e-MANTSHI

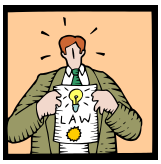
A KZNJETCOM Newsletter

June 2023: Issue 197

Welcome to the hundredth and ninety seventh 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 Minister of Social Development has in terms of Section 56 (3) (a) of the Child Justice Act, 2008 (Act No. 75 of 2008) published particulars of each accredited diversion service provider and diversion programme in a schedule. The notice was published in Government Gazette no 48841 on 23 June 2023. The notice covers diversion programmes and diversion service providers that are granted an accredited status. Diversion programmes and diversion service providers that have been granted candidacy status, have received certificates and are allowed to operate, based on condition(s) set by the accrediting committee. The Policy Framework on Accreditation of Diversion Services in South Africa defines candidacy status as a 'pre-accreditation status, awarded to an organization pursuing accreditation… Candidacy indicates that an organization or programme has achieved recognition and is progressing towards receiving full accreditation, and has the potential to achieve compliance with standards within two years'.

The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202306/48841gon3602.pdf

.

Recent Court Cases

1. VJV and Another v Minister of Social Development and Another (CCT 94/22) [2023] ZACC 21 (29 June 2023)

Section 40 of the Children's Act 38 of 2005 is unconstitutional to the extent that it excludes permanent life partners.

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria. The following order is made:
1. The declaration of constitutional invalidity of section 40 of the Children's Act 38 of 2005 (Children's Act) made by the High Court is confirmed in the terms set out in paragraphs 2, 3, 4, 5 and 6 of this order.
2. It is declared that the impugned provisions of the Children's Act unfairly and unjustifiably discriminate on the basis of marital status and sexual orientation by excluding the words—
(a) "or permanent life partner" after the word "spouse" and "husband" wherever such words appear in section 40 of the Children's Act; and
(b) "or permanent life partners" after the word "spouses" wherever such word appears in section 40 of the Children's Act.
3. The declaration of constitutional invalidity referred to in paragraph 1 takes effect from 1 July 2007, but its operation is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy the constitutional defects giving rise to the constitutional invalidity.
4. From the date of the order of this Court section 40 of the Children's Act will read as follows – the underlined words being read into the section as it is currently formulated:
"(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse or permanent life partner have been used with the consent of both such spouses or permanent life partners for the artificial fertilisation of one spouse or one permanent life partner, any child born of that spouse or

permanent life partner as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses or permanent life partners as if the gamete or gametes of those spouses or permanent life partners had been used for such artificial fertilisation.

(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses or permanent life partners have granted the relevant consent.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when—

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband or permanent life partner of such woman at the time of such artificial fertilisation."

5. In respect of the period 1 July 2007 until the date of this order, the following shall be the position:

(a) The reading in provided for in paragraph 4 above will not apply to persons who were permanent life partners at the time of the artificial fertilisation unless they invoke the benefit of this order by a written declaration signed by both of them. In such event the provisions of section 40(1)(a) as read in will apply.

(b) In the event that rights and responsibilities in respect of the child/children so born has been assigned to any third party/ies in terms of the Children's Act or any other legislation, or are enjoyed by a former partner of the permanent life partnership only, then:

(i) The party seeking to invoke the benefit of this order will give written notice to the party/ies or former partner of their intention to do so and afford the third party or former partner with an opportunity to object thereto.

(ii) If the third party or former partner objects in writing thereto, the matter must be referred to the Children's Court which will determine the procedure to be followed and issue appropriate orders and directions within its powers.

(iii) The Children's Court, after considering the matter may make any order that is just and equitable and in doing so shall be guided by what the best interest/s of the child/children in question require.

6. In the event that Parliament does not remedy the constitutional deficiency in section 40 within the period provided for in paragraph 3 of this order, or any extended period granted by this Court, section 40 will be deemed to read as set out in paragraphs 4 and 5 above.

7. The respondents are to pay the applicants' costs in this Court, including the costs of two counsel.

2. Centre for Child Law v T.S and Others (CCT 157/22) [2023] ZACC 22 (29 June 2023)

Section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 is unconstitutional to the extent that it precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate.

On application for confirmation of the order of constitutional invalidity granted by the High Court of South Africa, Gauteng Local Division, Johannesburg, the following order is made:

1. The order of the High Court, Gauteng Local Division, Johannesburg, declaring section 4 of the Mediation in Certain Divorce Matters Act 24 of 1987 to be inconsistent with the Constitution and invalid is confirmed to the extent that it precludes never-married parents and married parents who are not going through a divorce, and their children, from accessing the services of the Office of the Family Advocate in the same manner as married parents who are divorced or going through a divorce do.
2. The declaration of invalidity referred to in paragraph 1 shall not be retrospective and is suspended for a period of 24 months to enable Parliament to cure the defect in the Mediation in Certain Divorce Matters Act giving rise to its invalidity.
3. During the period of suspension referred to in paragraph 2, the Mediation in Certain Divorce Matters Act shall be deemed to include the following additional provision:

"*Section 4A*

(1) The Family Advocate shall—

(a) after an application has been instituted that affects, or is likely to affect, the exercise of any right, by a parent or non parent with regard to the custody or guardianship of, or access to, a child; or after an application has been lodged for the variation, rescission or suspension of an order with regard to any such rights, complete Annexure B to the regulations, if so requested by any party to such proceedings or the court concerned, institute an enquiry to enable them to furnish the court at the hearing of such application with a report and recommendations on any matter concerning the welfare of each minor or dependent child of the marriage concerned or regarding such matter as is referred to them by the court.

(2) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned apply to the court concerned for an order authorising him or her to institute an enquiry contemplated in sub section (1)(a).

(3) Any Family Advocate may, if they deem it in the interest of any minor or dependent child concerned, and shall, if so requested by a court, appear at the hearing of any application referred to in sub section (1)(a) and may adduce any available evidence relevant to the application and cross-examine witnesses giving evidence thereat."

4. Should Parliament fail to cure the defects within the 24-month period mentioned in paragraph 2 above, the reading-in will continue to be operative.
5. The third respondent must pay the applicant's costs in this Court and the first respondent's costs in the High Court occasioned by the filing of written submissions and the hearing of 10 January 2022.

From The Legal Journals

Stal, S J

Does Mistaken Belief in Consent Constitute a Defence in South African Rape Cases?

***PER /PELJ* 2023(26)**

Abstract
In the 2020 case of Coko v S 2022 1 SACR 24 (ECG), the Eastern Cape High Court held that a person's mistaken belief in consent to penetrative sex could constitute a valid defence in law. In statutory provisions and jurisprudence, the absence of the victim's consent is fundamental in establishing a case of rape. This paper evaluates the decision, where it was held that when an appellant reasonably believes that the complainant/victim had consented to sex, this alone could be enough to acquit the appellant of the charge of rape.

The article can be accessed here:
https://perjournal.co.za/article/view/15002/20012

Swemmer, S

S v P–The Abuse of Protection Orders to "Gag" Victims of Rape

PER / PELJ2023(26)

Abstract

In recent years there has been the emergence of global and local anti-gender-based violence movements such as #MeToo and, in South Africa, #menaretrash, which has precipitated an increase in the disclosure of the names of the alleged perpetrators of sexual violence by the survivors. The increase in the disclosure of these names has been met with the intensification of legal processes by alleged perpetrators to counter and silence survivors.This case note will focus on the recent appeal case of S v P 2022 2SACR 81 (WCC)in the High Court of South Africa, Western Cape Division, in Cape Town. In this case the court had to consider whether the court a quo was correct in issuing a final protection order (in terms of the Protection from Harassment Act17 of 2011) against the appellant (S) where the court a quo found that her act of harassment was a third party's public disclosure of the respondent (P) as her rapist. It will be argued that the Western Cape High Court was correct in finding that the court a quo should not have issued a final protection order against S. It will be further argued that the reasons to overturn this decision included the court a quo's failure to appreciate the gendered purpose of the Protection from Harassment Act and that P misused and abused the Act in order to silence S. It will then be argued that one of the reasons why survivors choose to disclose alleged perpetrators' names on social platforms is a societal contextual reason, which includes the high rates of gender-based violence in South Africa alongside the high rates of attrition in gender-based violence cases in the criminal justice system. Finally, I will consider the cases of Mdlekeza v Gallie2021 (WCHC) (unreported) case number 15490/2020 of 20 April 2021 and Booysen v Major (WCHC) (unreported) case number 5043/2021 of 30 August 2012 and argue that these cases are further examples of this abuse of process employed to silence survivors. With the courts seeing an increase in these applications to silence victims, it is argued that the courts must adopt a feminist-contextualised approach in order to avoid gagging survivors of gender-based violence and being complicit in the increasing weaponisation of court processes by alleged perpetrators.

The article can be accessed here:
https://perjournal.co.za/article/view/14640/20047

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

Contributions from the Law School

The role of the magistrate when putting a suspended sentence into operation (Part 2)

Introduction

Part 1 of this contribution gave an overview of the principles that govern how a court should determine whether a condition attached to a suspended sentence has been breached, and what should happen thereafter. It discussed case law that influenced the position in the past, and showed how they had been affected by the constitutional era and its Bill of Rights. It also considered the position when the putting into operation of a suspended sentence had an effect on the totality of punishment experienced by an offender, and how the law has dealt with this issue.

In this second part the discussion mainly focuses on the appealability of orders to put suspended sentences into operation, the influence of the judgment in *Stow v Regional Magistrate, Port Elizabeth NO and Others* 2019 (1) SACR 487 (SCA), and the way forward for magistrates.

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

Part I concluded that an enforcement court cannot escape its responsibility to carefully and judiciously consider each application for a suspended sentence to be put into operation. No magistrate is ever forced 'to bring the suspended sentence into operation merely by reason of accused's non-compliance with the conditions of suspension, nor can the magistrate do so automatically without full enquiry into and consideration of all the circumstances of the particular case' (*S v Peskin* 1997 (2) SACR 460 (C) at 464*f*). Part I also indicated that there is increasing authority that the enforcement court must 'consider and apply all the necessary principles which it would apply if it was imposing an original sentence' (cf *S v Hoffman* 1992 (2) SACR 56 (C) at 63*c*); that it should determine the reasonableness of the different sentences (cf *S v Peskin* 1997 (2) SACR 460 (C) at 464-465); and that putting a suspended

sentence into operation is basically the same as imposing an original sentence (cf *S v Chake* 2016 (2) SACR 309 (FB)).
As noted above, the first focus of this contribution is to consider the remedies that are available to a party aggrieved by the decision of an enforcement court. We now turn to this discussion.

Appeal or review of an order that a suspended sentence is put into operation
Formerly, the courts consistently held that an order putting a suspended sentence into operation was not appealable (nor subject to automatic review). They held this view based on an interpretation of s 309(1)(a) of the Criminal Procedure Act 51 of 1977, which allows '… any person convicted of any offence by any lower court … [to] appeal against such conviction and against any resultant sentence or order to the High Court…'. The courts had held that, although ordering a suspended sentence into operation followed a conviction, it was not a *consequence* thereof (cf *Gasa v Regional Magistrate for the Regional Division of Natal* 1979 (4) SA 729 (N) at 732A-B; *S v Helm* 1980 (3) SA 605 (T) at 605H). The courts also held that an order putting a suspended sentence into operation was not the imposition of a sentence, and not part of a criminal trial (cf *S v Titus* 1996 (1) SACR 540 (C) at 544*h*).
The conclusion drawn was stated as follows in *S v Hoffman* 1992 (2) SACR 56 (C) at 63*d-e*: 'Where a suspended sentence is put into operation the decision so to do is not subject to automatic review nor is it appealable. The only way that the decision can be struck down is on review.' The Supreme Court of Appeal revisited this view in *Stow v Regional Magistrate, Port Elizabeth NO &Others* 2019 (1) SACR 487 (SCA). It is important to consider this judgment in detail.

The judgment in *Stow*
The facts and proceedings
The appellants (Stow and Meyer, respectively) had been convicted in two different cases of white-collar crime and each sentenced to five years' imprisonment, fully suspended on condition, inter alia, that they repay 'the monies to the complainants' (at para [1]). They failed to make the required payments, and the enforcement courts, both regional courts, put the suspended sentences into operation (at para [1]). The appellants sought to have these orders reviewed by the Eastern Cape High Court. This court consolidated the two cases, and gave one judgment upholding the regional courts' orders (at para [2]).
The appellants appealed to the Supreme Court of Appeal, which delivered two judgments: the first was authored by Nicholls and Carelse AJJA (Seriti and Zondi JJA concurring) and the second, a supplementary judgment, by Ponnan JA (with all four other judges concurring).
The first judgment provides the relevant facts. Briefly, they are as follows. Stow had failed to pay value-added tax to the South African Revenue Service for his closed corporation. He pleaded guilty, admitting to an amount of about R406 000 being involved, and was convicted and sentenced as indicated above. The relevant condition ordered him to repay R513 060 at a minimum of R10 357 per month, from 1

Aug 2011, until the full amount had been paid (at para [7]). He immediately fell behind, and in November 2011 successfully approached the court to have the repayment amounts reduced to R6 000 per month. He made a final payment of R5 600 in February 2012, having paid some R38 000 (at paras [8] - [9]). In June 2013 the State successfully applied for the suspended sentence to be put into operation. The first judgment responded as follows (at para [12]):

'The provisions of s 297(7) and (9) circumscribe the regional court's power – there were two avenues available to it. The court could either further suspend the sentence subject to the same conditions or other conditions that could have been imposed at the time of the original sentence, or to put the sentence into operation. In its discretion, the regional court chose the latter. It believed, with justification, that a further suspension in the circumstances would be pointless.'

As the court a quo could not be faulted for declining to interfere with the regional court's decision to put the suspended sentence into operation, the SCA held that Stow's appeal must fail (at para [13]). Incidentally, the observation above that there are 'two avenues available' to the enforcement court should be qualified by pointing out that a third option is also available, namely to do nothing (cf *S v Peskin* 1997 (2) SACR 460 (C) 464*h*).

The position of the other appellant, Meyer, was different in several respects. The details of the offences are not essential for current purposes, and it is enough to state that he was sentenced to imprisonment, suspended on condition that he pay R5 300 000 to 116 investors, plus 1,25 percent interest per month. He complied with this order from June 2006, defaulting for the first time some three years later. The State applied for his suspended sentence to be put into operation on 29 Sep 2009 (at paras [15]-[16]). He had paid at least R3 100 000 to the complainants (at para [19]). However, the suspended sentence was put into operation and the appeal to the high court was unsuccessful. The SCA noted (at para [20]) that, 'The court a quo held that the regional court was correct in finding that Mr Meyer's breach of his condition of suspension was not beyond his control, or for any good and sufficient reason'. It further held (at para [21] that there was 'no reason warranting interference by this Court with the conclusion by the court a quo. The appeal must accordingly fail.'

Having effectively dealt with the appeals, the first judgment then deals with the question whether the correct means of recourse for parties in the appellants' position was to take the matter on appeal or on review. It noted the position taken in the previous cases, that 'the putting into operation of a suspended sentence has generally been challenged by way of review rather than appeal' (at para [26]). It then concluded that there was no reason why the phrase 'resultant sentence' in s 309(1)(a) of the Criminal Procedure Act 'should not be more expansively interpreted to encompass the putting into operation of a suspended sentence. It is a consequence of the resultant sentence in the broader sense' (at para [32]). Not only does s 309(1)*(a)* not prohibit an appeal against a decision to put a suspended sentence into operation' but, the court held, 'It is clearly in the interests of justice that a person be afforded the right to challenge a decision to put a suspended sentence into operation' (at para [33]). Therefore, the earlier position 'is no longer tenable'

(ibid). In confirming the difference between review and appeal, the court noted that, 'Such challenge is invariably on the basis of a court wrongly exercising its discretion. This can never be a ground for review' (ibid). The correct means to challenge an order to put a suspended sentence into operation is, therefore, an appeal.

In his judgment, Ponnan JA provided a little more background about the 'former view', which was based on an interpretation of s 309 of the Criminal Procedure Act (and its predecessor, s 103 of the Magistrates' Court Act 32 of 1944). He provided an example of this interpretation, from *Gasa v Regional Magistrate for the Regional Division of Natal* 1979 (4) SA 729 (N) at 731. Hefer J concluded in *Gasa* that a 'resultant order' is 'an order made as a result of the conviction', and continued that, although putting a suspended sentence into operation 'follows upon a conviction, … it is not the result thereof; it is the result of non-compliance with the conditions of suspension . . . and for that reason it is still not appealable'. This view has been criticised in a few more recent judgments, inter alia in *S v S* 1999 (1) SACR 608 (W), where Nugent J noted that these decisions 'were not based upon a principled objection to the appealability of such a decision' (cf also Ponnan JA at para [39]). Ponnan JA essentially repeated this finding in the following statement (at para [40]):

'I must confess to having some difficulty as to why a sentence, when subsequently put into operation, is not to be regarded as a "resultant sentence" within the meaning of that expression. There is no gainsaying that the sentence results from the conviction. That the operation of the sentence is suspended on certain conditions does not alter the fact that it resulted from the conviction. It is so that it only comes to be put into operation as a result of non-compliance with the conditions of suspension, but that hardly alters the fact that the sentence resulted from the conviction. That the sentence only becomes operative upon the breach of a condition and consequently that there is a delay in the implementation of the sentence matters not. But for the conviction there can be no sentence to speak of.'

There can be no doubt that the sentence, as imposed by the trial court, is a sentence that results from the conviction. It is true that this sentence could not have been imposed if, first and foremost, the offender had not been convicted.

To make this practical, let us consider 'the sentence' that was imposed in Meyer's case. The trial court imposed 'a fine of R100 000 or 400 days' imprisonment and a further five years' imprisonment, which was suspended for a period of five years on condition that…' (at para [15]). If Meyer appealed against this sentence, in accordance with s 309, there would be no doubt that this full sentence was 'the resultant sentence', in other words, the sentence that resulted from the conviction. However, we know that this sentence was *not* the object of the SCA's judgment in *Stow*. Not even the fully suspended five years' imprisonment, by itself, was the object of the court's judgment—the court never even asked the question whether five years' imprisonment was appropriate, never mind considering an answer to that question. What *was* the object of the judgment, was the *putting into operation* of the five years' imprisonment. In other words, this matter involved at least two 'sentences': the fully suspended five years' imprisonment and, because the suspensive conditions had been breached, the effective five years' imprisonment. Therefore, if Ponnan JA's

argument is followed to its logical conclusion, there must be at least *two* 'resultant sentences' whenever a trial court imposes a suspended sentence and that sentence is subsequently put into operation.

From this point, the second judgment continues by again noting the differences, in principle, between reviews of and appeals against decisions of lower courts (at paras [41]-[42]). It notes that 'there are strong policy considerations in favour of an appeal' (at para [43]). *Gasa* (supra) is an example of a case where the accused had effectively been left without a remedy because he could not appeal, despite that being the correct remedy, and he could also not convince the court that the requirements for a review had been complied with. The crux of the matter is that now, under the Constitution, things should be different, as explained by Ponnan JA (at para [44]):

'In any event, whatever the position might have been at the time those cases were decided, we are now enjoined by s 39(2) of the Constitution to "promote the spirit, purport and objects of the Bill of Rights". In terms of s 35(3) thereof every accused person is entitled to a fair trial, which includes the right of "appeal to, or review by, a higher Court". In my view, construing the provision as conferring no more than a rather limited review, renders the full realisation of the s 35(3) right illusory.'

In addition, he wrote (at para [46]), 'It would be unconscionable if a decision of that nature could be made capriciously, and a higher court could not provide redress by way of appeal' and 'the "justice of the end result" is better served by construing the provision as permitting a right of appeal, as opposed to denying it'.

In between these two statements, at para [45], Ponnan JA quotes a considerable portion of the judgment by Van Rooyen AJ in *S v Sekotlong* 2005 JDR 0190 (T) at para [4] – [5]. This quote starts with, 'I do not have the slightest doubt that this Court is entitled and in fact duty bound to consider the appeal of the appellant. I do not regard the setting into operation of a suspended sentence by a court as a mere administrative or quasi administrative function.' The rest of the quote deals with principles of sentencing and the role of the enforcement court. Ponnan JA quoted the whole of paras [4]–[5] from *Sekotlong*, without commenting on that part of the judgment unrelated to the issue whether the appropriate remedy is appeal or review. Since the legal question that the Supreme Court of Appeal had to answer in *Stow* was whether an appeal against the order to put the suspended sentences were permissible, and it had answered this in the positive, it did not need to quote these additional aspects from *Sekotlong*, which must be seen as obiter dictum. There is no indication from any of the two judgments that the parties to the case addressed the SCA on how the second court should approach its role.

It is important to consider the rest of the quote in *Sekotlong* in *Stow* at para [45], because in *Moroe v Director of Public Prosecutions, Free State & Another* 2022 (1) SACR 264 (FB) the high court used this quote as Supreme Court of Appeal authority about the role of the second, or enforcement, court.

The judgment in *Sekotlong*

After the initial statement that has been noted above, the judgment in *Sekotlong* at para [4] – [5] continues as follows:

'Punishment is an inherent element of the criminal process and where a court orders that a suspended sentence be made operational, it assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of punishment and cannot simply have a person imprisoned as would a clerk keeping a register. When the liberty of a person is at stake, grounds must exist before such liberty is taken away. In fact, to my mind, the second court is nothing else than an extension of the trial court when it considers putting a suspended sentence into operation … In deciding whether to order that a suspended sentence should become operational, the court must have regard to the ordinary principles of punishment."

Several elements of this statement are worthy of careful assessment.

- 'Punishment is an inherent element of the criminal process…'. Taken literally, this statement is problematic. While punishment is a central feature in criminal law, it only becomes relevant to the 'criminal process' once the accused has been convicted. Since conviction is not a guarantee of the 'criminal process', punishment cannot be central to the criminal process.
- [The second court] '…assumes the position of a criminal court which punishes the person who has been convicted'. Although earlier cases held that the hearing regarding the breach of suspensive conditions is not a criminal *trial*, it would be irrational to describe the second court as anything but a criminal court. However, it does not completely assume the position of a court that punishes the convicted person. For example, it does not give the prosecution another opportunity to prove the accused's previous convictions; it cannot impose a new sentence, as if the offender has not been sentenced for the same crime before.
- [The second court] must 'have regard to the ordinary principles of punishment…'. The same sentiment has been expressed before, as noted in Part I (cf *S v Hoffman* 1992 (2) SACR 56 (C) at 63*c*; Kruger *Hiemstra's Criminal Procedure* (updated to 2022, SI 15) at 28-88 – 28-89). But what are these 'ordinary principles of punishment'? Normally, when reference is made to these principles, one would immediately think of the triad of considerations from *S v Zinn* 1969 1969 (2) SA 537 (A) at 540G-H: 'What has to be considered is the triad consisting of the crime, the offender and the interests of society'. In addition, one would tend to add the well-known purposes of punishment. It remains unclear whether these are the principles the court had in mind.
- [The second court] 'cannot simply have a person imprisoned as would a clerk keeping a register'. This statement is correct and one of the aspects of the 'fully-fledged exercise of judicial discretion' (Kruger *Hiemstra's Criminal*

Procedure (updated to 2022, SI 15) 28-88; see Part I) about which there can be no doubt.

- 'When the liberty of a person is at stake, grounds must exist before such liberty is taken away'. Again, this statement is undeniable.
- '…the second court is nothing else than an extension of the trial court when it considers putting a suspended sentence into operation'. This is probably the correct view to take, although I have not been able to find other authority for this statement, and it is not normally described in this manner. But it is exactly as this extension of the trial court that it would be problematic for the second court to 'have regard to the ordinary principles of punishment', as if the trial court had failed to do so. It could not change the sentence imposed by the trial court, because the trial court itself does not have that authority (except for an immediate correction as provided for in s 298).

This contribution returns to some of the issues below. First, it is necessary to consider the *Moroe* case.

The judgment in *Moroe*

In *Moroe v Director of Public Prosecutions, Free State & Another* 2022 (1) SACR 264 (FB) the court (per Opperman J, Musi JP concurring) referred to the judgment in *Stow*, not only as authority that orders to put a suspended sentence into operation are appealable, but also as authority about the role of the enforcement court. Regarding the latter, it provided the following summary of relevant principles (at para [12]; emphasis added):

'The Supreme Court of Appeal *declared* on 12 December 2018 that the putting into operation of a suspended sentence is an inherent element of the criminal process and, where a court orders that a suspended sentence be made operational, it assumes the position of a criminal court which punishes the person who has been convicted. It has to have regard to the ordinary principles of punishment and cannot simply have a person imprisoned as would a clerk keeping a register."

Incidentally, the authority for this summary is paragraph [45] in *Stow*, which contains, as noted above, the quote from *Sekotlong*. In other words, not only was this part of *Stow* not directly on point, but it also does not contain any *declaration* by the Supreme Court of Appeal. Of course, when an appeal court quotes another judgment, those quoted words are incorporated to a certain extent into the appeal court's judgment, but this still does not justify the statement that the Supreme Court of Appeal made this *declaration*.

The court in *Moroe* then summarised what an enforcement court needs to consider before putting into operation a suspended sentence (at para [16]). Importantly, the process '*is not a mere formality, but entails a fully fledged exercise of judicial discretion* [which] … *requires as much consideration and judicial discretion as the imposition of sentence*' (at paras [16.2], [16.6]). Important points that must be considered are 'the issues listed in ss (7) and (9), respectively' (at para [16.6]); the 'circumstances of the precipitating non-compliance' — for example, in case of 'a

trivial or merely technical breach, a heavy suspended sentence should not be put into operation because of it' (at para [16. 4]); events that took place since imposition of the suspensive condition must be considered and, 'If implementation will no longer serve any substantial deterrent or reformatory purpose, it should not be ordered (*S v Hendricks* 1991 (2) SACR 341 (C) at 346*d* – *g*) (at para [16.5]). These considerations require no further comment.

The court also noted that, 'The first aim of a condition of suspension is to keep the convicted person out of prison' (at para [16.1]). It is important that the enforcement court reminds itself why the trial court imposed a suspended sentence in the first place. Of course, apart from the stated 'first aim', individual deterrence would usually have been another aim of the suspended sentence. In fact, this is usually the 'overriding purpose' (Terblanche *A guide to sentencing in South Africa* (2016) 406 and the authority provided in fn 49).

The most problematic item in the list of considerations read as follows (emphasis in the original):

'[16.3] *In certain respects, the consideration of implementation requires even more careful consideration than the original imposition of sentence.* In the first place, the original trial and the reasonableness of the relevant condition of suspension, which possibly was imposed by another judicial officer of equal status, must be assessed afresh. If the condition was ab initio unreasonable, the sentence should not be put into operation.'

This statement and its competing considerations are addressed next.

Competing considerations

There are many competing considerations here.

The first is that the offender has the right to a fair trial. One could argue, based on earlier authority, that the putting into operation is not part of the criminal trial, which has earlier been completed with the imposition of the (suspended) sentence. However, this is a weak argument, especially when the suspended sentence amounts to imprisonment, which impacts the right to liberty. It is inconceivable that the putting into operation of a suspended sentence could, somehow, fall outside the protection afforded by the right to a fair trial.

The second consideration is that the right to a fair trial, and by implication the right to a fair sentence, also extends to society (and the prosecution as representative of 'the people'). The benefit of a suspended sentence is not only to keep the offender out of prison but also to do so when imprisonment would not be in the interests of society, in the sense that there are not sufficient reasons to burden society with the cost of imprisonment. The other important aim of a suspended sentence is to deter the offender, and it is clearly in the interest of society not to be subjected to crime again.

The third consideration is that trial courts are functus officio once they have made a decision, unless the law provides a clear exception. A court has no inherent power to change a valid judgment, and the same applies when the judgment involves the sentence (Kruger op cit 28-91; *S v Swartz* 1991 (2) SACR 502 (NC) at 504*b* and the cases quoted there). Normally, once a magistrate has imposed a sentence, only a

high court may amend it on review or appeal (*S v Motuko* 2006 (1) SACR 264 (Ck) at para [4]). There is a true exception to this principle in s 276A(3) of the Criminal Procedure Act: according to Kruger 28-41, it 'breaks away from the rule that a court is functus officio after the imposition of sentence. It prescribes a very special procedure' (see also Terblanche op cit 262). Section 276A(3) provides that the Commissioner of Correctional Service may, in limited circumstances, request the sentencing court to reconsider the sentence of imprisonment that it imposed earlier. The Criminal Procedure Act also provides for the reconsideration of a sentence of correctional supervision (s 276A(4)) and reconsideration of declaration as a dangerous criminal (s 286B). In each instance, not only is the exceptional nature of these procedures generally acknowledged, but the law is quite clear about the considerations that give rise to the exception and the processes that must be followed. There are no equivalent procedures in s 297.

The Criminal Procedure Act contains a few other provisions that might appear to provide for exceptions to the functus-officio principle. For example, s 298 provides for the trial court to correct a 'wrong sentence'; but this provision is restrictively interpreted (*S v Smit* 1993 (1) SACR 540 (C) at 542*d–f*). Section 275 permits a judicial officer, other than the one convicting the offender, to impose sentence. This is only permitted once the next judicial officer has considered the case record, but this is not 'the exercise of a quasi review power or any reflection on the predecessor' (Kruger op cit 28-12 — 28-13; *S v Lukele* 1978 (4) SA 450 (T) at 454D–H).

The fourth consideration is that lower courts are not courts of review or appeal. They are 'creatures of statute and have no jurisdiction beyond that granted by the Magistrates' Courts Act and other relevant statutes' (*S v Ndlovu* 2017 (2) SACR 305 (CC) at para [41]). When a judgment such as *Moroe* (at para [16.3]) states that the enforcement court must assess afresh 'the original trial and the reasonableness of the relevant condition of suspension', it difficult to ignore that this is, effectively, a demand that it reviews the original sentence. Although, technically, the demand appears to be limited to the reasonableness of the suspensive condition, it is not possible to perform this assessment without the context of the full sentence. In addition, enforcement courts would be expected to express an opinion about the reasonableness of another sentence without access to the original record. Not even the high courts as 'real' courts of appeal or review are expected to blindly express opinions in this regard. The Criminal Procedure Act and the Uniform Rules of Court contain copious provisions ensuring access to the record of the original trial and judgment for the courts of review (ss 303) or appeal (ss 309). There is nothing of this kind in s 297. Even when the high courts have considered the trial record, they are expected to be slow in interfering with the judgments and orders of the trial courts. As summarised in Du Toit et al *Commentary on the Criminal Procedure Act* (RS 69, 2022) at 30-42A: 'A court of appeal will approach sentence as follows: The sentence will not be altered unless it is held that no reasonable court ought to have imposed such a sentence, or that the sentence is totally out of proportion to the gravity or magnitude of the offence, or that the sentence evokes a feeling of shock or outrage, or that the sentence is grossly excessive or insufficient, or that the trial judge had not

exercised his discretion properly, or that it was in the interest of justice to alter it (*S v Malgas* 2001 (1) SACR 469 (SCA) at [12] …)'.

Conclusion

In short, then, many questions remain about the full impact of judgments like *Stow v Regional Magistrate, Port Elizabeth NO and Others* 2019 (1) SACR 487 (SCA), *S v Sekotlong* 2005 JDR 0190 (T) and *Moroe v Director of Public Prosecutions, Free State & Another* 2022 (1) SACR 264 (FB). It is submitted that these judgments have not considered all the complications of a situation where enforcement courts are expected to effectively review the sentences of their colleagues, nor how this position fits with other important principles related to the rule of law.

Stephan Terblanche
Honorary Professor: University of KwaZulu-Natal

Matters of Interest to Magistrates

Protection of asylum seekers and of children facing lifelong statelessness highlighted in two significant South African decisions – case note extracts

22 June 2023 by Ghati_Nyehita

Asylum seekers face huge obstacles trying to reach a country that can offer them refuge. One of their greatest challenges is the risk of detention on arrival because their entry to the country is unauthorised. Now a landmark judgment reinforces protection of asylum seekers and respect for their right to seek and enjoy asylum even if they are in the country unlawfully, while the state's responsibility in cases of statelessness, another major problem for refugees, is considered in a second decision.

Asylum seekers face numerous obstacles as they strive to reach a country that can offer them refuge. One of the greatest challenges they encounter is the risk of detention upon their arrival. This is because they often enter countries through unauthorized means like using false documentation, entering without proper authorization, and relying on smugglers to assist them.

International instruments like the 1951 Refugee Convention emphasize that detention should only be used when necessary for administrative purposes. These instruments also stress that asylum seekers should not face penalties for illegal entry or presence without regard to the merits of their claims to be refugees.
The United Nations, the Working Group on Arbitrary Detention and the Office of the High Commissioner for Refugees recommend that governments should consider the possibility of progressively abolishing immigration detention. Examples of alternatives to detention include surrender of documents, sureties, reporting requirements, community supervision, designated residence, electronic monitoring, phone reporting and home curfew.

S A v Minister of Home Affairs and Another; S J v Minister of Home Affairs and Another; B I v Minister of Home Affairs and Another (A5053/2021; A5054/2021; A5055/2021) [2023] ZAGPJHC 178 (14 March 2023)

Intention
In this recent landmark judgment, the High Court of South Africa, Gauteng Division, Johannesburg, examined the scope of the principle of non-refoulement and interpreted the 2020 amendments to the Refugee Act and its Regulations. The court specifically focused on the provisions (sections 4 and 21 of the Refugee Act, 1998 and Regulations 8(3) and (4) of the Refugees Regulations, 2018, GN R. 1707 GG 42932, 1 January 2020) that regulate the authority of the State to continue detaining illegal foreigners, under section 34 of the Immigration Act, 2002 when they indicate an intention to seek asylum.

Public interest
This was an appeal against a judgment that refused to order the release of three illegal foreigners, who were being held in detention according to section 34 of the Immigration Act and had expressed a desire to apply for asylum. The foreigners were released long ago, and the case was resolved in relation to their personal interests. The matter was heard because public interest required the clarification of the effect of the 2020 amendments to the Refugees Act and its Regulations. Particularly, as regards to whether the detention of illegal foreigners under the Immigration Act extinguishes when they indicate an intention to apply for asylum and the procedure for making an asylum application.

Analysis
The court interpreted the right to seek and enjoy asylum in relation to asylum seekers who are in the country unlawfully as "illegal foreigners”.
The court dealt with the interplay of the Immigration Act and the Refugees Act. It was guided by the decisions of the Constitutional Court in *Ruta v Minister of Home Affairs, Abore v Minister of Home Affairs and Another* which interpreted the application of the principle of non-refoulement before and after the 2020 amendments to the Refugees Act and its regulations.

These decisions held, amongst other things, that the right to seek asylum goes beyond the procedural right to lodge an application for asylum – although this is an important component of the right. The decisions noted that the Immigration Act should be read in harmony with the Refugees Act. Although an asylum seeker is in the country unlawfully as an “illegal foreigner”, they enjoy the right to seek and enjoy asylum once they indicate an intention to apply for asylum. The right applies for as long as the claim to refugee status has not been rejected after a proper procedure. Section 2 of the Refugees Act captures the protection of refugees and asylum seekers under the principle of non-refoulement and should prevail when there is a conflict with other provision(s) in the Refugee Act or other laws.
The court interpreted the 2020 amendments and summed them as follows:
The detention of “illegal foreigners” under section 34 of the Immigration Act should cease when the application of the Refugee Act is triggered by an indication of an intention to apply for asylum, not by a formal application being submitted. Further, that the enquiry into good cause referred to in Regulation 8(3) of the Refugee Regulations is not a precondition for making an application for asylum and must be read as part of the overall enquiry to facilitate the application. Finally, the court declared Regulation 8(4) to be *ultravires* (made beyond powers) for introducing a requirement that cannot be found in the Refugees Act. Regulation 8(4) seeks to limit the right to seek asylum by empowering a judicial officer to require a foreigner who appears before court and indicates an intention to seek asylum to show good cause. Therefore, it conflicts with section 2 of the Refugees Act and must be ignored or read *pro non scripto.*

Decision
The appeal was upheld, and the court ordered the respondents to bear the costs of the applicants including the costs of two counsel where so employed. The costs ordered included the costs of the initial applications, the applications for leave to appeal, the application to waive security and the appeal. The costs were on the scale as between party and party.

Relevance and practical implications
This decision has significant implications for asylum seekers who find themselves in the country unlawfully. The court confirmed that the principle of non-refoulement is broad and protects asylum seekers for as long as the claim to refugee status has not been finally rejected after a proper procedure. It emphasized that the right to seek asylum extends beyond the mere procedural aspect of submitting an application and applies once an intention to seek asylum is indicated. This ensures that asylum seekers, despite their unlawful presence, are entitled to pursue protection.
Furthermore, the court's clarification on the interplay between the Immigration Act and the Refugees Act underscores the need for harmonious interpretation. By recognizing that the Refugees Act takes precedence in cases of conflict, the judgment reinforces the primacy of refugee protection principles.

The judgment establishes that the detention of "illegal foreigners" should cease when the Refugee Act is triggered by an intention to apply for asylum, rather than waiting for a formal application. This helps prevent unnecessary and prolonged detention of asylum seekers, allowing them to access the protection process more promptly.
Additionally, the court's declaration of Regulation 8(4) as ultra vires is crucial. By eliminating the requirement for asylum seekers to show good cause before seeking asylum, the judgment upholds the right to seek asylum without undue burdens or restrictions.
Overall, this landmark judgment reinforces the protection of asylum seekers, ensuring that their right to seek and enjoy asylum is respected, even if they are in the country unlawfully. It also highlights the need for a fair and streamlined asylum process, promoting efficiency and safeguarding the fundamental rights of those in need of international protection.

Childhood statelessness in South Africa

Stateless asylum seekers and illegal immigrants or their children often encounter difficulties in proving their identity and nationality, which can hinder the asylum process and lead to protracted legal battles and prolonged periods of uncertainty. Their lack of citizenship can affect their ability to access legal protection, travel documents, employment, education, healthcare, and other essential services.
By recognizing the intersecting challenges faced by stateless individuals and asylum seekers, governments and the international community can work towards developing inclusive policies and practices that promote the protection and inclusion of all individuals, regardless of their citizenship status.

Khoza v Minister of Home Affairs and Another (6700/2022) [2023] ZAGPPHC 93 (27 February 2023) determined the status of a child born in South Africa of a mother who was an irregular immigrant and an unknown father.

Summary

The applicant (Mr. Khoza), was a stateless person born in South Africa and had lived in the country his entire life. The applicant had made numerous attempts to register his birth from 2013 to 2023 but was denied assistance from the Department of Home Affairs. The applicant became an orphan at the age of six and had no official documents of his time/place of birth.
Despite the findings of one of the Department’s own officials (that Mr. Khoza was, in fact, born in the South Africa and had no other citizenship in any other country), the Department continuously refused to assist Mr. Khoza with his application for registration of his birth. The Department’s claims that the evidence provided by Mr. Khoza is insufficient were denied by the court, which ruled that due to the applicant’s circumstances, it is not for him to prove his birth and citizenship beyond any doubt.

Analysis

In determining whether the respondents' disputes were real, genuine and *bona fide*, the court applied the principles laid out in the cases of Plascon-Evans (the Plascon-Evans Rule) and "Wightman". The court found that the respondents disputes were far-fetched, consisted of "bald denials" and created fictitious standards of proof.
Late registration of birth – The court relied on the 1954 UN Convention: Statelessness, the Births and Death Registration Act 51 of 1992 (the "BDRA"), as well as the evidence before the Court and the investigation done by the Department. Since the applicant's guardians were illegal foreigners who lived in an informal settlement at the time of his birth, the court found that it is highly likely that the applicant was born at home – which explains the lack of hospital records. The court was satisfied with the findings that Mr. Khoza was born in South Africa.
Citizenship by Birth/Naturalisation – The court dealt with sections 2(2) and 4(3) of the Citizenship Act, 1995. Since it was already determined by the court that Mr. Khoza's birth must be registered in terms of the BDRA and from the evidence before the court, the court found that all requirements set out under the provisions were satisfied. The court ruled that citizenship by naturalisation should be conferred upon the Applicant in the alternative to section 2(2) of the Citizenship Act, 1995.
Regulations of the Citizenship Act – The court ordered the Minister of Home Affairs to accept applications in terms of section 2(2) of the Citizenship Act on affidavit pending the promulgation of the abovementioned regulations.

Decision
From the evidence and the investigation by the Department, the court was satisfied that Mr Khoza was born in South Africa. The application was successful, and the court ordered the respondents to:
· Register the applicant's birth.
· Declare the applicant to be a South African citizen (by birth, or alternatively, by naturalisation).
· Enter the applicant into the National Population Register as a citizen.
· Pay the costs of this application on an attorney and client scale, jointly and severally, the one to pay the other to be absolved - costs will include the costs consequent upon the employment of two counsel.

Relevance and practical implication
The court's reliance on the 1954 UN Convention on Statelessness and the Births and Death Registration Act of 1992 (BDRA) in the case of late registration of birth, highlights the importance of ensuring legal recognition and protection for individuals who are born in circumstances where their births were not registered promptly. The court's decision establishes the significance of rectifying such registration delays and acknowledges the difficulties faced by individuals in providing documentation, particularly when born at home or in informal settlements without access to hospital records. This case sets a precedent for similar situations and emphasizes the obligation of the state to protect the rights of individuals in vulnerable circumstances, such as stateless individuals.

This decision also clarifies the legal provisions surrounding citizenship in similar cases. The court's consideration of sections 2(2) and 4(3) of the Citizenship Act of 1995 addresses the issue of Mr. Khoza's citizenship status and underscores the importance of determining citizenship based on birth or naturalization criteria.
The court's order for the Minister of Home Affairs to accept applications under section 2(2) of the Citizenship Act on affidavit, pending the promulgation of regulations, allows individuals in similar situations to apply for citizenship through an affidavit. Thus, it provides a temporary solution until the regulations are put in place.
Overall, this case summary highlights the importance of birth registration, citizenship determination, and the adaptation of regulations to address specific circumstances. It reinforces the legal protections afforded to individuals in vulnerable situations, sets precedents for future cases, and emphasizes the state's responsibility to ensure the recognition of individuals' rights, including their citizenship status.

(The above post appeared on the *AfricanLII* website on 22 June 2023).

A Last Thought

"[1] On Friday, 26 May 2023 when the indictment was read to you and you tendered your plea to it, I saw standing before me four innocent men. Men accused of wrongdoing, but innocent, nonetheless, at that stage. That is no longer the case. Twenty days later, those four innocent men have been replaced by four convicted criminals. You are no longer to be viewed as being ordinary members of society but you are now forever marked as being part of that group of people that believes that the laws that govern the majority of us are not applicable to themselves. The benefits and privileges that you have enjoyed as free citizens of this young democracy are to be taken away from you because you have not respected society's laws and conventions.

[2] These may sound like harsh, condemnatory words, but in truth they are not. They merely describe what must now follow upon a conviction for serious criminal activity. Let me pull no punches: what you have been convicted of is, indeed, serious criminal activity. You used firearms to commit a robbery in a shop in a

shopping mall, you fired indiscriminately and extensively at members of the SAPS and attempted to kill them with those firearms. Criminal activity is all pervasive in our society. Right thinking, law abiding members of the community are outraged by people such as yourselves who think they are entitled to simply do, and take, what they want, irrespective of other people's rights. There is a feeling in the community that crime is out of control. There is a feeling in the community that crime does pay, despite the old adage that it does not. The courts are viewed as the last bastion in the fight against such unlawful behaviour and, as Ms Ntsele correctly argued, the community looks to the courts to impose sentences that will both punish those who commit such criminal activity and deter those who are contemplating committing such criminal activity.

[3] That having been said, and whilst I must now acknowledge you as criminals, I must not lose sight of the fact that while you are criminals, you are also human beings. That means that you are not perfect, for no human is a perfect being. Human beings from time to time will make mistakes. I also do not lose sight of the fact that I am sentencing you in a South Africa that is very different to the historic South Africa from which we come. We see things differently now, thankfully. We are much more cognisant of each other as human beings and we respect the inherent dignity that all human beings must be afforded. We thus continue to strive to acknowledge, respect and honour our humanity, even when imposing sentences on criminals.

[4] One of the building blocks of our new society is the principal of ubuntu. Ubuntu can loosely be defined as a fundamental African value embracing dignity, human interdependence, respect, neighbourly love and concern. In *S v Mankwanyane*, the Constitutional Court recognised this principal as one of the values underpinning the Constitution when dealing with the question of criminal punishment. The Interim Constitution also incorporated the concept of ubuntu from traditional jurisprudence. In *Mankwanyane*, six of eleven judges identified ubuntu as being a key constitutional value that:

'. . . places some emphasis on communality and on the independence and on the interdependence of the members of a community. It recognises a person's status as a human being entitled to unconditional respect, dignity, value and acceptance . . . The person has a corresponding duty to give the same. . .'

[5] The Constitutional Court has made several allusions to ubuntu being one of the core constitutional values of human dignity, equality and freedom. Though ubuntu is not specifically mentioned in the final Constitution, it remains part of our jurisprudence.

In *Port Elizabeth Municipality v Various Occupiers*,[3] Sachs J said:

‘The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the needs for human interdependence, respect and concern.’

I shall attempt to infuse the sentences that I must impose upon you with as much ubuntu as possible. But while the lofty principles referred to in the cases that I have just mentioned demonstrate what we strive for, our understanding of ubuntu also serves as a mirror to show us the extent to which you, personally, have failed to embrace and apply that philosophy. This is revealed in the disrespectful and despicable way that you treated those people whom you found inside the store. Ms Ntsele for the State correctly remarked that your legal representatives requested the court to show you mercy when you showed none to the victims of your crimes. You shall not be treated in the manner that you treated your victims for if that did occur then this court would be no better than you. But you must appreciate that your conduct will call for a very severe sentence.”

Per Mossop J in S v Gumbi and Others (Sentence) (CC24/2023) [2023] ZAKZPHC 65 (15 June 2023)