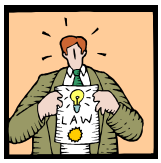
e-MANTSHI

A KZNJETCOM Newsletter

October 2023: Issue 201

Welcome to the two hundredth and first 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.A notice was published by the Minister of Police in which the Standard Operating Procedures for the Investigation, Search, Access or Seizure of Articles in terms of section 26 of the *Cybercrimes Act, 2020 (Act No.19 of 2020*) was listed. This notice was published in Government Gazette 49447 dated 6 October 2023. The operating procedures can be accessed here:
https://www.saps.gov.za/resource_centre/notices/downloads/SAPS-CCA-SOP-FINAL-12-09-2023.pdf

2. *The Repeal of the Transkeian Penal Code Act, 2023 Act 4 of 2023* has been published in Government Gazette no 49371 dated 27 September 2023. The Act repeals the Transkeian Penal Code, 1983 (Act No. 9 of 1983), of the Republic of Transkei. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette.

The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202310/49371repealofthetranskeianpenalcodeact42023.pdf

3. *The Land Court Act, Act 6 of 2023* has been published in Government Gazette no 49372 dated 27 September 2023. Section 7 (1) of the Act states as follows: Subject to the Constitution, and except where this Act provides otherwise, the Court and the Magistrate's Court within whose area of jurisdiction the land forming the subject matter before that court is situated, have jurisdiction in respect of all matters that in terms of this Act or in terms of any other law are to be determined by the Court or the Magistrate's Court. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette.
The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202310/49372landcourtact62023.pdf

4. *The Traditional Courts Act, Act 9 of 2022* has been published in Government Gazette no 49373 dated 27 September 2023. Section 14 of the Act makes provision for the transfer of a matter from the Traditional court to the Magistrates Court or a Small Claims Court. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette.
The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202310/49373traditionalcourtsact92022.pdf

Recent Court Cases

1. **Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others (CCT 38/16) [2023] ZACC 34 (30 October 2023)**

The interest of justice criterion has to be considered when the arrest and detention of an illegal foreigner is considered in terms of section 34(1) of the Immigration Act 13 of 2002.

Order

On application for revival of the order of this Court dated 29 June 2017, the following order is made:

1. Subject to and pending the enactment of legislation outlined in paragraph 2, as from the date of this order, and pending remedial legislation to be enacted and brought into force within 12 months from the date of this order, the following provisions, supplementary to those contained in paragraph 4 of this Court's order of 29 June 2017, shall apply:

(a) An immigration officer considering the arrest and detention of an illegal foreigner in terms of section 34(1) of the Immigration Act 13 of 2002 (Act) must consider whether the interests of justice permit the release of such person subject to reasonable conditions, and must not cause the person to be detained if the officer concludes that the interests of justice permit the release of such person subject to reasonable conditions.

(b) A person detained in terms of section 34(1) of the Act shall be brought before a court within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.

(c) The Court before whom a person is brought in terms of paragraph (b) above must consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.

(d) If the Court concludes that the interests of justice do not permit the release of such person, the Court may authorise the further detention of the person for a period not exceeding 30 calendar days.

(e) If the Court has ordered the further detention of a person in terms of paragraph (d) above, the said person must again be brought before the Court before the expiry of the period of detention authorised by the Court and the Court must again consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.

(f) If the Court contemplated in paragraph (e) above concludes that the interests of justice do not permit the release of such person, the Court may authorise the person's detention for an adequate period not exceeding a further 90 calendar days.

(g) A person brought before a Court in terms of paragraph (b) or (e) must be given an opportunity to make representations to the Court.

2. If remedial legislation is not enacted and brought into force within the said 12-month period, the provisions in paragraph (1) above shall continue to apply until such remedial legislation is enacted and brought into force.

The Judgment can be accessed here:
https://www.saflii.org/za/cases/ZACC/2023/34.pdf

2. **S v Ncube (HC 01 /2023) [2023] ZANWHC 176 (22 September 2023)**

When dealing with an application to have a suspended sentence put into operation in terms of section 297(7) and 297(9) of the Criminal Procedure Act there are only two possibilities available. The sentence may be further suspended subject to the same conditions or other conditions that could have been imposed at the time of the original sentence; or be put into operation. A Magistrate cannot dismiss the application.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2023/176.pdf

3. **S v P.M (Review) (02/2023) [2023] ZANWHC 184 (5 October 2023)**

The court failed to transmit a matter on automatic review in terms of section 84 of the Child Justice Act 75 of 2008 where a period of imprisonment was imposed but had also failed to deal with the criminal trial in terms of the Child Justice Act. It imposed an incompetent sentence in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 because it had misdirected itself on the applicability of section 51(2) and (3) of the Criminal Law Amendment Act 105 of 1997.The proceedings were reviewed and the conviction and sentence set aside.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2023/184.pdf

4. **L.W v K.C.A (A2023-013223) [2023] ZAGPJHC 1154 (13 October 2023)**

Protection from Harassment Act 17 of 2011 — whether reporting rape allegations can amount to "harassment" under the Act — There is a duty of utmost good faith and material non-disclosures when seeking an interim protection order ex parte — the conduct of the appellant did not amount to "harassment" as communications were not unreasonable.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPJHC/2023/1154.html

From The Legal Journals

Mabaso, F

Racial considerations are a prerequisite and not an afterthought: A discussion of Kroukamp v The Minister of Justice and Constitutional Development [2021] ZAGPPHC 526 and Magistrates Commission v Lawrence 2022 1 All SA 321 (SCA)

Obiter **, *44*(3).**

ABSTRACT
This case note engages in a critical examination of two recent cases concerning the issue of race-based appointments, or rather the lack thereof, in the judiciary. The crux of this case note concerns the appointment of judicial officers as regulated by section 174 of the Constitution of the Republic of South Africa, 1996 (Constitution). In particular, the case note is driven by subsection 2 of section 174, which provides: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed." In essence, this case note is an advocate for the argument that the South African judiciary must reflect the demographics of the country. That is to say, racial considerations are a prerequisite in judicial appointments, and not an afterthought. The case note starts with a discussion of the matter that was before the Gauteng High Court, sitting as the Equality Court, in Kroukamp v The Minister of Justice and Constitutional Development ([2021] ZAGPPHC 526). The case note then discusses the later decision of the Supreme Court of Appeal in Magistrates Commission v Lawrence (2022 1 All SA 321 (SCA)).

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/14166/20519

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

Contributions from the Law School

Tracking South Africa's handling of terrorist entities

1. Introduction

Prior to being repealed, sections 25 and 26 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) provided for the listing of terrorist entities by setting out a procedure for listing. Section 25 read as follows:

The President must, by Proclamation in the *Gazette*, and other appropriate means of publication, give notice that the Security Council of the United Nations, under Chapter VII of the Charter of the United Nations, has identified a specific entity as being -

(a) an entity who commits, or attempts to commit, any terrorist and related activity or participates in or facilitates the commission of any terrorist and related activity; or

(b) an entity against whom Member States of the United Nations must take the actions specified in Resolutions of the said Security Council, in order to combat or prevent terrorist and related activities.

The erstwhile section 26 of the POCDATARA further provided that '[e]very Proclamation issued under section 25 shall be tabled in Parliament for its consideration and decision and Parliament may thereupon take such steps as it may consider necessary'. Once an entity was listed as a terrorist entity under sections 25 and 26, the rendering of economic, financial, or property-related assistance to it was a criminal offence (section 4 of the POCDATARA). Handling property that is linked to a listed terrorist entity was also prohibited in terms of section 17 of the POCDATARA, and such property could be a subject of a freezing order in terms of the same section. Further consequences for terrorist entities also flowed from the Prevention of Organised Crime Act 121 of 1998, particularly the civil forfeiture of property associated with terrorist activities. These were the consequences of listing a terrorist entity before the recent amendment of the POCDATARA.

Given the recent amendment of the POCDATARA, this contribution now tracks the current treatment of terrorist entities. It starts off by going into the historical treatment of undesirable organisations under the apartheid security regime, and then moves on to examine the treatment of terrorist entities in terms of the POCDATARA after it was amended.

2 The treatment of undesirable organisations under apartheid

In addition to the myriad of criminal and other sanctions against undesirable organisations, the fact that such organisations could also be declared unlawful, be subsequently dissolved, and have their assets disposed of, served as another

weapon of oppression in the arsenal of the apartheid government (see the Suppression of Communism Act 44 of 1950 (which later became known as the Internal Security Act 44 of 1950), as well as the Internal Security Act 74 of 1982). The power to effectively ban and dissolve organisations vested in the Minister of Justice, who could exercise such power in his subjective discretion.

Owing to the subjective discretion clause, enquiring into the grounds for the exercise of such discretion was not permitted (*South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C); *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A)). Therefore, challenging the decision to effectively ban and dissolve was made extremely difficult, and the other review grounds that could be relied upon were hopelessly inadequate (see in this regard AS Mathews *Freedom State Security and the Rule of Law – Dilemmas of the Apartheid Society* (1986) 102-107). One might also add that the courts themselves were at times 'executive-minded' and tended to defer to the executive the making of decisions in matters related to state security.

The Internal Security Act 74 of 1982 notably included a procedure for declaring an organisation unlawful (i.e. banning), and for the dissolution and disposal of the assets thereof. In terms of this Act, once an organisation was declared unlawful (and therefore banned), the Minister would designate a liquidator in whom all the property of the banned organisation would vest (section 13(1)(b)), and the liquidator would wind up the organisation as a solvent or insolvent entity (section 14). Any remaining funds would be paid over to the State Revenue Fund (section 14(3)). Carrying on the activities of the banned organisation was a criminal offence (section 13(1)(a)).

The consequences of an order banning and dissolving a particular organisation notably extended even to the members of the banned organisation, in that the Director of Security Legislation was required to keep a list of members, supporters and leaders of the banned organisation (section 16(1)). Being on this list meant that an implicated person was disqualified from being a member of Parliament (section 33(2)), such that even accepting nomination for being a member of Parliament was a criminal offence (section 56(1)(q)). A person whose name was on the list was also precluded from practising as a lawyer (section 34(1)). Persons who appeared on the list were also effectively prevented from any meaningful participation in many of the organisations they may have wished to take part in (Mathews op cit 113-114).

Organisations that were not captured under the sweeping powers of the above-mentioned pieces of legislation found themselves liable to proscription in terms of the Political Interference Act 51 of 1968. In the main, this legislation outlawed the racially mixed political organisations (J Dugard *Human Rights and the South African Legal Order* (1978) 167). Multi-racial and non-political associations, which comprised mainly the non-political student and religious bodies, were not interfered with until 1972 when a parliamentary investigative commission was established in order to look carefully into the affairs of such multiracial and non-political organisations (Dugard op cit 169-170).

The parliamentary commission could interrogate any person at its discretion, and the failure to appear before the parliamentary commission or to provide a satisfactory answer without 'sufficient cause', was a punishable offence (see Dugard op cit 170).

The regulations establishing the commission also required that the proceedings be closed to the public, that the disclosure of information relating to the proceedings be a criminal offence, that legal representation be allowed at the discretion of the chairperson of the commission, and that witnesses could request that their identity be concealed (Dugard op cit 170). This allowed for clandestine investigations which intimidated organisations and negatively influenced them against continuing with their activities.

The reports of the parliamentary commission had severe consequences, which included, amongst other consequences, naming certain persons as a danger to internal security and subsequently banning them under the Suppression of Communism Act (see Dugard op cit 171). In 1974, Parliament enacted the Affected Organisations Act 31 of 1974, which operated alongside the parliamentary investigative commission. The Affected Organisations Act empowered the president to declare, without notice, an organisation as 'affected' if satisfied that politics are being engaged in by that particular organisation with the help of a foreign person or organisation (Dugard op cit 172; and Mathews op cit 115). The effect of the declaration was that the affected organisation would then be prevented from receiving foreign funding, thus effectively restricting the organisation from carrying out its activities (Dugard op cit 172).

In closure, South Africa's history of handling undesirable organisations notably did not end at the point of criminalising certain conduct of members or sympathisers of such organisations, but, in certain instances, also went as far as to facilitate the dissolution and disposal of the assets of undesirable organisations.

3 The treatment or handling of terrorist entities in terms of the existing regime

A clear take away from the history under heading 2 above, is that imposing restrictions on undesirable entities has a historical lineage. It therefore comes as no surprise that the POCDATARA proceeded along the same lines when it made provision for singling out and listing undesirable terrorist entities for purposes of imposing various criminal sanctions and restrictions. Despite the repeal of apartheid security legislation, as well as the repeal of sections 25 and 26 Sections 25 and 26, engagement with terrorist entities continues to be criminalised, thus further strengthening the undesirability of terrorist organisations. To illustrate, section 4(1) to (3) of the POCDATARA (as amended) continues to criminalise the rendering of financial, economic and property-related support if a person intended or 'knows' or 'ought reasonably to have known or suspected' that such support would be used:

(i) to commit or facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence;

(iiA) for the benefit of, or on behalf of, or at the direction of, or under the control of, a specific entity identified in an order made under section 23; or

(iii) for the benefit of a specific entity identified pursuant to a Resolution of the United Nations Security Council relating to the identification of entities-

(aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitate the commission of any terrorist and related activity; or

(bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities,

and which are announced in a notice referred to in section 26A(3) of the Financial Intelligence Centre Act…

Section 23(1) and (2) of the POCDATARA (as amended) continues along the same line and prohibits as follows the rendering of property-related support to terrorist entities:

(1) A High Court may, on ex parte application by the National Director to a judge in chambers, subject to such conditions and exceptions as may be specified in the order, make an order-

(a) prohibiting any person from engaging in any conduct, or dealing in any manner with any property owned or controlled by or on behalf of, or at the direction of, or otherwise associated with an entity referred to in subsection (2), and may include an order to freeze any such property;

(b) obliging any person to cease any conduct in respect of any property referred to in paragraph (a); or

(c) prohibiting any person from performing any act contemplated in section 4 for the benefit of, or on behalf of, or at the direction of, or under the control of, an entity referred to in subsection (2).

(2) An order referred to in subsection (1) may be made in respect of

(a) any entity, where there are reasonable grounds to believe that the entity has committed, or attempted to commit, participated in or facilitated the commission of a specified offence; or

(b) a specific entity identified in a notice pursuant to a Resolution of the United Nations Security Council relating to the identification of entities-

(i) that has committed, or attempted to commit, any terrorist and related activity, or participates in or facilitates the commission of any terrorist and related activity; or

(ii) against which Member States of the United Nations must take the actions specified in the Resolution in order to combat or prevent terrorist and related activities,

and that are announced in a notice referred to in section 26A(3) of the Financial Intelligence Centre Act…

Therefore, in terms of section 4, the provision of economic, financial or property-related support to a terrorist organisation is criminalised. Under section 23, the provision of property-related support can be prohibited by means of an interdict, and such property may be a subject of a freezing order. Section 23(4) goes even a step further and provides that:

(4) A High Court making an order under subsection (1) [of section 23] may make any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order, including-
(a) appointing a curator bonis, subject to the directions of that High Court, to do any one or more of the following on behalf of a person affected by that order:
(i) to assume control over the property;
(ii) to take care of the said property;
(iii) to administer the said property and to perform any act necessary for that purpose;
(iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
(v) to dispose of property if it is not economically viable to administer it or for any other reason it is not economically possible to assume control and take care thereof;
(b) ordering any person holding property, subject to an order referred to in subsection (1), to immediately surrender any such property into the custody of the curator bonis; and
(c) relating to the payment of the fees and expenditure of the curator bonis.
The newly added section 23(4) of the POCDATARA empowers a High Court to order the appointment of a curator bonis who will control, care for, control, administer, and/or dispose of the property which any person may be handling or administering on behalf or for the benefit of a terrorist entity.

4. Conclusion

Given the foregoing, it can be concluded that the treatment or handling of terrorist entities in South Africa is such that it can be readily accepted these entities and their activities are undesirable and prohibited. To amplify, terrorist entities are not legally capable of receiving any financial, economic or property-related support from any person, as it is a criminal offence under section 4 of the POCDATARA to offer such support. Moreover, an order interdicting a person from providing such support can be secured in terms section 23(1) and (2) of the POCDATAR, and the property which any person holds or uses for the benefit of a terrorist entity can be frozen by order of court (section23(1)(a)) and possibly even be subsequently disposed of (section 23(4)). The assets of a terrorist entity may also be subject to a forfeiture order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA).
Beyond the POCDATARA and the POCA, the (typically violent) activities of terrorist entities are proscribed and attract significant criminal sanctions. The advocacy of the ideology of a terrorist entity (without engaging in the criminal and often violent activities of the entity) appears not to be prohibited as long as such advocacy does not constitute hate speech or incitement of violence or any other prohibited conduct.

Khulekani Khumalo
University of KwaZulu-Natal

Matters of Interest to Magistrates

JULIUS MALEMA HAS OPENED HIMSELF TO CRIMINAL CHARGES OF 'SCANDALISING THE COURT'

Pierre De Vos

Malema's claims outside the East London Magistrates' Court were intended to delegitimise the trial and its outcome, and to intimidate the court into ruling in his favour.

Over the past decade, as the broadcasting of court proceedings have become commonplace, populist attacks on judicial officers and the judgments they produce have become more conspiracy-fuelled and hysterical — particularly in politically charged cases.

While much of this kind of speech (no matter how uninformed or unhinged) is protected by section 16 of the Constitution, accusing a presiding officer of dishonesty and corruption — as EFF leader Julius Malema did last week — should be prosecuted as it amounts to "scandalising the court", an incidence of contempt of court.

Addressing supporters outside the East London Magistrate's Court on Thursday 19 October 2023, Mr Malema accused the magistrate presiding over his criminal trial, Twanet Olivier, of not writing the judgment in which she ruled against his bid to have the charges against him dismissed.

Mr Malema claimed that the magistrate interrupted her judgment to take instructions from Pravin Gordhan, President Cyril Ramaphosa and/or Shamila Batohi about how to rule, and that she thus produced a "sponsored" judgment.

He also insulted the magistrate by calling her a racist and incompetent magistrate "who comes late to court", "can't get her papers in order", and "can't read her judgments".

Mr Malema's claims are self-serving and unsubstantiated. The claim that the magistrate was told what to write by Gordhan, Ramaphosa and Batohi is also obviously false. The claims are intended to delegitimise the trial and its outcome, and

to intimidate the magistrate into ruling in Malema's favour — regardless of whether the state had proven its case against him or not. (I make no prediction on whether he will indeed be found guilty of any of the charges he is facing.)

Much like Donald Trump, who has railed against prosecutors, judges and (in once case) even the clerk of a presiding judge in one of the criminal cases brought against him, Mr Malema has also suggested that he was being prosecuted to hamper his ability to campaign in the upcoming election. Like Trump, Malema also lashed out at those who criticised his utterances (targeting Judges Matter and the Ministry of Justice), telling the latter on X (formerly Twitter): "You can Voetsek small bedwetting boys."
I have previously explained that there is normally nothing wrong with criticism — even harsh criticism — of court judgments or of presiding officers such as magistrates and judges. Ideally, such criticism should be supported by reasons and based on the true facts. It should, additionally, also be based on a good faith engagement with the relevant legal rules and principles.

One finds excellent examples of this type of criticism in academic law journals, where academics often criticise judgments for their lack of rigour, their muddled reasoning, or their interpretation and application of the legal rules and principles.
But even when criticism is uninformed, intemperate, unfair, scurrilous or clearly politically motivated (as is so often the case of criticism of court judgments on social media), such speech will normally be protected by the right to freedom of expression in section 16 of the Constitution.

While such criticism would have little value and could rightly be ignored by the rest of us, section 16 of the Constitution protects the right of everyone to make a fool of themselves, for example, by criticising a judgment that they had not read or had not understood.

It is only in the most extreme and clearest of cases that criticism of presiding officers or court judgments will become a punishable offence. As the Constitutional Court pointed out in *S v Mamabolo*, the expansive protection of the right to criticise presiding officers and court judgments is necessary as "vocal public scrutiny" of courts and court judgments ensures that presiding officers and the judiciary more broadly are held accountable by the public.

In *Mamabolo* the court made clear that such criticism will only rise to the level of a criminal offence (the offence of "scandalising the court") where "a particular remark will tend to or is calculated to bring the administration of justice into contempt".
As the court explained in *Mamabolo*, the crime of scandalising the court (which is an incidence of contempt of court) is *not* aimed at protecting "the tender and hurt feelings of the judge or to grant him [sic] any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it

is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed."

It is for this reason that even false and obviously defamatory attacks on presiding officers will not necessarily amount to the crime of "scandalising the court". This is so, even though presiding officers are in the somewhat unique position of not being able defend themselves against such criticism as they "speak in court and only in court" and are thus "not at liberty to defend or even debate their decisions in public". (Unfortunately, Chief Justice Raymond Zondo has on occasion ignored this principle by unwisely responding to critics of the State Capture Commission of Inquiry and of judges more broadly, thus entangling himself in political controversy.)

In theory, presiding officers could sue any critic who makes false and defamatory claims about them, but I would argue that it would almost always be a catastrophic mistake to do so as it would inevitably entangle the presiding officer in political controversy or raise unnecessary questions about their temperament or impartiality.
The magistrate presiding in Mr Malema's criminal trial might well feel aggrieved that Mr Malema accused her of incompetence, suggested that she cannot read, and accused her of being a racist. But this is of no relevance when assessing whether Mr Malema made himself guilty of "scandalising the court". The only question is whether these remarks will tend to or are calculated to bring the administration of justice into contempt.

While some of Mr Malema's remarks were clearly defamatory and in bad taste, and while they obviously reflect poorly on Mr Malema's character, I do not believe that they rise (or should rise) to the level of a criminal offence worthy of prosecution.
If individuals were to be prosecuted for questioning the competence or even-handedness of presiding officers it would have a chilling effect (even when the insults are scurrilous) with the fear of being prosecuted for criticising the courts making courts less accountable to the public.

That said, our courts may well hold that Mr Malema's accusation of racism amounted to scandalising the court. In 2002 the Gauteng high court in *S v Bresler & Another* convicted a man of scandalising the court for launching a racist attack on the coloured magistrate who had convicted his daughter of a traffic offence after Mr Bresler wrote that the magistrate was unqualified, insane and incompetent, and had applied "bush law".

However, I agree with the criticism of this judgment by Dario Milo, Glenn Penfold & Anthony Stein in *Constitutional Law of South Africa* that, while the "comments were clearly reprehensible, and would have provided solid grounds for […] a complaint before the Equality Court, the conviction for contempt of court was not, in our view, a justifiable restriction of free speech". (I am, however, not persuaded by the authors'

thought-provoking argument that the crime of scandalising the courts should be abolished.)

Mr Malema's statement that the magistrate interrupted her judgment to take instructions from Pravin Gordhan, President Cyril Ramaphosa and/or Shamila Batohi about how to rule, and that she thus produced a "sponsored" judgment is a different matter altogether.

This statement does not merely question the competence or even-handedness of the presiding officer. Instead, it accuses the presiding officer of corruptly taking orders from the president, a Cabinet minister and the NDPP, thus suggesting that the trial is a predetermined sham directed by Mr Malema's political opponents and by the current NDPP.

The case law seems to be clear on the point: accusing a judge or magistrate of corruption and dishonesty when there is no factual basis to do so will often amount to criminal conduct punishable as an instance of scandalising the court.

For example, in 2018 the Eastern Cape high court in *Gouws v Taxing Mistress (Port Elizabeth) and Others* convicted Mr Gouws for contempt of court for scandalising the court and sentenced him to 18 months' imprisonment, wholly suspended for a period of three years, after he had made "serious, egregious, and scandalous statements" about various judges, magistrates and legal practitioners, which included allegations of "corruption, dishonesty, sexual deviancy and racism".

To determine whether remarks like these made by Mr Malema were calculated to bring the administration of justice into contempt, a court will not only look at the words, but also at the larger context. The fact that Mr Malema is a powerful and influential politician, that he uttered these words outside court to a large gathering of supporters who would mostly be highly susceptible to believe his claim, and that the motive was to discredit the criminal trial and its outcome, would all count against him if he were to be criminally charged for these utterances.

While I can imagine some citizens arguing that Mr Malema should not be prosecuted because it would bolster his claims of being persecuted and would be to his political advantage, this is not a permissible ground for non-prosecution. The NPA is required to act without fear or favour and may therefore not base a decision to prosecute or not to prosecute an individual on the possible impact of the decision on the electoral fortunes of any political party.

It would be rather ironic if an impartial and independent decision by the NPA to prosecute ends up boosting the electoral fortunes of the EFF, while exposing Mr Malema to possible imprisonment.

(The above article appeared on the *Constitutionally Speaking* blog of Prof Pierre De Vos on 25 October 2023)

A Last Thought

"The freedom to debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual judicial officers. A clear line cannot be drawn between acceptable criticism of the judiciary as an institution, and of its individual members, on the one side and on the other side statements that are downright harmful to the public interest by undermining the legitimacy of the judicial process as such. But the ultimate objective remains: courts must be able to attend to the proper administration of justice and — in South Africa possibly more importantly — they must be seen and accepted by the public to be doing so. Without the confidence of the people, courts cannot perform their adjudicative role, nor fulfil their therapeutic and prophylactic purpose".

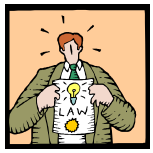
JUSTICE JOHANN KRIEGLER in S V MAMABOLO (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 APRIL 2001)

e-MANTSHI

A KZNJETCOM Newsletter

October 2023: Issue 201

Welcome to the two hundredth and first 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.A notice was published by the Minister of Police in which the Standard Operating Procedures for the Investigation, Search, Access or Seizure of Articles in terms of section 26 of the *Cybercrimes Act, 2020 (Act No.19 of 2020*) was listed. This notice was published in Government Gazette 49447 dated 6 October 2023. The operating procedures can be accessed here:
https://www.saps.gov.za/resource_centre/notices/downloads/SAPS-CCA-SOP-FINAL-12-09-2023.pdf

2. *The Repeal of the Transkeian Penal Code Act, 2023 Act 4 of 2023* has been published in Government Gazette no 49371 dated 27 September 2023. The Act repeals the Transkeian Penal Code, 1983 (Act No. 9 of 1983), of the Republic of Transkei. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette.

The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202310/49371repealofthetranskeianpenalcodeact42023.pdf

3. *The Land Court Act, Act 6 of 2023* has been published in Government Gazette no 49372 dated 27 September 2023. Section 7 (1) of the Act states as follows: Subject to the Constitution, and except where this Act provides otherwise, the Court and the Magistrate's Court within whose area of jurisdiction the land forming the subject matter before that court is situated, have jurisdiction in respect of all matters that in terms of this Act or in terms of any other law are to be determined by the Court or the Magistrate's Court. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette.
The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202310/49372landcourtact62023.pdf

4. *The Traditional Courts Act, Act 9 of 2022* has been published in Government Gazette no 49373 dated 27 September 2023. Section 14 of the Act makes provision for the transfer of a matter from the Traditional court to the Magistrates Court or a Small Claims Court. The Act will only come into operation on a date to be fixed by the President by proclamation in the Gazette.
The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202310/49373traditionalcourtsact92022.pdf

Recent Court Cases

1. **Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others (CCT 38/16) [2023] ZACC 34 (30 October 2023)**

The interest of justice criterion has to be considered when the arrest and detention of an illegal foreigner is considered in terms of section 34(1) of the Immigration Act 13 of 2002.

Order

On application for revival of the order of this Court dated 29 June 2017, the following order is made:

1. Subject to and pending the enactment of legislation outlined in paragraph 2, as from the date of this order, and pending remedial legislation to be enacted and brought into force within 12 months from the date of this order, the following provisions, supplementary to those contained in paragraph 4 of this Court's order of 29 June 2017, shall apply:
(a) An immigration officer considering the arrest and detention of an illegal foreigner in terms of section 34(1) of the Immigration Act 13 of 2002 (Act) must consider whether the interests of justice permit the release of such person subject to reasonable conditions, and must not cause the person to be detained if the officer concludes that the interests of justice permit the release of such person subject to reasonable conditions.
(b) A person detained in terms of section 34(1) of the Act shall be brought before a court within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.
(c) The Court before whom a person is brought in terms of paragraph (b) above must consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.
(d) If the Court concludes that the interests of justice do not permit the release of such person, the Court may authorise the further detention of the person for a period not exceeding 30 calendar days.
(e) If the Court has ordered the further detention of a person in terms of paragraph (d) above, the said person must again be brought before the Court before the expiry of the period of detention authorised by the Court and the Court must again consider whether the interests of justice permit the release of such person subject to reasonable conditions and must, if it so concludes, order the person to be released subject to reasonable conditions.
(f) If the Court contemplated in paragraph (e) above concludes that the interests of justice do not permit the release of such person, the Court may authorise the person's detention for an adequate period not exceeding a further 90 calendar days.
(g) A person brought before a Court in terms of paragraph (b) or (e) must be given an opportunity to make representations to the Court.
2. If remedial legislation is not enacted and brought into force within the said 12-month period, the provisions in paragraph (1) above shall continue to apply until such remedial legislation is enacted and brought into force.

The Judgment can be accessed here:
https://www.saflii.org/za/cases/ZACC/2023/34.pdf

2. S v Ncube (HC 01 /2023) [2023] ZANWHC 176 (22 September 2023)

When dealing with an application to have a suspended sentence put into operation in terms of section 297(7) and 297(9) of the Criminal Procedure Act there are only two possibilities available. The sentence may be further suspended subject to the same conditions or other conditions that could have been imposed at the time of the original sentence; or be put into operation. A Magistrate cannot dismiss the application.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2023/176.pdf

3. S v P.M (Review) (02/2023) [2023] ZANWHC 184 (5 October 2023)

The court failed to transmit a matter on automatic review in terms of section 84 of the Child Justice Act 75 of 2008 where a period of imprisonment was imposed but had also failed to deal with the criminal trial in terms of the Child Justice Act. It imposed an incompetent sentence in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 because it had misdirected itself on the applicability of section 51(2) and (3) of the Criminal Law Amendment Act 105 of 1997.The proceedings were reviewed and the conviction and sentence set aside.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2023/184.pdf

4. L.W v K.C.A (A2023-013223) [2023] ZAGPJHC 1154 (13 October 2023)

Protection from Harassment Act 17 of 2011 — whether reporting rape allegations can amount to "harassment" under the Act — There is a duty of utmost good faith and material non-disclosures when seeking an interim protection order ex parte — the conduct of the appellant did not amount to "harassment" as communications were not unreasonable.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPJHC/2023/1154.html

From The Legal Journals

Mabaso, F

Racial considerations are a prerequisite and not an afterthought: A discussion of Kroukamp v The Minister of Justice and Constitutional Development [2021] ZAGPPHC 526 and Magistrates Commission v Lawrence 2022 1 All SA 321 (SCA)

Obiter **, *44*(3).**

ABSTRACT
This case note engages in a critical examination of two recent cases concerning the issue of race-based appointments, or rather the lack thereof, in the judiciary. The crux of this case note concerns the appointment of judicial officers as regulated by section 174 of the Constitution of the Republic of South Africa, 1996 (Constitution). In particular, the case note is driven by subsection 2 of section 174, which provides: "The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed." In essence, this case note is an advocate for the argument that the South African judiciary must reflect the demographics of the country. That is to say, racial considerations are a prerequisite in judicial appointments, and not an afterthought. The case note starts with a discussion of the matter that was before the Gauteng High Court, sitting as the Equality Court, in Kroukamp v The Minister of Justice and Constitutional Development ([2021] ZAGPPHC 526). The case note then discusses the later decision of the Supreme Court of Appeal in Magistrates Commission v Lawrence (2022 1 All SA 321 (SCA)).

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/14166/20519

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

Contributions from the Law School

Tracking South Africa's handling of terrorist entities

1. Introduction

Prior to being repealed, sections 25 and 26 of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 (POCDATARA) provided for the listing of terrorist entities by setting out a procedure for listing. Section 25 read as follows:

The President must, by Proclamation in the *Gazette*, and other appropriate means of publication, give notice that the Security Council of the United Nations, under Chapter VII of the Charter of the United Nations, has identified a specific entity as being -

(a) an entity who commits, or attempts to commit, any terrorist and related activity or participates in or facilitates the commission of any terrorist and related activity; or

(b) an entity against whom Member States of the United Nations must take the actions specified in Resolutions of the said Security Council, in order to combat or prevent terrorist and related activities.

The erstwhile section 26 of the POCDATARA further provided that '[e]very Proclamation issued under section 25 shall be tabled in Parliament for its consideration and decision and Parliament may thereupon take such steps as it may consider necessary'. Once an entity was listed as a terrorist entity under sections 25 and 26, the rendering of economic, financial, or property-related assistance to it was a criminal offence (section 4 of the POCDATARA). Handling property that is linked to a listed terrorist entity was also prohibited in terms of section 17 of the POCDATARA, and such property could be a subject of a freezing order in terms of the same section. Further consequences for terrorist entities also flowed from the Prevention of Organised Crime Act 121 of 1998, particularly the civil forfeiture of property associated with terrorist activities. These were the consequences of listing a terrorist entity before the recent amendment of the POCDATARA.

Given the recent amendment of the POCDATARA, this contribution now tracks the current treatment of terrorist entities. It starts off by going into the historical treatment of undesirable organisations under the apartheid security regime, and then moves on to examine the treatment of terrorist entities in terms of the POCDATARA after it was amended.

2 The treatment of undesirable organisations under apartheid

In addition to the myriad of criminal and other sanctions against undesirable organisations, the fact that such organisations could also be declared unlawful, be subsequently dissolved, and have their assets disposed of, served as another

weapon of oppression in the arsenal of the apartheid government (see the Suppression of Communism Act 44 of 1950 (which later became known as the Internal Security Act 44 of 1950), as well as the Internal Security Act 74 of 1982). The power to effectively ban and dissolve organisations vested in the Minister of Justice, who could exercise such power in his subjective discretion.

Owing to the subjective discretion clause, enquiring into the grounds for the exercise of such discretion was not permitted (*South African Defence and Aid Fund v Minister of Justice* 1967 (1) SA 31 (C); *Minister of Law and Order v Hurley* 1986 (3) SA 568 (A)). Therefore, challenging the decision to effectively ban and dissolve was made extremely difficult, and the other review grounds that could be relied upon were hopelessly inadequate (see in this regard AS Mathews *Freedom State Security and the Rule of Law – Dilemmas of the Apartheid Society* (1986) 102-107). One might also add that the courts themselves were at times 'executive-minded' and tended to defer to the executive the making of decisions in matters related to state security.

The Internal Security Act 74 of 1982 notably included a procedure for declaring an organisation unlawful (i.e. banning), and for the dissolution and disposal of the assets thereof. In terms of this Act, once an organisation was declared unlawful (and therefore banned), the Minister would designate a liquidator in whom all the property of the banned organisation would vest (section 13(1)(b)), and the liquidator would wind up the organisation as a solvent or insolvent entity (section 14). Any remaining funds would be paid over to the State Revenue Fund (section 14(3)). Carrying on the activities of the banned organisation was a criminal offence (section 13(1)(a)).

The consequences of an order banning and dissolving a particular organisation notably extended even to the members of the banned organisation, in that the Director of Security Legislation was required to keep a list of members, supporters and leaders of the banned organisation (section 16(1)). Being on this list meant that an implicated person was disqualified from being a member of Parliament (section 33(2)), such that even accepting nomination for being a member of Parliament was a criminal offence (section 56(1)(q)). A person whose name was on the list was also precluded from practising as a lawyer (section 34(1)). Persons who appeared on the list were also effectively prevented from any meaningful participation in many of the organisations they may have wished to take part in (Mathews op cit 113-114).

Organisations that were not captured under the sweeping powers of the above-mentioned pieces of legislation found themselves liable to proscription in terms of the Political Interference Act 51 of 1968. In the main, this legislation outlawed the racially mixed political organisations (J Dugard *Human Rights and the South African Legal Order* (1978) 167). Multi-racial and non-political associations, which comprised mainly the non-political student and religious bodies, were not interfered with until 1972 when a parliamentary investigative commission was established in order to look carefully into the affairs of such multiracial and non-political organisations (Dugard op cit 169-170).

The parliamentary commission could interrogate any person at its discretion, and the failure to appear before the parliamentary commission or to provide a satisfactory answer without 'sufficient cause', was a punishable offence (see Dugard op cit 170).

The regulations establishing the commission also required that the proceedings be closed to the public, that the disclosure of information relating to the proceedings be a criminal offence, that legal representation be allowed at the discretion of the chairperson of the commission, and that witnesses could request that their identity be concealed (Dugard op cit 170). This allowed for clandestine investigations which intimidated organisations and negatively influenced them against continuing with their activities.

The reports of the parliamentary commission had severe consequences, which included, amongst other consequences, naming certain persons as a danger to internal security and subsequently banning them under the Suppression of Communism Act (see Dugard op cit 171). In 1974, Parliament enacted the Affected Organisations Act 31 of 1974, which operated alongside the parliamentary investigative commission. The Affected Organisations Act empowered the president to declare, without notice, an organisation as 'affected' if satisfied that politics are being engaged in by that particular organisation with the help of a foreign person or organisation (Dugard op cit 172; and Mathews op cit 115). The effect of the declaration was that the affected organisation would then be prevented from receiving foreign funding, thus effectively restricting the organisation from carrying out its activities (Dugard op cit 172).

In closure, South Africa's history of handling undesirable organisations notably did not end at the point of criminalising certain conduct of members or sympathisers of such organisations, but, in certain instances, also went as far as to facilitate the dissolution and disposal of the assets of undesirable organisations.

3 The treatment or handling of terrorist entities in terms of the existing regime

A clear take away from the history under heading 2 above, is that imposing restrictions on undesirable entities has a historical lineage. It therefore comes as no surprise that the POCDATARA proceeded along the same lines when it made provision for singling out and listing undesirable terrorist entities for purposes of imposing various criminal sanctions and restrictions. Despite the repeal of apartheid security legislation, as well as the repeal of sections 25 and 26 Sections 25 and 26, engagement with terrorist entities continues to be criminalised, thus further strengthening the undesirability of terrorist organisations. To illustrate, section 4(1) to (3) of the POCDATARA (as amended) continues to criminalise the rendering of financial, economic and property-related support if a person intended or 'knows' or 'ought reasonably to have known or suspected' that such support would be used:

(i) to commit or facilitate the commission of a specified offence;

(ii) for the benefit of, or on behalf of, or at the direction of, or under the control of an entity which commits or attempts to commit or facilitates the commission of a specified offence;

(iiA) for the benefit of, or on behalf of, or at the direction of, or under the control of, a specific entity identified in an order made under section 23; or

(iii) for the benefit of a specific entity identified pursuant to a Resolution of the United Nations Security Council relating to the identification of entities-
(aa) that commit, or attempt to commit, any terrorist and related activity or participate in or facilitate the commission of any terrorist and related activity; or
(bb) against which Member States of the United Nations must take the actions specified in that Resolution in order to combat or prevent terrorist and related activities,
and which are announced in a notice referred to in section 26A(3) of the Financial Intelligence Centre Act…
Section 23(1) and (2) of the POCDATARA (as amended) continues along the same line and prohibits as follows the rendering of property-related support to terrorist entities:
(1) A High Court may, on ex parte application by the National Director to a judge in chambers, subject to such conditions and exceptions as may be specified in the order, make an order-
(a) prohibiting any person from engaging in any conduct, or dealing in any manner with any property owned or controlled by or on behalf of, or at the direction of, or otherwise associated with an entity referred to in subsection (2), and may include an order to freeze any such property;
(b) obliging any person to cease any conduct in respect of any property referred to in paragraph (a); or
(c) prohibiting any person from performing any act contemplated in section 4 for the benefit of, or on behalf of, or at the direction of, or under the control of, an entity referred to in subsection (2).
(2) An order referred to in subsection (1) may be made in respect of
(a) any entity, where there are reasonable grounds to believe that the entity has committed, or attempted to commit, participated in or facilitated the commission of a specified offence; or
(b) a specific entity identified in a notice pursuant to a Resolution of the United Nations Security Council relating to the identification of entities-
(i) that has committed, or attempted to commit, any terrorist and related activity, or participates in or facilitates the commission of any terrorist and related activity; or
(ii) against which Member States of the United Nations must take the actions specified in the Resolution in order to combat or prevent terrorist and related activities,
and that are announced in a notice referred to in section 26A(3) of the Financial Intelligence Centre Act…
Therefore, in terms of section 4, the provision of economic, financial or property-related support to a terrorist organisation is criminalised. Under section 23, the provision of property-related support can be prohibited by means of an interdict, and such property may be a subject of a freezing order. Section 23(4) goes even a step further and provides that:

(4) A High Court making an order under subsection (1) [of section 23] may make any other ancillary orders that the court considers appropriate for the proper, fair and effective execution of the order, including-
(a) appointing a curator bonis, subject to the directions of that High Court, to do any one or more of the following on behalf of a person affected by that order:
(i) to assume control over the property;
(ii) to take care of the said property;
(iii) to administer the said property and to perform any act necessary for that purpose;
(iv) where the said property is a business or undertaking, to carry on, with due regard to any law which may be applicable, the business or undertaking; and
(v) to dispose of property if it is not economically viable to administer it or for any other reason it is not economically possible to assume control and take care thereof;
(b) ordering any person holding property, subject to an order referred to in subsection (1), to immediately surrender any such property into the custody of the curator bonis; and
(c) relating to the payment of the fees and expenditure of the curator bonis.
The newly added section 23(4) of the POCDATARA empowers a High Court to order the appointment of a curator bonis who will control, care for, control, administer, and/or dispose of the property which any person may be handling or administering on behalf or for the benefit of a terrorist entity.

4. Conclusion

Given the foregoing, it can be concluded that the treatment or handling of terrorist entities in South Africa is such that it can be readily accepted these entities and their activities are undesirable and prohibited. To amplify, terrorist entities are not legally capable of receiving any financial, economic or property-related support from any person, as it is a criminal offence under section 4 of the POCDATARA to offer such support. Moreover, an order interdicting a person from providing such support can be secured in terms section 23(1) and (2) of the POCDATAR, and the property which any person holds or uses for the benefit of a terrorist entity can be frozen by order of court (section23(1)(a)) and possibly even be subsequently disposed of (section 23(4)). The assets of a terrorist entity may also be subject to a forfeiture order in terms of the Prevention of Organised Crime Act 121 of 1998 (POCA).
Beyond the POCDATARA and the POCA, the (typically violent) activities of terrorist entities are proscribed and attract significant criminal sanctions. The advocacy of the ideology of a terrorist entity (without engaging in the criminal and often violent activities of the entity) appears not to be prohibited as long as such advocacy does not constitute hate speech or incitement of violence or any other prohibited conduct.

Khulekani Khumalo
University of KwaZulu-Natal

Matters of Interest to Magistrates

JULIUS MALEMA HAS OPENED HIMSELF TO CRIMINAL CHARGES OF 'SCANDALISING THE COURT'

Pierre De Vos

Malema's claims outside the East London Magistrates' Court were intended to delegitimise the trial and its outcome, and to intimidate the court into ruling in his favour.

Over the past decade, as the broadcasting of court proceedings have become commonplace, populist attacks on judicial officers and the judgments they produce have become more conspiracy-fuelled and hysterical — particularly in politically charged cases.

While much of this kind of speech (no matter how uninformed or unhinged) is protected by section 16 of the Constitution, accusing a presiding officer of dishonesty and corruption — as EFF leader Julius Malema did last week — should be prosecuted as it amounts to "scandalising the court", an incidence of contempt of court.

Addressing supporters outside the East London Magistrate's Court on Thursday 19 October 2023, Mr Malema accused the magistrate presiding over his criminal trial, Twanet Olivier, of not writing the judgment in which she ruled against his bid to have the charges against him dismissed.

Mr Malema claimed that the magistrate interrupted her judgment to take instructions from Pravin Gordhan, President Cyril Ramaphosa and/or Shamila Batohi about how to rule, and that she thus produced a "sponsored" judgment.

He also insulted the magistrate by calling her a racist and incompetent magistrate "who comes late to court", "can't get her papers in order", and "can't read her judgments".

Mr Malema's claims are self-serving and unsubstantiated. The claim that the magistrate was told what to write by Gordhan, Ramaphosa and Batohi is also obviously false. The claims are intended to delegitimise the trial and its outcome, and

to intimidate the magistrate into ruling in Malema's favour — regardless of whether the state had proven its case against him or not. (I make no prediction on whether he will indeed be found guilty of any of the charges he is facing.)

Much like Donald Trump, who has railed against prosecutors, judges and (in once case) even the clerk of a presiding judge in one of the criminal cases brought against him, Mr Malema has also suggested that he was being prosecuted to hamper his ability to campaign in the upcoming election. Like Trump, Malema also lashed out at those who criticised his utterances (targeting Judges Matter and the Ministry of Justice), telling the latter on X (formerly Twitter): "You can Voetsek small bedwetting boys."
I have previously explained that there is normally nothing wrong with criticism — even harsh criticism — of court judgments or of presiding officers such as magistrates and judges. Ideally, such criticism should be supported by reasons and based on the true facts. It should, additionally, also be based on a good faith engagement with the relevant legal rules and principles.

One finds excellent examples of this type of criticism in academic law journals, where academics often criticise judgments for their lack of rigour, their muddled reasoning, or their interpretation and application of the legal rules and principles.
But even when criticism is uninformed, intemperate, unfair, scurrilous or clearly politically motivated (as is so often the case of criticism of court judgments on social media), such speech will normally be protected by the right to freedom of expression in section 16 of the Constitution.

While such criticism would have little value and could rightly be ignored by the rest of us, section 16 of the Constitution protects the right of everyone to make a fool of themselves, for example, by criticising a judgment that they had not read or had not understood.

It is only in the most extreme and clearest of cases that criticism of presiding officers or court judgments will become a punishable offence. As the Constitutional Court pointed out in *S v Mamabolo*, the expansive protection of the right to criticise presiding officers and court judgments is necessary as "vocal public scrutiny" of courts and court judgments ensures that presiding officers and the judiciary more broadly are held accountable by the public.

In *Mamabolo* the court made clear that such criticism will only rise to the level of a criminal offence (the offence of "scandalising the court") where "a particular remark will tend to or is calculated to bring the administration of justice into contempt".
As the court explained in *Mamabolo*, the crime of scandalising the court (which is an incidence of contempt of court) is *not* aimed at protecting "the tender and hurt feelings of the judge or to grant him [sic] any additional protection against defamation other than that available to any person by way of a civil action for damages. Rather it

is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed."

It is for this reason that even false and obviously defamatory attacks on presiding officers will not necessarily amount to the crime of "scandalising the court". This is so, even though presiding officers are in the somewhat unique position of not being able defend themselves against such criticism as they "speak in court and only in court" and are thus "not at liberty to defend or even debate their decisions in public". (Unfortunately, Chief Justice Raymond Zondo has on occasion ignored this principle by unwisely responding to critics of the State Capture Commission of Inquiry and of judges more broadly, thus entangling himself in political controversy.)

In theory, presiding officers could sue any critic who makes false and defamatory claims about them, but I would argue that it would almost always be a catastrophic mistake to do so as it would inevitably entangle the presiding officer in political controversy or raise unnecessary questions about their temperament or impartiality.
The magistrate presiding in Mr Malema's criminal trial might well feel aggrieved that Mr Malema accused her of incompetence, suggested that she cannot read, and accused her of being a racist. But this is of no relevance when assessing whether Mr Malema made himself guilty of "scandalising the court". The only question is whether these remarks will tend to or are calculated to bring the administration of justice into contempt.

While some of Mr Malema's remarks were clearly defamatory and in bad taste, and while they obviously reflect poorly on Mr Malema's character, I do not believe that they rise (or should rise) to the level of a criminal offence worthy of prosecution.
If individuals were to be prosecuted for questioning the competence or even-handedness of presiding officers it would have a chilling effect (even when the insults are scurrilous) with the fear of being prosecuted for criticising the courts making courts less accountable to the public.

That said, our courts may well hold that Mr Malema's accusation of racism amounted to scandalising the court. In 2002 the Gauteng high court in *S v Bresler & Another* convicted a man of scandalising the court for launching a racist attack on the coloured magistrate who had convicted his daughter of a traffic offence after Mr Bresler wrote that the magistrate was unqualified, insane and incompetent, and had applied "bush law".

However, I agree with the criticism of this judgment by Dario Milo, Glenn Penfold & Anthony Stein in *Constitutional Law of South Africa* that, while the "comments were clearly reprehensible, and would have provided solid grounds for […] a complaint before the Equality Court, the conviction for contempt of court was not, in our view, a justifiable restriction of free speech". (I am, however, not persuaded by the authors'

thought-provoking argument that the crime of scandalising the courts should be abolished.)

Mr Malema's statement that the magistrate interrupted her judgment to take instructions from Pravin Gordhan, President Cyril Ramaphosa and/or Shamila Batohi about how to rule, and that she thus produced a "sponsored" judgment is a different matter altogether.

This statement does not merely question the competence or even-handedness of the presiding officer. Instead, it accuses the presiding officer of corruptly taking orders from the president, a Cabinet minister and the NDPP, thus suggesting that the trial is a predetermined sham directed by Mr Malema's political opponents and by the current NDPP.

The case law seems to be clear on the point: accusing a judge or magistrate of corruption and dishonesty when there is no factual basis to do so will often amount to criminal conduct punishable as an instance of scandalising the court.

For example, in 2018 the Eastern Cape high court in *Gouws v Taxing Mistress (Port Elizabeth) and Others* convicted Mr Gouws for contempt of court for scandalising the court and sentenced him to 18 months' imprisonment, wholly suspended for a period of three years, after he had made "serious, egregious, and scandalous statements" about various judges, magistrates and legal practitioners, which included allegations of "corruption, dishonesty, sexual deviancy and racism".

To determine whether remarks like these made by Mr Malema were calculated to bring the administration of justice into contempt, a court will not only look at the words, but also at the larger context. The fact that Mr Malema is a powerful and influential politician, that he uttered these words outside court to a large gathering of supporters who would mostly be highly susceptible to believe his claim, and that the motive was to discredit the criminal trial and its outcome, would all count against him if he were to be criminally charged for these utterances.

While I can imagine some citizens arguing that Mr Malema should not be prosecuted because it would bolster his claims of being persecuted and would be to his political advantage, this is not a permissible ground for non-prosecution. The NPA is required to act without fear or favour and may therefore not base a decision to prosecute or not to prosecute an individual on the possible impact of the decision on the electoral fortunes of any political party.

It would be rather ironic if an impartial and independent decision by the NPA to prosecute ends up boosting the electoral fortunes of the EFF, while exposing Mr Malema to possible imprisonment.

(The above article appeared on the *Constitutionally Speaking* blog of Prof Pierre De Vos on 25 October 2023)

A Last Thought

"The freedom to debate the conduct of public affairs by the judiciary does not mean that attacks, however scurrilous, can with impunity be made on the judiciary as an institution or on individual judicial officers. A clear line cannot be drawn between acceptable criticism of the judiciary as an institution, and of its individual members, on the one side and on the other side statements that are downright harmful to the public interest by undermining the legitimacy of the judicial process as such. But the ultimate objective remains: courts must be able to attend to the proper administration of justice and — in South Africa possibly more importantly — they must be seen and accepted by the public to be doing so. Without the confidence of the people, courts cannot perform their adjudicative role, nor fulfil their therapeutic and prophylactic purpose".
JUSTICE JOHANN KRIEGLER in S V MAMABOLO (CCT 44/00) [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (11 APRIL 2001)