the State had proven beyond reasonable doubt that the appellant threatened to kill, assault, injure or cause damage to the complainants with the intention to subject them to a stay-away action on the mine. The majority found that the State did not prove its case and consequently, the purposes and rationale of the sub-section was not discussed. Notwithstanding the acquittal, there can be little doubt that the action allegedly taken, but not proven, was sufficiently serious to warrant prosecution in terms of s 1(1)(a).

V A FINAL WORD ON THE EVIDENCE AND LEGAL PRINCIPLES

[20] In his address in mitigation of sentence the accused's attorney placed on record that the complainant wanted to withdraw the complaint as he and the accused, apparently co-employees on a farm at the time, had made peace.

[21] I explained the broad ambit of s 1(1)(a) above and opined that the sub-section should be used in deservingly serious matters only. Although a person's threat to kill another if he does not abstain from dating his girlfriend falls strictly speaking within the broad ambit of s 1(1)(a), the wording of the section may cause problems to the prosecution wishing to rely on this statutory offence. This is exactly what happened *in casu*. I quoted the charge sheet, the s 112(2) statement and the *viva voce* version in court and pointed out the discrepancies. These will not be repeated, save to mention the following: the charge sheet is confusing and incorrectly worded insofar as its effect is that the complainant should abstain from not dating Palesa Dichakane. There is no indication in the s 112(2) statement that the complainant was compelled or induced to abstain from doing an act, to wit to date Palesa Dichakane. Again, the word "not" appears in paragraph 3.2 of the statement which was repeated when it was read into the record, making the same mistake as contained in the charge sheet. One should perhaps not be too pedantic about errors as detected, but the seriousness of a conviction in terms of the Intimidation Act cannot be ignored. If the prosecution wants to rely on statutory offences, they should ensure proper compliance with the particular statute.

[22] A final word should be expressed. It does not appear as if English is the mother tongue of any of the role players in the court proceedings. If simple mistakes could be made as pointed out, there was ample opportunity for not only confusion about language, but more importantly, legal principles such as whether the accused really understood what the offence of intimidation entailed.

[23] In the circumstances I am satisfied that the proceedings before the *court a quo* were not in accordance with justice and need to be set aside on review. The conviction is so clearly not in accordance with justice that the review court may deal with the matter without obtaining a response from the trial magistrate as provided for in s 304(2)(a).

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[15] 1993 (2) SACR 185 (T)

VI ORDERS

[24] Consequently the following orders are issued:

1. The proceedings in the Hertzogville Magistrate's Court under case A162/2021 are reviewed and set aside.
2. The conviction and sentence are set aside.

2. In the matter between: -

Minister of Social Development **Applicant**
and
Centre for Child law **Respondent**

IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG DIVISION, PRETORIA)

Case No: 55477/2020 on 8 November 2022

Every and any foster care order that is in existence at the date of this order, shall be deemed to be extended for a further period of 12-months from the date of this order or until the end of the year on which the child subject to such foster care order turns 18 years old.

DRAFT ORDER

BY AGREEMENT BETWEEN THE PARTIES, and having considered the matter and counsel **IT IS ORDERED THAT:**

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA
Private Bag X67, Pretoria 0001
2022 -11- 08
GD-PRET-016
REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION

1. It is in the best interests of children in the Republic that:

1.1 the period stipulated in clause 3.1 of the Order made by this Court on 12 November 2020 (marked Annexure "A") is hereby extended by a further period of twelve (12) months from the date of this Order to 11 November 2023;

1.2 the interim regime as contemplated clause 4.1 of Annexure "A", and subject to the provisions of section 159(1) and section 186 of the Children's Act 38 of 2005, will apply to every and any foster care order that is in existence at the date of this order, and such order shall be deemed to be extended for a further period of 12-months

from the date of this order or until the end of the year on which the child subject to such foster care order turns 18 years old as contemplated in Regulation 28(3)(d) of the Regulations of the Social Assistance Act, whichever occurs first unless such foster care order is extended, withdrawn, suspended or varied by the Children's Court in terms of section 159, 186 or 48(1)(b) of the Children's Act;

1.3 a Children's Court, during the subsistence of this Order, shall not refuse save for instances where good cause is shown to extend a foster care order as contemplated in section 159, 186 or 48(1)(b) of the Children's Act; and

1.4 the provisions of section 186(2) of the Children's Act should be considered in all instances relating to extension of foster Care orders as this will contribute to reducing the backlog of lapsed orders in need of extension.

2. The Second Respondent is directed to effect or continue to effect payments of all foster child grants related to foster care orders referred to in this order until the date on which the foster care orders referred to in Para 1.1 of this Order lapse.

3. The First Respondent is directed to develop an action plan to resolve all outstanding issues regarding the comprehensive legal solution.

4. The action plan referred to in paragraph 3 above must:
4.1 describe the 'foster care crisis' that necessitated the original 2011 High Court order.
4.2 describe the comprehensive legal solution to this crisis and elaborate on how each provision of the laws or regulations that have been recently amended contribute towards the solution; and
4.3 specify the roles, responsibilities, timeframes and resources required to implement each aspect of the comprehensive legal solution be delivered to the Centre for Child Law on/or before 27 January 2023 for it to make any comments thereon.

5. The finalised action plan shall be filed with the Registrar for the Honourable Madam Justice Van Der Schyff on/or before 31 January 2023, and if the need arises the judge, may in her discretion call for a case management after receipt of the action plan to issue further directives

6. The First Respondent shall ensure that at all high level meetings of the Department, including but not limited to the Executive Committee (EXCO), Heads of Social Development Services (HSDS) and the Minister and MEC’s meeting (MINMEC), compliance with the terms of this Order is included as part of the discussions, and relevant progress thereon is recorded.

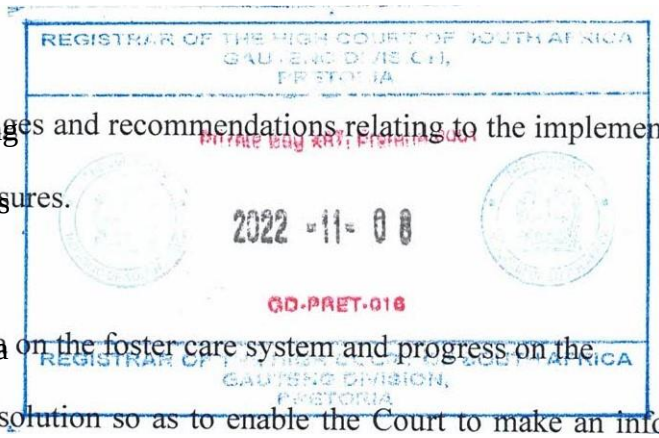
7. The Applicant is directed to publish a copy of this order in the Government Gazette and the Third to Twenty-first Respondents are to post a copy thereof prominently at all their offices.

8. The First, to Eleventh Respondents are directed to file with the Judge's Registrar for the Honourable Madam Justice Van der Schyff, from the date of this Order, quarterly progress reports on the measures required in the implementation of the comprehensive legal solution.

9. The quarterly reports must:

9.1 include progress reports on the development of the legislative instruments required to implement any amendments of the legislation passed by Parliament including but not limited to the regulations, norms and standards;

9.2 include notes regarding discussion with relevant stakeholders in the foster care system including but not limited to the Presiding Officers of Children's Courts; and the CCL;



9.3 also detail the challenges and recommendations relating to the implementation of these required measures.

9.4 provide statistical data on the foster care system and progress on the comprehensive legal solution so as to enable the Court to make an informed assessment of the progress being made in realising the terms of this order.

9.5 copies of such quarterly reports are due on 31 January, 30 April, 31 July and 30 October 2023 and must be delivered to the Centre for Child Law at the same time as they are filed at Court.

10. The Centre for Child Law shall within 10-days of receipt of all the quarterly reports, deliver its comments thereon to the First Respondent, and file such with the Registrar of this Court;

11. The Parties are directed to arrange with the Registrar for Honourable Madam Justice Van der Schyff, for a supervisory hearing regarding this matter to be held on or before 21 April 2023, and subsequently on/or before 31 July 2023, or so soon as they are satisfied that the measures required to ameliorate the challenges have all been implemented.

12. There are no orders as to costs.

From The Legal Journals

Holness, D

The Need for Monitoring and Assessment of Legal Aid Quality in South Africa

PER / PELJ 2022(25)

Abstract

Legal aid is needed in South Africa as one mechanism for poor South Africans to realise their legal rights and to use the law as a vehicle for positive social change in a grossly unequal society in which deep poverty is rife. However, simply having a legal aid service provider is insufficient if the quality of such services is not satisfactory. But how can high quality legal services be ensured? This paper considers how different forms of legal aid service provision can be effectively monitored and assessed to ensure that satisfactory standards of legal aid work are delivered. Categories of "legal aid" (broadly construed) which are considered are legal NGOs, including university law clinics, the state's Legal Aid South Africa telephonic advice, and pro bono work by private lawyers. Separate research has focussed on the need for much improved coordination between legal service providers to promote co-operation among legal aid services. The next step is to ensure that such coordination leads to quality services and promoting quality control mechanisms which are appropriate and which can be considered best practice. This paper analyses and discusses this next step. If legal aid is not of an adequate standard or quality assurance is not in place, the legal aid is not serving a positive function. The paper considers viable means for vetting the quality of these free legal services in a South African context, including telephonic legal advice in the Covid era. It suggests mechanisms to promote high-level free legal service provision by assessing the quality of such services. Legal aid quality control methods abroad were analysed to serve as an indicator of the options used in this regard in those jurisdictions. The question to be answered is what quality control measures are most apposite in the South African legal aid arena.

The article can be downloaded here:
https://perjournal.co.za/article/view/13182/19356

Van Der Linde, D C

Once, Twice, Three Times Delayed: Considering a Permanent Stay of Prosecution in *Rodrigues v The National Director of Public Prosecutions*

PER / PELJ 2022(25)

Abstract

The National Prosecuting Authority is vested with the power, as dominus litus, to institute and discontinue charges whereas high courts are empowered to order a permanent stay of the prosecution prohibiting the continuation of the trial. However, such an order is considered to be a "drastic remedy" and is not empowered in terms of statute such as the Criminal Procedure Act 51 of 1977 but rather vested in the right of an accused to have their trial begin and conclude without unreasonable delay under section 35(3)(d) of the Constitution of the Republic of South Africa, 1996. A permanent stay of the prosecution is an order made on a case-by-case basis, balancing various factors such as the prejudice faced by the accused, systemic factors as well as the reason for the delay. The ultimate question however remains whether the lapse of time in a particular case is unreasonable. The Supreme Court of Appeal in Rodrigues v The National Director of Public Prosecutions had to evaluate whether the 47-year-delay and eventual prosecution between the death of anti-apartheid activist, Ahmed Timol, was unreasonable. Both the majority and minority of the Supreme Court of Appeal, although for different reasons, concluded that the delay was not unreasonable. This contribution discusses the recent judgment in Rodrigues v The National Director of Public Prosecutions against the backdrop of the principles relating to permanent stays as established by South African courts. Both the majority and minority judgments are discussed and evaluated to discern important themes and considerations. It is argued that the judgment is a strong reminder of the significance of the right to a speedy trial.

The article can be downloaded here:
https://perjournal.co.za/article/view/13096/19352

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

Contributions from the Law School

Sexual offences: Some skirmishes with the Act

The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('the Act') was the process of a long period of consultation and drafting (see Burchell 'A personal and academic tribute to John Milton: Reflections on aspects of the reform of the law of sexual offences in South Africa' in Hoctor & Schwikkard *The exemplary scholar: Essays in honour of John Milton* (2007) 27 at 29-30). The objects of the Act are contained in section 2, and include these words:

'The objects of this Act are to afford complainants of sexual offences the maximum and least traumatising protection that the law can provide, to introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act and to combat and, ultimately, eradicate the relatively high incidence of sexual offences committed in the Republic by:

(a) Enacting all matters relating to sexual offences in a single statute;

(b) criminalising all forms of sexual abuse or exploitation;

(c) repealing certain common law sexual offences and replacing them with new and, in some instances, expanded or extended statutory sexual offences, irrespective of gender…'

The idea of having a single repository of all the important sexual offences (as mentioned in (*a*)) – essentially a codification of this area of the law – is an understandable goal. However, it seems that this process has not proceeded as smoothly as it might. First, it may simply be noted that the Sexual Offences Act 23 of 1957 is still in existence, and offences such as keeping a brothel (s 2), procuration (s 10) and prostitution (s 20) amongst others, are still to be found in the Sexual Offences Act.

Second, the question has been raised as to whether the new sexual offences regime is indeed as comprehensive as it should be, in 'criminalising all forms of sexual abuse and exploitation', having repealed previous provisions and reformulated the law (see (*b*) and (*c*)). The case of *Sihoyi v S* [2021] ZAECGHC 107 (25 November 2021), 2021 JDR 3167 (ECG) raises some doubt in this regard. The case dealt with an appeal against a conviction of contravening s 5(1) of the Act, that is, the offence of sexual assault. The complainant alleged that in her statement to the police, as well as in her interaction with the prosecutor prior to her testimony in court, she had not only stated that the appellant had touched her thighs, which did form part of the charge, but that he had also touched her breasts and had slapped her, which did not form part of the

charge (at para [4]). The State failed to take the opportunity to rectify the omission by amending the charge sheet at the outset of the trial, or specifying the allegation (at para [20]).

The consequence of the procedural slip-up on the part of the State was therefore that the basis of the conviction for sexual assault was that the appellant had touched the complainant on the thigh. Section 5(1) of the Act provides that: 'A person ("A") who unlawfully and intentionally sexually violates a complainant ("B"), without the consent of B, is guilty of the offence of sexual assault'. It is therefore required that there be a sexual violation for liability to ensue. The court cited the relevant part of the definition of 'sexual violation' (at para [9], leaving aside those aspects of the definition which relate in some way to the mouth of a person, or to the masturbation of one person by another)

'"sexual violation" includes any act which causes (a) direct or indirect contact between the—

(i) genital organs or anus of one person or, in the case of a female, her breasts, and any part of the body of another person or an animal, or any object, including any object resembling or representing the genital organs or anus of a person or an animal;…'

As the court correctly pointed out, adopting the ordinary, grammatical meaning of the words of this provision, as is required in interpreting a statute (at para [10]), 'sexual violation' does not include contact with the thighs of a person (at para [12]). Consequently, despite the State's contention for a broader interpretation of the definition of 'sexual violation', the court overturned the conviction (at para [23]). The court held that the failure to amend the charge was a 'serious oversight' (at para [21]), and in order to give effect to the fair trial rights of the appellant, it could not be permitted that he be 'taken by surprise' by the charge being amended at a later stage (at para [22]).

The deficiencies in the charge sheet in this case have already been noted. Another curiosity is the absence of an alternative charge. Before its repeal and replacement in the schema of sexual offences by the new offence of sexual intimidation (section 14A of the Act, which came into force with the other amending provisions of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act 13 of 2021, which commenced on 31 July 2022), in terms of section 5(2) of the Act, the offence of sexual assault could also be committed by a person ('A') who unlawfully and intentionally inspired the belief in a complainant ('B') that B will be sexually violated. It is unclear why the State did not see fit to bring a charge of contravening section 5(2) in the alternative in the present case.

To return to the formulation of section 5(1), and the definition of 'sexual violation', it seems clear that the particular conduct on which the charge was unsuccessfully based in this case would have sufficed for a conviction in terms of the common-law crime of indecent assault, which was repealed and replaced by the offence of sexual

assault. There could be a conviction of indecent assault for touching the victim's thighs following the case of *S v F* 1982 (2) SA 580 (T), where it was held that even if the touching was not *per se* indecent, it could be held to be so if it was the intention of the accused to touch the victim indecently, and that intention was made clear to the victim. (The approach in *F* was favoured by the writers (see e.g Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 474-475), as opposed to the contrasting approach, which was founded on the majority judgment in *R v Abrahams* 1918 CPD 590, that the touching itself must be indecent, and not merely the intent accompanying the touching.)
This conduct could also fall within the ambit of the section 5(2) offence (set out above), where the touching of the thighs could be regarded as evidence of the accused unlawfully and intentionally inspiring the belief that an assault was about to occur. However, given its demise, it will now have to be prosecuted as a contravention of the new offence of sexual intimidation (section 14A of the Act), which provides:

'A person ('A') who unlawfully and intentionally utters or conveys a threat to a complainant ('B') that inspires a reasonable belief of imminent harm in B that a sexual offence will be committed against B, or a third party ('C') who is a member of the family of B or any other person in a close relationship with B, is guilty of the offence of sexual intimidation and may be liable on conviction to the punishment to which a person convicted of actually committing a sexual offence would be liable.'

The rationale for replacing the form of sexual assault criminalised in section 5(2) with this provision would seem to be linked to the fact that the offence now extends to not only the person being made aware of the threat being the victim of a sexual assault ('B'), but also if B as a result believes that a family member of B ('C') or 'any other person in a close relationship with B' will be assaulted. The extension of the ambit of liability in this way is not without some complexity however. What does 'close relationship' entail? And by requiring that there be a 'reasonable belief' of imminent harm, it is evident that the provision provides *less* protection than the common-law crime of indecent assault would have. In the case of *F*, it is clearly indicated that the crucial considerations pertaining to liability would be that there was an impression created in the mind of the complainant as to the nature and motive of the assault (*supra* at 583H-584A), that the accused unlawfully and intentionally created such impression, and created the understanding in the complainant's mind that such assault was imminent. There was no indication of the belief on the part of the complainant needing to be 'reasonable', simply because if the accused unlawfully and intentionally acted in such a way as to induce such belief, it was in accordance with the understanding of the harm that the indecent assault crime (and for that matter, the assault crime) protected against, and thus was deserving of liability, even if the complainant's belief that the assault would follow was, on an objective evaluation, not reasonable (see Hoctor *Snyman's Criminal Law* 7ed (2020) 398-399).

A further curiosity of phrasing in the drafting of the new offence may be noted in passing: that the accused 'may be liable on conviction to the punishment to which a person convicted of actually committing a sexual offence would be liable'. Does this indicate that sexual intimidation is not *actually* a sexual offence in its own right?
Moreover, it is by no means clear that the sexual intimidation offence will necessarily cover touching which does not fall within the description of the offence of sexual assault in section 5(1), read with the definition of 'sexual violation' in section 1 of the Act. Much will depend on the facts of the case. In any event, as is frequently the case with legislative codification, it seems that the new formulation of sexual assault does not compare favourably with the suppleness of its common-law antecedent.

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Matters of Interest to Magistrates

SLAPP SUIT JUDGMENT PAVES WAY TO SHUTTING THE DOOR ON STALINGRAD TACTICS

Prof Pierre De Vos

The Constitutional Court judgment on Slapp suits reminds us that there may be ways to curtail the practice whereby well-resourced political actors implicated in corruption and other unlawful or unethical behaviour (often abetted by ethically tainted lawyers) make use of the 'Stalingrad strategy' to delay or even completely avoid accountability for their actions.
When individuals abuse the legal process or the rules of court, it will often impinge on the integrity of the courts or cause harm to parties against whom it is being used. But, in part, because section 34 of the South African Constitution guarantees everyone's right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, our courts have been reluctant to nip such abuses in the bud.
While the recent Constitutional Court judgment in *Mineral Sands Resources (Pty) Ltd and Others v Reddell and Others* displays similar caution, it nevertheless provides helpful guidance on the mechanisms available to courts to curtail the kind of abuses that often arise when litigants deploy the "Stalingrad strategy" to try and avoid any accountability for their actions.

The judgment also sharply raises the question of whether our courts should do more to stop these abuses, given the fact that they impact the integrity of the courts and the judicial process, and given that they allow parties with deep pockets and few scruples to pervert the cause of justice.

This is not only because the court confirmed that defendants faced by defamation suits brought for ulterior or nefarious ends, and not to enforce any rights, would in some instances be able to rely on a so-called Slapp defence to stop the case brought against them in its tracks.

As the Constitutional Court explained (in a unanimous judgment penned by Justice Steven Majiedt), Slapp suits are often brought by well-resourced parties (in this case an Australian mining company) to “silence or fluster” their opponent, or “tie them up with paperwork or bankrupt them with legal costs”. Such suits often lack merit, and are intended to “silence critics by burdening them with the cost of litigation in the hope that their criticism or opposition will be abandoned or weakened”.

The Constitutional Court thus held that courts may reject such suits if the defendants can prove at trial that the defamation suit brought by the plaintiffs is an abuse of process of court; is not brought to vindicate a right; amounts to the use of court process to achieve an improper end and to use litigation to cause the defendants financial and/or other prejudice in order to silence them; and violates, or is likely to violate, the right to freedom of expression entrenched in section 16 of the Constitution in a material way.

The Constitutional Court pointed out that our courts have over many years used their inherent powers to protect the institution from litigious abuse, and proceeded to discuss and analyse some of the mechanisms available to courts to do so.

Apart from the Slapp defence, our courts may take action to prevent abuse of the legal process (particularly the rules of court); and to halt frivolous or vexatious litigation and malicious prosecution. I discuss each of these in turn.

The abuse of process is most commonly associated with the abuse of procedures permitted by the rules of the court to achieve a purpose other than that intended by those rules. For example, if the rules of court are used to delay proceedings indefinitely in an attempt to avoid the merits of the case being heard and decided by the court, this will amount to an abuse of process.

Our courts have also stated that “where the procedures to facilitate the pursuit of the truth are used for a purpose extraneous to that objective” it will amount to an abuse of process.

The Constitutional Court approvingly quoted from the Supreme Court of Appeal (SCA) judgment in *Phillips v Botha*, where the court defined an abuse of process as follows:

The term ‘abuse of process’ connotes that the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose.

I would argue that a litigant who pursues a matter for an ulterior purpose, in a case where there is absolutely no prospect of success, also abuses the legal process. A prime example of such a case is the application of the suspended Public Protector to the Constitutional Court to rescind its decision not to rescind its judgment of February 2022 where it upheld the separation of powers arguments regarding the appointment of a judge to the Section 194 independent panel.

There is overwhelming evidence that this application was launched with the sole purpose of delaying the parliamentary inquiry into her impeachment.

Such abuses are often dealt with by slapping a personal cost order on the litigant who abused the process. But where the litigant is funded by public money, or is so wealthy that such cost orders will have little impact, something more may be required.

Thus, in *Mineral Sands Resources* the Constitutional Court noted that there are exceptional cases "where there is gross abuse by the procedure employed by a litigant" where the courts "will dismiss the claim, without any regard to the merits". But in cases like the application to rescind the decision not to rescind, courts may have to devise other remedies to try and limit this kind of abuse of the process.

Apart from the legislative provisions allowing a court to declare someone a vexatious litigant, our courts have long held that they have the inherent power to regulate their own process and stop frivolous and vexatious proceedings before them. This happens when it can be shown that a litigant had "habitually and persistently instituted vexatious legal proceedings without reasonable grounds".

The Constitutional Court confirmed that legal proceedings were vexatious and an abuse of the process of court if they were obviously unsustainable as a certainty and not merely on a preponderance of probability. But as the Constitutional Court warned in *Maphanga*:

In granting this type of relief, [courts must] proceed very cautiously and only in a clear case make a general order prohibiting proceedings between the same parties on the same course of action and in respect of the same subject matter where there has been repeated and persistent litigation, and craft such order to meet only the immediate requirements of the particular case. The stringent onus on the applicant who seeks the relief and the need for the court's caution in exercising this power obviously arise from the fact that the relief curtails a litigant's access to court.

This principle may apply to former president Jacob Zuma's continued attempts to avoid criminal prosecution, essentially making the same arguments and relying on the same factually dubious claims that he is the victim of a political conspiracy and that those prosecuting him are biased.

Even in the Zuma case, claims that the former president has abused the process to delay his prosecution has not yet found favour with the courts, but this may be partly due to the fact that the arguments have not yet been forcefully and comprehensively put before the courts.

The third class of cases concerns the public or private prosecution of an individual. Here the position is different. Our courts have long held that a prosecution will not be unlawful merely because the charges were being pursued with an improper motive.

Nevertheless, if a prosecution was not being pursued with the ultimate purpose of securing the conviction of the accused, and if there was no reasonable or probable cause for instituting the prosecution, the prosecution could be declared unlawful.
Moreover, in cases of private prosecution, the prosecution will be unlawful if a *nolle prosequi* certificate was not issued by the NPA, or if the party wishing to prosecute cannot show that they have a unique and substantial interest in a matter, arising out of some injury which they had individually suffered in consequence of the commission of the offence.
This means that one would not be able to prosecute somebody lawfully if the alleged criminal offence did not affect them to any different degree than any other member of the public.
Lastly, a private prosecution embarked on for personal financial gain or in pursuit of some other private interest (such as an interest in avoiding prosecution oneself) would render the prosecution unlawful. The case in which Mr Zuma is seeking to prosecute Billy Downer and Karyn Maughan may fall into this category. As these prosecutions are clearly part of Zuma's Stalingrad strategy, and as the prospects of success are slim to zero, the court may well throw out these prosecutions.
There are good reasons why courts are reluctant to deal with various abuses of court rules and other legal processes. Most notably, it is not always easy to determine whether a litigant is pursuing a matter for no other reason than to subvert the legal process for their own ends.
Often lawyers representing litigants advance hopeless or even bogus legal arguments because they know no better or because they hope that the court will develop or change the law in their favour.
But it may be time for our courts to confront the fact that the abuse of the legal process and of courts more generally undermines the integrity of the system and exacerbates the effects of inequality by allowing those litigants with deep pockets to game the system.
While the Constitutional Court's judgment in *Mineral Sands Resources* represents a tentative and cautious step in this direction, it may have to become more forceful in future to ensure that the many charlatans and crooks (and their unethical lawyers) who abuse the system to evade accountability do not succeed in destroying the integrity of the entire system.

(The above article appeared on Prof De Vos' blog *Constitutionally Speaking* on the 17th of November 2022)

A Last Thought

"For the reasons that follow, I am of the view that it would not be in the interests of justice to develop the common law in this case to accommodate the applicant's type of interest:

(a) If the test is broadened it would not only allow a witness to pursue litigation to overturn adverse credibility findings against them but it would also allow other persons who may be adversely affected by some or other adverse finding of a court to do the same.

(b) If we accommodate the applicant's interest, we will have to also allow a party who is not aggrieved by the order of court but by one or other reason or credibility finding to appeal against such a reason or finding even if they do not appeal against the order.

(c) Although the applicant's application arose from an action, the same problem could arise in motion proceedings as well as in criminal proceedings.

(d) Although in this case we are dealing with one witness who seeks to have an adverse credibility finding made against him overturned, in other cases there could be multiple witnesses who would seek to do the same and this could seriously complicate the adjudication process.

(e) If there are multiple witnesses against whom adverse credibility findings have been made and they are allowed to intervene in a particular matter, they could be entitled to be represented by multiple lawyers.

(f) A refusal of an application for intervention may result in an appeal or appeals.

(g) If an aggrieved witness could intervene at the stage of an appeal, he or she might also then be entitled to intervene before judgment is given and to be represented at the trial of the action or at the hearing of the opposed application, if it appeared that that person's credibility or reputation could be the subject of an adverse credibility finding.

(h) If a litigant or a witness could pursue an appeal against adverse credibility or reputational findings, without having an interest in or seeking to impeach the actual order, an appellate court might need to adjudicate such an appeal without the assistance of anyone other than the aggrieved litigant or witness. This is because the parties with an interest in the actual order might well not wish to incur the costs of participating in an appeal if the trial court's order is not attacked. They might have no interest in whether or not a particular adverse credibility finding stands.

(i) All of these implications have great potential to delay and increase the costs of litigation."

Per Zondo C J in Lebea v Menye and Another (CCT 182/20) [2022] ZACC 40 (29 November 2022)