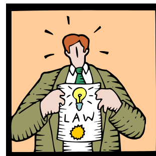
# e-MANTSHI

A KZNJETCOM Newsletter

**August 2023: Issue 199**

Welcome to the hundredth and ninety ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.




## New Legislation

1. The Rules Board for Courts of Law ("Rules Board") is considering amending item 5(b) of the Tariff in Uniform Rule 68 and item 2(c)(i) of Table C (Part II) of Annexure 2 to the Magistrates' Courts Rules that deals with the tariffs for ejectment for sheriffs.
The proposed amendments that are being considered arise from a representation received wherein a role-player indicated that the tariff fee for sheriffs for ejectment proceedings is not adequate.
The Rules Board has considered the tariff fees for ejectment in relation to the activities associated therewith and proposes amended tariff fees, calculated using an estimation of the time expended on the activities associated with an ejectment, together with an appropriate tariff fee. The Rules Board is proposing for the fee for ejectment, a time based flat rate for the first hour and thereafter a lower half-hourly rate for both the High Court and Magistrates' Courts.

The tariff fee proposed for sheriffs for an ejectment in the Magistrates' Courts has not been harmonized with the fee proposed for ejectment in the tariff in Uniform Rule 68 as it was considered that the adjustment would be too drastic and would negatively affect access to justice for end-users.

**Comments and inputs should be submitted to the Secretariat of the Rules Board by no later than 15 September 2023**

The proposed amendment can be accessed here:
https://www.justice.gov.za/rules_board/invite/20230816-RB-InviteToComment-MCR-URC68-TableC.pdf

2. The Rules Board for Courts of Law ("Rules Board") is considering amending Part II of Table C of Annexure 2 to the Magistrates' Courts Rules and Part II of Annexure 2 to the Small Claims Courts' Rules (tariffs for sheriffs).

The envisaged proposed amendments arise from a representation received from a role-player who proposes that the different fees per radius structure for service and execution in Part II of Table C of Annexure 2 to the Magistrates' Courts Rules should be done away with in favour of a single service fee, as is the case in Uniform Rule 68. The Rules Board is proposing a single service fee to be charged by the sheriffs for service and execution as well as for attempted service and attempted execution, in the Magistrates' Courts and Small Claims Courts.

**Comments and inputs should be submitted to the Secretariat of the Rules Board by no later than 15 September 2023**

The proposed amendment can be accessed here:
https://www.justice.gov.za/rules_board/invite/20230816-RB-InviteToComment-MCR-SCC.pdf

3. The South African Law Reform Commission (the Commission) has approved the Discussion Paper on Domestic Violence: the Criminal Law Response for publication. The discussion paper is preceded by an issue paper. The focus of this investigation is on an aspect which has not formed part of the recent review of the legal response to gender-based violence, namely the need for a specific domestic violence offence or offences and the related criminal law response. The Commission is of the preliminary view that it continues to be in the best interest of an adult survivor of domestic violence (who is not elderly or disabled) to be able to choose whether to engage a civil or criminal remedy, together or separately, or not at all. The Commission is further of the preliminary view that to ensure that the remedies provided to survivors of domestic violence are truly survivor led and survivor focused, it would require a broader approach than engaging the legal system on its own. It would arguably include different layers of societal intervention, including personalised risk assessment. The discussion paper highlights the necessity of prevention or early intervention, particularly in respect of certain acts of domestic violence. It emphasises that this stance is supported by research that domestic violence is primarily a social problem and that femicide is predictable and preventable as it is seldom the first act of violence, but instead the final act in a process of chronic domestic violence. The Commission is of the preliminary

view that a whole-of-society approach focusing on societal and normative change of deep-rooted harmful patriarchal views regarding women, which perpetuates inter-generational domestic violence, is needed. This approach requires a collaboration between government and civil society in respect of awareness raising, training and provision of remedies, in order to provide survivors of domestic violence with realisable avenues of exit from abusive relationships and to ensure the effective implementation of laws around domestic violence. This it believes is key to dismantling the structural drivers that lead to gender-based violence, which is core to achieving substantive equality. While recognising the recent amendments to the sentencing regime, the Commission is of the provisional view that sentencing of domestic violence offenders should be properly informed by the impact on the victim of domestic violence through detailed victim impact statements, that appropriate consideration should be given to relevant aggravating factors; and that the possibility of alternatives to sentencing which include interventions for the offender, and where suitable both the victim and offender should be considered. Respondents are requested to submit written comment or representations on the discussion paper to the Commission by no later than 30 October 2023.
The discussion paper can be accessed here:
https://www.justice.gov.za/salrc/dpapers/dp161-prj100-DV.pdf

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**Recent Court Cases**

**1. Van As v Additional Magistrate Cape Town Guendouz N.O and Others (18052/2022) [2023] ZAWCHC 170 (24 July 2023)**

| **The amendments to sections 59 and 59A of the CPA provide that neither the police nor prosecutor bail should be granted for an offence against a person in a domestic relationship as defined in the Domestic Violence Act, nor for a protection order issued in terms of this Act.** |
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**Ralarala, AJ**

**INTRODUCTION**

[1] This matter served before this court by way of review as contemplated in section 22 of the Superior Courts Act 10, of 2013 ("Superior Court Act"). The applicant approached this court, seeking an order to review and set aside the decision taken by the first respondent ("magistrate") on 15 September 2022. The review is pursuant to an order of the magistrate invoking the new provisions of the Criminal and Related Matters Amendment Act 12 of 2021, requiring that bail of an arrested person in domestic related offences only be determined by a court, as a result of which she revoked the applicant's release on warning.

[2] The notice of motion indicates that the applicant seeks an order declaring the decision of the magistrate dated 15 September 2022 as unlawful, unconstitutional and invalid. The applicant therefore requests this court to review and set aside:

- the Magistrate's decision to retain the applicant in custody;

- The decision to release the applicant on bail with conditions; and

- The decision to grant a final protection order and warrant of arrest against the applicant in favour of the fourth respondent under case no. D1373/2022 in the Cape Town Magistrate's Court.

- Declaring that the applicant's release on warning under Cape Town case number 13/0722/2022 remains extant.

- The second to third respondents pay the costs of this application jointly and severally.

- In the event of opposition from the fourth respondent shall jointly and severally with the second to third respondents pay the costs of this application.

[3] The application is not opposed by the respondents. The first, second, and third respondents filed notices of intention to abide by the decision of the court. The fourth respondent initially opposed the matter and filed her answering affidavit. However, on the eve of the date of hearing the fourth respondent filed a notice of intention to abide with the decision of the court and thus the matter is unopposed. It bears mentioning, however, that the said notice of intention to abide was filed along with an affidavit in response to the applicant's heads of argument, setting out or reiterating her opposition to the setting aside of the Domestic Violence Protection Order granted by the magistrate.

**FACTUAL BACKGROUND**

[4] It is necessary to sketch the events forming the background to the dispute.

In this matter, it is common cause that upon the applicant's arrest by the police on the assault charge, he [the applicant] was warned to appear in court on 15 September 2022. Consequently, on his first appearance before the magistrate on 15 September 2022, the applicant appeared on his own cognizance and with his own legal representative.

[5] Upon the applicant's appearance on warning, the prosecutor requested the magistrate to revoke his warning status and to remand him in custody. Pursuant to the request by the prosecutor, the magistrate revoked the applicant's warning status and he was taken into custody. The record reveals that the decision taken by the magistrate was based solely on the prosecutor's request. Moreover, the magistrate concluded that the process is permissible in terms of section 72A (read with section 68) of the Criminal Procedure Act 51 of 1977("the CPA") as amended by the Criminal and Related Matters Amendment Act 12 of 2021(" the Amendment Act "). The magistrate also determined that the offence the applicant was charged with, fell within the purview of schedule 5 of the CPA, thus a formal bail application was consequential.

[6] During the bail proceedings the prosecutor did not oppose the applicant's release on bail. However, the prosecutor requested that contingent to the release of the applicant on bail, a final Protection Order in terms of section 6 of the Domestic Violence Act 116 of 1998 ("the Domestic Violence Act"), as envisaged in the Amendment Act, should be issued against the applicant. The magistrate granted bail simultaneously with a final Protection Order.

[7] In the course of her ruling in respect of the cancellation of the applicant's release on warning, the magistrate stated:

*"The prosecution applies for the accused's warning to be revoked. The defence objects. Court is obliged to grant the application in terms of section 72A of Act 51 of 1977, as it was in the first instance unlawful for the police to release the accused. No provision for his release is made in the Act as it now stands since 5 August 2022."*

[8] The applicant and the fourth respondent were romantically involved. On 13 August 2022, they were together at the applicant's residence in Cape Town. An argument ensued between the two of them, the fourth respondent approached the police and reported a criminal case of assault against the applicant.

[9] On 22 August 2022, the applicant was contacted by the investigating officer in the matter advising him of the assault allegations levelled against him. The applicant attended the Cape Town Central Police station with his legal representative where he was formally charged with assault and subsequently released on warning.

[10] The Amendment Act came into operation on 5 August 2022. The purpose of the Act is to *inter alia* amend the CPA so as to further regulate the granting and the

cancellation of bail in domestic-related offences. It also seeks to regulate sentences in respect of offences that have been committed against vulnerable persons. This resulted in the amendment of the Criminal Law Amendment Act 105 of 1997. The extent and effects of the Amendment Act in relation to this matter will become apparent later in the judgment.

**THE APPLICANT'S SUBMISSIONS**

[11] It is averred by the applicant in his founding affidavit that, during the court proceedings the magistrate did not grant the applicant's attorney any opportunity to oppose the application to cancel the warning, save for noting an objection on behalf of the applicant. It is convenient at this stage to refer to the relevant passage of the proceedings:

"PROSECUTOR: The offence occurred in August.
COURT: On which date in August? Be specific.
PROSECUTOR: 13 August.
COURT: So that would be exactly eight days after the new amendment came into operation. Is that correct? So what is your application now in terms of section 72?
PROSECUTOR: Your Worship, we will have to … that will have to be set aside and then the matter will have to be placed now in terms of … a bail will have to be … the defence will have to apply for bail because now the offence is treated as a Schedule 5.
COURT: Mr Kay, that was a section 72A. I am obliged to keep your client in custody until a Schedule 5 bail application can be heard. Unless it can be heard right now, I will have to"

[12] According to the applicant, his legal representative indicated that he was objecting to the cancellation of his release on warning. The applicant further states in his affidavit that the magistrate merely noted his attorney's objection to the cancellation of the warning and did not afford his attorney the opportunity to present any further argument thereon or amplify the content of the objection.

[13] The applicant further draws this court to the interaction between his attorney and the magistrate that went as follows:
"MR KAY: Yes, Your Worship.
COURT: The prosecution applies for the warning to be revoked. I am noting that you are objecting.
MR KAY: Thank you, Your Worship.
COURT: But like I said, I am a creature of statute. I am obliged to grant the application and revoke the warning in terms of 72A, Act 51 of 1977, however, I would like to resolve the matter today.
MR KAY: Yes, Your Worship"

[14] To avoid imprisonment, it is contended that the applicant had to agree to his release on bail on condition that a final protection order in terms of section 6 of the Domestic Violence Act is granted by the Court. The applicant further avers that the magistrate enquired whether there was an existing protection order forming part of the evidence in the case docket, despite the fact that the fourth respondent had not obtained a protection order against the applicant at the time. The relevant part of the record is as follows:

*"Court: I will give you a chance to draft the affidavit. I mean it is your chance if you want to put your client on the stand and then the prosecutor may address me ex parte regarding the feelings of the complainant and then also if there is no Protection Order, interim protection or application for the protection order either in Paarl or here in town, then I would be obliged to make one today and unfortunately, this new law says a final order. So if you are going to object to the final order being made, well you know where your client will be, should the matter be postponed. However, just a heads up you can have that application rescinded tomorrow."*

[15] The magistrate cautioned that in the event the applicant was to request a rule *nisi* in respect of the Protection Order, that would necessitate a postponement in respect of the bail application, meaning that the applicant would be incarcerated pending the finalisation of the bail application. The defence attorney agreed to the final protection order being granted against the applicant on condition that the applicant be released. It is the applicant's assertion that he instructed his attorney to agree to the proposed bail conditions as he was presented with no choice, thus the agreement was under duress.

[16] Further, it is asserted that the fourth respondent not only did she not lodge an application for a Protection Order in terms of the Domestic Violence Act, but she was also absent from court during the bail application and proceedings for the final Protection Order. Thus, no evidence was presented either *viva voce*, or by way of a sworn affidavit in respect of the Protection Order inquiry. Consequently, the applicant was released on bail on the following conditions in line with the Protection Order:

- That the applicant is precluded from directly contacting the fourth respondent electronically or via acquaintances;

- Not to enter the fourth respondent's residence;

- Not to publish, distribute or display any sensitive or explicit content of the fourth respondent; and a warrant of arrest was authorized for the applicant's arrest, the execution of which was suspended subject to compliance with the terms of the Protection Order.

**THE GROUNDS OF REVIEW**

[17] In his founding affidavit, the applicant asserts that his grounds for review are premised on the principle of legality and sections 22(1) (a) and 22 (1) (c) of the Supreme Court Act 10 of 2013, and are set out as follows:

*"Grounds of review of the cancellation of warning*

*60. I respectfully submit that the magistrate thereby breached the constitutional principle of legality in two respects:*

*60.1 by failing to comply with the provisions of the Criminal Procedure Act, in breach of the obligation imposed on the judiciary in terms of s 8(1) of the Constitution; and*

*60.2 by infringing my right, in terms of s 12(1) (a) of the Bill of Rights, not to be deprived of his freedom arbitrarily or without just cause.*

*61. I respectfully submit that the magistrate further:*

*61.1. Had no jurisdiction to cancel my release on warning without evidence under oath being presented to her which satisfied the considerations contemplated in Section 68 of the Criminal Procedure Act; and*

*6.1.2 Committed a gross irregularity in the proceedings in failing to comply with section68 of the Criminal Procedure Act and in acting under the mistake of law as she considered herself bound to cancel my release on warning.*

*Grounds for review of the protection order*

*71.I respectfully submit that the magistrate thereby breached the constitutional principle of legality in two respects:*

*71.1 by failing to comply with the relevant provisions of the Criminal Procedure Act and the Domestic Violence Act, in breach of the obligation imposed on the judiciary in terms of section 8(1) of the Constitution; and*
*71.2 by infringing my right in terms of section 34 of the Bill of Right, not to have a fair hearing.*

*72. I respectfully submit that the magistrate further:*
*72.1 Had no jurisdiction to issue a final protection order in the absence of an application, or evidence tendered, for same; and*
*72.2 Committed a gross irregularity in the proceedings in failing to comply with Section 6 of the Domestic Violence Act."*

## SUBMISSIONS BY THE FOURTH RESPONDENT

[18] I have earlier indicated that even though the fourth respondent elected to abide by the decision of the court, she filed an affidavit relating to the cancellation of the domestic violence protection order. In her affidavit the fourth respondent, lamented her plight of lack of protection and vulnerability should the protection order be set aside. Ordinarily the fourth respondent was expected to file heads of argument and not an affidavit at this stage of the application proceedings. The court, however, is alert to the fact that she traversed the application unrepresented and therefore, some degree of benevolence has to be exercised by the court and pay consideration to the purpose, content and the context of the affidavit. See *Xinwa and Others v Volkswagen of South Africa(Pty)Ltd* (CCT3) [2003] ZACC7; 2003 (6) BCLR 13. On the day of the hearing of this application, the fourth respondent was not in attendance and we were advised that she had resolved to apply for another protection order against the applicant.

[19] As mentioned previously, the fourth respondent is not legally represented and she is not opposing the application as far as the procedure followed by the magistrate on the applicant's first court appearance is concerned. Her main contention is confined to the relief sought by the applicant in respect of setting aside the final Protection Order granted by the Magistrate on 15 September 2022 in terms of section 6 of the Domestic Violence Act.

[20] In her answering affidavit, the fourth respondent points out that she launched an application for a Domestic Violence Protection Order against the applicant on 16 August 2022, and an interim Protection Order was granted on the same date. According to her, this was preceded by the assault case that she had lodged against the applicant on 13 August 2022, at Paarl Police Station which was later transferred to Cape Town Police Station. As mentioned earlier, the concern raised by the fourth respondent revolves around the setting aside of the final protection order, which was granted during the bail proceedings, and the adverse effects thereof on her and her minor son, as she claims that she would be without any form of protection from the applicant.

## ANALYSIS AND APPLICABLE LEGISLATION

[21] To recap and with the risk of repetition, this review is grounded in the provisions of section 22 of the Superior Courts Act. Specifically, subsection 1 (a) and (c) thereof. Section 22 (1) reads:

*"The grounds upon which the proceedings of any Magistrates' [sic] Court may be brought under review before a court of a Division are –*
*(a) absence of jurisdiction on the part of the court;*
*(b)…*
*(c) Gross irregularity in proceedings; and*

*(d) …"*

[22] Notably section 22 of the Superior Act confers powers and jurisdiction to the High Court, whereas Rule 53 of the Uniform Rules of Court sets out the procedure to be adopted when reviewing decisions or proceedings of the Magistrate Court or of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions. Section 38 of the Constitution provides a right to anyone to approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. A court may grant appropriate relief including a declaration of rights. This provision is relevant to the issue before us in this matter in that in bringing this review application the applicant contends that his constitutional rights were impermissibly infringed by the magistrate. It is further argued that in this process the principle of legality has been violated by the magistrate, and thus the impugned decisions are reviewable in terms of sections 22(1) (a) and (c).

[23] The principle of legality is one of the founding values of our Constitution, which requires that judicial officers and other public functionaries may only exercise public power lawfully. The judiciary relies on moral authority in society to fulfil its mandate of interpreting the Constitution and upholding the rule of law. It is expected, therefore, that with the history our country has, we have to be intent and steadfast in our commitment to the preservation of the integrity of the rule of law*. See S v Mamabolo* [2001] (3) SA 409 (CC) 16 to 17. It is thus pivotal in the circumstances that these constitutional rights be protected and for the court to determine whether the constitutional rights of the applicant have been infringed or threatened and employ an appropriate redress*. Gerber v Voorsitter: Komitee oor Amnestie van die Kommisie Vir Waarheid en Versoening 1998(2) SA 559 T.*

*Was the cancellation of release on warning unlawful?*

[24] Ostensibly the record shows that the Magistrate relied on the provisions of section 72A of the Criminal Procedure Act as amended when cancelling the applicant's release on warning. Section 72A in its application is read with sections 68 (1) and 68 (2) Of the CPA:

*"Cancellation of Release on Warning*
*Notwithstanding the provisions of section 72 (4), the provisions of section 68 (1) and (2) in respect of an accused who has been granted bail, are with the necessary changes, applicable in respect of an accused who has been released on warning"*

[25] This further necessitates citing the provisions of section 68 (1) and (2) as substituted by section 10 of Act 75 of 1995 and section 6 of Act 85 of 1997 to gain the understanding and the context of the amendment.

*"Cancellation of bail*

*68 (1) Any court before which a change is pending in respect of which bail has been granted may, whether the accused has been released or not, upon information on oath that-*
*(a)The accused is about to evade justice;*
*(b)The accused has interfered or threatened or attempted to interfere with the witness;*
*(c)The accused has defeated or attempted the defeat the ends of justice;*
*(c A) The accused has contravened any prohibition; condition; obligation or order imposed in terms of –*
*(i) section 7 of the Domestic Violence Act 1998;*
*(ii) Section 10 (1) and (2) of the Protection from Harassment Act, 2011: or*
*(iii) an order in terms of any law, that was against whom the offence in question was allegedly committed, from the accused;*
*(d) the accused person poses a threat to the safety of the public, a person against whom the offence in question was allegedly committed; or [of a] any other particular person;*

*(e) the accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her true list of previous convictions has come to light after his or her release on bail:*

*(e A) the accused has not disclosed that-*
*(i) a protection order as contemplated in section 5 or 6 of the Domestic Violence Act, 1998;*
*(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act, 2011; or*
*(iii) an order in terms of any other law; was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and whether such an order is still of force,*

*(e B) the accused has not discussed or correctly disclosed that he or she is or was at the time of the alleged commission of the offence, the sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act, 1998;*

*(f) Further evidence has since become available or factors have arisen, including the fact that the accused has furnished false information in the bail proceedings, which might have affected the decision to grant bait; or*

*(g) It is in the interests of justice to do so, issue a warrant for the arrest of the accused and make such order as it may deem proper, including an order that the bail be cancelled and that the accused be committed to prison until the conclusion of the relevant criminal proceedings.*

*(2) Any magistrate, may, in circumstances in which it is not practicable to obtain a warrant of arrest under subsection (1) upon the application of any peace officer and upon a written statement on oath by such officer that-*
*(a) he or she has reason to believe that-*

*(i) An accused who has been released on bail is about to evade justice.*

*(ii) The accused has interfered or threatened or attempted to interfere with witnesses;*

*(iii) The accused has defeated or attempted to defeat the ends of justice;or*

*(iv) The accused poses a threat to the safety of [8]the public, any person against whom the offence in question was allegedly committed or [of a] any other particular person;*

*(b) The accused has not disclosed or has not correctly disclosed all his or her previous convictions in the bail proceedings or where his or her list of previous convictions has come to light after his or her release on bail.*

*(c) Further evidence has since become available or factors have arisen including the fact that the accused furnished false information in the bail proceedings which might have affected the decision to release the accused on bail: [or]*
*(d) the accused has contravened any prohibition, condition, obligation or order imposed in terms of –*
*(i) section 7 of the Domestic Violence Act, 1998*
*(ii) section 10 (1) and (2) of the Protection from Harassment Act, 2011; or*
*(iii) an order in terms of any other, law, that was issued by the offence in question was allegedly committed from the accused;*
*(e) the accused has not disclosed or correctly disclosed that he or she is or was at the time of an alleged commission of the offence, a sentenced offender who has been placed under correctional supervision, day parole, parole or medical parole as contemplated in section 73 of the Correctional Services Act,1998;*
*(f) The accused has not disclosed that-*
*(i) a protection order as contemplated in section 5 of the Domestic Violence Act 1998:*
*(ii) a protection order as contemplated in section 3 or 9 of the Protection from Harassment Act 2011; or*
*(iii) an order in terms of any other law was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused and such an order is still of force; or*
*(g) it is in the interests of justice to do so, issue a warrant for the arrest of the accused and may, if the accused is not placed in custody, cancel the bail and commit the accused to prison, which committal shall remain of force until the conclusion of the relevant criminal proceedings unless the court before which the proceedings are pending sooner reinstates the bail."*

[26] Distinctly, the provisions of section 68 of the CPA require that information under oath to the effect that one or more of the factors in paragraphs (a) to (g) are present, be presented before the court, which entails hearing of evidence. The prosecutor would be required to present oral evidence justifying the cancellation of the release on warning. Where this process is not feasible the process described in subsection 2 can be employed. In this event a magistrate is approached, and upon consideration of a written statement by a peace officer, a warrant of arrest would be issued. In *Minister Justice and Constitutional Development and Another v Zealand* 2007(2) SACR 401 (SCA) 407 G 408A (confirmed by CC), the SCA remarked as follows:

*"On 29 October 2001, the respondent was remanded in custody without compliance with ss 72(4),72A and 68. These sections read together to provide, amongst other things, that an accused person's release on warning may be cancelled by a magistrate upon receipt of the information on oath. In the absence of compliance with the empowering provisions of those sections, the requirement of constitutional legality was not met and the respondent's release on warning was not lawfully cancelled."*

[27] Importantly, it is clear from the record that the cancellation of the applicant's warning was not informed by any consideration of evidence that would have been presented by the prosecution. Similarly, it is evident that the applicant was not afforded an opportunity to oppose such cancellation if they wished to do so. In essence, the applicant, in my view was denied the right to be heard.

[28] It must be noted that section 72A, read with section 68 does not confer a discretion to the judicial officer to *meru motu* cancel the release on warning of an accused person; even in instances where it was necessary to invoke the provisions of section 72A read with section 68 (1) and (2). In *Botha NO v The Governing Body of the Eljada Institute and another* (20530/14) [2016] ZASCA 36 (24 March 2016) para 39, the Supreme Court of Appeal stated the following:

"*As Gauntlett JA said in Lesotho in Matebesi v Director of Immigration and Others. The right to be heard ( henceforth"the audi principle" )is a very important one, rooted in the common law not only of Lesotho but of many other jurisdictions …it has traditionally been described as constituting (together with the rule against bias, or the nemo iudex in sua principle) the principles of natural justice…"*

[29] Section 165 of the Constitution which confers judicial power on the courts should be the starting point. Thus, courts are subject and subordinate to the Constitution as is the law which is applied by the courts independently without fear, favour, or prejudice. Disregarding the *audi alterum partem* rule constitutes a gross irregularity, especially where the magistrate's inquisitorial powers are greater as the procedure is less formal than that of a trial. Notably, courts are duty-bound to protect the citizen's right to freedom or liberty as contemplated in section 12(1) of the Constitution. The provisions of section 72A are clearly applicable only when the state applies for the section to be

invoked. *In casu* the court clearly improperly coaxed the prosecutor during the proceedings, to apply for the cancellation of the applicant's warning status and ordered such cancellation which is a power not conferred upon it by law. Thus, I find what Binns–Ward J said in *Claasen v Minister of Justice and Constitutional Development 2010(2) SACR 451* apposite to this matter, when he stated the following:

"*13 As mentioned in the current case the criminal court magistrate did not hold an enquiry in terms of section 72(4) nor did he cancel the appellant's release on warning in the manner provided for in terms of s 72A, read with s 68 (1) and (2) of the Criminal Procedure Act. It is clear therefore that the magistrate acted contrary to the relevant provisions of the Act in ordering the appellant to be held in detention in the manner in which he did. In doing so he acted in disregard of both the substantive and procedural requirements for the exercise of any power he might have had to curtail the appellant's rights to personal freedom. The disregard for substantive requirements manifested in the committal having been directed without reference to any evidence that might have afforded good reason in law to cancel the appellant's release on warning, or to imprison him in terms of section 72(4) of the Criminal Procedure Act. The disregard for the procedural requirement was demonstrated by the magistrate's omission to comply with any of the procedures in terms of s 72 or s72 A, which he was bound by the Act to follow if the appellant were lawfully committed to prison. The magistrate breached the constitutional principle of legality in at least two respects: by failing to comply with the relevant provisions of the Criminal Procedure Act and – in breach of the obligation imposed on the judiciary in terms of s 8(1) of the Constitution – by infringing the appellant's right in terms of s 12(1)(a) of the Bill of Rights, not to be deprived of his freedom arbitrarily or without just cause." See also S v Coetzee 1997 (3) SA 527 (CC) (1997(1) BCLR 437 at para159.*

[30] It is my view that the magistrate in cancelling the applicant's warning, arbitrarily, deprived him of his freedom and liberty, thereby acting contrary to the constitutional principle of legality and certainly failing to comply with the constitutional obligation. The provisions of section 8(1) of the Constitution impose on every judicial officer the obligation to comply with the Constitution. In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* (CCT7/98) [1998] ZACC17 1999(1) SA 374 1998(12) BCLR 1458 (14 October 1998) the court stated:

*"[58] It seems central to the conception of our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution."*

The magistrate's impugned decision in my view, is unlawful, unconstitutional and thus invalid, that being said it stands to be set aside.

[31] I accept, of course, that the Amendment Act also precludes the release on bail of the person arrested for allegedly committing an offence listed under section 1 of the Domestic Violence Act, which involves persons who are in a domestic relationship. Section 59 of the CPA, which permits the police to grant bail after arrest prior to a court appearance, has been amended by the substitution in subsection 1 for paragraph (a) of the following paragraph:

*"(a) an accused who is in custody in respect of any offence, other than an offence –*
*(i) referred to in Part II or Part III of Schedule 2*
*(ii) against a person in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998); or*
*(aa) section 17(1)(a) of the Domestic Violence Act,1998;*
*(bb) Section 18(1)(a) of the Protection from Harassment Act, 2011 (Act no 17 of 2011); or*
*(cc) any law that criminalises a contravention of any prohibition, condition, obligation or order, which was issued by a court to protect the person against whom the offence in question was allegedly committed, from the accused, may before his or her first appearance in a court, be released on bail in respect of such offence by any police official of or above the rank of non - commissioned officer, in consultation with the police official charged with the investigation, if the accused deposits at the police station the sum of money determined by such official"*

[32] Ostensibly the provisions of section 59 clearly preclude an accused person who is in custody after being arrested for an offence referred to in Part II or Part III of Schedule 2, committed in the context of a domestic relationship from being released on bail by the police officials. It is an uncontroverted fact that the applicant in this matter was at the time of the alleged assault on the fourth respondent in a romantic relationship with her. A relationship of the kind contemplated by the Amendment Act in section 59 (1) (a) (ii).

[33] For the sake of completeness it is necessary to include section 1(vii)(e) of the Domestic Violence Act, which refers to a domestic relationship to mean a relationship between a complainant and a respondent in any of the following ways:
*"*
*(a) …*
*(b) …*
*(c) …*
*(d) …*
*(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration;"*
*The applicant in the founding affidavit contends that the word " offence " in the context of section 59 should be interpreted to refer to offences of domestic violence to be incidences of abuse and the pattern thereof. The general rule to interpretation is that the words in a statute are to be given their ordinary grammatical meaning, having*

*regard to the context of the Act in its entirety, unless the result thereof would be unreasonable or incongruous. See Natal Joint Municipality Pension Fund v Endumeni Muninipality 2012(4) SA 593 SCA 17 and 18 .The Oxford Dictionary defines "offence" as an illegal act. The Amendment Act created a domestic violence offence. It would be remiss of the courts to interprete the domestic violence offence as to mean a series of domestic violence incidents, which is in total contrast to its grammatical meaning . The country is currently facing a crisis of epidemic proportions of gender based violence. Demonstrably, the Amendment Act seeks to address the scourge of gender based violence. Therefore, the only meaning to be attributed to the word "offence" in the context of the Amendment Act is the ordinary grammatical meaning which is a single illegal act.*

[34] Upon examination of the facts in light of the aforementioned legislative framework, it is abundantly clear that in the present matter, after arresting the applicant, the investigating officer had no authority to release him on bail, let alone on warning. Similarly, clear is the appreciation by the magistrate of this fact that propelled the impugned decision. If anything, this is indicative of the fact that the magistrate was alive to the provisions of the Amendment Act. Counsel for the applicant contends in the heads of argument, in paragraph 19 as follows:

*"A practice appears to have arisen whereby accused who need to be arrested and detained are "warned" to appear in terms of section 72 of the Criminal Procedure Act. A person may only be released on warning if they are in custody. Police always retain a discretion whether to arrest someone and ought to use less intrusive methods to secure a person's attendance at the court when they can."*

[35] Mr. Prinsloo, supplementing his argument on this point, relied on the case of *Minister of Safety and Security v Sokhoto and Another* 2011(1) SACR 315 (SCA), where the court at paragraph 28 observed as follows:

"*Once the jurisdictional facts for an arrest whether in terms of any paragraph of s 40(1) or in terms of s 43 are present, a discretion arises. The question whether there are any constraints on the exercise of the discretionary powers is essentially a matter of construction of the empowering statute.."(my own underlining)*

[36] Importantly, in this case, the empowering statute [Amendment Act] does not confer such discretion on police officers. On the contrary, the Amendment Act places an obligation on the police officer or investigating officer to effect the arrest of the accused where the assault was reported to the police to have occurred in the context of a domestic relationship. The Amendment Act seeks to provide protection to the victims of domestic and gender-based violence by tightening bail provisions applicable to such matters. Section 3 of the Domestic Violence Act permits a peace officer to arrest without warrant any respondent of domestic violence whom a police officer reasonably suspects of having committed an offence with an element of violence against a

complainant. In this respect, the provisions of section 3 correlate with the provisions of section 59 of the CPA.

[37] The amendments to sections 59 and 59A of the CPA provide that neither the police nor prosecutor bail should be granted for an offence against a person in a domestic relationship as defined in the Domestic Violence Act, nor for a protection order issued in terms of this Act. This course elevates the offence to the category of Schedule 5 offences in the CPA. Where the alleged perpetrator of domestic violence is arrested by a peace officer attending to the complaint, or where a victim of domestic violence lays a criminal charge, either in tandem with an application for a protection order or independently thereof or as a result of a breach of a protection order, the mechanisms of the criminal justice system which provide for arrest, bail, conviction and sentencing are activated. It warrants emphasis that the arresting officer in such instances has no discretion to decide whether to release the accused on warning given that he or she has no authority to even release the accused person on bail. Therefore, the argument proffered by the applicant cannot stand, as in this instance the investigating officer acted contrary to the empowering statute.

**Are the subsequent bail and Protection Orders valid?**

[38] This brings me to the issue of the bail application. In an ideal situation as contemplated in the Amendment Act, the accused person would upon arrest have remained in custody until he makes an appearance before the magistrate for the consideration of the question of bail. In the matter at hand and given the magistrate's cancellation of the applicant's warning is unlawful and invalid, the subsequent impugned decisions: the incarceration of the applicant and the bail proceedings, inclusive of the Protection order are unquestionably unlawful and invalid, hence annihilated. The magistrate's actions were not within the prescripts of the law and therefore erred in applying the provisions of the Amendment Act. However, had the investigating officer in the applicant's assault case kept him in custody after the arrest as required by law, the position would have been different and the applicant would have exercised his right to apply for bail, as section 60 of the CPA has been amended to include cases involving domestic violence.

**THE POSITION HAD THE APPLICANT NOT BEEN RELEASED ON WARNING**

[39] As the accused person has a right to apply to the court for release on bail, the prosecutor must apprise the court with evidence or information to enable the court to determine whether or not to release the accused person on bail. Section 60 (4) compels the prosecutor to furnish reasons if the release of the accused on bail is not opposed, as well as the views of the complainant regarding her or his safety concerns. The section reads as follows:

*"4. Section 60 0f the Criminal Procedure Act, 1977, is hereby amended-*

*(a) by the substitution in section (2) for paragraph (d) of the following paragraph:*
*"(d) shall, where the prosecutor does not oppose bail in respect of matters referred to in subsection 11(a) [and], (b) and (c), require of the prosecutor to place on record the reasons for not opposing the bail application."*
*(b) by the substitution for subsection (2A) of the following subsection:*
*"(2A) The court must, before reaching a decision on the bail application, take into consideration –*
*(a) any pre-trial service report regarding the desirability of releasing an accused on bail, if such a report is available; and*
*(b) the view of any person against whom the offence in question was allegedly committed, regarding his or her safety."*

[40] Furthermore, in terms of section 60 (11) (B) of the CPA [as amended by the Amendment Act], the accused person or, his or her legal representative is compelled to inform the court whether a protection order had previously been issued against him or her. This would ensure that the court will not have to issue a protection order if there is one already in existence in favour of the complainant, however, the court will take the existing protection order into consideration.

[41] In a case where bail is not opposed by the state, the court is duty bound as contemplated in section 60(9) of the CPA to weigh up the accused person's interests against the interests of justice, provided that the interests of justice would be interpreted to include, but not limited to, the safety of any person against whom the offence in question has allegedly been committed [section 60(10) of the CPA as amended]. After evaluating the evidence and considering the question of bail, the court may, as permitted in terms of section 60 (12) of the CPA, order the release on bail of the accused, subject to certain specified conditions informed by the evidence presented before it. Section 60 (12) reads as follows:

*" (a) The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in the interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.*

*(b) If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the Domestic Violence Act,1998 with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply."*

[42] Where after determining the question of the bail, the court is satisfied that the interests of justice permit such release, the court must hold an enquiry in view of issuing

a final protection order if one has not been issued. This process requires the court not only to be attuned to the aforementioned provisions but also to the Constitution.

**THE ENQUIRY, A PRECURSOR TO THE PROTECTION ORDER**

[43] Where there is no protection order in place at the time the court is considering the issue of the release of the accused on bail, the court must hold an enquiry in view of issuing a final protection order. At this stage, it is befitting to give a historical background of the application process involved prior to the court issuing a protection order at the advent of the Amendment Act. Traditionally the procedure in terms of sections 4,5,6 and 7 of the Domestic Violence Act, any person may apply by way of an affidavit to the court for a protection order. The affidavit must explain the basis of the application and be lodged with the clerk of the court. The application may also be brought outside the ordinary court hours or on a day that is not an ordinary court day if the court is satisfied that the complainant may suffer undue hardship if the application is not considered immediately.

[44] In terms of section 5 the court must as soon as reasonably possible consider any additional evidence it deems fit, including oral evidence or evidence by affidavit. At this stage, the respondent need not be informed of the proceedings and an interim order is granted without notice to the respondent. The court is only obliged to grant an interim order if the court is satisfied, firstly that there is prima facie evidence that the respondent is committing or has committed an act of domestic violence. Secondly, undue hardship may be suffered by the complainant as a result of the violence if an order is not issued immediately. The interim order must then be served on the respondent, and it must call on the respondent to show cause on the return date specified in the order why a final protection order should not be issued. The return date may not be less than ten days after service upon the respondent. It may, however, be anticipated by the respondent upon not less than 24 hours written notice to the complainant and the court [section 5 (5)]. An interim Protection Order has no force and effect until it has been served on the respondent [section 5(6)].

[45] Section 6 deals with the issue of a final protection order. If the respondent fails to appear on the return date, the court must issue an order if it is satisfied that proper service on the respondent has taken place and that the application contains prima facie evidence that the respondent has committed, or is committing an act of domestic violence. If the respondent appears on the return date to oppose the application, a hearing must take place. The court must consider any evidence previously received as well as further affidavits or oral evidence. After the hearing, the court must issue a protection order if it finds on a balance of probabilities, that the respondent has committed or is committing an act of domestic violence. When a protection order is issued, the clerk of the court must forthwith arrange for the original order to be served on the respondent and for certified copies of the order and the warrant to be served on

the complainant. Copies must be forwarded to the police station chosen by the complainant. A protection order remains in force until it is set aside.

[46] In terms of section 7, the court may impose conditions deemed reasonably necessary, for the safety, health or well-being of a complainant.

[47] Notwithstanding the fact that the Domestic Violence Act demonstrated the legislature's responsiveness to the need for effective legal protection for the victims of domestic violence. The courts have consistently recognized and pointed out the need to strengthen the protection of the victims of domestic violence to combat domestic and gender-based violence. The Constitutional Court in *Ahmed Rafik Omar v The Government of the Republic of South Africa and others* Case no CC 47/04 judgement dated 7 November 2005 expressed in Para 14:

*"The criminal justice system has not been effective in addressing family violence, for a range of reasons. The need for effective domestic violence legislation was recognised by the legislature. It thus enacted the Prevention of Family Violence Act 133 of 1993, which preceded the Domestic Violence Act."*

[48] In *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC), 2000 (1) BCLR 86 (CC) Sachs J, aptly lamented the scourge of domestic violence on women and expressed as follows:

*" All crime has harsh effects on society. What distinguished domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and in particular, on family life. It cuts across class, race, culture and geography and is all the more pernicious because it is so often concealed and so frequently goes unpunished...to the extent that it is systemic, persuasive and overwhelmingly gender specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particular brutal form...The ineffectiveness of the criminal justice system in addressing family violence intensifies the subordination and helplessness of the victims. This also sends an unmistakable message to the whole of society that the daily trauma of vast numbers of women counts for little. The terrorisation of the individual victims is thus compounded by on sense that domestic violence is inevitable. Patterns of systemic sexist behavior are normalized rather than combatted."*
Similarly, the SCA in *Kekana v The State (629/13) [2014] ZASCA 158 (1October 2014) Mathopo AJA articulated as follows:*

*"[20] Domestic violence has become a scourge in our society and should not be treated lightly. It has to be deplored and also severely punished. Hardly a day passes without a report in the media of a woman or a child being beaten, raped or even killed in this country. Many women and children live in constant fear for their lives. This is in some respects a negation of many of their fundamental rights such as equality, human dignity and bodily"*

[49] Lately, the legislature recognised the exigency to augment the existing protection provided by the Domestic Violence Act to the victims of domestic and gender-based violence who are amongst the most vulnerable members of our society. The reason is that South Africa is currently immersed in the worst kind of social evil, i.e. gender-based violence, which has reared its ugly head. The deliberate intervention by the legislature for reform of the existing laws to afford effective and rapid response to gender-based violence is most certainly desirable. Hopefully, it would eventually lead us to the ultimate obliteration of patriarchal comportment and total enhancement of the minimized dignity of women and girls in our society.

[50] Having regard to the constitutional provisions, particularly the right to equality and to freedom and security of the person and the international commitments and obligations of the states towards ending violence against women and children, including obligations under the United Nations Conventions on the Elimination of all Forms of Discrimination Against Women and Rights of the child (Preamble of the Domestic Violence Act 116 of 1998 as amended, Context and purpose of the Act). In response to a call made as recently as May 2021, by the United Nations Committee on the Elimination of All forms of Discrimination against Women (CEDAW/C/ ZAF/ IR/1 12 May 2021), which South Africa had ratified without reservation in December 1995. See *South Africa Law Reform Commission, Issue Paper 42, Project 100, Domestic Violence; The Criminal Response, 8 December 2021, page 15 paragraph 17*. In essence, the legislature has as a result effected an overhaul of the Domestic Violence Act to be more responsive to the need to afford maximum protection to women and girls who are exposed to domestic and gender-based violence. This is clearly propelled by the global quest for the creation of a specific crime or offence of domestic violence. South Africa is appropriately taking heed of that call.

**OTHER JURISDICTIONS**

[51] A number of comparable jurisdictions have sought to revise the manner in which family violence matters are dealt with. This includes holding domestic violence perpetrators accountable to the same extent as offenders of other similar offences. Some comparable jurisdictions have embarked on an overhaul of the criminal law approach to matters related to domestic violence. Signatory nations to the aforementioned international instruments have similarly demonstrated their willingness to strengthen the protection against domestic and gender-based violence.

[52] The legislature's infusion of the inquiry process for protection orders in bail proceedings mirrors that of South Australia and New South Wales. In South Australia, the Bail Act of 1985 particularly section 23 A thereof, and section 9 of Intervention Orders (Prevention of Abuse) Act 2009, allows for the issuing of an Intervention order by the court considering the release on bail of a person accused of committing a domestic violence offence. This concept has been adopted by the legislature and is

empowering the courts to issue protection orders during bail proceedings. Section 23 A of the Bail Act of 1985 provides:

*"1) If a police officer or a person representing the crown in bail proceedings is made aware that the victim of the alleged offence, or a person otherwise connected with proceedings for the alleged offence, feels a need for protection from the alleged offender or any other person associated with the alleged offender-*

*(a) The police officer or other person must ensure that the perceived need for protection is brought to the attention of the bail authority; and*

*(b) The bail authority must consider-*
*(i) If the bail authority is a court- whether to issue an intervention order in accordance with this section; or*

*(ii) If any other case- whether to apply to the Magistrate Court for an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009.*

*2) If an applicant for bail is a serious and organised crime suspect the bail authority must on its own initiative, consider-*

*(a) If the bail authority is a court - whether to issue an intervention order in accordance with this section; or*

*(b) In any other case - whether to apply to the Magistrates Court for an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009*

*(3) A court may when determining a bail application, exercise the powers of the Magistrates Court to issue against the applicant or any person associated with the applicant an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009*

*(4) An order issued under this section has the effect of an intervention order under the Intervention Orders (Prevention of Abuse) Act 2009." (my own underlining)*

[53] The Intervention Orders (Prevention of Abuse) Act 2009 provide for intervention orders in cases of domestic and non-domestic abuse by regulating the respondent's behaviour towards the protected persons. An intervention order is similar to the Protection Order as envisaged in the Domestic Violence Act in South Africa. Section 9 of the Intervention Orders (Prevention of Abuse) Act 2009 reads:

*"9---Priority for certain interventions*

*Proceedings relating to intervention against domestic abuse and proceedings brought by a bail authority under section 23 A of the Bail Act 1985 must, as far as practicable, be dealt with as a matter of priority."*
The intervention order in its nature may impose any prohibition or requirement upon a respondent in terms of section 12 of the 2009 Act. It may prohibit contacting, harassing, threatening, or intimidating the protected person. It may also prohibit damaging specified property, being in or near the premises of the protected person. It may even require the respondent to surrender specified weapons or articles; return specified personal property to the complainant; allow the complainant to recover or access specified personal property; undergo an assessment by the intervention program manager; undertake an intervention program; and meet conditions of any other particular prohibition or requirement. *[Family Violence Court and Bail: Legal Services Commission South Australia]*

[54] Essentially in terms of these provisions, if the prosecution is made aware that the victim or any other person connected to the proceedings for an alleged offence, feels the need for protection from the alleged offender, they must ensure this is brought to the attention of the bail authority. The bail authority must then consider applying for the intervention order, or if the bail authority is a court, grant an intervention order as if an application had been made. The inquiry, for a protection order, held during the bail proceedings will not change the nature and effects of the Protection Order.

[55] The New South Wales, Crimes (Domestic and Personal Violence) Act 80 of 2007, empowers courts in certain circumstances to issue an interim or final protection order regardless of whether an application for such an order has been made. Section 40 permits the issue of an interim protection order where a person is charged with an offence that appears to the court to be a serious offence. Serious offences include, stalking, attempted murder and domestic violence offences. Section 40(1) reads:

*"When a- person is charged with an offence that appears to the court to be a serious offence, the court must make an interim order against a defendant for the protection of the person against whom the offence appears to have been committed whether or not an application for an order has been made."*
*Section 40(5) reads:*
- *"Attempted murder*
- *in this section, a serious offence means-*
- *A domestic violence offence (other than murder manslaughter or an offence under section 25A of the Crimes Act 1900), or"*

[56] Clearly taking note of the above, and having had sight of reforms in comparative jurisdictions one gets the feeling that Domestic Violence cases are taken seriously. In *R v Sarahang* 2021 *ONCJ* 223 *(Can LII)* paragraph 9 where the court held:

*"…public safety grounds are of significant concern in the context of allegations of domestic violence. These concerns have informed policies and directives to Crown prosecutors to exercise caution in consenting to the release of an accused charged with an offence involving family violence."*

The court went on to state at paragraph 12:

*"Historically, the justice system's response to the complex problem of domestic violence has been wanting. It has been over thirty years since the Supreme Court of Canada's seminal decision in R v Lavellee and the justice system in Ontario is still struggling to deal with the overwhelming number of domestic violence cases that flow through the courts every day. However, our understanding of the complex dynamics associated with family violence are evolving and improving. Prior to the decision in Lavellee intimate partner violence was often approached by the criminal justice system as a private family matter with no societal response deemed appropriate. Then, following the high profile deaths of a number of women by their intimate partners, some of whom were on bail at the time, the justice system moved closer to a multi-faceted public response which in Ontario has included specialized courts and programs. The jury's recommendations in the May / Isles Inquest, The PAR program is a direct result of this, arguably more nuanced, approach to intimate partner violence. In approached cases, it has benefits for both those who are charged with a crime of domestic and their partners who are complainants."*

[57] The impetus to combat the rising epidemic proportions of gender-based violence and femicide globally, is apparent in the manner in which different jurisdictions have introduced special provisions that strengthen the protection of domestic and gender-based violence victims. The Amendment Act extends its reach further and imposes a minimum sentence for crimes of assault with intent to do grievous bodily harm committed against a victim who is or was in a domestic relationship with the accused person. The amendment is as follows:

"Amendment of Part III of Schedule 2 to Act 105 of 1997, as submitted by section 68 of Act 32 of 2007 and amended by section 48 of Act 7 of 2013.

*17. Part III of Schedule 2 to the Criminal Law Amendment Act, 1997, is hereby amended—*
*(a) by the deletion of the following offences:*
*"[Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively in circumstances other than those referred to in Part 1.*
*Sexual exploitation of a child of a person who is mentally disabled as contemplated in sections 17 or 23 or using a child for child pornography or using a person who is mentally disabled for pornographic purposes, as contemplated in sections 20 (1) or 26*

*(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively]"; and*

- *by the insertion of the following offence:*

*"Assault with the intent to do grievous bodily harm—*

- *on a child –*
- *Under the age of 16 years; or*

*Either 16 or 17 years of age and the age difference between the child and the person is more than four years; or*
*where the victim is or was in a domestic relationship, as defined in section 1 of the Domestic Violence Act,1998, with the accused."*

- *The implication of this amendment is that upon conviction the court has to impose the following sentences:*
  - *a term of not less than 10 years imprisonment in respect of a first offender of such an offence;*
  - *where the convicted person is a second offender of the offence, to imprisonment for a period not less than 15 years; and*
  - *a third offender or subsequent offender of any such offence, to imprisonment for a period not less than 20 years. Criminal Law Amendment Act 105, 1997 Section 51 (2) (b) (i), (ii) and (iii).*

It is axiomatic that the legislature by enacting the Amendment Act did not only create a domestic violence offence it ordained a minimum sentence indicative of the deliberate intention to curb this social ill engulfing our country. The courts have been provided with tools in the form of the Constitution and various legislation including the Amendment Act to address gender-based violence.

**STRIKING A BALANCE BETWEEN THE VICTIM'S PROTECTION AND THE ACCUSED PERSON'S RIGHTS**

[58] In comparison, the bail provisions of section 60 of the CPA are more stringent in nature compared to those of South Australia and New South Wales. In our jurisdiction, the complainant need not approach the court for a protection order. It is peremptory for the bail court upon resolving to order the release on bail, to hold the inquiry in view of issuing a final protection order. On the other hand, courts in New South Wales are conferred with the discretion to issue an interim or final protection order. Distinguishably South Australian courts would only consider issuing the Intervention order if the need to safeguard the victim has been brought to the attention of the bail court.

[59] For the Amendment Act to have the intended profound and beneficial effect on the fight against domestic and gender-based violence in South Africa, the constitutional

rights of the accused person must be prioritized in the process, meaning that proper regard must be paid to the rights to a fair trial enshrined in section 35(3) of the Constitution.

[60] It is therefore imperative to strike a balance between these competing rights, including the complainant's right to be free from all forms of violence [section 12(1)(d)] and upholding the constitutional rights of the accused persons as the incarceration of a person has far-reaching consequences, particularly with regards to the person's freedom, livelihood and security. See *Jeebhai v Minister of Home Affairs* 2009(5) SA 54 at 62H-63A. Significantly, both the accused and the complainant have a right to human dignity, that must be respected and protected. While Section 39 of the Constitution, which governs the interpretation of the Bill of Rights, obliges a court, tribunal, or forum to promote the values that underlie an open and democratic society based on human dignity, equality, and freedom, and to consider international agreements to which South Africa is a signatory and had ratified as binding.

[61] Therefore, it is fundamental to a fair trial that an accused person be given sufficient notice of the charge/s against him or her. In *Naude and Another v Fraser* 1998(4) SA 539*(SCA)* at 563E-G, the court considering a civil matter remarked as follows:

*"It is one of the fundamentals of fair trial, whether under the Constitution or at common law, standing co-equally with the right to be heard, that a party be apprised of the case which he faces. This is usually spoken of in the criminal context, but it is no less true in the civil…"*

[62] It is therefore incumbent upon the court as courts are enjoined to ensure that an accused person when appearing in court post-arrest, is not only apprised of the charge/s levelled against him but most significantly be forewarned that:

- the charge preferred against him is formulated within the context of the Domestic Violence Act.
- a minimum sentence is applicable to the charge if it is so applicable.

This will eliminate the element of surprise as the implications of the minimum sentence raise the question of the jurisdictional competence of a District court to hear the matter as it does not have jurisdiction to impose a sentence that falls within the ambit of section 51(2)(b) of Act 105 of 1997. Matters, where the minimum sentence is applicable, will have to be adjudicated upon by the Regional Court. Section 75(2) (b) of the CPA provides:

*"(b) If an accused appears in a magistrate's court and the prosecutor informs the court that he or she is of the opinion that the alleged offence is of such a nature or magnitude that merits punishment in excess of the jurisdiction of a magistrate's court but not of the jurisdiction of the regional court, the court shall if so requested by the prosecutor*

*refer the accused to the regional court for summary trial without the accused having to plead to the relevant charge."*

[63] This is due to the inescapable fact that upon conviction, a sentence outside the scope of the district court's sentencing jurisdiction will have to be meted out. Notably, this will culminate into the Regional Court roll rapidly increasing due to the influx of these matters.

[64] This means that the charge will have to be formulated in such a manner as to be read with the applicable provisions of the Amendment Act, 12 of 2021 and the relevant provision of the Criminal Law Amendment Act 105 of 1997 as amended. Accordingly, it is mandatory that subsequent to arrest, the arresting officer must inform the person in detention of the reason for his or her further detention [section 50(1) (c) CPA], and of his or her right to institute bail proceedings [section 50 (1)(b)]. Similarly, section 50(6) (a) enjoins the court to inform the accused person at his or her first appearance to inform the accused of the reason for his or her further detention, and the right to apply for release on bail. Ordinarily on the first court appearance the accused person must be sufficiently informed of the charge against him, section 35 (3) (a) of the Constitution as well as his rights to legal representation, bail, and the likelihood of the enquiry as envisaged in terms of section 6 of the Domestic Violence Act, must form part of that process. I refer to the term 'likelihood' as the court still has to be informed by the accused or his legal representative whether or not there is a protection order against him or her already in existence. [Section 60 (11B) of the CPA as amended].

**ISSUANCE OF THE FINAL PROTECTION ORDER**

[65] The issuing of a final protection order in terms of section 6 of the Domestic Violence Act is drastic in comparison to the ordinary process as envisaged by section 4 of the Domestic Violence Act, which permits the issuing of an interim protection order and on the return date a final protection order would be issued if the court so determines. With the accused already before the court, it is only apt for the Legislature to require that the court during the bail proceedings, holds the enquiry as envisaged in section 6 of the Domestic Violence Act, as the provisions of section 4 thereof are invoked in ex parte applications, with the purpose of issuing interim protection to the complainant pending the respondent's appearance before the magistrate. The situation is distinguishable in that the respondent is the one before court and the enquiry will be conducted as if the application for a protection order has been brought by the complainant. Evidently, the enquiry is now a special dispensation, integral to the bail proceedings. The legislature promulgated in this manner due to the exigency of bail proceedings, and demand for protection of the complainants against the accused in truncated time frames, without any delays. Notwithstanding the sui generis nature of the bail proceedings, due to the now composite nature thereof, it is incumbent upon the court to demonstrate the fulfilment of its Constitutional obligation by guarding against the infringement of the rights of the accused person in this process.

[66] Pertinently, the court must advise the accused person that the said enquiry will form part of the bail proceedings and will take the same procedure employed in the Domestic Violence enquiry without the rule *nisi*, as the Amendment Act directs that a final protection order has to be issued in these proceedings. Evidence will be presented before the magistrate either orally or by way of affidavits. The court will assess the evidence and if it finds on the balance of probabilities that the respondent has committed or is committing an act of domestic violence a final protection order must be issued. In essence, the enquiry must be conducted in a fair and impartial manner.

**CONCLUSION**

[67] In this case, the applicant was erroneously released on warning by the police or investigating officer. The magistrate acted unlawfully in arbitrarily cancelling his release on warning. The actions of the magistrate culminated in an infringement of the applicant's constitutional rights as he was not forewarned of the implications of the Amendment Act. As mentioned previously, the magistrate was aware of the provisions of the Amendment Act, however, in haste due to the desperate circumstances that prevailed at the time acted *ultra vires* upon revoking the applicant's release on warning and by invoking the provisions of section 72A of the CPA in an endeavor to remedy the arresting officer's unauthorized decision and actions.

[68] It is trite that the magistrate has no inherent powers to review the decision of the investigating officer in such a manner and can only act in terms of the prescripts of the empowering statute. I find the principle enunciated in the remarks of Jaftha J in his minority judgment in *Liebenberg NO & Others v Bergrivier Munucipality and Others* 2013 (5) SA 246 (CC) at paragraph 44, apposite to the matter at hand:

*"In our law, administrative functions performed in terms of incorrect provisions are invalid, even if the functionary is empowered to perform the function concerned by another provision. In accordance with this principle, where a functionary deliberately chooses a provision in terms of which it performs an administrative function and it turns out that the chosen provision does not provide authority, the function cannot be saved from invalidity by the existence of authority in a different provision."*

[69] In *Zuma v Democratic Alliance and Others; Acting National Director of Public Prosecutions and Another 2018 (1) SA 200 at para 58* Jaftha J's observation was relied upon by the SCA when it stated that:

*" the Constitutional Court was equally emphatic concerning the invocation and reliance on a statutory power that was inapposite."*

[70] In light of the infringement of the applicant's rights, the decisions of the first respondent on 15 September 2022 are reviewed and set aside.

(The judgment has been edited)

**From The Legal Journals**

**Le Roux-Bouwer, J**

The Common Purpose Doctrine and Dolus Eventualis Incorrectly Applied (Again): Mawela v S (377/2021) [2022] ZASC 18 (16 February 2022).

**Speculum Juris Volume 37 Issue 1 of 2023 188**

**Abstract**
*On 16 February 2022 the SCA, per Mothle JA in Mawela v S (377/2021) [2022] ZASC 18, heard an appeal from the Limpopo Division of the High Court, Polokwane after the first and second appellants were convicted on various counts, including murder, and were sentenced to 12 years in prison. The murder convictions were based on the doctrine of common purpose and dolus eventualis. For purposes of this discussion, only the convictions of, and appeal against the murder convictions, are relevant. The purpose of this note is to critically analyse the incorrect application of the common purpose doctrine and dolus eventualis by the court a quo. The SCA has often warned against the incorrect application of the common purpose doctrine, and it is argued that the conviction of innocent persons is the inherent danger of such an incorrect application. There exists a pressing need for courts to exercise caution to ensure that innocent persons are not convicted. This note underlines the warning by Snyman that the mere fact that a person happened to be present at the crime scene cannot serve as a basis for holding them liable for the crime. Even if a person tacitly approves of the actual perpetrator's crime, there is still no basis for an inference that they actively associated themselves with the commission of the crime. A critical analyses of the High Court's decision also illustrates that dolus eventualis as a form of intention was applied incorrectly. The court a quo's erroneous statement regarding dolus eventualis resembles the unfortunate rhetorical question by Masipa J in S v Pistorius: "[h]ow could the accused reasonably have foreseen that the shots he fired would kill the deceased or whoever was behind the door?" The court in Pistorius, like the High Court in Mawela, wrongly applied an objective rather than a subjective approach to the question of dolus.*

The article can be accessed here:
https://www.ufh.ac.za/sj/SJ2023-001%20PUBV%20JOLANDI%20LE%20ROUX-BOUWER.pdf

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

**Contributions from the Law School**

## A BRIEF DISCUSSION OF THREE RECENT INTERESTING CRIMINAL COURT CASES

### Conflation of the Oath and Admonishment

The case of *S v Tyatyeka* 2023 (1) SACR 193 (ECB) was an appeal against the appellant's conviction of the rape of a 14 year old girl in the court a quo. The basis of the appeal changed over time – with the appellant finally indicating that he was only challenging whether the complainant had been properly admonished or sworn in (para [10]). Due however to some confusion with the papers, the High Court considered the appeal on the basis of two issues – whether the court a quo conducted a proper enquiry whether the complainant understood the nature and import of the oath, and whether the state proved its case against the appellant beyond a reasonable doubt (para [11]). I will only consider the first question in this note.

The appellant contended that the magistrate did not comply with the peremptory requirement that the child complainant be admonished, and that the child should have been admonished because she did not understand the nature and import of the oath. The child was not warned of the consequences which could befall her if she lied. The appellant relied on the case of *S v Mekka* 2003 (2) SACR 1 (SCA) to support his appeal (para [12]). This case was in fact not helpful to the appellant because in the *Mekka* case, the court referred to its decision in *S v B* 2003 (1) SA 552 (SCA) at para [15] where it was stated that it was not necessary for there to be a formal finding that the complainant did not understand the nature and import of the oath; it was sufficient if the presiding officer simply formed that opinion prior to admonishing the complainant (para [25]). By parity of reasoning, the court could then also form the opinion that the complainant did understand the oath prior to swearing the complainant in. In casu the complainant was 15 years old when she testified. In *S v SIkhipa* 2006 (2) SACR 439 (SCA) the court held that a 14 year old complainant could be assumed to understand the nature and import of the oath.

In this case, the High Court stated that although the magistrate did not first make a finding that the complainant understood the nature and import of the oath, the

magistrate did establish the child's competence to testify and was therefore entitled to administer the oath which was done through an interpreter (para [21]). The authority in *Mekka*, *B* and *Sikhipa* supports this approach. The magistrate had clearly formed the opinion that the complainant understood the oath, because this is reflected in the judgement (para [23]). The magistrate was also diligent in reminding the complainant that she was under oath after each adjournment (para [21]). However, when the complainant returned to court after the adjournment to enable her to write exams, the transcript of the proceedings revealed that the magistrate admonished the complainant to tell the truth (para [22]). The High Court noted that the magistrate appeared to have conflated the oath and the admonishment but held that this was not a fatal irregularity because what was important was that the child had been properly established as a competent witness and the High Court was of the view that the magistrate had been entitled to swear the child in by way of the oath which was done (para [24]).

This aspect of the appeal was thus disposed of, and the conviction was ultimately confirmed and the appeal dismissed (para [36]).

In days gone by there was quite a strict approach taken by the courts to establishing the competency of a child witness and swearing the child in by way of the oath or the admonishment. The smallest irregularity could result in the child's evidence being found to be inadmissible by a higher court. It is to be welcomed that a more flexible approach to this is now being taken. Substance is being preferred to form, which supports justice.

**Convicting an accused based on his admissions in terms of section 112 (2) of the Criminal Procedure Act 51 of 1977.**

In the case of *Mkhize v S* AR365/21 [2023] ZAKZPHC 11 (3 February 2023), the appellant appealed against his conviction of murder in the Izingolweni regional court. In the case, the magistrate had convicted the appellant of the crime of murder on the basis of his plea of guilty, and the admissions made in his section 112 (2) statement. The magistrate was satisfied that the appellant had admitted to all the elements of the crime (para [6]).

The basis of the appeal was that the conviction was not proper because the section 112 (2) statement did not contain admissions relating to an intention to kill nor the element of unlawfulness (para [6]). The requirement in section 112 (2) is for the accused to set out facts he admits, on which basis he may or may not be convicted. Section 112 (2) provides that the presiding officer may convict the accused if they are satisfied that the accused is guilty of the offence he pleaded guilty to, provided that the court may question the accused in order to clarify any matter raised in the statement.

The appeal court referred to the case of *Negondeni v The State* (00093/15) [2015] ZASCA 132 (29 September 2015), where at para [10] the Supreme Court of Appeal spoke to section 112 (1) (b) of the Criminal Procedure Act 51 of 1977. Section 112 (1) (b) applies where the accused has pleaded guilty and the presiding officer is

satisfied that the offence warrants a sentence which could include detention without an option of a fine. In such a case, the presiding officer may question the accused to establish whether he in fact admits all the elements of the crime to which he's pleaded guilty. The *Negondeni* court, at para [7], quoted from *S v Nyanga* 4/6004/2002 [2003] ZAWCHC 33 (1 August 2003) where the court held that section 112 (1) (b) questioning had a twofold purpose. Firstly, to establish the factual basis for the plea of guilt and then to establish the legal basis for the plea. When establishing the factual basis, the admissions may not be added to by way of inferential reasoning (see *S v Nkosi* 1986 (2) SA 261 (T) at 263H-I; *S v Mathe* 1981 (3) SA 664 (NC) at 669E-G; *S v Jacobs* 1978 (1) SA 1176 (C) at 1177B). When establishing the legal basis for the plea, the court has to draw conclusions of law from the factual admissions relating to intention to commit the crime, and the element of unlawfulness. If the court is satisfied that all the elements of the crime are covered, the accused may be convicted (*S v Lebokeng* 1978 (2) SA 674 (O) at 675G-H; *S v Hendricks* 1995 (2) SACR 177 (A) at 187B-E; *S v De Klerk* 1992 (1) SACR 181 (W) at 183A-B; *S v Diniso* 1999 (1) SACR 532 at 533G-H).

In casu, the magistrates court was dealing with section 112 (2), not 112 (1) (b) of the Criminal Procedure Act 51 of 1977. Nevertheless, it seems that the principles established in terms of section 112 (1) (b) apply equally to section 112 (2). Section 112 (2) deals with the situation where an accused hands up written admissions from which the court can be satisfied that all the elements of the crime have been admitted. The section provides that the magistrate may question the accused regarding any matter in the statement which requires clarity.

Section 113 provides that if through the 112 (1) (b), or 112 (2) process of questioning, the magistrate cannot be sure that the accused has admitted every element of the crime, the plea of guilty must be changed to a plea of not guilty.

In casu, since there was nothing in the section 112 (2) statement to show that the accused admitted the elements of intention and unlawfulness, and since the factual admissions cannot be added to by inferential reasoning per the authority above, the High Court held that the magistrate ought not to have convicted the accused, but should rather have questioned him to establish whether he admitted every element of the offence (para [8]). The purpose of the questioning would be to avoid the necessity of calling witnesses where the accused understands and admits to all the elements of the crime (para [8], see *S v Shiburi* 2018 (2) SACR 485 (SCA) at para [18]). If the questioning reveals that the accused does not admit all the elements, including the legal elements of intention and unlawfulness, section 113 must be invoked.

In the case before the High Court, the conviction and sentence were overturned because the accused had not admitted the elements of intention and unlawfulness in his section 112 (2) statement. The matter was remitted back to the court a quo for questioning in terms of section 112 (2), and then, possibly, the application of section 113 (para [9]).

The decision in this case is correct and serves to establish that the same principles apply regarding it not being proper to add to the admissions by way of inferential reasoning regardless of whether one is dealing with section 112(2) and not 112 (1) (b) of the Criminal Procedure Act 51 of 1977.

**Single child witness: double cautionary rule, illegally obtained warning statement, alibi defence**

In the case of *Maila v The State* (429/2022) [2023] ZASCA 3 (23 January 2023), the appellant was appealing against his conviction and sentence by a full bench of the High Court, on a charge of child rape (para [2]). This discussion will focus on elements of the appeal against conviction only.

Double Cautionary rule

The complainant in this case was a 9 year old child, who was a single witness. There is a cautionary rule applicable to child witnesses and single witnesses. The question is whether in this case, a double cautionary rule should be applied. In *Vilakazi v S* 2016 (2) SACR 365 (SCA), the Supreme Court of Appeal cautioned against the application of a double cautionary rule to the disadvantage of the single child witness. Instead the child's evidence should be tested for reliability in a holistic manner, taking into account all the evidence (para [18]). This is a correct statement of the law since the *Woji* case.

Alibi

In his defence, the appellant raised an alibi that he was at work when the complainant was raped. However, the alibi was not put to the witnesses nor included in the section 115, Criminal Procedure Act 51 of 1977 statement. The court held that it was trite than an accused does not have to prove his defence (para [20], see also *Tshiki v S* [2020] ZASCA 92 (SCA)). However, the accused should raise the alibi defence at the earliest opportunity so that it can be properly investigated (para [21]). In casu, the Supreme Court of Appeal found many reasons as to why the alibi defence should be rejected (paras [33] – [38]).

The question of the disclosure of an alibi defence was canvassed at length in the case of *S v Thebus* 2003 (6) SA 505 (CC) where four judgements were given. Moseneke J delivered the majority judgement and at para [68], he held that: "The failure to disclose an alibi timeously is … not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole." In the case under discussion, the manner in which the court dealt with the alibi was consistent with the approach of the majority of the court in the *Thebus* case.

Warning statement

The Supreme Court of Appeal held that the warning statement by the appellant should not have been admitted into the evidence by the court a quo, and the full bench of the court. This was because the statement had been obtained illegally. This was conceded by the state at the start of the appeal to the Supreme Court of Appeal (para [16]). The evidence of the state thus fell to be considered without the warning statement (para [23]). The issues to be decided were whether the evidence of the child complainant was satisfactory in all material respects, and whether or not the accused's defence was reasonably possibly true (para [24]).

Conclusion

After a holistic consideration of all the evidence (except the warning statement), the Supreme Court of Appeal found that the child's incriminating evidence was trustworthy and supported by external evidence (para [25] – [31]), and that the accused's defence was false (para [33] – [38]). Accordingly, the appeal against conviction failed, and the conviction was confirmed (para [39]). I support the judgement.

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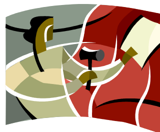

**Matters of Interest to Magistrates**

**What must a guilty plea entail?**

A guilty plea is meant to obviate the need for the state to adduce evidence to prove the guilt of the accused. The accused accepts that their conduct complies with the definitional elements of the charge(s) preferred against them. In terms of s 112(2) of the Criminal Procedure Act 51 of 1977, the accused who pleads guilty to the charge(s) is required to set-out the 'facts which he admits and on which he has pleaded guilty.' The accused need not set-out the conclusions of the law but facts from which the court would come to a legal conclusion of guilty. It is, therefore, not necessary for the accused to recite the definitional elements of the offence with which they are charged in their plea statement.

In *Mkhize v S* (KZP) (unreported case no AR365/21, 3-2-2023) (Chetty J (Ploos van Amstel J concurring)) the High Court failed to appreciate this trite proposition. The accused was charged with murder in terms of s 51(1) read with part 1 of schedule 2 of the Criminal Law Amendment Act 105 of 1997. At his trial, the accused pleaded guilty and the court *a quo* found him guilty as charged based on his plea. Events leading to the commission of the offence were that the accused and the deceased were involved in a romantic relationship. On 4 August 2019, the deceased informed the accused that she was visiting her mother and that she would be spending the weekend with her. The appellant discovered that this was not the case (para 4). On her return home the following morning the appellant confronted the deceased about her lies. The deceased confirmed that she had visited another man. On hearing this, the appellant's plea of guilty states he:

'… became enraged at the deceased's admission that she was seeing another man under the pretext of visiting her mother. He grabbed hold of a knife in the house and stabbed the deceased repeatedly. She attempted to flee without success' (para 5).

The appellant appealed his conviction on the basis that in his plea explanation he had not admitted that he had the necessary intention to kill the deceased and that his conduct was unlawful. In upholding his appeal, the court said:

'Although the appellant admitted to having stabbed the deceased repeatedly and that she died as a result of the wounds inflicted, these do not constitute facts from which the court *a quo* could have justifiably drawn the conclusion that the appellant had the necessary intention to kill the deceased' (para 6).

This conclusion is mindboggling. It is trite that the accused who pleads guilty to the charge of murder need not expressly state that they had the intention to kill. Intention as understood in law is a term of art, it encompasses more than the so-called 'colourless intention'. Intention entails the cognitive and the conative elements (CR Snyman *Criminal Law* (Durban: LexisNexis 2014) at 176). From the plea statement, there is nothing to suggest that the two elements were not satisfied. For example, on learning of the deceased's infidelity the appellant became angry and took the knife and repeatedly stabbed the deceased. It is clear from this statement that the conduct of the appellant was voluntary and goal oriented. The appellant did not claim the presence of any ground of justification. It is inconceivable that the usage of the word 'grabbed' in the plea explanation could have meant anything other than that when the appellant took a knife, he intended to stab the accused, an act that is unlawful. There is nothing in the judgment that suggests that the appellant did not fully admit the definitional elements of the crime of murder (perhaps the shortcoming of the plea statement is that it does not admit to premeditation, something, which was not the court's concern).

The court held that it is improper for the court to draw inferences from the admitted facts (para 8). If by the drawing of inferences, the court meant that the court convicting on the plea of guilty should not rely on circumstantial evidence then the court was correct. However, if the court meant that the court could not draw legal conclusions from the facts as presented in the plea of guilty then the court is wrong. The court must be satisfied that the facts contained in the plea of guilty establishes the offence with which the accused is charged. Conclusions whether the accused had intention or not

are for the court to determine from the stated facts. For the accused to say he had intention is a conclusion of law, which is reserved for the court, and in fact is superfluous. The reasoning of the court seems to suggest that the elements of the offence such as unlawful conduct and intention must be expressly stated in the plea of guilty (para 8). However, this is not the position in our law. At the risk of repetition, the question whether the accused who pleads guilty has intention or not is the question that the court and the court alone must decide based on the state facts. Whether the word's intention is included in the plea of guilty or not is immaterial. As Snyman puts it '[t]here is no rule to the effect that a court may find that X acted with intention only if he (X) admitted that he had intention' (Snyman (*op cit*) at 185). There is nothing in the portion of the plea of guilty statement that points to a conduct that indicates that the appellant might not have acted with intention, at the very least *dolus eventualis.* To conclude otherwise would compel courts dealing with guilty pleas to put legal questions to accused persons, something not envisaged by the Act. That the accused states that they had intention in his plea of guilty does not absolve the court from scrutinising the alleged facts to satisfy itself that indeed the accused had the requisite intention. Therefore, the court was wrong in concluding that the accused plea of guilty statement was deficient.

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**(This article was first published in *De Rebus* in 2023 (Aug) *DR* 44).**

**A Last Thought**

[18] The issue of police statements is well known and the court *a quo* dealt with it appropriately. The Law of Evidence in regard to the use of documents is applicable to both the State and the Accused. The authenticity of the content of a document needs to be proven by the party that relies on the veracity thereof.

[19] In *S v Govender and Others* 2006 (1) SACR 322 (E) Nepgen, J discussed the issue extensively. He pointed out that it is important that it should always be borne in mind ". . . that police statements are, as a matter of common experience, frequently

not taken with the degree of care, accuracy and completeness which is desirable. . .'. (*S v Xaba* 1983 (3) SA 717 (A) at 730B - C.)
Furthermore, as was pointed out in *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE) at 437h that the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court. Quite apart from that, however, there are other problems associated with police statements. They are usually written in the language of the person who records them. Frequently the use of an interpreter is required and, invariably, such interpreter is also a policeman and not a trained interpreter. The statement, according to my experience, is also usually a summary of what the policeman was told by the witness and is expressed in language or in terms normally used by him and not necessarily the witness. I am of the view that the fact that discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual nor surprising. Whenever there are contradictions between the police statement of a witness and the evidence of such witness, or where there is no reference in a police statement to what can be considered to be an important aspect of that witness' testimony, the approach to be adopted in regard thereto is as described in *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593e - 594h.

[20] In *S v Mafaladiso and others* 2003 (1) SACR 583 (SCA) it is summarised in the headnote that the juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, *inter alia*, between her or his *viva voce* evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain their statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between

the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings. (At 593e - 594h.)

**Per Opperman, J in P.H.K v S (A67/2022) [2022] ZAFSHC 354 (13 December 2022)**