e-MANTSHI

A KZNJETCOM Newsletter

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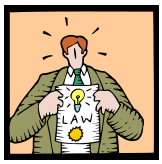
Welcome to the hundredth and ninety sixth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The revised National Instruction on domestic violence issued in terms of section 18(3) of the Domestic Violence Act, 1998 (Act No. 116 of 1998) was published for general information on 4 May 2023. The notice in this regard was published in Government Gazette no 48517. The revised National Instruction is available on the website of the South African Police Service at:
http://www.saps.gov.za/resource_centre/policies/ni-1999-dv.pdf

2. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, Act 107 of 1985 and with the approval of the Minister of Justice and Correctional Services, amended the Rules regulating the conduct of the proceedings of the Magistrates Courts of South Africa. The notice to this effect was published in Government Gazette no 48518 dated 5 May 2023. The amended rules deal specifically with mediation and will come into operation on 9 June 2023.

The amended rules can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202305/48518rg11579gon3371.pdf

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Recent Court Cases

1. Todd v Magistrate, Clanwilliam *and Others* 2023 (1) SACR 481 (WCC)

The decision of a magistrate to hold an informal inquest, despite the recommendations of the Director of Public Prosecutions and the request by the daughter of the deceased, was wrong and mistaken.

Lekhuleni J

INTRODUCTION

[1] This application arises from an unfortunate incident which occurred on 14 January 2016 at the Cederberg Mountains in the district of Clanwilliam. On that fateful day, the deceased one Ms Terry Wampach-Todd fell from a cliff in a mountainous area and later died due to the injuries she sustained. When this tragic incident happened, the deceased was in the presence of her husband, the applicant in this matter and the only witness of this disastrous incident.

[2] Pursuant to that unfortunate incident, the first respondent, a magistrate in the district of Clanwilliam held an inquest and made findings in terms of section 16(2)(d) of the Inquests Act 58 of 1959 ("*the Act*"). Among others, the magistrate found that although there were no witnesses to give direct evidence as to how the incident occurred, the available circumstantial evidence strongly indicates foul play and the only person this foul play points at is the applicant. It is aspects of these findings that the applicant seeks to have reviewed and set aside. More specifically, the first respondent's findings made in terms of section 16(2)(d) of the Act in so far as he found that 'the death of the deceased Ms Theresa Wampach-Todd was brought about by an act or omission that prima facie involves or amounts to an offence on the part of Mr Sean Todd".

[3] In his review application, the applicant impugned this decision and seeks an order that it be set aside and be substituted with an order that it has not been established that the death of the deceased was brought about by any act or omission prima facie involving or amounting to an offence on his part or on the part of any person. The review application was not opposed by any interested party. The first and the second respondent elected to abide the decision of this court.

[4] This application among others, relates to the manner in which the inquest into the deceased's death was held. Stated more broadly, the inquest raises the question whether the first respondent committed an irregularity that vitiated the inquest proceedings by holding a non-public inquest into the deceased's death based solely on affidavits and without recourse to oral evidence? In addition, the applicant's counsel, Mr Tredoux, contended that the magistrate neglected or disregarded material evidence that was placed before him and this in his view amounted to an irregularity which enjoins this court to review the first respondent's findings. If the magistrate considered all the evidence that was placed before him, so it was argued, the magistrates could have reached a different conclusion.

FACTUAL BACKGROUND

[5] The factual matrix of this matter gleaned from the statements of witnesses can succinctly be summarised as follows: The deceased and the applicant were married to each other and they lived together as husband and wife for six years. The deceased was an accomplished athlete with numerous achievements in various fields of cycling. In January 2016, the applicant and the deceased visited the Sanddrift Holiday Resort in Cederberg in the district of Clanwilliam. It was their practice to visit this place. On 14 January 2016 early in the morning they set off with their mountain bikes from their cottage and cycled on the mountain bike trail. The applicant avers that approximately 40 minutes later they reached a cliff face where they stopped to take photos. He took a photo of the deceased sitting on the edge of the cliff. After the photo was taken she got up and the applicant told the deceased that he was going to walk further.

[6] Applicant left his bike and carried on walking and suddenly he heard a scream. The deceased yelled and when he turned around, he saw her falling forward into the cliff. He never saw if she fell along the rock on the way down to the foot of the ravine. The deceased fell 80 to 100 meters from the top of the cliff to the ground. He then found a way to go down to her and he found her lying in the ravine. At that time, the deceased was making choking suffocating sounds. Saliva and blood was oozing out her mouth. He tried to open her jaw with his hands and the deceased teeth clenched shut and she grabbed him on his arms and suddenly went lame. He later realized that the deceased was dead. He then went to back to the Chalet to get assistance. Upon arrival at Sanddrift Holiday resort where they were based, he reported the incident to

the receptionist Ms Fortuin and pointed to her on the map where the incident happened. After that he returned to his wife. Two hours later the rescue team arrived and they certified the deceased dead. Police came and investigated the scene and later the deceased was airlifted from the ravine.

[7] Corrine Fortuin the receptionist of the Sanddrift Holiday resort declared in her statement that indeed on the day in question the applicant came to the reception around 09h00 and asked for help. According to her, the applicant was exceptionally calm and had no sense of panic. The applicant told her that his wife fell off her bicycle and he thought that she was dead as she had no pulse and her limbs were broken. She then called the mountain rescue teams for help. She alluded to the fact that the applicant and the deceased stayed in this resort numerous times over the last few years.

[8] Shaheed Osmon employed by the EMS rescue services attended the scene where the deceased allegedly fell. He has been in the emergency services for 25 years. He averred in his statement that when they initially received the call regarding this incident, the report was that the deceased was still alive. Later, they were informed that she was not breathing anymore. He went to the scene in the company of his colleague Anthony Hall. Upon arrival at the scene, they found the deceased lying at the bottom of the ravine and she was dead. Anthony climbed the ravine to the spot where the deceased fell and took photos. According to him, due to the step like shape of the cliff, the injuries that the deceased sustained did not seem consistent with someone who has slipped down from the top of the cliff to the bottom. If indeed she slipped down that terrain he would have expected more injuries on the deceased.

[9] At the scene, he asked the applicant as to what happened that led to the deceased's death. The applicant informed him that he and the deceased stopped to take photos. The applicant informed him that he was further up the road from where the deceased was and he suddenly heard the deceased screaming and when he turned around the deceased was gone. They retrieved the body of the deceased after the necessary photographs were taken. From his observation, the deceased suffered injuries on her left arm and both legs. He also heard the applicant say that when he had returned to his wife after reporting her fall at reception, the deceased was still alive and struggling to breath.

[10] Anthony Hall a volunteer rescue climber restored with Skymed Helicopter attended the scene and assisted to recover the body of the deceased from the ravine with the Skymed helicopter. Upon his arrival at the scene, the applicant gave him the description of the incident. He then prepared diagrams of the scene and a geographical layout of the place where the incident occurred. The layout he prepared formed part of the inquest record and indeed reflected the step like shape of the cliff from the top to the bottom of the ravine.

Grant Jennings a medical scientist of 20 years experienced based at UCT also provided a statement. He studied the photos of the deceased and the layout of the place where the deceased fell and in his view, he has never seen a body in such a good condition from a cliff fall, though this is possible if the deceased did not have multiple strikes.

[11] The investigating officer Ms Inez Wales also filed a statement. She attended the scene together with her colleague Mr Goeieman. The scene was a place which formed a deep ravine which was approximately 25 meters from top to bottom. She observed mountain biking trails that went around the ravine and carried on. At the bottom of the ravine she saw the deceased lying on her back. She found the applicant and the rescue team at the scene. She asked the applicant what happened to the deceased and the applicant informed her that they had stopped at the top of the cliff to take photos of each other with their cellphones because the sun looked very pretty.

[12] The applicant told her that he took a photo of the deceased sitting on the edge of the cliff and he then walked on a sandy path which led to an outcrop of rocks. He stood there and suddenly he heard the deceased screaming and when he turned he saw her body falling over the edge of the cliff. She averred that she then went to the sandy path which the applicant pointed to her and she noticed that there were no footprints at all on this path. When the applicant saw her taking pictures of the path, the applicant suddenly started walking along the path towards her and she stopped him and warned him not to do so.

[13] She averred that the applicant had deep scratches under his right eye. The applicant's legs were also covered in thin scratches. The applicant told her that he fell twice trying to get to the deceased. She then took a statement of the applicant at the top of the cliff near the spot where the deceased had fallen. Subsequent thereto, they left the cliff and went to the resort where the applicant was based. The applicant told her that their marriage had been sublime however going through their cellphones, she found overwhelming evidence to the contrary. That was in short her evidence as contained in her sworn statement. There were other statements which were obtained by the investigation officer which in my view are not relevant for the purposes of this review application.

GROUNDS OF REVIEW

[14] The applicant did not clearly set out the grounds of review in his notice of motion upon which he impugns the decision of the magistrate. However, from the reading of the applicant's founding affidavit, the grounds of review can succinctly be summarized as follows:

1. That the magistrate erred in dispensing with viva voce evidence at the hearing of the inquest.
2. That the magistrate failed to consider material evidence placed before him and made a finding in circumstances where there was no admissible evidence at all to justify such finding.

APPLICABLE LEGAL PRINCIPLES AND DISCUSSION

[15] For the sake of convenience, I will consider the grounds of review set out above ad seriatim.

Did the magistrate err when he dispensed with viva voce evidence at the hearing of the inquest?

[16] The applicant impugns the decision of the first respondent for holding the inquest on affidavits and for not hearing oral evidence. From the inquest record, it must be mentioned that the original magistrate (Ms Duimelaar) who was assigned to attend to the inquest decided to hold the inquest proceeding in open court and to hear viva voce evidence. She also directed that a number of witnesses be subpoenaed for the hearing of the inquest. Indeed, witnesses were subpoenaed for court for the 15 June 2018. On 15 June 2018, rights to legal representation were explained to the applicant and the matter was postponed for the applicant's attorney to 06 August 2018.

[17] Subsequent thereto, the designated magistrate was not available and the inquest proceedings was allocated to the first respondent. After perusing the available statements of witnesses, the first respondent decided not to hear oral evidence but to base his decision on the affidavits filed. The first respondent was of the view that a formal inquest was not necessary. The matter was heard in an open court and after listening to arguments from the daughter of the deceased and written arguments from both the prosecutor and the applicant's counsel, the first respondent made a finding that there was prima facie evidence implicating the applicant.

[18] It is trite that if criminal proceedings are not instituted in connection with death arising from unnatural causes, an inquest is held in order to determine the circumstances and the cause of the death in question. In other words, an inquest can only commence once the Director of Public Prosecution (*"the DPP"*) or his representative has decided that no criminal proceedings are to be instituted. An inquest is not a replacement or a substitute for criminal proceedings. It is aimed at making a determination whether or not the prosecution of any person for having brought about the death of the deceased is called for, and to consider and make an assessment of the available evidence for that purpose.

[19] In *Timol and Another v Magistrate, Johannesburg and Another* 1972(2) SA 281 (T) at 287 H to 288 (A), the Appellate Division observed that 'for the administration of justice to be complete and to instil confidence, it is necessary that, amongst other things, there should be an official investigation in every case where a person has died of unnatural causes, and the result of such investigation should be made known.' Meanwhile in *De'Ath (Substituted by Tiley) v Additional Magistrate, Cape* Town 1988 (4) SA 769 (C) at p775G, it was said an inquest is not aimed at proving anyone's guilt, but is most certainly aimed at ensuring that, if possible, where guilt exists it will not remain hidden.

[20] Section 16(2) of the Act enjoins a judicial officer holding an inquest to record a finding of the identity of the deceased person; the cause or likely cause of death; the date of death; and whether the death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any person. The purpose which is served by an inquest was aptly described by the Appellate Division in *Marais N.O. v Tiley* 1990 (2) SA 899 (A) at 901 F-G as follows:
"The underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice".

[21] Section 10 of the Act provides that unless the giving of oral evidence is dispensed with under this Act, an inquest shall be held in public. The injunction envisaged in this section that an inquest shall be held in public clearly implies that oral testimony must be heard. In *Morais v Tiley* (*supra*) the Appellate Division found that it would be purposeless to hold an inquest in public if only affidavits are to be admitted (in terms of s 13(1)) and no viva voce evidence is led. The court stated that the fact that oral evidence and a public inquest go hand in glove is also apparent from the wording of section 10. Properly interpreted, in the context of the Act, section 10 in effect provides that as a rule there should be a public inquest with oral evidence.

[22] Section 13(2) of the Act gives a presiding officer an unfettered discretion to dispense with viva voce evidence. For the sake of completeness, the section provides:
'The judicial officer may in his discretion cause the person who made such statement to be subpoenaed to give oral evidence at the inquest or may cause written interrogatories to be submitted to him for reply, and such interrogatories and any reply thereto purporting to be a reply from such person shall likewise be admissible in evidence at the inquest.'

[23] It must be stressed that an exercise of that judicial discretion deputed to the presiding officer must be exercised judiciously and not arbitrarily or capriciously. It must be exercised in such a manner that will assist the court to unravel the truth. The

presiding officer must always bear in mind that justice must not only be done but must be seen to be done. In my view, an exercise of such discretion must be infused with constitutional values and must reflect the Bill of Rights in particular the right of access to courts envisaged in section 34 of the Constitution. Notably, section 39(2) of the Constitution enjoins the courts, tribunals or forums when interpreting any legislation, to promote the spirit, purport and objects of the Bill of Rights. This provision *inter alia*, requires judicial officers to read legislation, where possible, in ways which give effect to its fundamental values and in conformity with the Constitution. (See *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others 2000 (10) BCLR 1079* (CC) at para 22). In my view, this should be the starting point for every judicial officer when making a determination whether or not he should dispense with oral evidence in terms of section 13(2) of the Inquest Act.

[24] In this case, the DPP decided not to institute criminal prosecution but directed that an inquest be held and the DPP recommended to the magistrate to hear viva voce evidence. The DPP also informed the applicant's legal representative that they are entitled to attend the hearing of the inquest, to lead evidence and to cross-examine witnesses. In addition, the DPP advised the applicant that he can make submissions to the magistrate regarding the finding that should be made.

[25] In my view, the recommendation of the DPP to the magistrate to hear viva voce evidence was in terms of section 8(1) of the Act which provide as follows:

8. Witnesses and evidence at inquests.—(1) The judicial officer who is to hold or holds an inquest may, of his own accord or at the request of any person who has a substantial and peculiar interest in the issue of the inquest, cause to be subpoenaed any person to give evidence or to produce any document or thing at the inquest: *Provided that the said judicial officer shall, if so requested by the attorney-general within whose area of jurisdiction the inquest is to be held or is being held, cause persons or any particular person to be subpoenaed to give oral evidence in general or in respect of any particular matter at the inquest. (My emphasis)*

[26] In my opinion, the plain reading of this provision makes it abundantly clear that where a judicial officer is requested by the DPP to hear oral evidence, it becomes peremptory for him to hold a formal inquest. He cannot dispense with oral evidence in those circumstances.

[27] In this case, the magistrate informed the parties at the hearing of the inquest that he had decided to conduct an informal inquest and to decide the matter based on the statements of witnesses. He requested the parties to make oral submissions in open court. The daughter of the deceased who was in attendance, made oral submissions and contended that the applicant had a hand in the death of the

deceased. She implored the court to consider hearing viva voce evidence so that the applicant can be examined under oaths. In response, Mr Tredoux who appeared on behalf of the applicant opposed this request and informed the court that the hearing of oral evidence would not change anything as the only witness who really knew what happened is the applicant. He further told the magistrate that the version of the applicant was not going to differ from what the magistrate had in front of him.

[28] When this submissions were made, the applicant's counsel was fully aware of all the allegations that were levelled against the applicant by the various witnesses who are referred to by the first respondent in his written finding. The first respondent accepted the submissions of the applicant's counsel and decided the matter on the papers before him.

[29] I am of the view that the decision of the magistrate to hold an informal inquest in this case despite the recommendations of the DPP and the request by the daughter of the deceased was wrong and mistaken. The first respondent was ordinarily under an obligation deputed to him by section 8(1) to call for oral evidence. To this end, I am in full agreement with the views expressed in *Marais NO v Tiley* 1990 (2) SA 899 (AD) p. 5, where the court stated that it is axiomatic that public confidence and satisfaction would normally best be promoted by a full and fair investigation, publicly and openly held, giving interested parties an opportunity to assist the magistrate holding the inquest in determining not only the circumstances surrounding the death under consideration, but also whether any person was responsible for such death.

[30] Notwithstanding, I must however emphasise that the fact that the first respondent failed to comply with the provisions of the Act does not mean that his decision must be reviewed by this court. The inquiry does not end there. The non-compliance with the statutory provision of the Act in my view does not in itself vitiates the inquests proceedings before the first respondent. Something more is required. The onus rests on the applicant to satisfy this court that the exercise of the first respondent's discretion was so unreasonable, and so capricious such that it infringed on his fundamental rights. To this end, the dictum of Brink J in *De Vos v Die Ringkommissie van die Ring van die N.G Kerk, Bloemfontein en Ander* 1952 (2) SA 83 (O) at p.101 still hold sway. The court said:
'Die persoon wat beweer veronreg te wees moet bewys dat hy daardeur benadeel is en dat hy 'n burgerlike reg of belang het wat deur die oortreding geskend word en wat die beskerming van die hof verlang.'

[31] It must be stressed that this court will not on review interfere with the decision of the first respondent merely because in its opinion the decision was wrong or unreasonable. It will only do so only if the possible inference is that the decision was arbitrary or mala fide – See *Claassens v Landdros, Bloemfontein* 1964(4) SA 4 (OFS) at 9B-D. Even if there was a technical breach of the statute the court will not interfere

on review unless the applicant or any interested party can show prejudice. In my view, the applicant has not shown that he has suffered any prejudice pursuant to the decision of the first respondent to hold an informal inquest. This finding is fortified among others, by the fact that the applicant requested the first respondent to dispense with viva voice evidence. When making this submission, the applicant was duly assisted by his attorney and legal counsel.

[32] In addition, when these submissions were made, the applicant was aware of the evidence that was levelled against him by all the witnesses who were referred to by the first respondent in his written findings. Most importantly, the averments of these witnesses are based on what the applicant informed them on what happened to the deceased at the cliff. The first respondent decided to hold an informal inquest which decision was supported by the applicant. The first respondent subsequently made his findings based on the statements of witnesses which the applicant possessed. In my judgment and taking into account the totality of the facts before court, the applicant's first ground of review must fail. This leads me to the last review ground.

Did the magistrate fail to consider material evidence placed before him?

[33] It was argued on behalf of the applicant that the first respondent came to a wrong conclusion in respect of his finding that the death of the deceased was brought about by an act or omission prima facie evidencing or amounting to an offence on the part of the applicant. It was further contended that the only reasonable inference to be drawn from the fact that the DPP decided not to institute a prosecution against the applicant in 2017 was because it was of the view that the evidence constituting the prosecution's case was insufficient to establish a prima facie case of a crime having been committed by the applicant. Based on the DPP's decision, it was submitted that the magistrate was wrong in finding on the exact same evidence that a prima facie case was established against the applicant.

[34] This argument in my view misses the point. It should be borne in mind that this is not an appeal but a review application. There exists no right of appeal against the findings in an inquest. The standard of proof applicable in inquest proceedings is poles apart to the standard of proof applicable in criminal matters. In criminal matters the state must proof its case beyond reasonable doubt. (See *S v Jackson* 1998 (1) SACR 470 (SCA). While in inquest proceedings the question is whether a judicial officer holding the inquest is of the opinion that there is evidence available which could, at a subsequent criminal trial, be held to be credible and acceptable and which, if accepted, could prove that the death of the deceased was brought about by an act or omission which involved or amounted to the commission of a criminal offence on the part of some person or persons. (See *In re Goniwe and others* (2) 1994 (2) SACR 425 (SE).

[35] In my view, having considered all the affidavits filed by the witnesses, the findings of the first respondent cannot be faulted. I am of the view that the first respondent was correct in finding that there is a prima facie case against the applicant. In addition, to the reasons the first respondent gave, I must stress the fact that the applicant gave conflicting versions of what transpired at the ravine. He made his first report to Ms Fortuin a receptionist at the Sanddrif Holiday Resort immediately after the alleged incident. He told her that his wife fell off her bicycle and he thinks that she may be dead because he felt her pulse and there was nothing and her limbs were also broken.

[36] Subsequent thereto, on the same morning he told other witnesses including the police, the rescue team in particular Mr Osmon that the deceased fell into the cliff after he took her a photo. When Mr Osmon asked him to explain what happened, the applicant told him that they stopped to take photos and he was further up the road from where the deceased was. He was not standing by her and then he just heard her screaming and when he turned around she was gone. Ms Fortuin the receptionist and to whom the first report was made, averred in her affidavit that while she was in an adjoining office, she was surprised when she heard the applicant telling everyone that the deceased fell into a cliff while they were taking photos and there was no mention of her falling off a bike. The version the applicant gave to other witnesses was diametrically opposed to the version he gave the receptionist when he came for the first time seeking for help.

[37] The applicant has not given a plausible explanation on what really caused the deceased, an accomplished sportswoman to fall into the cliff. The deceased was a cyclist of note who won numerous cups in the world including America. She was medically sound and physically fit. Her fall into the cliff was mysterious and demands an answer. She was with the applicant and he is the only one who can clearly explain what happened to the deceased.

[38] I must emphasise the fact that in his founding and supplementary affidavit, the applicant could not explain what really pushed the deceased to fall into the cliff on such a clear and sunny day. The weather condition was good. The applicant averred that the wind was mild and there was nothing major. In my view, the applicant has to answer as to what caused the deceased to fall into the ravine. According to the applicant, they had a very good relationship. There is nothing that suggests that the deceased intentionally threw herself in the ravine. Something surely caused her to fall into the cliff and it is the applicant who must explain this in the right forum.

[39] Most importantly, the investigating officer averred in her statement that she asked the applicant to explain to her what he remembered. The applicant told her that he took a photo of the deceased sitting on the edge of the cliff and then he walked away from the deceased on a sandy path which lead to an outcrop of rock and he stood there when he suddenly heard the deceased just screaming and when he had

turned he saw her body falling over the edge of the cliff. When she investigated the sandy path which the applicant pointed to her she observed that there were no foot prints at all. She took pictures of the path and the applicant started to walk on the path. She stopped him from doing so.

[41] Furthermore, the applicant could not give a credible explanation of the two deep scratches under his eye which were observed by the investigating officer who arrived at the scene whilst the deceased was still lying in the cliff. Taking into account the facts of this case, I am of the view that there is no basis whatsoever warranting the setting aside of the decision of the first respondent.

ORDER

[42] In the result, I propose the following order:
The applicant's application to review the findings of the first respondent is hereby dismissed.

From The Legal Journals

Mabeka, N Q & Cassim, F

Interpreting the provisions of the Cybercrimes Act 19 of 2020 in the context of civil procedure: a future journey.

Obiter 2023 19

Abstract
It is accepted nowadays that cyberspace is used extensively to commit cybercrimes and cybersecurity offences. Victims of cybercrime can use civil procedure to institute claims for damages. Civil procedure is a branch of law that allows victims of cyberspace crimes to institute claims for damages. This article examines the impact of the Cybercrimes Act 19 of 2020 (Cybercrimes Act) on South African civil procedure. It appears that a contravention of the Cybercrimes Act may result in financial problems for the plaintiff, which then enables the latter to institute a civil claim against the defendants. The authors determine whether contravening the provisions of the Cybercrimes Act gives rise to a cause of action that permits the plaintiff to institute civil proceedings for damages suffered. While the Cybercrimes Act

is lauded for its provisions addressing cybercrime, room for improvement is identified. Lastly, the authors conduct a comparative analysis between the provisions of the Cybercrimes Act and the Budapest Convention.

Mujuzi, J D

Compensation for wrongful conviction in South Africa.

Obiter 2023 50

Abstract
South Africa acceded to the International Covenant on Civil and Political Rights (ICCPR) without reservations. Article 14(6) of this treaty requires South Africa to put measures in place to compensate people who have suffered miscarriages of justice (wrongful convictions). However, the right to be compensated for wrongful conviction is not provided for in South African law. This is so although case law shows that many people have been wrongfully convicted. A person who has been wrongfully convicted has to institute a civil case (delictual claim) or to apply for a free pardon. In this article, the author argues that these two options do not comply with what is required of South Africa under article 14(6) of the ICCPR. The author suggests ways in which South Africa could comply with its obligation under article 14(6) of the ICCPR. The author also suggests ways in which the common law (actio iniuriarum) could be developed to compensate people who have been wrongfully convicted.

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

Contributions from the Law School

Corporate criminal liability in South Africa

Introduction
The legal question of who is responsible in cases involving unlawful acts committed by large corporations has in recent years come to the fore with Ford Motor Corporation's sale of its Kuga 1.6-litre EcoBoost. The National Consumer Commission fined Ford Motor Company R 35 million for Kuga SUV fires, which have resulted in a number of vehicles bursting into flames. One passenger, Reshall Jimmy was burnt beyond recognition in his SUV whilst still wearing his seatbelt (accessed at https://www.timeslive.co.za/news/consumer-live/2016-12-22-ford-confirms-kuga-fires-

confined-to-single-model-concedes-engine-overheating-a-possible-cause/). From a mechanical perspective the problems stemmed from insufficient cooling which resulted in warping of the engines aluminium cylinder head, causing cracking and leaking oil into the hot engine compartment, thereby resulting in fires. https://www.news24.com/life/motoring/news/guides_and_lists/ford-kuga-recall-whats-gone-wrong-and-who-is-to-blame-20170117).
The purpose of this note is therefore to briefly examine whether corporate criminal liability is in need of reform.

At present the current legal position is regulated by s 332(1) of the Criminal Procedure Act 51 of 1977 (hereinafter referred to as 'CPA') which endorses an individualist approach. According to this section, corporate criminal liability is imputed to the corporate body in terms of s 332(1) (CPA). The section reads as follows:

"For the purpose of imposing upon a corporate body criminal liability for any offence, whether under any law or at common law –
(a) any act performed, with or without a particular intent, by or on instructions or with permission, express or implied, given by a director or servant of that corporate body; and
(b) the omission, with or without a particular intent, of any act which ought to have been but was not performed by or on instructions given by a director or servant of that corporate body, in the exercise of his powers or in the performance of his duties as such director or servant or in furthering or endeavouring to further the interests of that corporate body, shall be deemed to have been performed (and with the same intent, if any) by that corporate body or, as the case may be, to have been an omission (and with the same intent, if any) on the part of that corporate body".

The approach adopted in s 332(1) is derivative in nature which means that the *mens rea* of the director or servant is imputed to the corporation regardless of whether the act was committed outside the scope of powers or duty as long as the individual was furthering the interests of the corporation (J Burchell *Principles of Criminal Law* (2013) 451). Guilt is derived from individual members because the corporation lacks a 'substantive independent identity' (VL Borg-Jorgensen & K Van der Linde "Corporate Criminal Liability in South Africa: Time for a Change (Part 1), 2011 *J. S. AFR. L*. 452 (2011).453). In this instance liability can be based on vicarious liability or the theory of identification (Borg-Jorgenson & Van der Linde supra). Vicarious liability arises when individuals who 'act in the execution of their duties or in the scope of their employment and with the intent to further the interests of the corporation' commit an unlawful act' (CR Snyman *Criminal Law* (2002) 247). Whether the conduct falls within the scope of employment will be determined according to an objective subjective test (see further *Minister of Police v Rabie* 1986 (1) SA 117 (A) at para 134C-E: "It seems clear that an act done by a servant solemnly for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment. This is a subjective test. On the other hand, if there is a

close link between the employees act and his personal interests but for the business of his employer, the employer would be liable. This is the objective test. In conflating the two tests to the facts, he found the employer liable. Moreover, "... a master...is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes – although improper modes – of doing them"). The problem with vicarious liability is that the scope for liability is too broad in nature in that sense that liability is imputed to the corporation regardless of *mens rea* being present (CN Nana 'Corporate Criminal Liability in South African Law: The need to look beyond Vicarious Liability' (2011) *Journal of African Law* 101). Further such liability dispenses with an individual's constitutional right to be presumed innocent as set out in s 35 of the Constitution and also the availability of alternative charges with which the accused could be charged such as accomplice liability (Burchell supra 27-29). According to the case of *State v Coetzee* (1997) (3) SA 527 (CC) the court declared any further application of s 332(5) unconstitutional by stating that in extending criminal liability to servants under this section 'constitutes a substantial impairment of freedom under s 11(1) of the 1996 Constitution. Second, given the nature of organisation structures and their decision-making processes, it would be inherently difficult to identify a key actor who is singularly responsible for the harmful conduct thereby attributing fault to that individual (JP Ongeso, Corporate Accountability in South Africa: Sharpening the Role of Criminal Law, 29 *S. AFR. J. CRIM. Just*. 225 (2016) 230). If this position is correct, then an alternative rationale must be used to determine liability of corporations.

It is submitted that the organisational model bears reference in this regard. For instance, the provisions of s 12.2 of the Australian Criminal Code Act 12 of 1995 (Cth) (Criminal Code) is applicable both to corporations and natural persons. This provision is similar to vicarious liability since actus reus i.e. an act or omission as performed by an employee or agent acting within the scope of his employment is attributed to the corporation. In terms of this doctrine, a corporation will now be liable for the actus reus of the offence, irrespective of the level of rank of the employee (V L Borg-Jorgensen & K Van der Linde supra at 696). According to the organisational approach, corporations are 'viewed as entities with identifiable personality that have a presence in the community distinct from humans associated with them. It is also supported by the practice of corporations to market themselves as unique entities possessing individualistic feature (V L Borg-Jorgensen & K Van der Linde supra 454). The benefits of such an approach are as follows. First, in complex organisational structures, senior management is far removed 'tactically and operationally" from the implementation of decision making and this would make the determination of who is violating human rights difficult to ascertain.

Conclusion

In light of the problematic nature of vicarious liability on which corporate criminal liability is based, it is submitted that an organisational approach to liability is to be preferred. First, it would not be dependent on proving of individual fault. Second, the likelihood of attaching fault to the corporation for acts for which they are not

responsible would be minimal (J P Ongeso supra). Therefore, it is more appropriate to hold the organisation liable where the conduct which resulted in the offence was tolerated by the corporation (Nana supra 86).

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Matters of Interest to Magistrates

Lower courts paving the road for the development of the law

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Prior to the enactment of subsection 8*(c)* of the Criminal and Related Matters Amendment Act in 2021, subsection 170A(7) of the Criminal Procedure Act required the court to immediately provide reasons for refusing to appoint an intermediary in matters involving children below the age of 14 years.[1] In 2009, the Constitutional Court reversed a High Court decision declaring the provision invalid.[2] The High Court had reached its decision on the basis that the provision discriminated between children under the age of 14 years old and those above that age.[3] It held that the provision was irrational and discriminatory and thus unconstitutional.[4] In *Director* of *Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others*, the Constitutional Court held that the High Court's finding seemed to be based on the assumption that the court is not required to give reasons where its refusal related to a child over 14 years old.[5] The Constitutional Court, therefore, relied on the principles of constitutional interpretation to construe the provision in a manner that promoted equality, accountability, responsiveness, and openness.[6] The Constitutional Court reasoned that the principles mentioned in the preceding

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[1] Section 8*(c)* of the Criminal and Related Matters Amendment Act 12 of 2021, Criminal Procedure Act 51 of 1977.
[2] *Director* of *Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* 2009 (2) SACR 130 (CC) para 162.
[3] Ibid para 155.
[4] Ibid para 155.
[5] Ibid para 155.
[6] Ibid para 156-157.

sentence require courts to respond to requests for intermediaries and to account for their decisions. Courts account by giving reasons for their decisions. Therefore, so went the reasoning, the need to give reasons for a decision refusing the use of an intermediary for children over the age of 14 years old, must be read as implicit in the provision.[7]

Through its interpretive exercise, the Constitutional Court found that subsection 170A(7) was capable of being read in a manner that was consistent with the Constitution.[8] Accordingly, the court favoured the interpretation that put the provision in line with the Constitution, namely that a court is required to give reasons for refusing to allow the appointment of an intermediary in respect of all children below 18 years old.[9] Having saved the provision from unconstitutionality, the Constitutional Court retained the age distinction in relation to when the reasons for a refusal were to be given. As such, courts would continue to only be required to give immediate reasons when the child in question was below 14 years old. The Constitutional Court held that the distinction between children over the age of 14 and those above that age was one of emphasis rather than exclusion.[10] It held that the subsection merely emphasised that younger children need greater protection.[11] Moreover, it held the provision recognised that vulnerability decreases with age and that the protection given to children must be appropriate to their age, unique needs, and level of maturity.[12] In 2021, however, subsection 170A(7)*(a)* was amended as follows:

"The court must provide reasons for refusing any application or request by the public prosecutor or a witness referred to in subsection (1), for the appointment of an intermediary, immediately upon refusal, which reasons must be entered into the record of the proceedings."

This legislative amendment does away with the distinction between children under 14 years old and those who are over that age. It requires the court to give immediate reasons each time it refuses an application for the appointment of an intermediary regardless of the child's age. In this way, it deviates from some of the proclamations of the Constitutional Court but aligns with the High Court's finding that the age distinction should have been eradicated.

Interestingly, however, subsection 158(5) of the Criminal Procedure Act makes the same age distinction as the old subsection 170A(7)*(a)* in respect of the use of closed-circuit television or similar electronic media. Similar to the old subsection 170A(7), subsection 158(5) requires the court to provide immediate reasons for refusing an application to have a child below the age of 14 years old give their evidence using closed-circuit television or similar media. Similar to subsection 170A(7), the Constitutional Court in Director of *Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* reversed a decision declaring the

[7] Ibid para 157.
[8] Ibid para 159.
[9] Ibid.
[10] Ibid para 160.
[11] Ibid para 160.
[12] Ibid para 160.

provision unconstitutional for the same reasons as those outlined above in respect of subsection 170A(7). However, the legislature has not amended subsection 158(5) to eradicate the distinction between children under the age of 14 years old and those above 14 years old. The subsection still reads:

"The court shall provide reasons for refusing any application by the public prosecutor for the giving of evidence by a child complainant below the age of 14 years by means of closed circuit television or similar electronic media, immediately upon refusal and such reasons shall be entered into the record of the proceedings."

The fact that subsection 158(5) retains the age distinction may be an oversight on the part of the legislature, or it might be intentional. Either way, there is something to be learned from the fact that the legislature amended subsection 170A(7) in a way that reflected what the High Court initially held – that the distinction was invalid. The lesson is that perhaps because they are closer to the realities of trial proceedings and are not bogged down by precocious formalistic rules and interpretive tools, Magistrates Courts and High Courts are more in tune with what justice entails in practical terms. In *Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and others* the Constitutional Court engaged in an intricate interpretive exercise to save a provision that, in its own words, appeared arbitrary.[13] The Constitutional Court was not remiss to save the provisions from constitutional invalidity. This is what it is required to do by law.[14] However, when formal rules and principles of interpretation result in obscure findings, one must stop and reflect on the soundness of such rules. In the context of subsection 170A(7), the legislature may have recognised the unnecessary and arbitrary gap created by the old provision and opted to bridge it by removing the age distinction. But it is noteworthy that the apex court did not immediately recognise and address a gap that a lower court had so clearly recognised and sought to bridge. This instance arguably signals the importance of the lower courts in paving the road for the development of the law. It shows that at times, the lower courts see the law with greater clarity and that in some instances, it is important for the superior courts to be more deferential to the lower courts' findings or observations.

Despite having not declared the seemingly arbitrary age distinction in subsections 158(5) and 170A(7) unconstitutional, the Constitutional Court made significant statements that may continue to have a bearing on how the new subsection 170A(7) is applied. As mentioned above, these statements related to the court's assertion that the age distinction in subsections 158(5) and 170A(7) was designed to emphasise the need to afford greater protection to younger children. Moreover, the court held that the distinction emphasised that vulnerability decreases with age and that the protection given to children must be appropriate to their age, unique needs, and level of maturity.[15] These are important statements and could mean that appeal courts will assess a refusal to appoint an intermediary with greater scrutiny where the child is

[13] Ibid para 160.
[14] Ibid paras 82-85.
[15] Ibid para 160.

below 14 years old. Therefore, trial courts may have to draft their refusals to appoint intermediaries with greater care where the child concerned is below the age of 14.

A Last Thought

[54] I briefly pause, to share a word of caution to the legal practitioners of who practice in this court. I mentioned to counsel during argument in this matter that this matter is one where the court could have made an order after hearing closing submissions, but for purposes of education, found it necessary to pen this judgment.

[55] I have over the years, in teaching, practice, and on the bench, many a times lamented that there is no remedy in law – for even the best or most intelligent trial legal practitioner, who does not read. With all the authorities on the subject matter, it was clear that counsel for Mr Iipinge, when he took instructions as successive attorney in this matter, did not acquaint himself with the pleadings and the legal principles governing Mr Iipinge's claim. Had counsel taken the trouble to read the relevant authorities, the basis on which the plaintiff was before court would have been clear, and the stumble in the dark that ensued during the trial of this matter would have been avoided.

[56] It is further the duty of a legal practitioner to familiarize themselves with the full content and context of the authority which they cite. It has become evident and common practice for legal practitioners in the profession to consider the headnote of a case, and extract the decision, without understanding the context and content within which the decisions were made. It is incumbent for legal practitioners to appreciate the difference in the factual matrix of every single case before court, different to the previous matter, and it is necessary to understand the application of the law to the different circumstances and facts of that case, and the case which they intend to make. The only route to success for a trial attorney is to read, read, and read.

Per Ueitele J in *Iipinge v Taapopi* (I 1928/2015) [2022] NAHCMD 567 (18 October 2022)