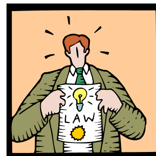
# e-MANTSHI

A KZNJETCOM Newsletter

**March 2023: Issue 194**

Welcome to the hundredth and ninety fourth 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. In terms of Rule 276(1)(b) of the Rules of the National Assembly the Minister of Justice and Correctional Services has indicated that he intends to introduce the Judicial Matters Amendment Bill, 2023 (the Bill), in the National Assembly shortly. The Bill contains 37 clauses which seek to amend—
(a) the Magistrates' Courts Act, 1944, so as to further regulate the calling of a witness by the court; and use of assessors;
(b) the Administration of Estates Act, 1965, so as to make provision for electronic payments; provide for an affidavit by an executor; further regulate liquidation and distribution accounts; provide for the review of Master's appointments; provide for the powers, duties and functions of the Chief Master; provide for a procedure to review a decision of a Master of the High Court or designated official; and further regulate the making of regulations;

(c) the Criminal Procedure Act, 1977, so as to provide for the information that must appear on a summons or a written notice that is endorsed to the effect that the accused may admit his or her guilt in respect of an offence in respect of which an admission of guilt fine may be paid without appearing in court; provide for the capturing of the conviction and sentence of a person who pays and admission of guilt fine by the Criminal Record Centre of the South African Police Service ("CRC"); and provide for the expungement of the criminal record of a person who is deemed to have been convicted and sentenced in respect of an offence in respect of which an admission of guilt fine has been paid or appeared in court in terms of a summons or written notice in respect of an offence where it was permissible for the person to admit his or her guilt and who have been convicted and sentenced by the court in respect of the offence in question; provide for the procedure and criteria that are to be taken into account to declare offences in respect of which an accused may pay a fine without appearing in court and which will not result in a previous conviction; provide for the payment of a fine without appearance in court and previous conviction; provide for the expungement of criminal records of persons whose name appears in the records of the CRC after having paid an admission of guilt fine for offences as envisaged in section 57B(1); provide for the expungement of the criminal record of a person who is deemed to have been convicted and sentenced in respect of an offence contemplated in any regulations that have been made in terms of section 27(2) of the Disaster Management Act, 2002, in respect of which an admission of guilt fine has been paid or appeared in court in terms of a summons or written notice, where it was permissible for the person to admit his or her guilt and who have been convicted and sentenced by the court in respect of the offence in question; and further regulate the calling of a witness by the court;
(d) the Matrimonial Property Act, 1984, so as to repeal an unconstitutional provision;
(e) the Sheriffs Act, 1986, so as to amend the duration of the term of office of members of the Board for Sheriffs;
(f) the Intestate Succession Act, 1987, so as to extend the meaning of "spouse";
(g) the Maintenance of Surviving Spouses Act, 1990, so as to insert more definitions;
(h) the National Prosecuting Authority Act, 1998, so as to further regulate the due dates of reports by Directors of Public Prosecutions and the National Director of Public Prosecutions;
(i) the Debt Collectors Act, 1998, so as to further regulate the term of office of members of the Council for Debt Collectors;
(j) the Domestic Violence Act, 1998, so as to penalise the making of a false declaration;
(k) the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to give effect to a judgment of the Constitutional Court;
(l) Protected Disclosures Act, 2000, so as to effect a technical amendment;
(m) the Judges' Remuneration and Conditions of Employment Act, 2001, so as to further regulate the conditions of employment of judges of the Constitutional Court, the Supreme Court of Appeal and the High Court;

(n) the Prevention and Combatting of Corrupt Activities Act, 2004, so as to regulate and strengthen the duty of private sector entities to put in place measures against corrupt activities;
(o) the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, so as to regulate the designation of public health establishments for purposes of providing post exposure prophylaxis and carrying out compulsory HIV testing; amend the definition of 'sexual offence'; regulate the designation of sexual offences courts; and regulate the manner in which child pornography must be dealt with and be disposed of;
(p) the Superior Courts Act, 2013, so as to further regulate applications for leave to appeal and appeals; the composition of courts of appeal; electronic service of documents initiating legal proceedings;
(q) the South African Human Rights Commission Act, 2013, so as to further regulate the powers of the South African Human Rights Commission with respect to its investigations;
(r) the Legal Aid South Africa Act, 2014, so as to further regulate the appointment of the Board; and substitution of obsolete provisions;
(s) the International Arbitration Act, 2017, so as to effect a technical correction; and repeal the common law crime of defamation; to provide for transitional arrangements, and to provide for matters connected therewith. The notice was published in Government Gazette no 48217 dated 16 March 2023.
The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202303/48217gen1678.pdf

2. A notice was published in terms of the Criminal Law (Sexual Offences and Related Matters) Act in relation to an amendment to the National Instruction on Sexual Offences. The Amendment, was published in Government Gazette no 48183 dated 8 March 2023.
The amendment can be accessed here:
https://www.saps.gov.za/resource_centre/sexual_offences/sexual_offences.php

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**Recent Court Cases**

1. **S v Bergman; S v Matume (14 /884/2021; T1715/2018) [2023] ZAWCHC 60 (17 March 2023)**

**A presiding magistrate must always guard against an unjustified guilty plea. The purpose of the plea proceedings in terms of section 112(1) (b) of the CPA is primarily to protect the undefended and uneducated accused.**

Ralarala J:

**INTRODUCTION**

[1] The two matters were brought before me by way of review in terms of section 304 of the Criminal Procedure Act 51 of 1977 (‘CPA’). Both matters were dealt with by magistrates in the Cape Town and Athlone Magistrates Courts respectively. The accused were unrepresented and in both cases they pleaded guilty to the charges of robbery and contravention of section 65(2) (a) of the National Road Traffic Act 93 of 1996 (“NRTA”), respectively. The Guilty pleas prompted the application of the provisions of section 112(1) (b) of the CPA. The accused were convicted and sentenced based exclusively on their guilty pleas.

[2] When both matters came before me, I was not satisfied that the proceedings were in accordance with justice. Consequently, in both matters the convictions and the sentences were set aside. I then ordered the immediate release of both accused. In S v Bergman, I directed certain questions to the magistrate.

[3] In light of the similar manner in which the presiding magistrates dealt with these matters, I decided to consider them together. This court is essentially enjoined to consider whether the proceedings before the respective magistrates appear to be in accordance with justice and equity.

**BACKGROUND**

**S v Bergman**

[4] In this particular case, after the questions and conviction of the accused by the Presiding Magistrate, Bergman was sentenced to a period of 12 months’ imprisonment.

[5] In his plea, the accused admitted the following:

- that he grabbed the complainant’s cellphone;
- the complainant resisted;
- a scuffle ensued between them;

- a security guard intervened and the cellphone was recovered and returned to the complainant.

[6] Importantly, the above information satisfied the court a quo that the accused admitted the elements of the offence of robbery. The relevant parts of the plea proceedings reveal the following:

"*Q in your own words can you tell Court it (sic)*
*I saw young sitting with this phone in his hand (sic). I walk past him. I return – on my return I grab his cellphone. We tostile (sic) – He pushed me on the ground and I had still in my hand hit Iphone (sic) on his head. Both of us fell on the ground –security came. He told them what happened. Security kept me until the police arrived and was arrested.*
*The phone was given back to the victim*
*Public Prosecutor: State Fact (sic)*
*Confirmed own xxx with accused.*
*Public Prosecutor: SAP 69 –hand court 13 –charge sheet –Exhibit "A"*
*FINDING*
*The court is satisfied that the accused is guilty of the offence to which he has pleaded."*

[7] A close examination of the plea proceedings reveals that the questioning did not establish all the elements of the offence of robbery. Clearly, the elements of unlawfulness and intention were not covered by the admissions made by the accused.

[8] As mentioned above, on 6 September 2022, I then directed the following query to the magistrate:

"*Kindly explain whether the Presiding Officer in this instance was satisfied that the elements of unlawfulness and intent in particular were sufficiently admitted by the accused?"*

On 02 November 2022, in his delayed response, the magistrate conceded that he had erred in questioning the accused. The following are the relevant parts of his response:

"*After questioning the Accused, the Court, in error, was satisfied that the Accused has admitted all elements to the charge.*
*Upon receipt of the record, which was received by me on the 20 October 2022, post facto, I am not satisfied that the elements of unlawfulness and intent were sufficiently canvassed by the Court and admitted by the Accused.*

*I submit that it was a regrettable oversight on my part and request for your indulgence".*

[9] In my mind, the concession made by the magistrate was correctly made.

**S v Matume**

[10] In this instance, the accused, a 42 male inter alia, admitted that:

- he was arrested at a road block on Govan Mbeki Road, a public road in the Wynberg district, for driving a motor vehicle with registration number CY [. . . ] whilst the concentration of alcohol in any specimen of his blood was not less than 0,0 5 grams per 100 ml;
- he drank five to six beers at a work related party;
- the alcohol content in his blood had been determined to be 0.15 grams per 100 ml.
- Blood was drawn within two hours.

[11] However, upon further questioning by the Presiding Magistrate, the accused indicated that he had no knowledge that driving a motor vehicle on a public road while the alcohol content in his blood stream was not less 0.05 gram per 100 ml was a criminal offence. For the sake of completeness, I will recite the relevant parts of the record:

"*Court: Did you know that it is an offence Mr Matume, to drive a motor vehicle on a public road while the concentration of alcohol in your blood is not less than 0.05 grams per 100 millilitres of blood?*
*Accused: I did not know that, Your Worship.*
*Court: What do you know?*
*Accused: What I thought your Worship, one gets arrested when you drive and busy drinking with a beer in your hand, Your Worship.*
*Court: Ms Gangat?*
*Prosecutor: Yes Your Worship. Ignorance of the law is not a defence, Your Worship.*
*Court: Okay*
*Prosecutor: The accused … [intervenes]*
*Court: That is your answer.*
*Prosecutor: … even though he did not know, it is still an offence and he ought to have known, Your Worship.*
*Court: Okay I wanted you to say. Okay. Mr Matume … [intervenes]*
*Accused: Yes, Sir*
*Court: You are saying the only thing that you knew was that you, is that according to your knowledge is that you cannot drink whilst you are driving?*
*Accused: To be honest, yes, Your Worship.*
*Court: What do you think about driving a vehicle whist you have had some drinks?*

*Accused: I will not really know, Your Worship, because I will not know, Your Worship, how a person feels, Your Worship, driving after …[indistinct], Your Worship. Because I drive normally, Your Worship, even after I had something to drink, Your Worship."*

[12] Subsequent to the above questioning, the magistrate proceeded to convict the accused and sentenced the accused to a period of 18 months' imprisonment or a fine of R6000,00 half of which was suspended for five years, on condition that the accused is not convicted of contravening section 65(2) (a) and section 65(1)(a) of NRTA. The accused was disqualified from obtaining a learner's licence within the next 6 months. I should further point out that, the accused was driving without being in possession of a driver's licence, although that was the case the state did not charge him in that regard.

**APPLICABLE LEGAL PRINCIPLES AND ANALYSIS**

[13] Plea proceedings are by their very nature different from trial proceedings in that the questioning is designed to determine whether the accused admits all of the allegations in the charge sheet to which he pleaded guilty. The purpose of the plea proceedings in terms of section 112(1) (b) of the CPA is primarily to protect the undefended and uneducated accused as in the instant cases. Particularly, in Mr. Matume's case the court below was informed that his highest level of education is grade 6. In *S v M* 1982(1) SA 242 D –E Didcott J observed that:

"*Accused persons sometimes plead guilty to charges, experience shows, without understanding fully what these encompass. The danger of their doing so is obvious in a society like ours, which sees many who are illiterate and unsophisticated coming before the courts with no legal assistance* …".

See also *S v Samuels* 2016(2) SACR 298 (WCC) para 21. It follows that the questioning and answers must cover all the elements of the offence that the state would ordinarily be required to prove had the accused not proffered a guilty plea. In this manner, the court will be in a position to determine whether the accused person is indeed guilty and whether a conviction is justified.

[14] Back to the matter of S v Bergman, the presiding magistrate in this matter, clearly did not grasp that the questioning was not adequate to establish the existence of all the elements of the offence of robbery. I must emphasize that it should appear prominently from the accused person's answers that he had the intention to commit robbery, which means that he intended to steal the victim's property while using force. The essential elements of robbery are theft, violence, submission and intention. Embedded in the element of theft is the intention to deprive the owner permanently of his property and making it his own. Thus where force was used to take one's property with the aim of borrowing the said property rather than to deprive the owner thereof

permanently, it cannot be said that theft was committed and thus no robbery. See *Jonathan Burchell's Criminal Law Fourth Edition* page 707.

[15] The magistrate had a duty to establish the intention of the accused in respect of the appropriation of the cellphone in order to ensure that the element of theft was fulfilled. In *casu,* the presiding magistrate did not enquire about the state of mind of the accused person to determine *mens rea* at the time of the commission of the offence. Most importantly, it should be borne in mind that the admissions made by an unrepresented accused do not absolve the court of the obligation to satisfy herself or himself of the accused's guilt. *S v Adams en Tien Ander Soortgelyke Sake* 1986 (3) SA 733 (C)

[16] As a result of the inadequate and insufficient questioning, which contributed to the non-compliance with section 112, the provisions of section 113 of the CPA should have been invoked. *Mudau v S* [2015] JOL 33536 (SCA). There is therefore an inescapable obligation on the presiding magistrate to determine whether the accused person admits all the allegations in the charge sheet to satisfy her or himself that the accused is indeed guilty. *S v Witbooi* 1978 (3) SA 590 (T) at 594 -595; *Mkhize v S* and another 1981 (3) SA 585 (N) at 586 H -587A. A conviction should not have followed in the circumstances that played out at the end of the questioning, instead more questions from the magistrate should have followed. This would be expected if the magistrate had full appreciation of the definition and the elements of the particular offence. This is a clear indication that particular attention need to be given to the elements of the specific offences when magistrates consider plea proceedings, especially where undefended accused persons are involved. It should be emphasized that when considering plea proceedings magistrates need to be meticulous throughout, and that should be abundantly clear throughout the record of proceedings. In order circumvent injustice to the accused persons, plea proceedings should not be rushed. In my view with the necessary appreciation of the offence more questions ought to have been asked in order to cover all the elements of the offence or a plea of not guilty ought to have been noted in terms of section 113 of the CPA.

[17] Turning back to the Matume case. The record of this case clearly reveals that, the court granted the prosecutor an opportunity to address the court following the accused's indication of not having knowledge that the conduct he was charged with and had pleaded to was an offence. Following that, the court proceeded with the questioning in a manner similar to cross examination, and when it appeared that the accused maintained his stance, the court proceeded with conviction. Unlawfulness as an element of the offence was not established in these plea proceedings, and what was established was sufficient to show that he offered a defense. In that case, the court should have been skeptical of the accused's guilt.

[18] I cannot emphasize enough how important it is for the presiding magistrate to always guard against an unjustified guilty plea. It must be borne in mind that the

questioning is directed at what the accused person alleges rather than the truth of those allegations. It is for this reason that the questioning cannot assume the nature of trial proceedings. If during the questioning, it becomes apparent that a defence or a justification is advanced by the accused person a plea of not guilty must be noted as envisaged in section 113 of the CPA. See *S v W en Andere* 1999 (2) SACR 640 (C).

[19] Regrettably, instead of invoking the provisions of section 113 of the CPA, the presiding magistrate proceeded to question the accused person. According to the questions, the accused did not admit that his conduct was unlawful and that induced a sense of uncertainty on the part of the presiding magistrate as to the next step to be taken. This manifests itself in the magistrate allowing the prosecutor to address the court rather than making a decision that only a court can make in the circumstances. As already indicated, a "not guilty" plea would be appropriate in these circumstances.

[20] A distinctive anomaly in the sentence that cannot be overlooked, is that although the period of suspension and the offences that he should not be convicted of have been specified by the sentencing court, the sentence does not stipulate that these offences are not to be committed during the period of suspension. *Section 297 (1)(b) of the CPA* provides for suspension of sentences and stipulates the following:

"*Where a court convicts a person of any offence other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion- . .*
*(b) pass sentence but order the operation of the whole or part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph(a)(i) which the court may specify in the order; or*
*(c)…."*
In my view the sentence is not a competent sentence, in that the condition is not clear nor precisely formulated as it does not specify in relation to what period is the accused precluded from committing the specified offences. The primary object is after all that the accused must understand what he or she has to do or avoid and for what length of period. *Hiemstra's Criminal Procedure Issue 11 28-81.* In my view the sentence imposed by the magistrate is incongruous to the provisions of section 297(1).

[21] It is apparent on the record of both matters that the magistrates did not adhere to the constitutional requirement of fairness when considering the plea proceedings. See section 35 (3) of the Constitution.

[22] It is for the above reasons that the convictions and sentences in both cases were set aside and this Court ordered the immediate release from prison of both accused.

## From The Legal Journals

**Le Roux-Bouwer, J**

Premeditated Murder: Section 51 of the Criminal Law Amendment Act 105 of 1997 and the right to a fair trial: *Baloyi v S* 2022 1 SACR 557 (SCA); *Peloeole v Director of Public Prosecutions, Gauteng* (740/2022) [2022] 4 All SA 1 (SCA);
*Mpuqe v S* (53/2021) [2022] ZASCA 37 (4 April 2022).

***2023 (86) THRHR 107***

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

## Contributions from the Law School

### The role of the magistrate when putting a suspended sentence into operation

#### Introduction

It is common knowledge that the vast majority of criminal cases in South Africa are completed in the magistrates' courts. It is also well known that many of these cases result in fully or partially suspended sentences. Sentencing data in South Africa has always been hard to obtain, but past studies have indicated that totally suspended sentences can be imposed for as much as 27% of assault cases, while partial suspension was employed in as much as 67% of drunken driving cases (cf Van der Merwe & Terblanche *Investigation into the sentencing practices of magistrates' courts* (1995) 348ff; see also South African Law Commission *Research paper 17: An empirical quantitative and qualitative study of the sentencing practices of the South African criminal courts, with particular emphasis on the Criminal Law Amendment Act, 105 of 1997* (2000)). According to the National Prosecuting Authority Annual

Reports, over 200 000 criminal cases leading to convictions can be expected annually in the district magistrates' courts. It is therefore safe to deduce that more than 50 000 suspended sentences are imposed in South Africa every year.

When so many thousands of suspended sentences are imposed, it is also safe to assume that the conditions of suspension are regularly broken. It has been said that, 'It seems to be the rule rather than the exception, … that a suspended sentence will be put into operation at some stage' (*S v Chake* 2016 (2) SACR 309 (FB) at para [7.4]). Therefore, the procedure that should follow when a condition has been breached and the legal principles involved should be familiar to prosecutors and magistrates. This expectation is confirmed when Kruger *Hiemstra's Criminal Procedure* (updated to 2022, SI 15) 28-88 writes that, 'There is no lack of clarity about the applicable principles. However, when one considers the small number of authoritative judgments about the procedure and principles, and the fact that they often contradict each other, one has to start wondering about these suppositions. In addition, the main sources of courts' powers in this connection, s 297(7) and (9) of the Criminal Procedure Act 51 of 1977, are not models of clarity. Lack of certainty has been increased further by some recent judgments; and perhaps none more so than the fairly recent judgment of the Supreme Court of Appeal, *Stow v Regional Magistrate, Port Elizabeth* 2019 (1) SACR 487 (SCA).

These considerations prompted this contribution, of which this is the first part. It starts with an overview of the legal principles that govern how a court should determine whether a condition has been breached, and what should happen thereafter. It discusses case law that affected the position in the past, and shows how they were affected by the constitutional era and its Bill of Rights. It also considers the position when the putting into operation of a suspended sentence affects the totality of punishment experienced by an offender, and how the law has dealt with this issue. In the second part, which will appear in this next edition of this journal, the discussion will mainly focus on the appealability of orders to put suspended sentences into operation, the influence of the *Stow* judgment, and the way forward for magistrates.

It is appropriate to define a few common concepts used in this contribution. First, a condition of suspension of a sentence is usually referred to as a 'suspensive condition'. Secondly, there are always at least two courts involved in these situations: the court that imposed the suspended sentence, which is here referred to as the 'trial court' or 'first court' or 'original court'; and the court that considers whether a suspensive condition has been breached and what should be done when it has, which is here referred to as the 'second court' or 'enforcement court'. Obviously, a *second trial* court is also often involved, being the court that convicts the offender of the offence that amounts to the breach of the original court's suspensive condition; this court might become the 'enforcement court' when it is also requested to consider putting the original, suspended, sentence into operation.

One further qualification for purposes of this contribution: the suspensive condition may be a positive condition, requiring the offender to do something, such as pay compensation or do community service or undergo treatment (Terblanche *A guide to sentencing in South Africa* (2016) 403). However, by far the most common condition

is one that requires the offender *not* to commit an offence related to the one for which the suspended sentence has been imposed; for this reason such conditions are sometimes called 'negative' conditions. Most of this discussion involves such negative conditions, but the principles also apply to positive conditions.

**Section 297 of the Criminal Procedure Act**

*Introduction*

About one thing there is no doubt: a suspended sentence *never* just comes into operation by itself, no matter how obvious it might be that the person involved breached the suspensive condition. In fact, 'An application for putting into operation a suspended sentence is not a mere formality but entails a fully-fledged exercise of judicial discretion' (Kruger *Hiemstra's Criminal Procedure* (updated to 2022, SI 15) 28-88; see also, e g, *S v Hoffman* 1992 (2 ) SACR 56 (C) at 63*a*; *S v Titus* 1996 (1) SACR 540 (C) at 543*i*).

Section 297 of the Criminal Procedure Act is the statutory provision that covers the current situation. The relevant subsections read as follows:

'(7) A court which has— … *(b)* suspended the operation of a sentence under subsection (1)*(b)* or (4) … whether differently constituted or not, or any court of equal or superior jurisdiction may, if satisfied that the person concerned has through circumstances beyond his control been unable to comply with any relevant condition, or for any other good and sufficient reason, … *further suspend* the operation of a sentence …, subject to any existing condition or such further conditions as could have been imposed at the time of such … suspension.'

(9) *(a)* If any condition imposed under this section is not complied with, the person concerned may upon the order of any court, or if it appears from information under oath that the person concerned has failed to comply with such condition, upon the order of any magistrate, regional magistrate or judge, as the case may be, be arrested or detained and, where the condition in question— … (ii) was imposed under subsection (1)(b) … be brought before the court which suspended the operation of the sentence … or any court of equal or superior jurisdiction, and such court, whether or not it is, in the case of a court other than a court of equal or superior jurisdiction, constituted differently than it was at the time of such … suspension, may then, … put into operation the sentence which was suspended.'

*First things first*

The first prerequisite for the 'fully-fledged exercise of judicial discretion' is that the offender subject to the suspended sentence (the 'person concerned') must be brought before a court with jurisdiction to attend to the enquiry. As noted above, this is the second, or enforcement, court. The normal procedure is for the prosecution to bring the matter before the court, and to make an application for the suspended sentence to be put into operation (cf *S v Peskin* 1997 (2) SACR 460 (C) 463g; *S v Mndela* 2023 (1) SACR 275 (ECM) at para [2]). The process is quite informal (Terblanche *A guide to sentencing in South Africa* 3ed (2016) 428); in fact, it has been held that it would be undesirable to introduce strict procedures (*S v Hoffman* 1992 (2) SACR 56 (C) at 63*g-h*).

*Has the condition been breached?*

It is the second court's first task to determine whether the relevant condition or conditions has been 'complied with' (sub-s (9)*(a)*). Almost invariably, this determination amounts to a factual question. If the court finds that the condition has not been complied with, it then needs to decide what the next step should be. Essentially, the enforcement court can choose from three available options: to put the suspended sentence into operation; to further suspend the sentence; or to do nothing. The last option is taken when the court simply denies the prosecution's application to have the suspended sentence put into operation (as happened, e g, in *S v Peskin* 1997 (2) SACR 460 (C) 464h; *S v Hendricks* 1991 (2) SACR 341 (C) at 347a; *Callaghan v Klackers NO* 1975 (2) SA 258 (EC) 260D-F).

*Exercising the judicial discretion*

What guidance is there for this discretion, to choose from the available options? Sub-section (9) allows the court to put the suspended sentence into operation, but says nothing about the grounds upon which this decision should be based. Sub-section (7) provides for further suspension of the suspended sentence, when compliance was not within the person's control or 'for any good and sufficient reason'. It is hardly necessary to argue that this 'guidance' is so vague as to be almost meaningless.

Even if a judicial discretion needs to be exercised, it is also safe to say that there is a 'normal' outcome when a suspensive condition has been breached. Normally, therefore, when the offender has been subject to a negative condition and, during the period of suspension, commit a further crime in breach of that condition, the enforcement court will have little option but to put that suspended sentence into operation. One of the main objectives of a suspended sentence is to serve as individual deterrent on the offender or, as explained in *S v Chake* 2016 (2) SACR 309 (FB) at para [7.4], 'to discourage the accused from repeating the same criminal behaviour'. When the offender acted in flagrant disregard of this objective, a disregard that most intentional crimes will demonstrate, the offender has no one but himself to blame and the interests of justice will usually demand that the sentence be put into operation (cf the response to this argument in *Callaghan v Klackers NO* 1975 (2) SA 258 (EC) at 260B, noted below). However, at this point it is important to remind the reader of the first prerequisite of this procedure, namely that the enforcement court must engage in a 'fully-fledged exercise of judicial discretion'. This means that no court may prejudge the decision and there is no room for a situation where suspended sentences are put into operation almost automatically – that would be antithetical to the whole notion of a judicial discretion. This point is revisited in the conclusion to this part of this contribution.

*Comparing the discretion to enforce the suspended sentence with imposing a sentence*

In respect of the discretion to enforce the suspended sentence, Kruger *Hiemstra's Criminal Procedure* (updated to 2022, SI 15) 28-88 declares that, 'It requires as much consideration and judicial discretion as the imposition of sentence.' Shortly thereafter, the author strengthens the argument: 'In certain respects the consideration of

implementation requires even more careful consideration than the original imposition of sentence' (at 28-88 – 28-89). There is support for this view in *S v Hoffman* 1992 (2) SACR 56 (C) at 63*c*; the court held that, 'In the exercise of its discretion the court is engaged in a sentencing process and must consider and apply all the necessary principles which it would apply if it was imposing an original sentence' (the court referred to a few very old cases in support of this: *Berg v Regional Magistrate Southern Transvaal and Another* 1956 (2) SA 676 (T); *S v Esterhuizen* 1963 (3) SA 165 (GW); *S v Gaika* 1971 (1) SA 231 (C)).

Kruger *Hiemstra's Criminal Procedure* (updated to 2022, SI 15) 28-88 – 28-89 offers three main reasons for his assessment of the discretion, based on deduction from current case law. These are:

(1) The original trial and the reasonableness of the condition of suspension 'must be assessed afresh';

(2) The conviction that might amount to a breach of the condition of suspension must be assessed, and 'If it was, for instance, a trivial or merely technical breach, a heavy suspended sentence should not be put into operation because of it. That applies especially when the condition of suspension has been widely worded';

(3) The suspensive condition 'must be assessed in the light of events since its imposition'.

*Relevant case law*

It is worth considering a few of the most important judgments in this connection, to see what problems they highlighted, and how Kruger came to draw the above conclusion. As an aside, it is worth noting that none of the following cases considered reviewing the original sentence – in all cases, the only order before the court was the order to put into operation the suspended sentence.

In *Callaghan v Klackers NO* 1975 (2) SA 258 (EC) the offender had been convicted of exceeding the speed limit. The first offence was committed in May 1973, and for this he received a fine plus suspended imprisonment of 40 days. The second offence was committed a year later, he was fined only. However, on subsequent application by the prosecutor, the magistrate later put the suspended 40 days' imprisonment into operation. On review, the court noted that, if the first sentence had been the subject of its enquiry, it would have found 'that the conditions of suspension were unreasonably harsh and ought not to be allowed to stand' (at 259E). The court reminded itself that 'the magistrate [was] called upon to exercise his discretion [to put the suspended sentence into operation] in a judicial manner…'. This being the case, a review court would only interfere when 'it is of the view that that discretion was so badly exercised as to amount to a gross irregularity - in other words, that it was a grossly unreasonable exercise of the discretion' (at 259G-H). Eksteen J continued, 'In considering whether or not this was so it is pertinent, in my view, to have regard not only to the circumstances pertaining to the commission of the present offence, but also to the nature of the suspended sentence and the results which will flow from its imposition' (at 259H). The magistrate had remarked 'that the applicant ought to have realised that his personal liberty would be affected by his commission of the offence and that therefore he brought the results on himself', to which the review court

responded, 'This is not to my mind an answer to excuse the undoubtedly harsh consequences which will ensue from the exercise by the magistrate of his discretion in the way he has done' (at 260B). Finally, Eksteen J concluded (at 260C): 'I consider the imprisonment of the applicant for a period of 40 days in the circumstances of this case to be a grossly unreasonable exercise of discretion, and a failure by the magistrate to exercise a judicial discretion. In the light of this conclusion the present review proceedings must succeed.'

The next important case is that of *S v Hendricks* 1991 (2) SACR 341 (C). This review judgment also deals with an order to put a suspended sentence into operation. The original court imposed, for possession of one Mandrax tablet, five years' imprisonment of which four years were conditionally suspended. The offender was 19 years old at the time. This sentence was confirmed on review (at 345*h-i*). Less than two years later, he was convicted of possession of seven 'stoppe' dagga, and sentenced to three months' imprisonment. The second court ordered the four years' suspended sentence into operation. Despite the earlier review confirmation, the review court now considered it to be extraordinarily severe. It gave five reasons for this conclusion, but essentially they all amount to the following: the sentence was very severe, when compared to current authority, which meant that such a severe sentence should not have been put into operation (at 345*i-j*). This conclusion was reinforced by the fact that a much less severe sentence was imposed for slightly more drugs by the second trial court (at 346a-b). Finally, there was no point to such a severe sentence (at 346*c-h*). Therefore, the review court concluded in *Hendricks*, the second court exercised its discretion incorrectly, and its order to put the suspended sentence into operation was therefore irregular (at 346*i*).

In *S v Peskin* 1997 (2) SACR 460 (C), the review court dealt with similar issues. In August 1995, the accused was convicted of driving with too much alcohol in his blood and sentenced to a fine, plus an additional suspended sentence of 5 months' imprisonment. A year later, he committed a similar offence and received a similar sentence but, in this instance, the suspended imprisonment was for 6 months. The magistrate in the second case was fully aware that the first suspended sentence was still hanging over the accused's head at the time (at 468*b*). In April 1997, on application by the prosecutor, she was also the magistrate that ordered this suspended sentence into operation. At the second trial, the prosecutor had asked that the offender not be sent to imprisonment, and the magistrate also, by implication, concluded that imprisonment was not appropriate. The review court found it 'disconcerting' and 'altogether contradictory' that the State then later applied for the suspended prison sentence to be put into operation, and that the magistrate granted this application (at 467*h*). It concluded (at 467*i*) that, 'The decision of the magistrate on the application to put the suspended sentence into effect, contradicts the decision in sentencing the accused that he should not be sent to prison.'

In the course of the judgment on the exercise of the discretion to enforce the suspended sentence, Rose-Innes J (at 464*h-i*) held that there 'is a wide scope for the enquiry which the court should make in arriving at a just decision. The enforcement court is free to consider the reasonableness of both the first and second sentences.

Regarding the *first sentence*, if the court 'comes to the conclusion that the sentence or the conditions of suspension were unreasonable it should decline to put the sentence into effect'. In this case, given the circumstances of the first offence, the review court was at pains to explain that the additional suspended sentence of five months' imprisonment 'rendered the sentence, as a whole, most severe' (at 465*f-g*), and its imposition seriously questionable (at 469*c-d*). The accused was not the kind of person 'who should be sent to prison by reason of [even a] second conviction of this offence' (at 469*e-f*). In other words, when it is not the intention of the first court that such offender should go to prison for a second offence, the addition of a suspended prison sentence is inappropriate. Regarding the *second sentence*, the enforcement court should 'decide whether commission of the second offence, having regard to all the circumstances of the offence and of the accused, justifies putting the suspended sentence into operation' (at 464*i-j*). From practice in the review court's jurisdiction, Rose-Innes J observed (at 469*d-e*) that 'the courts do not readily sentence the wrongdoer to imprisonment, even on repetition of the offence for a second time, where there are no special or aggravating circumstances such as, for example, injury to persons or damage to the property of others caused by driving under the influence of liquor. In such a case the court should be equally reluctant to put a suspended sentence of imprisonment into effect'.

In *Peskin* the magistrate had also committed a misdirection during the second trial, by stating that 'it would be necessary to put the suspended sentence into operation' (at 468*e-f*). This amounted to a prejudging of the issue when there was not even an application before the court (at 469*b*).

In *S v S* 1999 (1) SACR 608 (W) there appeared a first glimpses of the influence of the constitutional era on this discretion to put a suspended sentence into operation. The facts of the case are important. In October 1997, the 15-year-old accused was convicted of theft of a pistol. The magistrate sentenced him to one year's suspended imprisonment, on condition that he submits himself for supervision, and a typical negative condition. The 'accused' reported for his supervision at the designated centre and, at one point, was given leave of absence. He did not return, because of reasons that are not entirely clear. Although the accused admitted that he had breached the first condition of suspension, other factors were involved, and the review court could find no justification for the magistrate's finding 'that the accused had culpably breached the conditions of the suspension' (at 615*f-g*). In the course of the judgment, Nugent J noted as follows (at 613*e-j*): 'It seems to us that when a court ultimately directs that a person should be subjected to imprisonment, that step is quite capable of being construed as the "imposition" of the relevant sentence. In our view the scheme of the relevant provisions of the Act reflects an intention on the part of the Legislature that all criminal proceedings in the magistrates' courts should be capable of being considered by this Court on review, and corrected where they are not in accordance with justice …'. The court then noted that earlier judgments have to be reconsidered in view of s 39(2) of the Constitution of the Republic of South Africa 1996, which enjoins courts to 'promote the spirit, purport and objects of the Bill of Rights'. Finally, 'In our view the clear spirit, purport and object of that section [s 35,

which guarantees the right to a fair trial] is to ensure that no person is condemned to endure a penalty provided for by the criminal law without recourse being had to another court in order to correct any irregularity or injustice which might have occurred in the course of the proceedings which have had that result.' These dicta would become persuasive in the later judgment by the Supreme Court of Appeal in *Stow v Regional Magistrate, Port Elizabeth* 2019 (1) SACR 487 (SCA).

In closing this review of case law, reference can also be made to *S v Govender* 1986 (4) SA 972 (N). In this case the enforcement magistrate was concerned that, when the suspended sentence was put into operation, 'the cumulative effect of the two sentences would place a very heavy burden on the accused' (at 973C). The review court concluded that, in these circumstances, he should have further suspended the suspended sentence (at 974D).

**Criminal procedure connected to the enforcement of suspended sentences**

*Two related spheres of criminal procedure*

At least two elements of criminal procedure that have challenged our courts over many decades are closely linked to the question of the enforcement court exercising its judicial discretion to put a suspended sentence into operation, or to choose another course:

1. When more than one sentence is imposed on an offender, the sentencing courts must consider the cumulative effect of such multiple sentences. This situation often occurs when a suspended sentence is put into operation, as the offender is then usually already serving another sentence.
2. It has long been held that the putting into operation of a suspended sentence is not subject to review or appeal (cf *Gasa v Regional Magistrate for the Regional Division of Natal* 1979 (4) SA 729 (N); *S v Hoffman* 1992 (2) SACR 56 (C) at 63*d*-*e*), mainly because a court that orders a suspended sentence into operation is not imposing a new sentence, but is merely making an order with regard to a sentence already imposed by another court.

Judgments in which these two processes have been addressed have regularly made pronouncements on the nature of the enforcement court's discretion. The first process, involving the cumulative effect of multiple sentence, is addressed in this part of the contribution, while the question about appealability stands over to the next part.

*Concurrent running of suspended sentences*

The seminal case in the pre-constitutional era is *S v Govender* 1986 (4) SA 972 (N). In July 1984, the accused was given a suspended sentence of three months' imprisonment for possession of dagga. He breached the condition of suspension when, in September 1985, he was convicted of a similar offence and sentenced to 12 months' imprisonment of which six months were conditional suspended. In January 1986, a magistrate put the first, suspended, sentence into operation, 'but directed that it should "in terms of s 280 (2) (of the Criminal Procedure Act 51 of 1977) run concurrently with the present term of imprisonment that the accused is serving" (at 973B).

Whether this additional order was competent is the main issue for determination by the review court (per Booysen J). First, the court held (at 973H, based on *S v Strydom* 1967 (2) SA 386 (N) at 387D) that s 280(2) empowered the court to order 'that sentences run concurrently and *this court is without doubt* the court referred to in ss (1), that is to say, "the trial court passing sentence at the conclusion of the trial"' (emphasis added; see also *S v Fourie* 1992 (1) SACR 481 (NC) at 484*b*-*c*). Secondly, the trial court 'is thus empowered to direct that its sentence should run concurrently with an earlier suspended sentence *which it brings into operation*'; however, the court is *not* empowered 'to order such suspended sentence to run concurrently with its new or any other sentence' (at 973H-I, emphasis added). The court referred to substantial case law in support of this statement: *Strydom* supra at 687C-F; *S v Osborne* 1981 (3) SA 645 (C) at 648F; *S v Mothibi* 1982 (4) SA 49 (NC) at 50G; *S v Nkosi en Andere* 1976 (4) SA 832 (O) at 834D-G; *S v Johnston* 1977 (3) SA 27 (T) at 28H. In addition, the court noted (at 973J), 'It is clear that the putting into operation of a suspended sentence cannot be regarded as a sentence which follows upon conviction. (*S v Delport alias Boucher* 1984 (1) SA 511 (O) at 515H.)'

The full bench in *S v Fourie* 1992 (1) SACR 481 (NC) at 484*d*-*e* interpreted *Govender* to be authority for the proposition that s 280(2) empowers the second trial court to order that its (second) sentence shall be served concurrently with, inter alia, a suspended sentence, should that suspended sentence put into operation. However, as noted above, the relevant dictum in *Govender* states that the court is 'empowered to direct that its sentence should run concurrently with an earlier suspended sentence *which it brings into operation*', which is not the same as the speculative proposition in *Fourie*. Be that is it may, Buys J in *Fourie* had earlier noted that this point might not have been argued before, but that there were many cases in which the second court ordered that its sentence had to be served concurrently with a suspended sentence, should that suspended sentence be put into operation (at 483*d*)—he expressly agreed with this approach.

Further agreement with this approach was expressed in *S v Hoffman* 1992 (2) SACR 56 (C), a review judgment by Selikowitz J. After conviction at the second trial, in the magistrates' court in Paarl, for possession of 63 g of dagga, the State proved that the accused had a relevant previous conviction: for possession of 950 grams of dagga he had been sentence to a fully suspended sentence of 12 months' imprisonment. The second court imposed a sentence of six months' imprisonment. However, 'Because the period of suspension of the [first] sentence … had not yet expired and the current conviction amounted to a breach of the conditions of suspension, the magistrate at Paarl added that the sentence of six months' imprisonment was to be served concurrently with the suspended sentence of 12 months' imprisonment if it was put into operation' (at 57*d*-*e*). The main question for decision was whether this additional order was competent, as the prison authorities argued that there was no competent sentence. In essence, the court held that the sentence was competent. During the judgment, Selikowitz J first confirmed (at 60*h*-*j*) that 'a person who was sentenced to a term of imprisonment which has been conditionally suspended is "undergoing

punishment" until the period of suspension has elapsed'. Therefore, the power afforded by s 280(2) 'to order concurrency include suspended sentences which have not yet been put into operation'. He then also noted that, 'It should be noted here that the court which puts the suspended sentence into operation cannot order that the sentence put into operation is to run concurrently with any other sentence' (at 63*j*-64*a*).

The above approach has also, if obiter, been confirmed in *S v Motloung* 2015 (1) SACR 310 (GJ) at paras [27]-[28].

However, in *S v Chake* 2016 (2) SACR 309 (FB) Murray AJ (Van Zyl J concurring) found that all these principles needed to be re-evaluated. Essentially, this case also involved a suspended sentence, followed by a second sentence for a second offence, and the enforcement magistrate being concerned about unfair consequences of the combined sentences, and frustrated that precedent prevented her from ordering that the suspended sentence be served concurrently with the other sentences (at para [2.4]). *Chake* is a long judgment, covering a wide range of sentencing considerations, and this assessment of its essential elements. Essentially, the court's conclusion is the following (at paras [11.1] - [11.2]):

'I am of the view, therefore, that the putting into operation of a suspended sentence can be regarded as a procedure which follows on conviction as demanded in s 280(1) because s 297 grants the enforcing court such jurisdiction. … Consequently [an enforcement court] … is empowered to order that an earlier suspended sentence which it brings into operation is to run concurrently with a new or any other sentence because its implementation complies both procedurally and substantively with general constitutional standards such as legality, equality, proportionality and the protection of human dignity.'

As is clear from this conclusion, it was partly informed by 'the constant development of the law since the advent of the Constitution' (at para [9.1]). The constitutional right to a fair trial played a role (at para [8.6]):

'In order to meet the accused's right to a fair trial, the enforcing court's discretion to order concurrency needs to be available at the time when all the current circumstances and the extent of all the sentences are known. It is indeed so that the core purpose of s 280 is to protect human dignity by applying the "totality principle" referred to above. Disregard for this principle may lead to inhumane and unfair sentences, which could never have been the intention of the legislature by denying *any sentencing court*, whether it be the trial court, the enforcing court or the substituting court, the jurisdiction to order concurrency'.

Another factor was that none of the earlier judgments ever considered the reasonableness of limiting the power to order concurrent running to the trial court itself (at para [5.21]). Finally, the court considered all the principles related to s 297 proceedings, that are aimed at ensuring that the enforcement of a suspended sentence follows a 'full judicial process' (at paras [7.2] et seq). From these principles it concluded (at paras [7.16] - [7.18]) that these

'…duties are equally applicable when a "trial court" imposes sentence after conviction of an offence that breached the suspensive conditions. In fact, the *conviction* by the

trial court is the *sine qua non* not only *for the trial court's own sentence, but also for the s 297 court's putting into operation of the suspended sentence.* In that sense, then, the s 297(9) court's "sentence" or "punishment" (the putting into operation of the suspended sentence) can in my view also be widely interpreted to be a "sentence following upon conviction". The practical consequences of the "sentencing" action performed by both courts based on that same conviction are identical: imprisonment and the creation of multiple sentences. In both instances, therefore, whichever court is the last one to apply its sentencing discretion, it needs to keep the "cumulative effect" or "totality principle" in mind, for, unless concurrency is ordered, the formerly suspended sentence will be tagged onto the end of the triggering sentence and may result in disproportionate punishment'.

**Concluding part one**

This contribution shows that an enforcement court cannot escape its responsibility to carefully and judiciously consider each application for a suspended sentence to be put into operation. As emphasised in *S v Peskin* 1997 (2) SACR 460 (C) at 464*f*, 'There can be no question of any element of obligation upon the magistrate to bring the suspended sentence into operation merely by reason of accused's non-compliance with the conditions of suspension, nor can the magistrate do so automatically without full enquiry into and consideration of all the circumstances of the particular case.'

There is also authority, and increasing authority, that the enforcement court must 'consider and apply all the necessary principles which it would apply if it was imposing an original sentence' (cf *S v Hoffman* 1992 (2) SACR 56 (C) at 63*c*); that it should determine the reasonableness of the different sentences (cf *S v Peskin* 1997 (2) SACR 460 (C) at 464-465); that putting a suspended sentence into operation is basically the same as imposing an original sentence (cf *S v Chake* 2016 (2) SACR 309 (FB)).

The proverbial elephant in the room with most of these judgments is that the original court *has* imposed a sentence, following all the 'necessary principles' of the sentencing process. When a next court assesses the fairness or reasonableness or appropriateness of such a sentence, it is difficult to ignore that it is effectively reviewing that sentence. But magistrates' courts have no review or appeal powers regarding sentences imposed by themselves or other magistrates' courts. They have no powers apart from those expressly given in legislation. As noted in *S v Ndlovu* 2017 (2) SACR 305 (CC) at [41], 'It is trite that magistrates' courts are creatures of statute and have no jurisdiction beyond that granted by the Magistrates' Courts Act and other relevant statutes.' (see also *S v Naidoo* 2012 (2) SACR 126 (WCC) at para [12]; *S v Matitwane* 2018 (1) SACR 209 (NWM) at para [12]; *S v James* 2019 (1) SACR 95 (ECB) at para [12]; *S v Lin and Another* 2021 (2) SACR 505 (WCC) at para [22]; *S v Chake* 2016 (2) SACR 309 (FB) at para [2.2]). This leaves them with no inherent jurisdiction (*Naidoo v Regional Magistrate, Durban and Another* 2017 (2) SACR 244 (KZP) at para [13]; *Ndamase v Functions 4 All* 2004 (5) SA 602 (SCA) at para [5]), for example to prevent abuses of their processes.

In addition, enforcement courts are expected to express an opinion about the appropriateness of another sentence without access to the original record. Not even the high courts as 'real' courts of appeal or review are expected to blindly express such opinions. The Criminal Procedure Act, ably assisted by the Uniform Rules of Court, contain copious provisions ensuring access to the record of the original trial and judgment for the courts of review (ss 303) or appeal (ss 309). Even then, these high courts are expected to be slow to interfere with the judgments and orders of the trial courts.

These arguments, and further arguments, especially on the appealability of the enforcement of suspended sentences, are considered further in Part 2 of this contribution.

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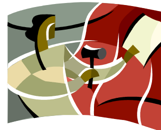

**Matters of Interest to Magistrates**

**Magistrate wins defamation case against accused**

By Carmel Rickard

A Namibian magistrate has been awarded damages of N$20 000 after an accused, appearing in court before her, handed up a document in which he defamed her. Among other claims, the document, hand-written by the accused, said she was paid by the family of the complainant in the criminal case before her. The magistrate then brought a defamation action in the high court. Now she has won her case and the judge who heard the matter ordered that if the man who defamed her didn't make her a written apology, the damages award would jump to N$30 000.

Oshakati magistrate, Helen Ekandjo, has more than 20 years' experience on the bench. She might even have thought that she had seen it all – but when David David appeared before her in October 2021, it sparked a novel situation, one that has ended up in the high court with a successful defamation action.

According to Ekandjo, David appeared before her, in a bail application. She turned down the bail application after she found there was a likelihood that he would interfere with investigations if he were allowed out.

At David's next appearance, on 19 October 2021, the case was called. But before the prosecutor could address the court, David raised his hand. Ekandjo told him to wait until the prosecutor had completed the address. Once the prosecutor was done, she gave David a chance to address the court.

Recuse

It turned out that what he wanted to say was that Ekandjo should recuse herself from hearing the case. He justified his application by saying he had heard that she is a friend of 'the complainant' in the case where he was standing trial.

Ekandjo told the high court that because there were two complainants in the case, she wasn't clear which of the two complainants David had in mind.

At that point, David handed the prosecutor a document addressed to her (Ekandjo). The prosecutor read it and made some comments on it to the court before he handed it to the magistrate to form part of the record.

'Corruption'

She told the high court that the statement was handwritten and that it made a number of allegations against her. It said he didn't want her to hear the case because she was 'dishonest' and 'full of corruption'. She was a 'friend' of the complainant's, he said, and she had been paid by the complainant's family.

All these allegations were made in the presence of five other court officials.

Ekandjo said the statement was defamatory: David's allegations weren't true and she didn't even know the complainants in the matter.

Loose morals

According to the magistrate, David's statement insinuated that she was dishonest, had 'loose morals', engages in criminal conduct and did not uphold the law. She didn't think it was appropriate to have him committed for contempt of court since that would only have dealt with the dignity of the court and the administration of justice – without restoring her personal dignity.

She therefore asked for damages of N$70 000 plus a public apology in a national newspaper. That combination, she said, would restore her reputation and the confidence of the public in the administration of justice.

David Munsu, the high court judge who heard Ekandjo's defamation claim, said she had established that the contentious statement was made during court proceedings and in the presence of other court officials. In other words, she had established that there was 'publication'.

Innuendo

David, the defendant, had not opposed Ekandjo's action, so the presumptions that the publication was unlawful and made with intention to injure, both remained intact.

The judge said the allegations made against the magistrate – being dishonest, corrupt and being paid by litigants – were defamatory. The innuendo was that she lacked integrity and behaved contrary to her judicial oath. The claimed behaviour 'is not only inconsistent with [her] office but also implies criminal conduct on her part', something that would tend to lower her in the eyes of the public.

Yet ‘no iota of evidence was presented to support the allegations’. The judge added that he was thus satisfied that she had made out a case of defamation against David, who had no lawful defence in respect of the allegations he had made.

Humiliation

What about the scale of damages that should be awarded?

Among the relevant factors to consider would be the circumstances in which the defamation occurred, David’s behaviour, Ekandjo’s standing in society, the extent of her humiliation or distress and whether there had been an apology.

Counsel for Ekandjo said the court should consider that she was a sitting magistrate and that most of her more than 20 years on the bench had been in that same court. It was also relevant that the statement was in writing (and thus was ‘permanent’) and had been published in the presence of other officers of the court whilst the court was in session. It had been attached to the record, a public document that was open to any member of the public. Moreover, David had not made any apology. There was also no justification for the defamatory statement and there had been no iota of evidence.

Apologise

The judge, said counsel, should consider that the ‘defamatory attack’ took place in open court, and should show its displeasure at such conduct by making it clear that ‘an attack on a judicial officer will not be tolerated without clear proof of such allegations’.

In the judge’s view, while the failure to apologise made matters worse, the fact that the statement was not circulated, and that publication was once-off and thus limited, also had to be borne in mind.

Since there had been no publication (of the statement) in any media, there was no need to order that David publish an apology in a newspaper.

The judge therefore set the damages award at N$20 000, with interest at 20%, along with legal costs.

But there was a further sting in the tail: the judge ordered David to apologise, in writing, within 10 days. If he didn’t do so, the damages award would increase to N$30 000.

* 'A matter of justice', Legalbrief, 28 February 2023

**A Last Thought**

"*Women in this country have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment to go and come from work and to enjoy the peace and tranquillity of their homes without fear of the apprehension and the insecurity which continually diminishes the quality and enjoyment of their life.*"

**S v Chapman 1997 (3) SA 341 (SCA)**