e-MANTSHI

A KZNJETCOM Newsletter

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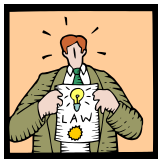
Welcome to the two hundredth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP.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

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

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



New Legislation

1. The Minister of Social Development has issued an addendum Notice no 2608 published in Government Gazette no 48853 on 26 June 2023. The addendum was published in Government Gazette no 49310 dated 11 September 2023. The purpose of the addendum is to provide forms for the proposed amendment to Regulation 56 of the Childrens Act 38 of 2005. The addendum can be accessed here:

https://archive.gazettes.africa/archive/za/2023/za-government-gazette-dated-2023-09-11-no-49310.pdf

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Recent Court Cases

1. S v Lenting and Others (CC08/2018) [2023] ZAWCHC 241 (14 September 2023)

Child witnesses who at the time of a gruesome crime and now reached age of majority – Suffering from psychological effects and PTSD – One witness mildly intellectually impaired – Witnesses to testify through the assistance of an intermediary who understands witnesses suffering from PTSD and psychological problems – Witnesses will testify through a close circuit television and their evidence will be heard behind closed doors – Their names and identities shall not be disclosed to the public.

Lekhuleni J

[1] This is an application in terms of sections 170A, 153, 154, and 158 of the Criminal Procedure Act 51 of 1977 ("the CPA"). The State sought an order directing that two witnesses it intends to call testify through the assistance of an intermediary via a close circuit television or a similar means of electronic media. The State also sought an order that the identity of these witnesses should not be disclosed to the public. In addition, the State also applied that should the court find that the two witnesses it intends to call are mentally above the age of 18, the court must declare sections 153(5) and 164(1), and 170A of the CPA unconstitutional to the extent that these sections do not provide ongoing protection for minor children who witnessed a commission of an offence as minor children and who have since reached the age of majority at the time they are called to testify in court.

[2] The State contends that if this court finds that the scientific evidence it presented is not conclusive regarding the mental age of the two witnesses being under the age of 18, then section 170A will not apply, nor will section 153(5) or 164(1) despite the mental anguish and stress being evident. This is so because these sections only afford protection if the additional requirements of mental age are met as set out in section 170A of the CPA. To this end, the State requests that this court declare sections 153(5), 164(1), and 170A of the CPA unconstitutional and read in provisions that remedy the defects until the legislature amends the sections.

[3] The relevant counts in these applications are counts 111 - 113. These counts involve a charge of Murder, Possession of an Unlicensed Firearm, and Possession of Ammunition. These counts implicate accused 1, 2, 8, and 9. The State's applications also relate to counts 120 - 123. These counts involve a charge of Housebreaking with intent to commit Murder and Murder, Murder, Possession of Unlicensed Firearm, and Possession of Ammunition. These counts (120 - 123) implicate accused 1, 2, 3, and 9.

[4] As stated in my previous judgment dealing with section 158(2) application (see *S v Lenting and 19 Others* CC08/2018[2023] ZAWCHC 168 (24 July 2023), the accused are facing various charges totalling 145. Their criminal trial is pending before this court. The State intends to lead two witnesses who allegedly witnessed the commission of the offence in respect of counts 111 - 113, and 120 - 123. It is alleged that they were still minors when these witnesses saw the commission of these crimes. One was 13 years old, and the other was 15 years old. These witnesses have since reached the age of majority. The State relies on the paramountcy of the best interest of minor children entrenched in section 28(2) of the Constitution and contends that these witnesses should enjoy ongoing protection despite their age. The State further submitted that intermediaries be appointed for the two witnesses, regardless of their age, to assist them in presenting their evidence in court.

[5] In support of its contention, the State relied on the decision of the Constitutional Court in *Centre for Child Law and Others v Media 24 Limited and Others,*[1] in which the Constitutional Court held that ongoing protection must be afforded to child victims, witnesses, and accused. In the context of section 154(3) of the CPA, the court held that a child who has experienced trauma, be it as a victim, a witness, or an accused, does not forfeit the protection afforded by that subsection upon reaching the age of 18 and should not, as a result of turning 18, have their story and identity exposed without their consent or necessary judicial oversight.

[6] Notwithstanding, the State led viva voce evidence of Colonel Clark, a Clinical Psychologist, and tendered an affidavit of the investigating officer to support its application. Colonel Clark testified that she assessed the witness in respect of counts 111 - 113 and prepared a report, which was handed in by agreement as an exhibit in these proceedings. In her evidence, she testified that the witness in these counts suffers from headaches and flashbacks of the shooting of his father. His eyes strain when he has a headache. Colonel Clark noted in her report that the witness was admitted to hospital for an apparent psychotic break in 2019. The witness is said to have had auditory and visual hallucinations and flashbacks after witnessing the shooting of his father. The witness reported several symptoms of depression, like psychomotor agitation, suicidal ideation, and persistent inability to experience positive emotions. He had difficulty sleeping and attempted suicide by swallowing his mother's sleeping pills.

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[1] 2020 (4) SA 319 (CC).

[7] According to Colonel Clark, if this witness were to testify in open court and start recounting the events of that particular incident, there is a great possibility that he would experience flashbacks on the stand, which would obviously make his narrative incoherent based on the fact that he has dissociated where he is. Colonel Clark further reported that the witness feared for his life, and to place him in such a situation would increase his distress. He could decompensate on the witness stand.

[8] In addition, the witness reported symptoms of Post-Traumatic Stress Disorder ("PTSD") due to recurrent, involuntary, and intrusive distressing memories and recurrent distressing dreams. Colonel Clark testified that the witness is not intellectually impaired, and his intellectual capacity is functioning within the range of borderline intelligence. In Colonel Clark's view, intellectually impaired people have an Intelligence quotient (IQ) below average. Her clinical judgment is that the witness suffers from psychotic disorder after witnessing the incident. It is possible that if the witness testifies in open court, this would provoke a psychotic break and negatively affect the mental health of the said witness in the long term.

[9] In her opinion, the witness would need someone to assist him if he goes psychotic, and it must be someone who can see that the witness is decomposing to psychosis. Furthermore, the witness experiences visual and auditory hallucinations, which may be exacerbated when the witness recounts what happened in the accused's presence. Colonel Clark stated that the determination of mental age is a contentious issue for many psychologists working within the forensic field. However, in her clinical opinion, the witness in these counts has a diminished mental age compared to his chronological age. In her view, this witness functions at 17 years old.

[10] Concerning the witness in counts 120 – 123, Colonel Clark testified that at the time of assessment, the witness was 19 years old. She assessed this witness and prepared a report, which was also handed in by agreement as an exhibit in these proceedings. Colonel Clark testified that the witness in these counts also reported symptoms of PTSD. The witness was assessed and was found to suffer a mild intellectual impairment. In light of the mild intellectual impairment, in her opinion, the mental age of the witness is below the age of 18. According to Colonel Clark, the witness's symptoms of PTSD may have impacted his performance during the assessment test. The witness was visibly distressed when he told her how he witnessed his mother being shot and killed by her assailants.

[11] Moreover, Colonel Clark stated that the witness also displayed symptoms of depression such that, at some stage, he wanted to shoot himself. The witness exhibits symptoms of PTSD and may be re-victimised and re-traumatised by testifying in open court in the presence of the accused. Colonel Clark recommended that the witness be permitted to testify via closed circuit television or other similar media, with the assistance of a court-appointed intermediary. She asserted that if the witness were to

testify in an open court, this would increase the severity of the witness's symptoms of PTSD.

[12] The State also tendered evidence of the Investigating officer, Sergeant Van Wyk, in the form of affidavits in both applications. In both applications, Sergeant Van Wyk supported the State's application that the witnesses testify in camera through a close circuit television due to the nature of the case and the vulnerability of the witnesses and that their identity in both applications should remain anonymous in respect of the proceedings in court in terms of section 153(2) of the CPA.

Submissions by the Parties

[13] Mr Damon, who appeared for the State, contended that the evidence of Colonel Clark and Sergeant Van Wyk that the two witnesses' mental age is below 18 is uncontroverted. Counsel implored the court to invoke the provisions of section 170A and 158(2) of the CPA that the two witnesses testify in camera through a closed circuit television with the assistance of a court-appointed intermediary.

[14] In addition, Counsel argued that section 170(A) of the CPA does not provide for witnesses/victims that saw the commission of crimes when they were children and have since reached the age of majority when they are called to testify. Furthermore, if assessed by a clinical or medical professional and it is concluded that the witness, although mentally and biologically above the age of 18 years, still would require the services of an intermediary to testify due to mental anguish, the witness would not be able to testify through a court-appointed intermediary because the court's discretion has been removed.

[15] Mr Damon submitted that the court has a discretion to appoint an intermediary in terms of section 170A if the child or person with a mental age below 18 years would suffer mental anguish without the service of an intermediary. Counsel further submitted that the court does not have that discretion despite clinical evidence indicating the appointment of an intermediary in the ongoing protection scenario. A witness or victim qualifying for ongoing protection in section 28(2) of the Constitution would, therefore, have to convince the court that he/she is below the mental age of 18 for the court to exercise its direction to appoint an intermediary because of their biological age.

[16] Counsel further submitted that the ongoing protection of minor children (witnesses) should be consistent with the ongoing protection accorded to accused 9, who was a child when the alleged offences were committed. Mr Damon argued that accused 9 still enjoys protection despite achieving the age of majority. Even if he should be convicted of any or all of the offences he is charged with, the minimum sentence of life imprisonment will not apply because he was a minor when the crimes were allegedly committed. The witnesses he intends to call do not enjoy the same protection or enjoyment of their rights as children, similar to those enjoyed by the

accused, who do not forfeit the ongoing protection upon attaining the age of majority. The delay in bringing the case to court was not due to their (the witnesses) fault and should not be held against them.

[17] Counsel further contended that section 153(5) of the CPA explicitly protects witnesses under the age of 18 and does not extend the same protection to witnesses who witnessed the commission of a crime while they were minors and are called to testify after they have reached the age of majority. As a result of turning 18, so the argument went, neither the two witnesses' inability to take the oath and be admonished to tell the truth will be considered and may be considered as incompetent to testify, as they are not included in section 164(1) of the CPA. To this end, Mr Damon submitted that these sections, 153(5), 164(1), and 170A, are unconstitutional because they do not provide ongoing protection for such witnesses.

[18] Mr De Villiers, who appeared for accused 1, 2, and 3, did not oppose the application of the State in terms of sections 170A if the court finds that the witnesses satisfy the jurisdictional facts in section 170A. However, he submitted that the section only applies to children under the biological or mental age of 18.

[19] Mr Badenhorst, appearing for accused 9, opposed both applications and argued that accused 9's right to a fair and open trial, as embodied in the provisions of section 35 of the Constitution, to be heard in an open court, would materially be infringed if he and everyone else that has an interest in the accusers of the accused, on the two murder charges, would not be able to observe the state witness testifying in an open court. As in the previous application, Mr Badenhorst relied on the Constitutional Court case of *S v Shinga (Society of Advocates (Pietermaritzburg) as Amicus Curiae; S v O' Connell and Others,*[2] where the Constitutional Court found that closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based. Counsel argued that these witnesses must testify in open court so that their version could be tested.

[20] On the State's application for the declaration of invalidity, Counsel submitted that section 170A(1) should be afforded its ordinary unambiguous meaning. Mr Badenhorst submitted that section 170A(1) clearly reflects the legislature's intention to apply to any witness under the biological or mental age of 18 years. Counsel further submitted that it would not be incumbent upon this court to declare the provisions of the section unconstitutional until it is amended. Counsel argued that the evidence of Colonel Clark in support of both applications falls significantly short of substantiating any basis for extended protection to the witnesses in both murder charges.

[21] Although their clients are not implicated in these charges, on invitation by the court, Mr Klopper and Mr Strauss submitted heads of argument on the Constitutional

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[2] 2007 (2) SACR 28 (CC).

question raised by the State. I want to thank them for the comprehensive arguments raised in their heads of argument. Mr Strauss argued that the constitutional rights of both children and witnesses who are children are protected by both the CPA and the Constitution. On the State's submission that if ongoing protection is not afforded to the now adult witnesses, they will suffer prejudice, Mr Strauss submitted that if one reads section 170A(1), the legislature intended to deal with the undue mental stress or suffering which witnesses may endure at the time of testifying. In his view, section 170A(1) was written to deal with the age of a witness at the time he or she is giving evidence in court. The legislature intended to specifically deal with witnesses under the biological or mental age of 18 when giving evidence in court. This does not extend to adult witnesses. When the section was amended, Counsel argued, the legislature expressly did not include adult witnesses with a mental age of 18 in section 170A(1) when they testify in court.

[22] Mr Klopper shared the same sentiments and further submitted that section 170A was never enacted to apply to adult witnesses but to apply exclusively to children. On the parallel reasoning the State drew between the sentencing of an accused person who was a minor at the time of the commission of the crime and a witness who witnessed a crime while a minor, Counsel argued that there was no such correlation. In Counsel's view, the sentencing of a child offender who has become an adult relates to the focus being on age at the time of committing the offence. It is a reflection upon and a consideration of a past event.

[23] Regarding a witness in section 170A, Counsel argued that the focus is on stress or anxiety at the time of testifying. It is a reflection upon and a consideration of a present event. Counsel contended that the relevant questions are whether the witness will suffer stress while testifying now or whether the witness is younger than 18 or has a mental age of under 18 now at the time of testifying.

[24] Mr Klopper further contended that the State's argument requires the application of a state that will not exist at the time of testifying just because the witness was a child at some stage in the past. Relying on *S v ZF,*[3] Counsel submitted that section 170A is about the present and presenting evidence now and not a past situation. The submission was that the section was designed for children and could only be applied to children at the time of testifying.

The Legislative Framework

[25] Section 170A of the CPA was introduced in 1993 to protect child witnesses. This was pursuant to a research by the South African Law Reform ("SALRC") Commission, which investigated and recommended that child witnesses must be protected and that they should testify in a child-friendly environment as opposed to the traditional

[3] [2016] 1 AII SA 296 (KZP).

courtroom with attired court officials, which resulted in children being afraid and confused.[4] At the time, the SALRC lamented the adversarial system, which allowed aggressive cross-examination and its effect on a child, and noted it as a matter of concern. The accused's right to a fair trial, which included the right to see and hear witnesses, traumatised the child. Furthermore, the commission noted that such children would often be unwilling to testify and, therefore, poor witnesses.

[26] Pursuant to the SALRC's rigorous and exhaustive research, section 170A was introduced on 30 July 1993 in terms of the Criminal Law Amendment Act 135 of 1991, which allowed child witnesses to testify in a child-friendly room with the assistance of an intermediary. The section was essentially introduced to balance the need to protect a child witness in the adversarial system and ensure that an accused is given a fair trial. The section has been found to pass constitutional muster by the Constitutional Court in *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others.*[5]

[27] The Constitutional Court held that section 170A aims to prevent a child from undergoing undue mental stress or suffering while giving evidence. It does this by permitting the child to testify through an intermediary.[6] The intermediary is required to convey the general purport of questions put to the child. More importantly, the court noted that section 170A(3) allows the child who testifies through an intermediary to give evidence in a separate room away from the accused and in an atmosphere designed to set the child at ease. The court further observed that this provision ensures that the court and the accused can see and hear the child and the intermediary through electronic or other devices.

[28] The section has been amended over the years. Before 05 August 2022, the relevant parts of this section provided as follows:

"(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary.
(2) (a) No examination, cross-examination or re-examination of any witness in respect of whom a court has appointed an intermediary under subsection (1), except examination by the court, shall take place in any manner other than through that intermediary…."

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[4] See *The Protection of the Child Witness: Project 71* (April, 1989).
[5] 2009 (2) SACR 130 (CC).
[6] *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 130 (CC) at para 94.

[29] This section was amended by the Criminal Law Amendment Act 12 of 2021, which took effect on 05 August 2022. The amendment made significant changes to the section. Subsections 1 and 2(a) were amended, and new subsections 11, 12, and 13 were added to the section which introduced new innovations. Currently, the relevant parts of this section provides as follows:

"(1) Whenever criminal proceedings are pending before any court and it appears to such court that it would expose any witness—

(a) under the biological or mental age of eighteen years;

(b) who suffers from a physical, psychological, mental or emotional condition; or (c) who is an older person as defined in section 1 of the Older Persons Act, 2006 (Act 13 of 2006), to undue psychological, mental or emotional stress, trauma or suffering if he or she testifies at such proceedings, the court may, subject to subsection (4), appoint a competent person as an intermediary in order to enable such witness to give his or her evidence through that intermediary…"

[30] It is well established that a child witness must be protected from undue mental stress or suffering while giving evidence. Evidence through intermediaries is widely recognised as an effective procedure in criminal proceedings to protect a child witness or complainant. Prior to the amendment, the intermediary service was available to a child witness or complainant in criminal proceedings. The intermediary service was not available to any other witness or complainant who may be exposed to similar undue mental stress, trauma, or suffering. The intermediary service was also not available for any proceedings, other than criminal proceedings. Youth was the focus of the inquiry for the appointment of an intermediary. Most cases that dealt with this provision in the courts, involved persons under the biological or mental age of 18 years.

[31] However, the amendment stated above gave the section a new complexion. The amendment brought about by the Criminal Law Amendment Act 12 of 2021 significantly increased the power of the courts to appoint intermediaries in two respects. The list of witnesses who might qualify for this purpose now goes beyond young persons. It includes two other classes of witnesses: namely, any person 'who suffers from a physical, psychological, mental, or emotional condition. This category of witnesses is not age-bound or limited. In other words, regardless of age, an intermediary can still be appointed for witnesses who suffer from a psychological, mental, or emotional condition, even if that witness is older than 18 years.

[32] The second category introduced by the recent amendments is a witness who is an older person as defined in section 1 of the Older Persons Act 13 of 2006. In terms of section 1 of the Older Persons Act, an older person is a person who, in the case of a male, is 65 years of age or older and, in the case of a female, is 60 years of age or older. Furthermore, before August 2022, an appointment for an intermediary for a witness under the biological or mental age of eighteen years could be made only if it appeared that testifying in an open court would expose the witness to 'undue stress or

suffering'. The amended section now provides that the court may order the use of intermediary service if it appears to the court that the proceedings would expose such a witness to undue psychological or emotional stress, trauma, or suffering if he or she testifies at such proceedings. This is in addition to undue 'mental stress or suffering', which was provided for in the section before it was amended. I pause to mention that the amendment also introduced the services of intermediaries to proceedings other than criminal matters.[7] Witnesses in civil matters who meet the threshold set out in the respective sections, may testify through the assistance of an intermediary.

[33] Before the amendment to this section, the intermediary service was not available to an adult witness or complainant who were exposed to undue mental stress, trauma, or suffering. As amended, section 170A(1) lists various categories of witnesses for whom an intermediary may be appointed. A careful reading of the section clearly indicates that these subsections must be read disjunctively. Subsection 1(b) uses the word "or" which distinctly demonstrates that the category of witnesses envisaged in subsection 1(a) and (b) are different from those envisaged in subsection (c). For all intents and purposes, the legislature intended to extend the services of intermediaries to witnesses older than 18 years who suffer either from a psychological, mental, or emotional condition and to older persons. A court must determine if a witness falls into one or more of the various categories envisaged in the subsections.

[34] For certainty, section 170(1)(a) deals with young witnesses. In contrast, section 170A(1)(b) applies to witnesses who suffer from a physical, psychological, mental or emotional condition (regardless of age). Section 170A(1)(c), on the other hand, applies to witnesses who are older persons as defined in the Older Persons Act. As previously stated, these amendments came into effect on 5 August 2022. In my view, these amendments are procedural in nature. They are designed to govern how rights are enforced and do not affect the substance of those rights.

[35] The general rule is that a statute is as far as possible to be construed as operating only on facts that come into existence after its passing.[8] Despite this general rule, it has been held that a distinction must be drawn between those amendments that are merely procedural in nature, and those that affect substantive rights. New procedural legislation designed to govern only the manner in which rights are asserted or enforced does not affect the substance of those rights.[9] Such legislation is presumed to apply immediately to both pending and future cases. Therefore, the amendment of section 170A of the CPA does not impact on substantive rights and is presumed to apply immediately to both pending and future cases.[10] In other words, the provisions

[7] See sections 51A and 51B of the Magistrates Court Act 32 of 1944, and sections 37A and 37B of the Superior Courts Act 10 of 2013.
[8] *S v Mhlungu and Others* 1995 (3) SA 867 (CC) para 65.
[9] See *Raumix Aggregates (Pty) Ltd v Richter Sand CC and Another, and Similar Matters* 2020 (1) SA 623 (GJ) at para 9.
[10] See *Unitrans Passenger (Pty) Ltd t/a Greyhound Coach Lines v Chairman, National Transport Commission and Others* 1999 (4) SA 1 (SCA) para 16 – 24.

of section 170A, as amended, are applicable in all proceedings from the date the section came into operation.

[36] In considering an application in terms of section 170A, the court must engage in a two-pronged approach. The court must first determine whether the witness is one defined either in subsections 1(a) to (c) of section 170A as amended. For instance, the court must determine whether the witness has a physical condition or has a mental age below 18. Once the court has made a finding in this regard, the court must decide whether the proceedings would expose such a witness to undue psychological, mental, or emotional stress, trauma, or suffering if he or she testifies at such proceedings without the assistance of an intermediary. If the court is satisfied that the witness meets the two requirements, the court may appoint an intermediary to enable such witness to give his or her evidence through that intermediary.

[37] It must be stressed that the principles applied by the courts in determining the need for the appointment of an intermediary concerning children and people with a mental age below 18 remain relevant and apply with equal force to the new categories. However, each case must be determined on its merits. I find the principles espoused by the Constitutional Court in *Director of Public Prosecutions, Transvaal v. Minister for Justice and Constitutional Development and Others,*[11]*("DPP Transvaal")* apposite. The court stated:
"The nature of the enquiry that is required is not akin to a civil trial which attracts a burden of proof. It is an enquiry which is conducted on behalf of the interests of a person who is not party to the proceedings but who possesses constitutional rights. It is therefore inappropriate to speak of the burden of proof being placed upon a party to an application for an intermediary, as some High Courts have done."

[38] The court went further and stated:

"Judicial officers are provided with discretion to ensure that the principles and values with which they work can be applied to the particular cases before them in order to achieve substantive justice. Discretion is a flexible tool which enables judicial officers to decide each case on its own merits. In the context of the appointment of an intermediary, the conferral of judicial discretion is the recognition of the existence of a wide range of factors that may or may not justify the appointment of an intermediary in a particular case."[12]

[39] I am mindful that the court in *DPP Transvaal*, dealt with the application of section 170A in respect of children, however, I am of the view that the principles expressed in that case, apply with equal force in this matter and in matters involving the new categories of witnesses envisaged in subsection 1(b) and (c) of the amendment. In

[11] 2009 (2) SACR 130 (CC) at para 114.
[12] Para 115.

DPP Transvaal, the court was concerned with the best interests of children as enshrined in section 28(2) of the Constitution. In the same way, the category of witnesses envisaged in subsections 1(b) and (c) as amended, have a right to equal protection and benefits of the law and to have their dignity respected and protected as entrenched in section 9 and 10 respectively, of the Constitution. To allow them to be subjected to undue mental stress and suffering would offend against these constitutional rights. To enable them to give a full account of the acts complained of with ease and to ensure that justice is done, courts have to apply these principles discussed above conscientiously and determine what the interests of justice demand.

[40] For greater certainty, in determining whether a witness is protected by the section, a birth certificate for a child witness should be provided to the court to prove the age of a child witness at the date that the witness is scheduled to testify. In my view, a psychologist's report should be provided to the court to determine whether the witness has a mental age below 18. An identity document or a similar document for older persons as defined in section 170A(1)(c) must be provided to the court to prove the older person's age as defined in the Older Persons Act.

[41] Meanwhile, scientific evidence in my view, must be placed before the court before an intermediary can be appointed for a witness envisaged in section 170A(1)(b) of the amended section. The CPA and the amendments do not define the psychological, physical, mental, and emotional condition set out in section 170A(1)(b). In my view, consistent with the tenets of statutory interpretation, these words must be given their grammatical meaning unless doing so would result in an absurdity.[13] This should be done consistent with the three interrelated riders to this general principle, namely: that statutory provisions should always be interpreted purposively; the relevant statutory provisions must be properly contextualised; and that all statutes must be construed consistent with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity.

[42] For a court to satisfy itself that a witness is suffering from a psychological condition, a psychologist's report must be filed before a court can invoke the provisions of this subsection to appoint an intermediary for that witness. In my opinion, a psychologist’s report would also suffice for a witness alleged to be suffering from an emotional condition. The amendment also envisages the application of the section in cases of witnesses suffering from a physical condition. The Act does not explicitly define physical condition or the level of impairment of the body. However, the grammatical meaning of physical condition would refer to the state of the body or bodily functions. For instance, a physical condition may refer to a person who is visually impaired or suffering from speech disorders. Courts would ordinarily require a medical report explaining the detail of such impairment and the extent to which the witness would suffer undue psychological, mental, or emotional stress or trauma if the witness testifies in such proceedings without the assistance of a court-appointed intermediary.

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[13] *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

[43] Giving this section its ordinary grammatical meaning, it becomes evident that it is no longer limited to the protection of children but applies to older persons and people suffering from mental, physical, and psychological conditions. In my opinion, the new categories of persons introduced in the recent amendments negate the age limitation envisaged in section 170A(1)(a). A child witness who has reached the age of majority but suffers from a psychological, mental, or physical condition can still be allowed to testify through the assistance of an intermediary. This section can still protect witnesses experiencing emotional issues if it can be established that they will suffer undue psychological, mental, or emotional stress or trauma if they testify in the proceedings without the assistance of an intermediary.

[44] Other notable observations of the new amendment are the requirements introduced in subsections 11, 12, and 13 to the section and the amendment of subsection 7. Section 170A(7), which required a court to provide reasons for refusing an application by the State for the appointment of an intermediary immediately upon refusal in respect of a child under the age of 14 years, was amended. This section was amended to remove reference to a child under the age of 14 years. The amended subsection now provides that the court shall provide reasons immediately upon refusal of any application for the appointment of an intermediary. The furnishing of reasons is not only limited to applications involving children under the age of 14 years. In my view, the purpose of this amendment is to ensure that the protective measure covers every witness referred to in this section.

[45] Subsection 12 envisages a competence enquiry that the court must conduct before a person can be appointed as an intermediary. Among others, the enquiry must include, but not limited to, qualifications, the fitness of a person to be an intermediary and his or her experience, which has a bearing on the role and functions of an intermediary. The enquiry must also include the person's experience, which has a bearing on the role and functions of an intermediary, the language, and communication proficiency. Importantly, the court must inquire about the ability of the intended intermediary to interact with a witness under the biological or mental age of 18 years or, a witness who suffers from a physical, psychological, mental, or emotional condition, or a witness who is an older person as defined in section 1 of the Older Persons Act.

[46] The amendment did away with the one size fits all approach and introduced a specialisation requirement for each category. Persons destined to be used as intermediaries will not necessarily be able to be intermediaries for all categories envisaged in subsection 1. The amendment also ensures that different skills are employed to cover witnesses with different needs. Intermediaries appointed before this section's amendment must also undergo a competence test to determine their suitability to act as intermediaries for the relevant categories. Crucially, the court must inquire about their language and communication proficiency. In my view, this is critical

because there is a vast potential prejudice against a witness if the intermediary is not well-versed in the language the witness speaks. Before an intermediary is appointed, in my view, the court must be satisfied that such an intermediary is competent and proficient in the witness's language to prevent such prejudice to the witness.

[47] Subsection 13 enjoins a head of court as the most senior judicial officer, namely, a Regional Court President for the Regional Courts, a Chief Magistrates for the District Courts, and the Judge Presidents for the High Court after holding an enquiry contemplated in section 12 to issue a certificate of competence to a person whom he or she has found to be competent to appear as an intermediary in the court concerned. Before the head of court issues the certificate of competence, he or she must cause the persons found competent to be appointed as an intermediary to take the oath or make the affirmation.

[48] The certification by the judicial head is an alternative to the one that the presiding officer must do during trial proceedings. If the intermediary is certified by the judicial head and sworn in, it is not necessary in my view, for a presiding officer to conduct a competency test again, once he/she is satisfied that the intermediary is certified to be an intermediary for that category of witnesses. The submission of certified copies of the certificate of competence and oath or affirmation taken will be sufficient.

[49] Ordinarily, an enquiry into the competency of a person to be appointed as an intermediary and taking the oath by intermediaries take up valuable court time. In various courts, the same person served as an intermediary numerous times. In order to ensure the competence of the intermediary, the court had to conduct an inquiry and the intermediary was required to take an oath or affirmation every time she appeared in court. Unfortunately, this process consumed valuable court time. The certification by the head of court is intended to alleviate this problem. It aims to save time during court proceedings and promote functional efficiency. However, the head of court's certification does not prohibit a judicial officer presiding over proceedings from holding an enquiry regarding a person's competence to act as an intermediary at any stage of the proceedings.

[50] Importantly, section 11 of the Act obligates any person who is found to be competent to be appointed as an intermediary to take an oath or make such affirmation before commencing with her functions in terms of the section. The intended intermediary must confirm that to the best of her ability, she will perform her functions as an intermediary and will convey properly and accurately all questions put to witnesses and, where necessary, convey the general purport of any questions to the witness, unless directed otherwise by the court.

Application of this section to the present matter

[51] In the present matter, the evidence of Colonel Clark, the Clinical Psychologist, remains uncontroverted. The defence did not present any scientific evidence to counter the evidence of Colonel Clark. She assessed the witness in counts 111 - 113 and noted that this witness has been experiencing visual and auditory hallucinations since 2016. She used multifaceted tests to measure the mental age of the witness. Colonel Clark further stated that the two witnesses are suffering from PTSD. According to Colonel Clark, the witness in counts 120 - 123 displayed symptoms of depression, so much so that he wanted to shoot himself.

[52] Her evidence was that the witness in counts 111 - 113, whom the State intends to call, is not intellectually impaired but is functioning cognitively on the border between average intelligence and mild impairment. It was her evidence that if these witnesses were to be called to testify in court without the assistance of a court-appointed intermediary, they may decompensate during their evidence. In my view, it is evident from the evidential material placed before this court that the two witnesses suffer from psychological and emotional conditions as envisaged in the amended section 170A (1)(b).

[53] Evidently, they will suffer undue psychological, trauma, and mental stress if they testify without the assistance of an intermediary. In my view, the two witnesses fall squarely within the purview of section 170A as amended. The two witnesses are exhibiting symptoms of PTSD, and one is functioning within the range of mild intellectual impairment. Colonel Clark stated that the witness in count 120 - 123 felt numb and depressed. The witness was visibly distressed as he narrated the events he witnessed. These witnesses will break down if an intermediary does not assist them. They fear the accused. It was reported that as the victims are experiencing symptoms of PSTD, they may be re-victimized and re-traumatized by testifying in open court. Colonel Clark recommended that the witnesses be permitted to testify via closed-circuit television or some other similar media with the assistance of a court-appointed intermediary. In my view, these recommendations are unimpeachable and cannot be faulted.

[54] The two witnesses are said to have witnessed the gruesome killing of their parents committed in their presence. In my view, an intermediary with the knowledge of dealing with patients who have PTSD must be appointed for each witness when their evidence is tendered. I am further of the opinion that to allow them to give their evidence freely without fear of repercussions; their identity must not be revealed or published. Furthermore, their evidence must be rendered in camera and through a close circuit television.

The Constitutionality of sections 153(5), 164(1), and 170A of the CPA

[55] As far as the constitutional issues raised by the State are concerned, I am of the view that there are merits in the argument raised by the State. It must be borne in mind that the Bill of Rights in the South African Constitution is renowned for its extensive commitment to the protection of the rights of children in section 28, particularly section 28(2), which emphatically underscores the paramountcy of the child's best interests. The Constitution emphasises children's best interests while envisaging the limitation of fundamental rights in certain circumstances. For brevity's sake, section 28(2) provides: 'A child's best interests are of paramount importance in every matter concerning the child.' Meanwhile, section 28(3) provides that 'in this section, child means a person under the age of 18 years.'

[56] From the apt reading of sections 153(5) and 170A, a child witness loses that protection when he or she reaches the age of majority. In *Centre for Child Law and Others v Media 24 Limited and Others,*[14] the Constitutional Court observed within the context of section 153(3), which fell short of protecting child victims, that the ongoing protection for children as the default position accounts for adequate protection as well as evolving capacities and fosters conditions that allow children to maximize opportunities and lead happy and productive lives. Importantly, the court found that a child who has experienced trauma, be it as a victim, a witness, or an accused, should not, as a result of turning 18, have their story and identity exposed without their consent or necessary judicial oversight. A lack of ongoing protection infringes on the rights of dignity, privacy, and the child's best interest. There, the court dealt with section 153. I do not understand the finding of the Constitutional Court on ongoing protection to be limited exclusively to matters relating to section 153.

[57] I must emphasise that witnessing a traumatic event may have long-term deleterious effects on a child even after reaching the age of majority. It cannot be said that the trauma or anguish that a child experiences after witnessing a horrific crime committed in his presence simply disappears when he reaches the age of majority. Seeing such a horrendous act has a long-lasting effect on a child. For instance, in this case, it is alleged that the witnesses were minor children at the time they witnessed the killing of their parents. However, it is reported that pursuant to that, these witnesses suffer from PTSD even after reaching the age of majority. It was further reported that both wanted to commit suicide due to what they witnessed while they were minors. The effects of witnessing a gruesome crime are detrimental to the psychological well-being of a child even when he/she is of age.

[58] I share the view expressed by Block, who argues that witnessing a traumatic event may have a lasting effect on a child's mental health, educational progress, and

[14] 2020 (4) SA 319 (CC).

personality development.[15] In my view, there are merits in the argument raised by the State that sections 170A, and 153(5) should provide for the ongoing protection of children who witnessed the commission of a crime while they were young and should testify after reaching the age of majority. I have some doubts, though, on section 164(1).

[59] Notwithstanding, I am mindful that this case stands on a different footing. More than once, the Constitutional Court has warned that when it is possible to decide a case without raising a constitutional issue, such a course is to be followed. In *S v Mhlungu & Others*,[16] Kentridge J, as he then was, emphasised this principle while dealing with the referral of a matter to the Constitutional Court, stating:

'Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed…'

[60] In *Motsepe v Commissioner of Inland Revenue,*[17] the Constitutional Court quoted this principle with approval. Ackermann J, writing for the majority, noted:

'The referral may very well be defective for another reason. This court has laid down the general principle that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed, and has applied this principle specifically to s 102(1) referrals and *obiter* to applications for direct access. On an objective assessment of the present case it was unnecessary to decide the constitutional issue because Mrs Motsepe could, by following the objection and appeal procedures provided for in the Act, have avoided the barriers imposed by ss 92 and 94 of the Act and the sequestration application could have been decided in the light of the outcome of such procedures.'

[61] From the foregoing, I deem it unnecessary to consider further the constitutionality of the sections impugned by the State. I would leave that question to be decided on another day. This case can easily be decided without reaching a constitutional issue. In any event, I am of the opinion that any prejudice that may be suffered by child witness who have since reached majority is ameliorated by the new amendment to section 170A. The evidence that was presented, in my view, makes it abundantly clear that the two witnesses need protection from undue mental and psychological stress. They must be shielded from secondary trauma when they recount the evidence in court. They fear for their lives and must be protected to give a full and

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[15] Dora Block 'Witnessing adults' violence: the effects on children and adolescents' *Advances in Psychiatric Treatment* (1998), vol. 4, pp. 202-210.
[16] 1995 (3) SA 867 (CC) para 59. See also *S v Vermaas; S v Du Plessis* 1995 (3) SA 292 (CC) at para 13.
[17] 1997 (2) SA 898 (CC) para 21.

candid account of the acts complained of with ease. Both suffer from PTSD, which is a psychological condition envisaged in subsection 170A(1)(b). I am of the view that if the evidence of these two witnesses is heard in an open court, it would expose them to emotional, trauma or suffering. More so, it is most likely that these witnesses would decompensate at the witness stand, particularly during cross-examination, if a court-appointed intermediary does not assist them.

Order

[62] In the result, the following order is granted:
62.1 The application of the State to have the two witnesses testify through the assistance of an intermediary in terms of section 170A of the Criminal Procedure Act 51 of 1977, is hereby granted. The intermediary must be a person who understands witnesses suffering from PTSD and psychological problems.
62.2 It is further ordered that the two witnesses would testify through a close circuit television in terms of section 158(2) of the CPA and that their evidence will be heard behind closed doors in terms of section 153.
62.3 The name and identity of the two witnesses in question in respect of the proceedings in court shall not be disclosed to the public.

From The Legal Journals

Marais, M

Hate Speech in the Equality Act Following the Constitutional Court Judgment in Qwelane v SAHRC

Potchefstroom Electronic Law Journal*, *26, (Published on 12 September 2023) pp 1 – 33.

Abstract
In its judgment in Qwelane v South African Human Rights Commission 2022 2 BCLR 129 (CC), the Constitutional Court declared section 10(1) of the Equality Act unconstitutional and invalid to the narrow extent that section 10(1)(a) refers to the intention to be "hurtful". The prohibition on hate speech passed constitutional muster in all other respects. In addition, the court purposively interpreted aspects of the application of section 10(1) so as to limit its impact on the right to freedom of

expression. This contribution firstly welcomes the court's reliance on the transformative goals of the Constitution and the Equality Act as its primary framework in interpreting section 10(1). The severance of section 10(1)(a) and the conjunctive reading of sections 10(1)(b) and (c) ("be harmful or to incite harm" and "promote or propagate hatred" respectively) also seem sensible considering the court's broad definition of "harm". The article further emphasises that the terms of section 10 call for a proper consideration of context. In this regard, the court rightly considered the extreme homophobia in the society addressed by Mr Qwelane, the particular vulnerability of the target group and the real threat of devastating imminent consequences to conclude that Qwelane's words were clearly intended to "incite harm" and "propagate hatred". Yet the court's view that the speaker's subjective intention is irrelevant in performing the requisite objective reasonableness assessment from the ambit of section 10(1) is arguably less judicious, as is the categorical exclusion of expression in private. Ultimately, the objective case-by-case reasonableness inquiry under section 10(1) should be whether a reasonable person in the speaker's position should have refrained from making the impugned harmful discriminatory utterances. This inquiry involves a determination of wrongfulness based on the constitutional duty not to discriminate unfairly. It invokes all the aspects of the Equality Act's definition of discrimination as well as all the elements of fairness analysis set out in section 14 of the Equality Act. Factors to be considered include the value of the particular expression, and the extent of the (potential) harm to individual members of a protected group and to society as a whole, as well as justification considerations such as the respondent's legitimate and bona fide exercise of the right to freedom of expression and to privacy.

The article can be accessed here:
https://perjournal.co.za/article/view/15438/20332

Delano Van der Linde

Does the state have to provide substantiating evidence when an accused pleads guilty to drug-related charges? A discussion of *S v PAULSE 2022 (2) SACR 451 (WCC)*

Journal for Juridical Science 2023:48(1):96-110

Abstract
This analysis assesses the ruling in the case of S v Paulse 2022 (2) SACR 451 (WCC) and examines the possibility of an accused entering a guilty plea and subsequently being convicted for offenses under sec. 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 (DDTA), even when the State presents no supporting evidence for such a conviction. According to the Criminal Procedure Act 51 of 1977 (referred to as "CPA"), a court has the authority to convict an accused who pleads guilty to a serious offense as defined in sec. 112(1)(b), following a thorough inquiry of the accused. This process is designed not only to safeguard the accused from unwarranted convictions but also

to expedite proceedings. Nonetheless, legal precedents have indicated that determining whether a substance falls within the category of an "undesirable dependence producing" substance, as outlined in Part III of Schedule 2 of the DDTA, might be beyond the accused's knowledge. To prevent unjust convictions, the State should provide the court with a certificate as outlined in sec. 212(4)(a) of the CPA, if the accused is unable to offer this information. This certificate is issued by a qualified expert subsequent to necessary tests that establish the chemical composition of the substance in question. The certificate acts as preliminary evidence of the relevant fact. When such a certificate is not presented, the courts ought to adopt a more careful approach, especially when an accused is unrepresented by legal counsel. This careful approach during questioning is intended to satisfy the court that the substance indeed falls under the prohibited category as per the DDTA. This approach underscores the importance of due process. There have been instances where some courts have been hesitant to demand the sec. 212(4)(a) certificate or to employ a more cautious approach, seemingly giving greater weight to crime control. However, to safeguard accused individuals from baseless convictions and to uphold their right to a fair trial as stipulated in sec. 35(3) of the Constitution of the Republic of South Africa, 1996, it is imperative to prioritize considerations of due process.

The article can be accessed here:
https://journals.ufs.ac.za/index.php/jjs/article/view/7300/4819

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

Contributions from the Law School

Some remarks on the criminalisation of intimidatory conduct

The offence of intimidation, which first developed in the context of controlling labour-related misconduct, was refined through various reformulations into the offence defined in section 1 of the Intimidation Act 72 of 1982. This provision, which was further amended and extended by the legislature, was part of the raft of offences which were used to deal with the political unrest in the last period before democracy (see also the Internal Security Act 72 of 1982).

Given the taint associated with such offences, and the advent of the Bill of Rights, it was a matter of time before the intimidation offence was challenged on the basis of

constitutionality. When this moment arose, in the context of the broader formulation of the offence contained in s 1(1)(*b*) of the Act, along with reverse onus provision contained in s 1(2) of the Act, the Constitutional Court in *Moyo v Minister of Police* 2020 (1) SACR 373 (CC) firmly held both challenged provisions to be unconstitutional, on the basis of the unjustifiable infringement of the right to freedom of expression (contained in s 16 of the Constitution) and the right to be presumed innocent (contained in s 35(3)(*h*) of the Constitution) respectively.

The offence of intimidation nevertheless subsists, in the form of the provision contained in s 1(1)(*a*) of the Act. It remains controversial however (see, e.g. the recent case of *S v White* 2022 (2) SACR 511 (FB)). Perhaps, ironically, whereas in the previous dispensation there was resistance to the intimidation offence being deployed in the case of political (or labour) unrest, now the courts seem to want to limit the offence to such contexts (see also the cases of *S v Holbrook* [1998] 3 ALL SA 597 (E), *S v Motshari* 2001 (1) SACR 550 (NC), *S v Gabatlhole* 2004 (2) SACR 270 (NC), all of which dealt with the repealed s 1(1)(b) form of the intimidation offence), rather than allow it to be employed more broadly (as the wording of the offence allows). This apparent judicial antipathy for the intimidation offence must however be balanced with the recognition that intimidation can be profoundly harmful, and violates the rights to dignity, personal freedom and security (*Moyo v Minister of Police* supra para [25]).

In this wider context, it is interesting to briefly advert to the new offence of sexual intimidation, newly introduced into South African law in the form of s 14A of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 ('SORMA') by Act 13 of 2021. (See further the discussion of whether this offence entirely replaces the form of the sexual assault offence contained in s 5(2) of SORMA, which was repealed by Act 13 of 2021, in 'Sexual offences: Some skirmishes with the Act' *e-Mantshi* 191 (November 2022) 14-17).

In terms of s 14A, the offence of sexual intimidation is committed by a person ('A') who unlawfully and intentionally utters or conveys a threat to a complainant ('B') that inspires a reasonable belief of imminent harm in B that a sexual offence will be committed against B, or a third party ('C') who is a member of the family of B or any other person in a close relationship with B. The penalty on conviction is the punishment to which a person convicted of actually committing a sexual offence would be liable.

This offence is therefore committed by the accused where he or she: (i) unlawfully (ii) intentionally (iii) utters or conveys a threat that inspires a reasonable belief of imminent harm in the form of a sexual offence (iv) against B, or a third party who is a member of B's family, or any other person in a close relationship with B.

In terms of the element of unlawfulness (i), this could be negated by any justification ground or lawful reason for the threat. As regards intent (ii), it is clear that intention in the form of *dolus eventualis* would suffice for liability. With regard to a threat inspiring

reasonable belief of imminent harm in the form of a sexual offence (iii), it may first be noted that 'sexual offence' means any offence in terms of Chapters 2, 3 and 4 and section 55 of the Act (SORMA) and any offence referred to in Chapter 2 of the Prevention and Combating of Trafficking in Persons Act 7 of 2013, which was committed for sexual purpose (s 1).

It is noteworthy that the belief that reasonable harm will occur in the form of a sexual offence in the sexual intimidation offence does not accord with the subjectively assessed threat in the analogous offence of intimidation (see Hoctor 'HA-1: Intimidation' in Milton, Cowling & Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* 2ed (loose-leaf) (2023)), or the common-law crime of assault (see Burchell *Principles of Criminal Law* 5ed (2016) 599, but is required to be reasonable. It is not entirely clear why the legislature chose to limit the offence in this manner, particularly because the offence of sexual violation as previously defined did not impose an objective evaluation on the subjective apprehension of the threat of violation (Hoctor *Snyman's Criminal Law* 7ed (2020) 326-327).

Perhaps the rationale for seeking to limit the ambit of the offence in this way is to exclude the overly sensitive complainant. There is however an inherent limitation in that the offence must be committed intentionally. Thus the offender must at the very least utter or convey a threat with the intention to inspire a belief of imminent harm in the complainant with regard to the complainant's bodily integrity or the bodily integrity of another person in a close or familial relationship to the complainant. Furthermore, the fact that the threat must be imminent also places a constraint on liability in terms of this provision. It will be up to the courts to determine what 'reasonable' belief entails. It may well be that courts will interpret the reasonableness criterion generously, and in accordance with the ordinary practices of social discourse, and that the qualifier 'reasonable' will not play a significant role in excluding liability for an intentional threat. If so, this nevertheless begs the question why the word needed to be excluded in the provision at all.

Lastly, the threat is required to be made against B (the complainant), or a third party who is a member of B's family, or any other person in a close relationship with B (iv). Both categories of person other than B are potentially rather broad, and will clearly require some measure of interpretation. How should 'family' be measured – not all blood relations are close, and modern family arrangements may be based on other considerations than consanguinity. What constitutes a 'close relationship'? How should this be ascertained? Once again, it may simply be noted that the s 1(1)(a) intimidation offence is not limited in this manner, but applies broadly.

In conclusion, it appears that even though some decisions of the courts have sought to limit the ambit of the intimidation offence, the perspective of the legislature in the context of sexual misconduct (see also s 1(3) of SORMA where consent is distinguished from submission as a result of intimidation, threats or force) is to make

wider use of the concept of intimidation. Given the need to combat the scourge of intimidatory conduct in South African society, this approach of the legislature is entirely appropriate (for further support for this approach, see the majority judgment of the Supreme Court of Appeal in *Moyo v Minister of Constitutional Development* 2018 (2) SACR 313 (SCA)). However, the limitations placed on the offence of sexual intimidation are not consistent with the broader ambit of the general intimidation offence set out in s 1(1)(a) of the Intimidation Act, which itself has been described as 'narrowly tailored' by the minority judgment of the Supreme Court of Appeal in *Moyo v Minister of Constitutional Development* supra para [49].

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Matters of Interest to Magistrates

Enhancing effectiveness: Strengthening protection for domestic violence victims through the Amendment Act

In 2020, President Cyril Ramaphosa declared [gender-based violence (GBV)] South Africa's second pandemic and noted that it needed to be taken as seriously as the coronavirus. Already named the "rape capital of the world" by Interpol, South Africa continues to grapple with increasing rates of domestic abuse, sexual violence and femicide. During the pandemic, incidents of GBV increased exponentially due to many women having been confined to spaces with their perpetrators as a result of lockdowns and measures to restrict movement and curb the spread of the virus.

Police Minister Bheki Cele recently announced that more than 9 500 cases of GBV and 13 000 cases of domestic violence were reported just between July and September 2021. Over the same period, 897 women were murdered (an increase of 7.7% compared to the same period in 2020), while sexual offence cases increased by 4.7% and incidents of rape rose by 7.1% compared to the second quarter of 2020.
These troubling statistics highlight our failures as a nation in protecting South African women, especially black and disabled women, and calls for an urgent and consolidated

response to the crisis we are facing from all sectors of our society including government, corporates, communities, schools and universities.

This year, [President] Ramaphosa signed into law legislation aimed at strengthening efforts to end GBV in the country including the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill, the Criminal and Related Matters Amendment Bill, and the Domestic Violence Amendment Bill' (Deepa Vallabh 'Criminalising gender-based violence is not enough' (https://mg.co.za, accessed 31-7-2023)).

A presiding officer in the domestic violence court is responsible for overseeing cases related to domestic violence. This includes presiding over hearings, making legal rulings, and ensuring that court proceedings are conducted fairly and impartially.
The role of a presiding officer in domestic violence court is particularly important because domestic violence cases can be complex and emotionally charged. The presiding officer must be knowledgeable about relevant laws and regulations, as well as the specific issues that arise in domestic violence cases, such as the dynamics of power and control between abusers and victims.
In addition to overseeing court proceedings, a presiding officer in the domestic violence court may also be responsible for coordinating with other agencies and organisations, such as law enforcement, social services, and victim advocacy groups, to ensure that victims receive appropriate support and services.

Overall, serving as a presiding officer in domestic violence courts can be a challenging but rewarding experience, as it involves working to protect the safety and well-being of victims of domestic violence while upholding the principles of justice and fairness in the legal system.

The Domestic Violence Amendment Act 14 of 2021 came into effect on 14 April 2023 as per Proc R117 *GG*48419/14-4-2023.

The original Act had a section called definitions. The new Act now calls it definitions and interpretations. There were no subsections in the old Act. There are now subss 1 and 2. Section 1(1) is the definitions and s 1(2) is the interpretation. The old Act had 24 definitions and the new Act has 52 definitions.
There are new definitions for words such as 'capture', 'coercive behaviour', 'caregiver', 'child' and 'Director-General'.
There are also new definitions contained in the regulations regarding electronic communication.

The Act now prescribes that the court manager will prepare a roster for clerks who will attend to applications and provide contact details that can be outside normal court hours, including weekends and public holidays. The roster will be sent to Station

Commanders at local police stations and displayed on the Department of Justice website.

The supervisor on duty or court manager is responsible for contacting the magistrate designated to consider urgent applications, which are brought after hours.

'The new Act aims to aid the country in its endemic of widespread gender-based violence as well as the harm done against children within a household' (BusinessTech 'New domestic violence laws in South Africa – what you need to know' (https://businesstech.co.za, accessed 31-7-2023)).

The Act also provides that a new document called a domestic violence safety monitoring notice may now also be applied for with application for protection order or before a final protection order is granted. This is applied for where a complainant shares a joint residence with the respondent. The application is made with a supporting affidavit to the clerk of the court or via electronic submission to the electronic address of the court. The court may consider any other additional evidence (oral or written), but such evidence must form part of proceedings.
The service by the clerk now may be effected by hand, e-mail, SMS, mms or any social media, such as WhatsApp, Facebook or Twitter.
If a clerk foresees any delay, then the clerk is required to approach the magistrate for directions.

The Act also makes provision that all courts now have jurisdiction where either the complainant or respondent resides, studies, carries on business permanently or temporarily within its area. This includes the area where the cause of action arose.
Provision has been made for the clerk of the court to receive applications electronically via online portal or in person.

A minor child without assistance or consent of an adult may also bring an application.
An application may be considered by the court outside of ordinary hours if a court is satisfied that a reasonable belief exists that the complainant is suffering or may suffer harm if the matter is not dealt with immediately.

The clerk of the court must capture all applications, supporting affidavits and other information in the integrated electronic repository. The clerk must immediately submit the application and supporting affidavits to court.

A magistrate must consider the application and if an application for a domestic violence safety monitoring notice is made, then both applications are considered together.
A court must satisfy itself that reasonable grounds for believing that the complainant and respondent share joint residence, and reasonable grounds exist to suspect that the respondent poses a threat to complainant's safety. The court may then issue a domestic violence safety monitoring notice.

The domestic violence safety monitoring notice directs the Station Commander where the complainant resides to direct a South African Police Service (SAPS) member to contact the complainant at regular intervals to inquire about the complainant's well-being via electronic service at an electronic address and visit the joint residence at regular intervals and see and communicate privately with the complainant. Where a SAPS member is prevented from seeing the complainant or unable to enter the joint residence to see and communicate with the complainant in private, the SAPS may, to overcome resistance against entry, use such force as may reasonably be required.
The words 'undue hardship may be suffered' are deleted and replaced with 'complainant is suffering or may suffer harm' because of domestic violence.

There is now also provision for an investigation by the Family Advocate or designated social worker to determine if a child needs care and protection.
The Act now provides that a warrant of arrest is issued by the magistrate the moment the interim protection order has been issued. The warrant of arrest remains on the file, until the interim protection order has been served on the respondent. The clerk serves the interim protection order and warrant of arrest on the complainant only after receiving the return of service.

If a notice to show cause is issued, the clerk must inform parties in the prescribed manner and captures written notice in the integrated electronic repository.
All service of any documents in terms of this Act are to take place not later than 12-hours if served electronically and no later than 24-hours if served in person.
The Act also makes provision for seizure of weapons. Any weapon seized must be kept by SAPS. A court must direct the clerk of the court to refer a copy of the record of evidence to the relevant Station Commander for consideration in terms s 102 of the Firearms Control Act 60 of 2000 and a copy of the record must be submitted to the National Commissioner of SAPS.

Any documents subpoenaed (book, document, or object) must be produced by 12pm on the day before proceedings.
Provision has also been made for the hearing of evidence by audio visual link.
In issuing a final order, where a notice to show cause is issued, a court must proceed to hear the matter to consider all evidence received in terms of the application and further affidavits or oral evidence as the court may direct which will form part of the record of the proceedings. Where a court finds on a balance of probabilities, that the respondent has or is committing an act of domestic violence then the court must issue a final protection order.

For variation applications, the court must be satisfied that circumstances have materially changed since the original order was made; good cause must be shown for the variation or setting aside; and proper service has to be effected on the respondent.

The court has several applicants constantly looking for their final orders, which they have lost or misplaced, and have difficulty in tracking the file. People move homes and change jobs over time and lose documents. The court will now be able to secure all documents electronically and be able to retrieve orders at a press of a few buttons.

The changes to the Act are welcomed as they will help improve its effectiveness in addressing domestic violence. An added advantage is that the process for obtaining a protection order has been simplified and made more accessible to all victims, including children.
Overall, the changes to the Domestic Violence Act help to improve protection and support to victims of domestic violence in South Africa and have strengthened the legal and social framework for addressing this pervasive problem in the country.

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(This article was first published in *De Rebus* in 2023 (Sep) *DR* 18.)

A Last Thought

Time to rethink Zambia's law on 'insulting language'?

An outspoken Zambian magistrate has criticised the country's law against the use of insulting language, saying some people saw mere criticism as insults, and that the law 'when misapplied' could result in an authoritarian and controlling society. It could cause 'contemporary intolerance' and 'when not well prosecuted', represented 'an intense desire to gag uncomfortable voices of dissent'. He was giving judgment in a case where the accused was charged with naming someone as a witch and with using insulting language. The magistrate said it was the actions taken in consequence of a belief in witchcraft that are a problem, rather than the belief itself – but that this belief 'has been deeply entrenched in the Zambian psyche'. He said it increasingly seemed that 'old age is synonymous with being a witch in many communities in Zambia', and

that many elderly men and women were forced to leave their ancestral villages because of being labelled witches.

Witchcraft cases are heard all too often in the Zambian courts. This time the accused, Isaac Sindala, was charged with 'naming a person' as a wizard, thus infringing the country's Witchcraft Act. Sindala was also charged with 'using insulting language', something prohibited under the penal code.
Sindala is said to have named John Sichivula as a wizard during April, and to have used 'insulting language' about Sichivula on the same occasion.
According to Sichivula, Sindala came to his home late one night, and shouted 'a stream of damnable invective' against him, as well as calling him a wizard.

Damnable invective
Sichivula said from that time he has feared for his safety. He reported the situation to the local headman hoping that he would call Sindala in and make him stop his 'despicable behaviour'. The matter was also reported to the police.
Sindala's attitude seemed to be that Sichivula should have paid no attention to what Sindala said, unless of course he was in fact a wizard, and he denied the allegations made against him.
The law on witchcraft says that whoever names or accuses or threatens to accuse someone of being a wizard or a witch is liable to a fine and/or imprisonment of up to a year, with or without hard labour. There's an exception to the rule where the 'naming' of someone as a wizard is made to a police officer.
The penal code is equally clear about the use of insulting language: if you use insulting language or conduct yourself in a way that could provoke someone into breaking the peace, then you could go to jail for three months and/or be fined.

Mob violence
The magistrate hearing the case, Deeleslie Mondoka, found that the prosecution had proved the case against Sindala in relation to naming someone as a wizard, but found him not guilty of using insulting language.
But in his judgment Mondoka went further, saying that the belief in witchcraft was deeply entrenched in the Zambian psyche and that people believed to be witches had been treated with 'untold mob violence'. Many were ostracised by families and communities, dehumanised, seriously assaulted or killed.
In the 'rustic place' where Sindala lived, naming someone as a witch would be 'fertile ground for disaster' and the suspect could be 'subjected to brutal force, barbaric and sadistic treatment' like lynching, and, inevitably, death. Thus, it had been dangerous for Sindala to call Sichivula a wizard.

Elderly

Naming people as witches was particularly bad when it was directed at the elderly, as happened in this case, and it appeared increasingly that 'old age is synonymous' with being a witch in many Zambian communities.

The magistrate also had some important observations about the law against using insulting language.

He said he believed that 'merely using threatening or abusive language' shouldn't be outlawed as the law did. Criticism was easily construed as insults by some people, so was ridicule, sarcasm and even 'merely stating an alternative … to orthodoxy' could be seen as an insult.

Contemporary intolerance

The law against insults had been on the statute books for more than 20 years and, when misapplied could create a society of an 'authoritarian and controlling nature'. It could create 'contemporary intolerance' and result in 'an intense desire to gag uncomfortable voices of dissent' as could have happened in this case.

'The incessant need to police insulting language can be counter progressive' and was open to abuse.' The way to deal with underlying prejudice, injustice or resentment was not to arrest people. Instead, the issues involved should be 'liberally aired, argued and dealt with, preferably outside the legal process.'

A better approach to dealing with insulting language would be to 'increase society's resistance' to it by developing a thicker skin, he suggested. 'We need to build our immunity to taking offence, so that we can deal with the issues that perfectly justified criticism can raise.'

Carmel Ricard on the *Africanlii.org* website on 12 September 2023. The judgment of the Magistrate can be downloaded here:

Download The People v. Isaac Sindala 3D_27_2023.pdf (175.2 KB)