e-MANTSHI

A KZNJETCOM Newsletter

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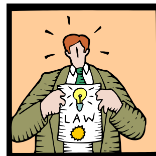
Welcome to the hundredth and ninety fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. Under section 28(1) of the Domestic Violence Amendment Act, 2021 (Act No. 14 of 2021), the President has fixed 14 April 2023 as the date on which the said Act, with the exception of section 6A, came into operation. The notice was published in Government Gazette no 48419 dated 14 April 2023. The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202304/48419rg11571proc117.pdf

(A).In the same Government Gazette the Minister of Justice and Correctional Services, under section 5B(9) of the Domestic Violence Act, 1998 (Act No. 116 of 1998), prescribed a tariff of (a) R150 for providing the information referred to in section 5B(1)(b) to the court; (b) R150 for providing the information contemplated in section 5B(7) to the respondent; and (c) R150 for removing or disabling access to the

electronic communication which was used to commit an act of domestic violence, as contemplated in section 5B(6)(a), which tariffs are inclusive of value-added tax.

(B) The Director General, Justice and Constitutional Development, has, in terms of section 18A of the Domestic Violence Act, 1998 (Act No. 116 of 1998), issued directives in a Schedule which can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202304/48419rg11571gon3282.pdf

(C) The Minister of Justice and Correctional Services has, in terms of section 19 of the Domestic Violence Act, 1998 (Act No. 116 of 1998), and subject to paragraphs (a) and (b), made the regulations in the Schedule hereto.

(b) The Minister of Justice and Correctional Services has, in terms of section 19(1), read with section 19(2)(b) of the Domestic Violence Act, 1998 (Act No. 116 of 1998), and in consultation with the Minister of Finance, made regulations 22 and 32 in the Schedule hereto.

(c) The Minister of Justice and Correctional Services has, in terms of section 19(1)(c) of the Domestic Violence Act, 1998 (Act No. 116 of 1998), and in consultation with Legal Aid South Africa, made regulation 35 in the Schedule hereto.
The Regulations can be accessed here:

https://www.gov.za/sites/default/files/gcis_document/202304/48428rg11572gon3289.pdf

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Recent Court Cases

1. S v L.J (346/22) [2023] ZAWCHC 6 (24 January 2023)

If a child was sentenced to any form of imprisonment or detention in a child and youth care centre, they had an unqualified right to have the proceedings reviewed automatically irrespective of whether they were represented by an attorney or not.

Lekhuleni J et Nziweni J:

INTRODUCTION

[1] The Child Justice Act 75 of 2008 *("the CJA")* aims to protect child offenders and to establish a criminal justice system for minors who are in conflict with the law, in accordance with the values underpinning the Constitution. However, despite the aspirations of the CJA, what has happened in this case, is a quintessential example of a child offender who was, regrettably, failed by the system. This eventuality must be deprecated and condemned in the strongest possible terms.

[2] There are two cases before us from Stellenbosch Magistrates Court that involve the same child offender, (LJ). The first case bearing case number **B905/22**, comes before us by way of special review in terms of section 16(2)[1] of the CJA, read with section 303 of the Criminal Procedure Act 51 of 1977 (*"the CPA"*). The record of proceedings in respect of this matter, was placed before us on 27 October 2022. Having read the record on 28 October 2020, we formed the opinion that there were numerous irregularities on the record which vitiated the proceedings such that the proceedings were not in accordance with justice. Accordingly, we subsequently directed that the juvenile accused be released forthwith. What follows are the reasons for that order. The second case bearing case number **B1053/21** involves the reviewability of a wholly suspended sentence in terms of section 85(1) of the CJA imposed upon the child offender LJ, by the Stellenbosch Magistrates Court. The two cases are discussed *ad seriatim* hereunder.

THE FACTUAL MATRIX

[3] The child offender was 17 years old at the time of the commission of the offence. The State alleged in respect of the first case that the child offender was guilty of possession of housebreaking implements in that on 09 August 2022 at or near Crazier Street in Stellenbosch, the child offender was found in possession of a spark plug in respect of which there was a reasonable suspicion that it had been used or was intended to be used to commit housebreaking. In his first appearance in court on 11 August 2022, the court explained to him his rights to legal representation, and he elected to engage Legal Aid services. The child offender was subsequently remanded in custody for bail information to 17 August 2022. On 17 August 2022, with the assistance of a Legal Aid Practitioner, the child offender applied for bail. He completed an affidavit in support of his application.

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[1] Section 16(2) of the CJA provides: "If a presiding officer is of the opinion that an error regarding age may have caused any prejudice to a person during the proceedings in question, the presiding officer must transmit the record of the proceedings to the registrar of the High Court having jurisdiction, in the same manner as provided for in section 303 of the Criminal Procedure Act, in which event the proceedings must be dealt with in terms of the procedure on review as provided for in section 304 of the Criminal Procedure Act."

[4] The affidavit stipulated that the child offender was 18 years old and residing at Long Street, Cloetesville. The deposition of the child offender also revealed that he had a previous conviction of theft in which he received a wholly suspended sentence earlier in the year in 2022. The previous conviction arose from case B1053/21, referred to above as 'the second case'.

[5] The bail court found that it was in the interest of justice for the child offender to be released on warning. Accordingly, the child was released on warning and the matter was then adjourned for the child's criminal record (SAP 69) to 12 October 2022.

[6] On 12 October 2022, the child offender appeared in court B, Stellenbosch, with his attorney, Ms Myberg; who requested that a trial date be arranged. The matter was transferred to court A on the same day, ostensibly because the presiding officer in court B dealt with the child's bail application. It should be pointed out that, pursuant to the matter being referred to court A; it is not discernible from the record whether court B (the bail court), formally warned the child to appear in court A. What is clear, however is that the child was released on warning.

[7] The child offender failed to appear when the case was called in court A. Ms Lurai, a Legal Aid attorney for court A, informed the court that she had no instructions on the whereabouts of the accused. At 10h45, a warrant of arrest was authorised for the child offender's immediate arrest and detention.

[8] On 17 October 2022, the child offender was arrested and brought before the court, and a summary enquiry for failure to appear as contemplated in section 170(2) of the CPA, was held. During those proceedings, the child offender was represented by Ms Klein from the Legal Aid offices. In his defence, the child informed the court that he forgot the court date. The record reveals that the child offender was sentenced to a fine of R300 or three months imprisonment.

[9] On 24 October 2022, the Pollsmoor Prison authorities approached the state prosecutor and informed her that the child offender was 17 years old. They brought a birth certificate indicating that the child was born on 18 May 2005. The prosecutor acting upon the information given, enrolled the matter before a magistrate. The magistrate, thereafter, released the child offender on warning and postponed the case to 24 November 2022. Notwithstanding being released on warning, the child offender remained in custody due to the sentence imposed relating to his failure to attend court. The child was referred to Pollsmoor to go and serve his sentence.

[10] Concerned with the sentence imposed upon the child offender, the Senior Magistrate immediately referred this matter to this Court for special review. Upon our perusal of the record, we ordered that the child be released forthwith as a result of the irregularity committed in the matter. Gleaning from the record of proceedings, we

also discovered that the child offender was convicted of theft earlier in 2022. We then requested the Senior Magistrate to send us a record of those proceedings. Indeed, she obliged, and we are indebted to her. After perusal of that record, bearing case number B1053/21, ("the second case"), we noted that the child offender was convicted of two counts of theft pursuant to a guilty plea. The record reveals that on each count, the child offender was sentenced to three years imprisonment suspended for five years, on the condition that the accused is not convicted of any offence of which theft is an element committed during the suspension period. The trial court also ordered that the matter is not reviewable. We will return to this case, (the second case) later in this judgment.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[11] It has often been said that children are the soul of our society, and if we fail them, then we have failed as a society.[2] Our common law prescribes that the child's best interests must determine the outcome when a court has to make an order regarding a child. The Bill of Rights in the South African Constitution is renowned for its extensive commitment to the protection of the rights of children in section 28, particularly section 28(2), which emphatically underscores the paramountcy of the child's best interests.[3] While envisaging the limitation of fundamental rights in certain circumstances, the Constitution emphasises children's best interests. It singles them out for special protection, affording children in conflict with the law specific safeguards. Among others, section 28(1)(g) of the Constitution protects children in conflict with the law not to be detained, except as a measure of last resort, and that if detained, only for the shortest appropriate period. Importantly, for present purposes, section 28(1)(g)(i) of the Constitution acknowledges the special need and vulnerability of minor children and guarantees their right to be treated in a manner and kept in conditions that consider their age. Furthermore, section 28(1) acknowledges that children in conflict with the law must be kept separately from adults while in detention and not to be subjected to practices that could endanger their well-being, physical or mental health or spiritual, moral or social development.

[12] The CJA is giving effect to section 28 of the Constitution. The CJA is child-centric and intends to apply to children in the criminal justice system. The CJA provides for three stages in respect of children in conflict with the law: *First*, the CJA provides for a pre-trial stage referred to in the Act as the Preliminary Inquiry

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[2] See *SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012 (6) SA 45(GSJ) para 1; *S v KD* 2021 (1) SACR 675 (WCC) at par 7.

[3] International law also affirms "the best interests" principles. For instance, Article 3(1) of the United Nations Convention of the Rights of the Child, 1989 requires that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration". Similar pronouncements are found in Article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter).

contained in chapter 7 to the Act.[4] The objective of the Preliminary Inquiry, among others, is to consider the assessment report of the probation officer concerning the age estimation of the child if the age is uncertain and to establish from the prosecutor whether the matter can be diverted before the plea proceedings.

[13] The *second* stage envisaged in the CJA is the trial stage, regulated by chapter 9 of the Act. Section 63 of the CJA enjoins presiding officers in the Child Justice Court before a plea is taken to inform a child of the nature of the allegations against him or her, to inform the child of his or her rights, and to explain to the child the further procedures to be followed in terms of the Act. Significantly, section 63(4) enjoins a Child Justice Court to ensure that the child's best interests are upheld during the proceedings.

[14] The *third* stage envisaged by the CJA is the sentencing stage in chapter 10 of the Act. Section 68 of the Act states that a Child Justice Court must, after convicting a child, impose a sentence in accordance with this Chapter. Section 72 of the Act also sets out various sentencing options that may be imposed by a Child Justice Court, which include, among others, community-based sentence, restorative justice sentence, correctional supervision, fine etc. When considering the imposition of a sentence involving imprisonment in terms of section 77 of the Act, the Child Justice Court must take, among others, the desirability of keeping the child out of prison.

[15] From the forenamed statutory provisions, it is evident that the CJA is child-sensitive and is intended to provide as much protection as reasonably possible for children who have violated the law by ensuring that they are not treated on the same footing as adult detainees.[5] In *S v LM,*[6] the court referred to Chapter 10 of the CJA and stated that 'it is clear from the above provisions that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes of which may indeed be different from those set out in the CPA.' Courts are thus required to adhere to the provisions of the Act scrupulously. Moreover, the courts are required to scrupulously comply with the provisions of the Act unless reasons exist to depart therefrom. A wholesale departure or lackadaisical application of the provisions of the Act will not pass muster.[7]

THE FIRST CASE – WARRANT ENQUIRY (CASE NUMBER: B905/22)

[16] For the sake of completeness, we will discuss the warrant enquiry case first and thereafter, consider the second case bearing case number B1053/21. It is

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[4] Section 43(3)(c) of the CJA provides that "a child's first appearance at a preliminary inquiry is regarded as his or her first appearance before a lower court, in terms of section 50 of the Criminal Procedure Act."

[5] *S v SS* (Case No CA&R 42/2020) (unreported Judgment) (31 August 2020) (E) at para 20.

[6] 2013 (1) SACR 188 (WCC) at para 19.

[7] *S v JA* (Unreported, Review Case No 20190063) (ECD) at para 15.

common cause that the child offender was under the age of 18 at the time of the commission of the offence and at the time of his arrest. Since the accused was a child as envisaged in the CJA at the time of the commission of the offence and at the hearing of the warrant enquiry, it was peremptory that his trial is conducted strictly by following the provisions of the Act. However, throughout the proceedings in the lower court, the child offender was treated as an adult. A Preliminary Inquiry was not conducted. A probation officer did not assess the child offender. There was no consideration whatsoever whether the matter should be diverted or not.

[17] The child offender was deprived of the central themes of the CJA that children in conflict with the law should be diverted from the formal criminal justice system whenever possible.[8] The proceedings were held in an open court and not in camera as envisioned in section 63(5) of the Act. The child offender was also not assisted by his parent or guardian or an appropriate adult during the proceedings as envisaged in section 65 of the CJA. The court *a quo* did not observe the time limits relating to postponements for the child offender. The child offender was ostensibly transported and kept in Pollsmoor prison with adults awaiting trial detainees. More so, when he was sentenced for failure to attend court, he was committed to prison in Pollsmoor. The court did not consider that prison must be the last resort as the accused was a child offender.[9] The court *a quo* did not sentence the child offender in accordance with chapter 10 of the CJA.[10]

[18] It is important to note that the South African Police Services (SAPS) are the first point of contact when a child offender conflicts with the law.[11] The accused was arrested on 9 August 2022. The police officer who arrested the accused had a duty to treat the accused as a child if he was uncertain about the age of the accused. Section 12 of the CJA requires a police official to lean in favour of treating a child offender as a child in terms of the Act if the child's age is uncertain until a probation officer or medical practitioner has expressed an opinion on the age of the person or until the determination of that person's age at the Preliminary Inquiry or Child Justice Court. Section 13 of the CJA also empowers the probation officer to estimate the child offender's age. Therefore, within the schematic framework of the CJA, courts must be prudent to ensure that as soon as minors are apprehended, their age must be established.

[19] More importantly, section 14, read with Regulation 15 of the Act, enjoins the presiding officer in the Preliminary Inquiry or in the Child Justice Court to determine the age of the child if the age of a child at the time of the commission of the alleged offence is uncertain.

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[8] See Section 2(d) of the CJA.
[9] 2008 (2) SACR 135 (SCA) para 39.
[10] Section 68 of the CJA provides that "a child justice court must, after convicting a child, impose a sentence in accordance with this chapter".
[11] See *S v DW* 2017(1) SACR 336 (NCK) at para 10.

[20] It is highly concerning that the court *a quo* did not determine the age of this child offender despite all the provisions discussed above, set out in the Act. At the hearing of the warrant enquiry, the court had an inherent responsibility to determine the age of the juvenile accused and not to abdicate that responsibility to the prison officials. If the court was uncertain, the court was enjoined to determine the age of the accused as envisaged in section 14 of the CJA. During the sentence proceedings, it was incumbent upon the court to act dynamically to obtain full particulars of the accused's personality, age, date of birth, and other relevant personal circumstances.[12] Had the court done so, it would have discovered that the accused was under the age of 18 years. Instead, the inquiry conducted by the court in mitigation of sentence was perfunctory and lacking in substance. It is very worrying that court officials called upon to uphold the Constitution and to dispense justice, failed to protect the juvenile accused's rights entrenched in Section 28 of the Constitution.

[21] In our view, the court and its officials shirked their responsibility of ensuring that the juvenile accused is treated in terms of the provisions of the CJA. It is unfathomable that it was the prison officials, as opposed to the court and its officials, who took the responsibility to investigate the age of the accused. They immediately brought this information to the court's attention long after the accused was sentenced and detained. If the prison officials were indolent and lackadaisical in their work, this case would have fallen through the cracks to the prejudice of the child offender. The prison officials must be credited and praised for the excellent work they did in this matter.

[22] What we find very disturbing is that the said juvenile was previously convicted of theft on 11 July 2022 by the same court under case number 1053/2021, in respect of what we refer to as the second case in this judgment, discussed below. The record of that matter (the second case) reveals that the accused was treated as a juvenile. The charge sheet recorded that he was 16 years old. In that case, he was assessed by a probation officer as envisaged in chapter five of the CJA. The court conducted a Preliminary Inquiry, and the matter eventually ended in the Child Justice Court. What is very much disturbing is that the prosecutor, one Ms L Davids, who dealt with the matter when the warrant enquiry was held under case B905/22, is the same prosecutor who was involved in case number 1053/21 (the second case) in which the accused was treated as a juvenile.

[23] Notably, the Legal Aid Attorney, Ms Klein, who represented the accused during the warrant enquiry proceedings, is the legal representative who represented the child offender on 11 July 2022 under case number B1053/21 (the second case). She appeared on behalf of the accused several times under B1053/21. She was also

[12] See *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (E).

in contact with the child offender's mother when the latter could not attend court as a guardian for the accused due to work commitments. We believe Ms Klein as a legal representative of a child offender, had the legal duty to uphold the highest standards of ethical behaviour and professional conduct.[13] If it is the case that she was uncertain or in doubt about the age of the accused; she could have easily established this fact during consultation or even called the accused's mother.

[24] In our judgment, a practitioner must make a concerted effort to ensure that the child's best interests are served. As a matter of principle, we would state that practitioners should go the extra mile when child offenders are involved. Ultimately, justice must not only be done but must also be seen to be done.[14] In this case, we do not doubt that the attorney failed the child offender – her client.

[25] Undoubtedly, on a conspectus of all the facts placed before this court, both court officials were aware or should have been aware that the child offender was a minor. They were aware or should have been aware that the accused's mother assisted the juvenile accused two months earlier (before the warrant enquiry hearing) during the court proceedings under case number B1053/21. They were ethically obliged to assist the court in this regard. They had a duty to inform the court that the accused was a minor when his theft case was finalised in July 2022. We appreciate that they deal with many cases daily. Still, such laxity and carelessness is unacceptable and fall short of the attributes expected from court officials. More so, after it was discovered that the accused was a minor, the accused was brought to court. He then told the court that he had informed his attorney when the court conducted the warrant enquiry that he was 17 years old. The fact that the juvenile accused was delinquent did not detract from the fact that he had to be treated as a child.

[26] Since the accused was a child at the time of the commission of the offence and the commencement of the proceedings, it was peremptory that the proceedings, including the warrant enquiry, be conducted strictly in accordance with the provisions of the CJA. The entire proceedings grossly infringed on the child offender's constitutional rights. In our view, the treatment of the child offender as an adult person while awaiting his trial and even during the warrant enquiry, was an egregious misdirection on the part of the court. This irregularity had far-reaching consequence on the child offender's constitutional rights, which in our view, defiled and contaminated the entire proceedings. The child offender was deprived of all the protection envisaged by the CJA. In the circumstances, the fact that the child offender was tried and sentenced without the peremptory provisions of the CJA observed renders the entire proceedings unfair. It is a travesty of justice which in our opinion, is unjustifiable and inexcusable. Significantly, we are not persuaded that the court was

[13] See section 80(1)(e) of the CJA.

[14] *S v DW* 2017 (1) SACR 336 (NCK) at para 14.

justified in authorising the warrant of arrest against the accused. The child offender was in attendance with his attorney on the day in question and was not warned to appear in court A or to remain in attendance until he was called.

[27] The irregularities committed in this matter are so gross and amount to a failure of justice. In *S v Jaipal* 2005 (4) SA 581, at para 39, the court stated that 'a conviction and sentence will only be set aside if the irregularity has led to a failure of justice. If an irregularity leads to an unfair trial, then that will constitute a failure of justice. Each case will depend upon its facts and peculiar circumstances.' In our view, the proceedings relating to the warrant enquiry must be set aside due to a gross irregularity that led to a failure of justice.

[28] Before we turn to case B1053/2021 (the second case), there is something important on the record of proceedings of the court *a quo* that demands the attention of this court. It is worth noting that nowhere do the proceedings appear to be digitally recorded. The record of proceedings in the court below are so cryptic and recorded on pro forma form. This kind of notation is not encouraged as it might not always result in a true and accurate reflection of the actual proceedings.[15] Digital or mechanical recording of court proceedings, including postponements and warrant enquiries, is to be encouraged in all courts. Judicial officers should record faithfully and honestly what transpires during the court proceedings.[16] Rule 66 of the Magistrates Court rules does not envisage the usage of templates or pro forma forms. Instead, the rule provides as follows:

"The plea and explanation or statement, if any, of the accused, the evidence orally given, any exception or objection taken in the course of the proceedings, the rulings and judgment of the court and any other portion of criminal proceedings, may be noted in shorthand (also in this rule referred to as "shorthand notes") either verbatim or in narrative form or recorded by mechanical means."

[29] This rule makes it abundantly clear that only the shorthand notes of the presiding officer or the transcribed record of the digitally recorded proceedings form part of the record. In *casu*, when the matter was transferred from court B to court A on 12 October 2022, the court did not note on the record that the accused was warned to appear in court A and that he had to remain in attendance. The magistrate's cryptic notes only recorded that the accused was on warning in an acronym notation (O/W). Notwithstanding this deficiency, the presiding officer in court A, authorised a warrant of arrest against the accused for failure to appear in court. This was despite the fact that the accused was in court B earlier with his attorney Ms Myberg. The defence attorney in court A, Ms Lurai, where the warrant was authorised, informed the court that she had no instructions. This case reveals the

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[15] *S v Fransman; S v Nstikelelo Kowa* (Case No. 17531 & 17532) (22 June 2018) (WCC) at para 19.
[16] See *S v Phundula; S v Mazibuko; S v Nievoudt* 1978 (4) SA 855 (T) at 862.

shortcomings of the Legal Aid Offices at Stellenbosch. Proper coordination between the two legal representatives could have averted this unfortunate eventuality. Ms Myberg, who appeared for the accused in court B, should have informed Ms Lurai in court A that the accused was in attendance and that his case was transferred to court A. We expect that the relevant authorities will attend to these deficiencies.

THE SECOND CASE – CASE NUMBER B1053/2021

[30] This leads us to case number B1053/2021 (the second case). As discussed above, when we perused the record of proceedings concerning the above matter (case No. B905/22 – warrant enquiry matter), we discovered that the accused was previously convicted of theft in May 2022. We then requested a copy of the charge sheet in respect of that matter. After perusing that record (case No. B1051/21), we discovered that the matter was finalised, and of the two counts of theft the accused was charged with, the accused was sentenced to three years imprisonment in respect of each count, and the whole sentence was suspended on normal conditions. In addition, the court *a quo* ordered that the sentence is not reviewable.

[31] We directed an inquiry to the presiding officer to explain why he did not refer the matter to the High Court in terms of section 85 of the CJA, and why he ordered that the matter was not reviewable. In response, the magistrate stated that the matter was marked not reviewable because the sentence imposed was wholly suspended, and that the child offender enjoyed legal representation from Legal Aid. The magistrates also alluded to the fact that the child offender was under the age of 16 years when he committed the offences as provided for in section 85(1)(a) of the CJA and that he was not sentenced to direct imprisonment or compulsory residence in a Child and Youth Care Center as provided for in terms of section 85(1)(b) of the CJA hence, the order that the matter is not reviewable. We consider these reasons hereunder.

[32] The original charges which were levelled against the child offender in this matter were housebreaking with intent to steal and theft, three counts of theft, and possession of car or housebreaking implements. The charge sheet also records that the juvenile accused was 16 years old when he committed the offences. The child offender was arrested on 14 November 2021 and made his first appearance in court on 15 of November 2021. Regrettably, there were several postponements before the matter could be heard. The trial commenced on 23 May 2022. At the trial, the prosecutor preferred two counts of theft against the child offender and withdrew the remaining charges. The said juvenile pleaded guilty to the two counts and was sentenced accordingly.

[33] There are several irregularities that this court observed on the record of proceedings of the court *a quo* which vitiate the proceedings. Noticeable from the record, is the order and the magistrate's reasons that the matter is not reviewable

because an attorney from Legal Aid represented the accused. The magistrate's order that the sentence imposed is not reviewable is erroneous and amounts to a misdirection on the application of the law which conflicts with the scheme envisaged by the CJA. Section 85(1) of the CJA, which deals with reviews of criminal matters involving child offenders, was amended by section 39 of the Judicial Matters Amendment Act 42 of 2013 ("the JMAA"), which came into effect on 22 January 2014.

[34] Section 85(1) of the CJA, before it was amended, provided as follows:

"The provisions of the Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence-

(a) Under the age of 16 years; or

(b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2)(J) of the Children's Act, the sentence is subject to review in terms of section 304 of Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence."

[35] The amended section 85(1) of the CJA now reads as follows:

"(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children's Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of-

(a) the duration of the sentence;

(b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;

(c) whether the child in question was represented by a legal representative; or

(d) whether the child in question appeared before a district court or a regional court sitting as a child justice court."

(2) The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84

[36] This section deals with the reviews of criminal matters involving child offenders. In contrast, section 303, read with section 304 of the CPA, deals with automatic reviews in the ordinary course for criminal proceedings in the magistrate's court. Before section 85(1) was amended, the section received several interpretations by the various divisions of our courts.[17] The courts grappled with questions about whether all cases regarding children under 16 years go on review or not. For example, do all cases regarding custodial sentences (that are not suspended) go on review, regardless of the experience of the magistrate, whether it was a regional court that issued the sentence, the length of the sentence, and even if the child was legally represented?[18]

[37] The golden thread that has flowed from those decisions has been that section 85(1) must be interpreted to provide for the automatic review under section 302 of the CPA in respect of all children convicted in terms of the CJA who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a child and youth care centre.[19] The courts preferred an interpretation that was in keeping with the constitutional injunction that the detention of juveniles must be a measure of last resort and for the shortest appropriate period. This interpretation, in our view, was consistent with the paramountcy of the child's best interests and the idea that the CJA seeks to establish a separate criminal justice system for children.

[38] The amendment of section 85(1) in terms of the JMAA put to bed any confusion or uncertainty on the review of criminal matters for child offenders. Section 85(1) of the CJA in its amended form, is clearly intended to extend the protection of children in criminal cases through the automatic review process. It does so by providing that in addition to the qualified right to automatic review created by section 302 of the CPA, if a child is sentenced to <u>any form of imprisonment</u> or detention in a Child and Youth Care Centre, he or she has, in addition, an unqualified right to have the proceedings reviewed automatically.[20] The High Court as an upper guardian of all minor children exercises supervisory jurisdictions to ensure that the constitutional injunction envisaged in section 28(1)(g) of the Constitution to the effect that children have a right not to be detained except as a measure of last resort is complied with. Importantly, section 85(1), in its amended form, is consistent with the common law principle that the High Court as the upper guardian of minor children, is empowered

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[17] See *S v Nakedi* [2012] ZANWHC 5 (2 January 2012); *S v Fortuin* [2011] ZANCHC 28 (11 November 2011); *S v Stander* 2012 (1) SACR 595 (ECP); *S v FM* [2012] ZAGPPHC 180 (20 August 2012)
[18] See Skelton "The automatic review of child offenders' sentences" *SA Crime Quarterly* no 44 (June 2013).
[19] See *S v John Pierre Ruiter* [2011] ZAWCHC 265 (14 June 2011); *S v FM* 2013 (1) SACR 57 (GNP); *S v LM* 2013 (1) SACR 188 (WCC).
[20] *S v KS* (unreported judgment, Case No. CA&R 54/2015 04 March 2015) at paras 9 and 10 (E)

and is under a duty to enquire into all matters concerning the best interests of minor children. Accordingly, it has extremely wide powers in establishing what such interests are.[21]

[39] It is abundantly clear from the reading of the amended section that a sentence that involves any form of imprisonment or any sentence of compulsory residence in a Child and Youth Care Centre, is subject to review in terms of section 85 of the CJA by a judge of the High Court having jurisdiction. For clarity and certainty, we must add that this includes a sentence of imprisonment with an option of a fine and even a wholly suspended sentence.

[40] In our view, the section applies to a wholly suspended sentence because a wholly suspended sentence cannot be enforced unless the condition is breached; it however remains in force and can be brought into operation if, during the period of suspension, the accused breaches the suspension condition.[22] Notably, the interpretation of section 85(1) of the CJA that a wholly suspended term of imprisonment is automatically reviewable conforms with the objects of the CJA. It overcomes the problem that putting a suspended sentence into effect is not subject to automatic review.[23] It is, therefore, inherently obligatory that the High Court exercises its supervisory review jurisdiction as intended by the legislature in direct prison sentences and suspended sentences.

[41] Crucially, the duration of the sentence, the fact that the accused was legally represented during the proceedings and the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate are immaterial. The fact that the child in question appeared before a district or a regional court sitting as a child justice court is also inconsequential. If a sentence of imprisonment is imposed, whether with an option of a fine or wholly suspended, such a sentence is reviewable in terms of section 85(1) of the CJA as amended.

[42] In the circumstances, the suspended sentence imposed by the magistrate in case number 1053/21 was reviewable in terms of section 85(1) of the CJA. The sentence of R300 or three months imprisonment imposed against the accused for failing to attend court under case number B905/22 was also reviewable in terms of section 85(1) of the CJA.

[43] We now turn to consider the merits of the proceedings of the court below under case no. B1053/21 (the second case). The accused faced two counts of theft. On the first count of theft, it was alleged that on 13 November 2021, the accused unlawfully and intentionally stole a pair of slippers, the property in the lawful

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[21] *H v Fetal Assessment Centr*e 2015(2) SA 193 (CC) at para 64.
[22] *Jaga v Donges NO and Another; Bhana v Donges NO and Another* 1950 (4) SA 653 (A) at 658A.
[23] See *S v KS* Case No. CA&R 54/2015 (E), para 14.

possession of Carmen De Koker. On the second count, it was alleged that on 14 November 2021, the accused unlawfully and intentionally stole a blade jacket, knives, and a spatula, on the property of Daniel Zeeman. The child offender's attorney handed in two statements in terms of section 112(2) of the CPA in respect of both counts. The accused confirmed the contents of the statements, and the court allegedly returned a verdict of guilt based on those statements.

[44] In terms of section 63(3) of the CJA, the magistrate was obliged to have informed the accused, before the plea was tendered, of the nature of the allegations against him, to have explained to the accused his rights and the procedures to be followed in his trial notwithstanding that the accused was legally represented. The court below failed to adhere to this judicial injunction. What we find very concerning is the two statements made on behalf of the juvenile accused in terms of section 112(2) of the CPA. The two statements in our view, are lacking in essential detail. The statements are not a model of clarity. In respect of the first count, after the charge is regurgitated, the accused admitted the following facts:

"On the day in question, I entered the store and took the pair of slippers. I ran out of the store, someone from the store chased and caught me. I was subsequently arrested. I admit the following: I have no defence to the charge and plead guilty. At the time of the commission of the offence I knew my actions were wrong and punishable by the court. My intention was to permanently deprive the owner of the items of their possession. My legal adviser has explained the consequence of this statement to me, and I understand."

[45] In respect of the second count, the accused admitted the facts as follows:

"On the day in question, I saw the above-mentioned items inside the complainants' vehicle. I took the item and left. I admit the following: I have no defence to the charge and plead guilty. At the time of the commission of the offence I knew my actions were wrong and punishable by the court. My intention was to permanently deprive the owner of the items of their possession. My legal adviser has explained the consequence of this statement to me, and I understand."

[46] The two statements are lacking in essential detail. In respect of the first count, the statement does not explain specifically where the theft occurred other than that it was in a store. It does not tell where specifically the accused took the slippers. It also does not disclose whether, at the time the accused ran, he had paid for the slippers or not. It also does not show what the value of the slippers was. The statement in respect of the second count is also couched in similar terms. It does not reveal what the value of the alleged stolen items was. It does not tell whether the accused had permission to take those items, nor where the item was placed before the accused took it. It does not describe what the accused wanted to do with the items in question. The statement does not tell how and where the accused was arrested.

[47] In terms of section 112 of the CPA, the court must be fully informed of how the alleged offense was committed. Section 112(2) provides as follows:

"If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1) (b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement."

[48] Section 112(2) must not be read in isolation. It must be read in conjunction with section 112(1)(b), which enjoins the court to question the accused regarding the alleged facts of the case to ascertain whether he or she admits the allegations in the charge.[24] While the written statement is intended to be accepted instead of questioning by the court in terms of section 112(1), it must satisfy the court that the accused admits the facts of the case which underlie the criminal charge.[25] Nowhere does it appear in the magistrate's handwritten notes or anywhere in the record that the magistrate questioned the accused on the contents of the written statements as required by section 112(1)(b) of the CPA. The court had a duty to ensure that the child's best interests were upheld, and to this end, to elicit additional information from the defence and the prosecution.[26]

[49] What is more concerning are the allegations in the probation officer's pre-sentence report. The probation officer records that, according to the accused, he was instructed by one Ricky Jacobs to commit all the theft cases he is accused of. Ricky Jacobs pretended to be the father of the accused. The report further indicates that the said juvenile would break into vehicles and houses and give the stolen goods to Ricky Jacobs. Mr Jacobs would, in turn, provide the child offender drugs. The report also suggests that the accused lived with Ricky in the streets. Ricky Jacobs used the accused to break into houses and paid him with drugs. To this end, the probation officer recommended that the court sentence the accused to correctional supervision in terms of section 75 of the CJA. The probation officer noted that this would prevent the accused from reoffending as the accused would be placed under firm supervision and monitoring.

[50] The probation officer also stated in her report that the court could add restrictions to its order on the sentence that the accused is not allowed in Stellenbosch, where Ricky resided. Notwithstanding these persuasive recommendations, the court *a quo* imposed a wholly suspended sentence without

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[24] *S v Moya* 2004 (2) SACR 257 (W) at p260.
[25] *S v B* 1991 (1) SACR 405 (N) at 406B.
[26] See section 63(4)(a) of the CJA.

giving reasons for its deviation from the sentence proposed by the probation officer. Ostensibly, the sentence made it easy for the accused to return to Ricky Jacobs. It is so that the recommendations in a pre-sentence report do not bind a court.[27] However, it was compelling, in this case, for the recommendations of the probation officer to be seriously considered. Importantly, where recommendations are not followed, the court must explain why the sentence differs from what was suggested in the pre-sentence report. The court must enter the reasons for the imposition of a different sentence on the record of proceedings.[28] In this case, the court *a quo* did not indicate at all or furnish reasons why it imposed a sentence other than the one recommended by the probation officer.

[51] Considerably, the accused appeared to be a child in need of care and protection, as envisaged in section 150(1) of the Children's Act 38 of 2005. The probation officer records in her report that at 16 when the accused abandoned his home, he met Mr Ricky Jacobs, who introduced him to Tik and Mandrax. They would often use drugs together. According to the accused, he would be given drugs instead of money when he returned with stolen goods. Evidently, it seems Mr Jacobs took advantage of the vulnerability of the accused and his lack of maturity. The sentence imposed by the court blissfully ignored this fact. The suspended sentence meant that the accused returned to Mr Jacobs, who allegedly abused and misled him. The court *a quo* did not consider risks factors that would contribute to the accused reoffending. A suspended sentence without the necessary conditions for therapeutic intervention in the form of educational programs etc., is relatively of no consequence. If correctional supervision had been imposed as recommended by the probation officer, the accused would have been caused to attend educational programs that would have assisted him in his development.[29] He would have been monitored by the probation officer and removed from Stellenbosch, out of reach of Mr Jacobs.

[52] Furthermore, the sentence imposed by the court *a quo* was so harsh and inconsiderate. The court *a quo* did not impose the sentence following the provisions of chapter 10 of the CJA.[30] The court a quo should have heeded the provisions of chapter 10 of the CJA as a first port of call after it convicted the accused.[31] The

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[27] See *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) at paragraph 88: ". . . sentencing is a judicial function and . . . this function will be performed by the courts and only the courts".

[28] See section 71(4) of the CJA.

[29] Section 69 (1) and (2) of the Correctional Services Act 111 of 1998 lists two additional conditions in respect of children, namely: the child may be compelled to attend educational programmes if not subject to compulsory education; and the Department of Correctional Services must provide access to such social work services, religious care, recreational programmes, and psychological services as the child may require.

[30] See section 68 of the CJA.

[31] See section 69 of the CJA, which provides: 'In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to - (a) encourage the child to understand the implications of and be accountable for the harm caused; (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society; (c) promote the reintegration of the child into the family and community;

accused was a first offender. There is no basis whatsoever why the court *a quo* imposed its maximum penal jurisdiction in respect of each count. It is unclear what informed this decision as the values of the items in question were not verified or placed on record. On the face of it, the stolen items are of nominal value. The fact that the sentence is suspended does not detract from its harshness.

[53] In our view, on both plea and sentencing, the proceedings in the court *a quo* amounted to a gross departure from the provisions of the Act which endeavors as far as possible to protect children in conflict with the law. In addition, there were unnecessary delays in this matter. It took eight months for the court *a quo* to finalise this matter. The case was postponed over 32 times. The child was incarcerated for a lengthy period in a Child and Youth Care Center facility. The presiding magistrate stated that the reasons for the delay, among others, was that after he convicted the accused on 23 May 2022, he was transferred very far to another station, and a resident magistrate based in Stellenbosch, refused to invoke section 275 of the CPA to finalise the matter. This, in our view, is unacceptable as it conflicts with section 28(2)(g)[32] of the Constitution and the guiding principles of the CJA which stipulates that all procedures in terms of the CJA should be conducted and completed without unreasonable delay.[33] In addition, section 66(1) of the CJA, echoes similar sentiments and provides that a Child Justice Court must conclude all trials of children as speedily as possible and must ensure that postponements in terms of this Act are limited in number and duration.

[54] On a conspectus of all the facts placed before us, the proceedings in the court *a quo* in both case number B905/22, and B1053/22, were not in accordance with justice.

ORDER

[55] In the result, the following order is granted:

55.1 The conviction and sentence in case number B905/22 are hereby set aside.

55.2 The conviction and sentence in case number B1053/22 are hereby set aside.

55.3 In terms of section 47 of the Children's Act 38 of 2005, the court directs that the question whether the accused needs care and protection is referred to the Social Worker, Ms Danhouse of Stellenbosch, for an investigation as contemplated in

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(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration and (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time."

[32] Section 28(1)(g) of the Constitution provides that "a child has a right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained <u>only for the shortest appropriate period of time</u>…" (emphasis added).

[33] See sections 3(f) of the CJA.

section 155(2) of the said Act. Ms Danhouse is directed to report back to this court within a period of three months from the date of this order, the outcome of the Children's Court inquiry.

From The Legal Journals

Le Roux-Bouwer, J

The Krugersdorp gang rapes — Another Tshabalala v S; Ntuli v S?

2023 SALJ 1

Abstract

This note assesses the application of the common purpose doctrine to the crime of gang rape. The recent gang rape of eight women in West Village, Krugersdorp on 28 July 2022 received wide media coverage. If and when there is a prosecution, the courts will have to adjudicate on the application of the common purpose doctrine to the newly defined statutory crime of rape. The Criminal Law (Sexual Offences and Related Matters Amendment) Act 32 of 2007 ('SORMA') came into effect on 16 December 2007. The Constitutional Court, in Tshabalala v S; Ntuli v S 2020 (2) SACR 38 (CC), held that the common purpose doctrine was applicable to the autographic crime of common law rape. Since the alleged crimes had occurred in 1998, SORMA was not applicable in this case. If the Krugersdorp gang rape incident reaches the Constitutional Court the case may provide the court with the opportunity to elucidate on the practical impact of its decision in Tshabalala v S; Ntuli v S.

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

Contributions from the Law School

The intimidation offence: still applicable today?

The intimidation offence has had a chequered and controversial history (for a detailed synopsis of this history, see 'HA1: Intimidation' in Milton, Cowling & Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (2020)). The idea of criminalising certain labour-related practices dates back to the pre-Union statutes which targeted intimidatory behaviour. This prohibition, more broadly defined, became part of national legislation. When the Riotous Assemblies Act 17 of 1956 was passed, it included this prohibition, which soon thereafter was further extended to include acts of intimidation beyond the context of labour disputes. The transformation of the prohibition from a labour-related offence to one targeting all forms of intimidation, which came to be particularly employed in the context of the unrest which had accompanied increasing civil opposition to apartheid, culminated in the Intimidation Act 72 of 1982 ('the Act'). The proximity to the passing of the Internal Security Act 74 of 1982 was hardly coincidental. As the opposition to apartheid came to be increasingly expressed through the burgeoning trade union movement, the intimidation offence provided a potentially useful weapon to employ in dealing with any such unrest.

The intimidation offence in the Act, although briefly defined, has been described as 'cosmic' in its scope (Mathews *Freedom, State Security and the Rule of Law* (1986) 57). Proof of the offence was further assisted by a reverse onus provision contained in s 1(2) of the Act, which imposed the burden of proof of the existence of a lawful reason for the prohibited conduct on the accused. Still, the apparent lack of success in obtaining convictions under the Act resulted in the Act being amended again, to further widen the net of liability, most notably to include a new form of the offence (in s 1(1)(b) of the Act). The offence now did not merely criminalize causing injury, harm or damage (or threatening to do so) in order to compel someone to act or not to act (as in s 1(1)(a)), but also included the negligent induction of fear by one's conduct (s 1(1(b)). The breadth of the s 1(1)(b) form of the offence has been variously criticized as 'disconcertingly widely formulated' (Snyman *Criminal Law* 6ed (2014) 456), as an 'unnecessary burden on our statute books' (*S v Holbrook* [1998] 3 All SA 597 (E) at 603b-c) and as 'an astonishing piece of legislation' (*S v Cele* 2009 (1) SACR 59 (N) para 11).

Inevitably, the intimidation offence was challenged as placing an unjustifiable limitation on various constitutional rights in *Moyo v Minister of Justice and Constitutional Development* 2017 (1) SACR 659 (GP). In particular, the extremely broad s 1(1)(b) form of the offence and the reverse onus provision contained in s 1(2)

were challenged. Though unsuccessful in the High Court, and on appeal in the Supreme Court of Appeal (SCA) (by virtue of a majority decision – 2018 (2) SACR 313 (SCA)) in respect of s 1(1)(b) (all members of the SCA court agreed that s 1(2) was unconstitutional), the Constitutional Court on further appeal (in *Moyo v Minister of Police* 2020 (1) SACR 373 (CC)) held that both provisions were indeed unconstitutional. The court agreed that the s 1(2) reverse onus provision constituted an unjustifiable infringement on the right to be presumed innocent, to remain silent, and the right not to be compelled to give self-incriminating evidence contained in s 35(3)(h) and (j) of the Constitution, and that the s 1(1)(b) form of the offence constituted an unjustifiable infringement of the right to freedom of expression (s 16 of the Constitution). In terms of the Protection of Constitutional Democracy Against Terrorist and Related Activities Amendment Act 23 of 2022, both s 1(2) and s 1(1)(b) have consequently been repealed (and with them s 1A(1) of the Act, which criminalized a broader form of intimidation aimed at the general public or a section thereof).

The intimidation offence has therefore now assumed the following form (in s 1(1)(a) of the Act):

'Any person who –

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 shall be guilty of an offence.'

Given the rather tainted history of this offence, the question arises whether even the remaining form of the offence should remain intact. There are a number of associated questions which arise in this regard: Is there a need for such an offence? Is such an offence constitutional? If the answers to the preceding questions are in the affirmative, what form should such an offence take? These questions will be briefly addressed below.

Is there a need for an intimidation offence?

In the SCA decision of *Moyo*, the majority judgment makes it plain that criminalizing intimidatory behaviour is legitimate in a democratic society, a point that was neither challenged in argument (par [91]) nor by the minority of the court, which describes the offence set out in s 1(1)(a) as 'narrowly tailored' (par [49]). The Constitutional Court in *Moyo* further indicates that the s 1(1)(a) provision protects against specific forms of harm and damage (par [68]), within the context of preventing intimidatory conduct (par [67]). No suggestion is made in the apex court that the offence has no right to exist.

What of the existence of other common-law crimes which could conceivably cover the same harm as that in the intimidation offence: *crimen injuria*; assault; public violence; extortion? Is it really necessary for a separate intimidation offence to subsist alongside these? Wallis JA, writing for the majority in the SCA, argues that the acts of

stalking and harassment are not covered by any other crimes (par [97]-[104]), and refers to the 'inadequacy of common-law crimes to deal with intimidatory behaviour causing fear' (par [104]). Moreover, it should not be overlooked that even if the unlawful act component of any related common-law crime may overlap with that of the intimidation offence, it is the particular intention associated with the offence – 'with intent to compel or induce any person' to do or not to do – that gives the offence its character, and which distinguishes it from other bases for criminal liability.

Is such an offence constitutional?

Ledwaba AJ, writing for a unanimous Constitutional Court in *Moyo*, states that if the section merely criminalises conduct that creates an objectively reasonable fear of imminent violent injury to such values as bodily integrity or property, 'it becomes easier to argue that it does not infringe on the constitutional guarantees of freedom of expression or peaceful protest', especially given that incitement of imminent violence is not protected as free expression (par [65]). Given the demise of the s 1(1)(b) form of the intimidation offence, which was held to be overbroad in its infringement of the right to freedom of expression, the remaining form of the offence, which deals with a particular harm which is endemic in modern society, appears entirely consistent with the Constitution. As Ledwaba AJ states earlier in the judgment of the court (par [25]):

'The Act is that part of our legislative scheme which provides a shield against treatment that is cruel, inhumane or degrading. Intimidatory conduct that negates these rights has no place in an open and democratic society that promotes democratic values, social justice and fundamental human rights.'

What form should such an offence take?

The s 1(1)(b) offence received extensive judicial criticism in the context of its application following threats made in a domestic argument, in cases such as *S v Holbrook* and *S v Motshari* 2001 (1) SACR 550 (NC). Even though the s 1(1)(b) offence has been repealed, it appears that concerns about the ambit and application of the intimidation offence remain. In the most recent reported case dealing with the intimidation offence set out in s 1(1)(a) of the Act, *S v White* 2022 (2) SACR 511 (FB), the basis of the charge was the accused's threat to kill the complainant for interfering in the relationship between the accused and his girlfriend. The court sought to distinguish this context from intimidation that has an impact on society as opposed to on an individual, and held that the present case could be distinguished as 'trivial', and to use the intimidation offence in such circumstances would be 'unimaginable' (par [15]). Stating that the offence should be confined to 'deservingly serious' matters only (par [21]), the court held that the conviction in the trial court should be set aside.

No doubt, intimidation is a serious offence, as the maximum prescribed penalty of ten years' imprisonment indicates. It should not be abused as a means to resolve domestic squabbles. At the same time, could it not be said that a death threat, seriously uttered, falls foursquare within not only the language, but also the legislative intent, of the Act? It may indeed be that an alternative charge based on a common-law crime may be more appropriate in certain circumstances, but where the death

threat is issued with the specific intent of intimidating the complainant, it can hardly be said that such conduct does not accord with the elements of the offence. After all, if the accused did not intend to intimidate the complainant, despite his use of such language, he is free to argue as much.

While the intimidation offence was conceived in the days prior to a Bill of Rights, and the formal recognition of the right to dignity (s 10) and to freedom and security of the person (s 12), it can and should be employed, under the Constitution, to protect such rights today, where they are threatened. Less serious instances of intimidation should certainly receive lighter punishment, but it is submitted that it should not typically be appropriate for intimidation by means of violence or threats of violence to be regarded by a court as so trivial as not to sustain a conviction.

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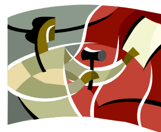

Matters of Interest to Magistrates

The ‘any court’ conundrum – revisiting s 16(2) of the Maintenance Act
April 1st, 2023

Section 16(2) of the Maintenance Act 99 of 1998 provides that ‘any court’ – including a children’s court – can issue a maintenance order.

South African courts, like the divorce courts, issue interim financial relief to vulnerable parties during divorce proceedings – in r 43 of the Uniform Rules of Court and r 58 of the Magistrates’ Courts Rules.

The Domestic Violence Act 116 of 1998 provides for emergency monetary relief in s 7(4), which states: ‘The [domestic violence] court may order the respondent to pay emergency monetary relief having regard to the financial needs and resources of the complainant and the respondent, and such order has the effect of a civil judgment of a magistrate’s court.’

The Children’s Act 38 of 2005 provides for maintenance in ss 33(3) and 161. Parenting plans can provide for maintenance as provided in s 33(3), while foster parents taking care of a foster child can apply for financial relief in an s 161 contribution order.

If one looks at children's courts and domestic violence courts statistics, these monetary orders are glaringly absent since most courts in South Africa shy away from making these monetary awards and refer maintenance matters to maintenance courts, which leads to the overcrowding of maintenance court rolls nationally.

I have observed divorce courts who refer spousal maintenance and child maintenance to maintenance courts by rather putting the burden of negotiating spousal maintenance orders with no token maintenance award on the maintenance court rolls than assisting divorced women during divorce proceedings. Child maintenance matters can take weeks or months to conclude after the divorce proceedings took its own toll of time on a desperate mother for financial assistance from fathers. It is recommended that divorce courts provide for token maintenance (nominal maintenance) – see *Butner v Butner* 2006 (3) SA 23 (SCA) or rehabilitative maintenance for indigent mothers to help them during the rehabilitative phase post-divorce instead of exacerbating overburden maintenance court rolls.

Since all South African courts have the statutory authority to make maintenance orders it is a strange phenomenon that courts do not make these orders but rather refer maintenance matters to an overburdened maintenance system.

Bail courts are *sui generis* in nature and can make any order including a maintenance order. Over the past few years, I have been advocating for a maintenance order to be considered by bail courts in domestic violence and sexual offences matters where the accused is a father or stepfather, and the criminal offence was perpetrated against another family member in the same household. I observed how mothers come to domestic violence courts and sexual offences courts to withdraw criminal charges against accused because their only source of income is incarcerated or refuses to contribute to rent or other necessities after their release on bail. If bail courts when hearing evidence of affordability of a bail amount can enquire regarding maintenance of the complainant or the family that the accused form part of – it might lead to more mothers and complainant pursue their domestic violence or sexual offence matter with no fear that their source of survival will be withdrawn from them.

In reprisal to filing a criminal case against a suspect the accused will refuse to contribute to the same household he once paid rent and contributed to food. Once released from the criminal courts on bail with a bail condition that the accused should not be in contact with the family member who filed the case against them – there will be little chance of success in securing much needed maintenance from the suspect while the criminal matter is pending. Some accused use the bail conditions as reason for not contributing to maintenance. If a bail magistrate while hearing the facts of the criminal case realise there might be reprisal or retaliation by an accused – the bail court can impose a bail condition that the accused continue his contributions to rent, groceries and school fees of his children or stepchildren despite the criminal matter brought against him by one of the family members dependent on the accused for financial assistance.

There is absolutely no reason why a domestic violence court cannot make an 'emergency monetary relief' order in terms of s 7(4) of the Domestic Violence Act.

There is absolutely no reason why a children's court cannot make a maintenance order in an s 33 parenting plan.

The question remains, why are courts reluctant to make these maintenance orders?

Some courts will argue no proper financial enquiry was conducted to make a proper finding regarding the financial liability of parties. Section 10(6) of the Maintenance Act provides that a court can grant interim financial relief during any enquiry after hearing evidence relating to affordability, or an offer made by a respondent. During these s 10 proceedings pending a final order, a court is given the authority to make an interim order even where all evidence have not been heard but can consider an offer of the respondent as an interim order.

The divorce courts in High Courts and regional courts can consider interim financial relief based on evidence placed before it by the parties and consider these financial relief orders pending a final divorce order that can amend the interim financial orders.

In a similar fashion, a children's court can consider maintenance in a s 33 parenting plan based on an offer by the non-custodial parent based on affordability that be reviewed later by a maintenance court – if there is some form of financial relief pending the finalisation of a final order.

Where a respondent makes an offer to any court to provide financial relief there is no reason why a court cannot consider and make such financial relief orders. If the father makes such an offer during the s 33 parenting plans process – the mediator or advocate can include such offer in the parenting plan that can easily be amended by a maintenance court at any stage after the parenting plan was made an order of court.

In domestic violence matters an emergency financial relief order can easily be reviewed and amended by a maintenance court.

In criminal bail matters, the bail court can easily review and amend the bail conditions, or the maintenance court can amend the maintenance order.

The enforceability of children's court parenting plans has been questioned by some legal practitioners stating it is not a 'maintenance order' since it was made in a domestic violence court, children's court or bail court but s 1 of the Maintenance Act defines a 'maintenance order' as meaning 'any order for the payment, including the periodical payment, of sums of money towards the maintenance of any person issued by any court in the Republic, and includes, except for the purposes of section 31, any sentence suspended on condition that the convicted person make payments of sums of money towards the maintenance of any other person'. So why an s 33 parenting plan with a maintenance order is not regarded by some courts as maintenance order is a mystery.

It is recommended that the legal fraternity, including presiding magistrates, attorneys, advocates, and mediators include maintenance clauses in proposed parenting plans. Public prosecutors in domestic violence matters and bail court proceedings can consider interim financial relief for vulnerable women and children where these gender-based violence offences occurred in a family setting that might be disrupted by removing the offender from the common household. There is no reason why a public prosecutor cannot consult with a complainant and obtain evidence on

expenses and present such evidence to a presiding officer to make an interim maintenance order in domestic violence courts or bail courts.

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A Last Thought

Whether maintenance for minor children could be awarded retrospectively or retroactively in a proper case?

The Maintenance Act 99 of 1998 does not provide for retrospective or retroactive maintenance orders.
However, s 18(2)(*b*) of the Maintenance Act provides for '[making] such other order as the maintenance court may consider appropriate in the circumstances of the case'.
The wording of s 18(2)(*b*) is open for interpretation as to whether '[making] such other order as the maintenance court may consider appropriate' includes orders retrospectively or retroactively.
In the case of *Harwood v Harwood* 1976 (4) SA 586 (C) at 588E the court held that retrospective or retroactive orders were possible in matters relating to maintenance in terms of the common law and that such orders are not ousted by the silence in this regard in the provisions of r 43 of the Uniform Rules of Court. This issue was decisively pronounced on in the decision of *Herfst v Herfst* 1964 (4) SA 127 (W) at 127-128A-B.
In the case of *S v Frieslaar* 1990 (4) SA 437 (C) the court held that if an existing maintenance order is replaced, the order may have a retroactive effect, provided that this is stated in the order.
The alternative to the common law position is s 8(1) of the Divorce Act 70 of 1979, which provides for: 'A maintenance order or an order in regard to the custody or guardianship of, or access to, a child, made in terms of this Act, may at any time be rescinded or varied or, in the case of a maintenance order or an order with regard to access to a child, be suspended by a court if the court finds that there is sufficient reason therefor'.

In the case of *Reid v Reid* 1992 (1) SA 443 (E) at 447B-C the court held that: 'When the consent paper is then made an order of court, *res judicata* is established on the just amount payable as maintenance.' 'Thus, any rescission, variation, or a suspension of the maintenance order granted earlier becomes a new dispute between the parties where the original order granted may form the basis of any new contemplated action' (Celeste Frank and Jordan Dias 'Case summary: *SA v JHA and Others* 2021 (1) SA 541 (WCC)' (www.schindlers.co.za, accessed 1-3-2023)).
In the case of *Georghiades v Janse van Rensburg* 2007 (3) SA 18 (C) at 22D the court held that '[s 8 of the Divorce Act] was introduced so as to authorise the court to amend maintenance orders on good cause shown, so as to enable spouses to come to court "to redress injustices occasioned by a maintenance order which no longer fits the changed circumstances"'. 'Having considered the applicable legal principles, the court was of the view that once a maintenance order, which formed part of a consent paper, was made an order of the court, it was a judgment like any other. By virtue of the fact that it imposes a monetary obligation, it is, accordingly, a "judgment debt" for the purpose of section 11(*a*)(ii) of the Prescription Act [68 of 1969] … which, accordingly, attracts a 30-year prescription period' (Frank and Dias (*op cit*)).

Concluding remarks

The problems with the maintenance system in South Africa are well documented, namely with the wide and unpredictable discretion of the court in making maintenance awards.
I submit that the time has come for the South African Law Reform Commission and the Department of Justice and Constitutional Development to research the problems experienced in the maintenance system comprehensively and to look afresh at reforming and developing the law as a whole.

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