e-MANTSHI

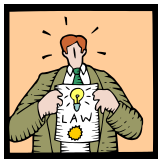
A KZNJETCOM Newsletter

November 2023: Issue 202

Welcome to the two hundredth and second 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. In terms of section 15 of the *Children's Amendment Act, Act 17 of 2022* certain sections of the Act were put into operation on 8 November 2023. These are sections 1,2,3,6,7 8(a),(b),(c) and (d), 9,10,13 and 14. The notice in this regard was published in Government Gazette no 49615 dated 8 November 2023. The most important amendments are the following:

Section 24 (1) "Any person having an interest in the care, wellbeing and development of a child may apply to the High Court or ***children's court for an order granting guardianship of the child."***

Section 150(1)(a) : A child is in need of care and protection if such a child-

(a) *has been abandoned or orphaned* ***and has no family member who is able and suitable to care for that child;***

This amendment has huge immediate implications. It essentially means that a child cannot be placed in the care of a family member as foster parent where the child is found to be in need of care and protection in terms of section 150(1)(a).
The amendment notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202311/49615proc142.pdf

2. The General Regulations regarding Children, 2010 were amended on 10 November 2023 by the Minister of Social Development. The notice to this effect was published in Government Gazette no 49659 dated 10 November 2023. The Transitional Measure Regulation 4 may be Ultra Vires.
The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202311/49659gon4059.pdf

3. Under section 1(2)(b) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), the Minister of Justice and Correctional Services, published rates of interest for the purposes of section 1(1) of the Act. The notice was published in Government Gazette no 49720 dated 17 November 2023. The notice can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202311/49720gon4075.pdf

Recent Court Cases

1.Smit v The State (1256/2022) [2023] ZASCA 154 (17 November 2023)

Criminal law and procedure – fraud – the appellant had no intent, in the form of dolus eventualis, to commit fraud at the time when an agreement of sale was concluded which later led to him being unable to repay the money.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2023/154.html

2. Mmabasotho Christinah Olesitse N.O. v Minister of Police [2023] ZACC 35

Application of the "once and for all" common law rule — applicable to only one cause of action and not to more than one cause of action, a

claim for wrongful arrest and detention, and one for malicious prosecution constitute separate causes of action and "once and for all" rule not applicable.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZACC/2023/35.html

3.Mbuyisa and Others v S (17574/2022P) [2023] ZAKZPHC 132 (10 November 2023)

Where the adjudication of an appeal on an· imperfect record will not prejudice the appellants, their convictions need not be set aside solely on the basis of an error or omission in the record or an improper reconstruction process.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAKZPHC/2023/132.html

From The Legal Journals

Van Coller, A

Chetty v Perumaul (AR313/2020) [2021] ZAKZPHC 66 (21 September 2021) A cautionary note on the self-inflicted injury of disastrous and careless cross-examination

436 2023 De Jure Law Journal

This article can be accessed here:
https://www.dejure.up.ac.za/images/files/vol56-2023/van_Coller_case_note.pdf

Stevens, G & Le Roux-Bouwer

A critical legal perspective on statutory intoxication – time to sober up?

584 OBITER 2023

This articles can be accessed here:

https://obiter.mandela.ac.za/article/view/16964/20404

Van Coller, A & Johnson, E

Legal gymnastics: an evaluation of the judgment in Z v Z [2022] ZASCA 113

634 OBITER 2023

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/17000/20492

Van der Linde, D C

Progressive, yet problematic: Unpacking the therapy order and sentence in S v SN

2023 SALJ 715

Abstract

The judgment in S v SN [2022] ZAECGHC 35 is dichotomous as it is both progressive and problematic. The judgment is progressive as, for the first time, a South African criminal court imposed a therapy order for a victim of rape. The minor victim in this case was raped multiple times by her uncle in a familial home. The court was further enjoined to impose a minimum life sentence under the Criminal Law Amendment Act 105 of 1997, as the victim was under the age of 16 and had been raped on multiple occasions. However, the court in SN was entitled to deviate from the minimum sentence when 'substantial and compelling circumstances exist' to do so. In considering the mitigating and aggravating factors present in the case, the court deviated from the minimum life sentence based on the remorse of the accused and the lack of force used during the rape. The judgment is problematic because considering these factors unearthed problematic narratives surrounding the nature of rape. This note critically analyses the judgment in SN and submits that although the therapy order is a welcome development, the court erred in considering a lack of force employed during the rape as a mitigating factor.

Singo, D

Coercive and controlling behaviour in the Domestic Violence Act

2023 SALJ 763

Abstract

This article focuses on two definitions of domestic violence — 'coercive behaviour' and 'controlling behaviour' — which were formally introduced into South African law by the Domestic Violence Amendment Act 14 of 2021. It tracks the legislative process, including an overview of the different iterations of the definitions as they appeared in the preceding Bills. This is followed by an analysis of the definitions grammatical, conceptual and legal meanings (including considering applicable foreign case law), after which various indicators are formulated. The article then examines whether the definitions are fit for purpose by analysing whether they are constitutional. This investigation reveals that the definitions suffer from numerous deficiencies: they are vague, overbroad and ambiguous, rendering them potentially unconstitutional. However, despite these deficiencies, the importance of the definitions — informed by the legislature's intentions and the prevailing societal context, amongst other things — is likely to deter any potential constitutional challenges disputing their validity. The article concludes by proposing alternative definitional formulations that, if implemented, may circumvent any potential constitutional challenges.

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

Contributions from the Law School

On the nature of common purpose: some inaccuracies

The prolific use of the common purpose doctrine in recent case law is not surprising. The doubts about the constitutionality of this doctrine having been extinguished by the Constitutional Court decision in *S v Thebus* 2003 (2) SACR 319 (CC), common purpose has flourished in the courts, being oft applied in the past few years. A notable extension of the application of the doctrine took place in the case of *S v Tshabalala* 2020 (2) SACR 38 (CC), where the Constitutional Court affirmed that the common purpose doctrine could even apply to an autographic crime (which can only be committed by means of the offender's own body) such as common-law rape.

Given the difficulties associated with proof of causation where a number of parties are acting together, the use of the common purpose doctrine has proved to be a necessary and important part of the ascertainment of liability in this context. The regular application of this doctrine has also provided the opportunity to confirm the principles and rules of which the doctrine consists. Given the breadth of this doctrine, enabling a less onerous prosecutorial task in establishing criminal liability in the group context,

and given that such application is notably further broadened and assisted by the associated use of the *dolus eventualis* form of intent, it is particularly important that the content of the doctrine is clear.

It goes without saying that while the common purpose doctrine has received the constitutional stamp of approval in its active association form, it is necessary to remain vigilant to ensure that the due process rights of the accused are never compromised in the application of the doctrine. Hence the critical voices that remain, be they academic writers (see Burchell *Principles of Criminal Law* 5ed (2016) 477ff) or judicial officers (see *S v Mzwempi* 2011 (2) SACR 237 (ECM)), are important in providing this reminder, albeit that their ultimate conclusions are debatable (see Hoctor 2011 *SACJ* 201; 2016 *Obiter* 666). Academic writing or judicial dicta which closely examine the nature or content of the common purpose doctrine are welcome in this context. However, where in commentary or application the possibility arises that the clarity of the understanding of the common purpose doctrine be compromised, then it is important to flag these statements for further consideration.

Two such issues have recently arisen in the case law. It is by now authoritatively established that the common purpose doctrine is applicable in two situations (and therefore falls to be analysed in two categories). As stated in *S v Tshabalala* para 48:

'The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.' (See also *Thebus* para 19, *S v Jacobs* 2019 (1) SACR 623 (CC) para 72 for a similar statement of the law.)

However, in the recent case of *S v Mbuyisa and others* [2023] ZAKZPHC 132 the court held (paras 71-76) that in fact the 'correct approach' is not found in the Constitutional Court judgments indicated, but rather in the analysis of *Hiemstra's Criminal Procedure* (by A Kruger, 2008, loose-leaf), where it is stated that the common purpose doctrine 'postulates as point of departure the absence of an agreement to commit the offence alleged' (22-29). The justification for this dissenting approach by the writer is based on the dictum in the leading case of *S v Mgedezi* 1989 (1) SA 687 (A) 705I where the writer states that the court only sets out the 'prerequisites for liability based on the doctrine' on the premise 'in the absence of prior agreement', and moreover states that the alternative would be to confuse co-perpetrator liability with common purpose liability (22-30). With regard to the first point raised, it seems evident that the court in *Mgedezi* was simply distinguishing the rules which are relevant in the application of the common purpose doctrine to a prior agreement to commit a crime, from those rules which would apply to common purpose liability where such prior agreement was absent. As regards the argument that '[common purpose thinking is irrelevant where an agreement to commit the offence has been proved' (22-29), this could only be true where 'common purpose thinking' applied solely to the active association form of common purpose. While prior agreement certainly does found co-perpetrator liability, the crucial point to

be made is that where the common purpose doctrine applies, the prosecutor need not prove a causal link between the harmful result and any particular participant in the common purpose, whereas this would be required for co-perpetrator liability. Thus, in this context common purpose thinking is hardly 'irrelevant', but instead enables a conviction to proceed where there is unlawful conduct following a bilateral or multilateral agreement, where establishing causation would potentially be very difficult because of the involvement of a number of actors.

It is worth repeating that the fact of the prior agreement form of common purpose does not exclude the possibility of the existence or proof of co-perpetrator liability. Where all the elements of liability can be established on the part of each of the actors, then they can all be convicted on this basis. But it is precisely the difficulty in proving all the elements of liability (and particularly causation) in respect of each individual offender who is committing unlawful conduct in a group that is the rationale for the common purpose doctrine, in all its forms. Hence the reason for the separate existence of prior agreement common purpose. In the light of these considerations, and the authoritative precedent to the contrary, it is unfortunate that the court, and the usually excellent *Hiemstra's Criminal Procedure*, should adopt this confusing and incorrect point of departure.

The need for clarification between the forms of common purpose liability has also recently arisen in the context of a statement in the Supreme Court of Appeal case of *S v Govender* 2023 (2) SACR 137 (SCA) where, in finding that the appellant could be held liable for murder based on active association common purpose, the court reasoned as follows (para 12):

'The concept of active association is wider than that of agreement, since it is seldom possible to prove a prior agreement. Consequently it is easier to draw an inference that a participant associated himself with the perpetrator.'

The application of the common purpose doctrine in *S v Nzo* 1990 (3) SA 1 (A) is instructive in assessing this statement. In *Nzo* the appellants were members of an undercover ANC group which had entered Port Elizabeth in order to engage in sabotage there. The deceased was killed by a member of the group, after she had threatened to expose to the authorities what the group were engaged in doing. While the appellants were not involved in the killing, their ongoing association with the group based on their underlying common purpose, despite foresight of the possibility of the murder being committed, was held to be determinative of liability. The majority judgment held that it was in the furtherance of the 'design' to wage a localised campaign of terror and destruction and for the preservation of the unit and the protection of each of its members that the murder was committed (7I). The use of the term 'design' clearly indicates that the basis of the majority verdict was prior agreement common purpose, at least founded on *dolus eventualis*. The minority disagreed, and in essentially applying active association common purpose, held that the appellants could not be convicted of the murder of the victim. Clearly the application of the wider, prior agreement form of common purpose allowed for conviction on this basis, while if the

active association form of common purpose were applied, its ambit would of necessity be narrower, focused on the particular unlawful conduct in question (see Hoctor *Snyman's Criminal Law* 7ed (2020) 229), and liability could not be established on the facts in *Nzo*.

If this reasoning is accepted, the inaccuracy of the statement by the court in *Govender* (which nevertheless correctly convicted on the basis of common purpose) is evident. The active association form of common purpose is in fact *narrower* than the prior agreement form of common purpose. If reliance is placed on a prior agreement or conspiracy between the participants, it is enough to prove that the accused agreed with the *wide and general* common design of the conspirators. However, if reliance is placed not on a previous agreement, but on active association, there must be proof that the accused associated himself, not with the wide and general common design, but with the *specific act* whereby the other participant(s) committed the crime (see *S v Dewnath* 2014 ZASCA 57 para 15, cited with approval in *S v Makhubela* 2017 (2) SACR 665 (CC) para 38).

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Matters of Interest to Magistrates

A discussion on the legal position of adult dependent children

The Supreme Court of Appeal (SCA) on 21 July 2022 in a unanimous decision of *Z v Z* 2022 (5) SA 451 (SCA) dispelled the notion that mothers cannot apply for maintenance on behalf of their young adult children. A few months after the *Z v Z* decision in October 2022, a mother in the George circuit court had a similar fight on her hands fending for the rights of her adult dependent children to maintenance. Saldanha J set the record straight for divorce matters in the SCA, or maintenance matters in the High Courts or lower courts, as to whether mothers have the *locus standi* or right to defend their adult dependent children's maintenance claims until such children becomes self-sufficient. In *DWT v MT and Another* (WCC) (unreported case no A222/2021, 19-10-2022) (Saldanha J) and *Z v Z*, the ages of the dependent children ranged between 19, 23 and 25, giving maintenance courts an idea that between the

ages of 18 to 25 young adult dependent children can still rely on the safety net of their parents while venturing into the adult world of financial independence.
Despite the *Z v Z* judgment, the *DWT v MT* attorneys still advised their clients that the non-custodial parent can stop maintenance payments *ipso jure/ex lege* the interpretation of a divorce clause in a divorce settlement without investigating if such children are self-sufficient and financially independent.
It became evident from social media and public discourse that the South African public and some members of the legal fraternity are still under the misguided notion that custodial mothers do not have *locus standi* to pursue maintenance claims on behalf of their adult dependent children. It is obvious that the *Z v Z* case created a *lacuna* for legal representatives to advise their clients that the *Z v Z* case is only applicable to divorce matters in the High Court.

Applicability to other adult children:
The question is whether the *Z v Z* case is applicable to other maintenance cases where no divorce proceedings were instituted. The short answer is affirmative since it is a SCA matter.
Unfortunately, some legal representatives including attorneys and advocates interpret the law to suit the needs of their clients and not the rights and needs of adult dependent children. For this reason, it is so important that a uniform approach is crafted by the Department of Justice (DOJ), which in turn will filter down to DOJ justice officials in maintenance courts, public prosecutors deemed maintenance officers in courts, the legal fraternity, magistrates, and judges.
Maintenance courts and maintenance officers (public prosecutors deemed maintenance officers in terms of s 4(1) of the Maintenance Act 99 of 1998, as well as maintenance officers appointed in terms of s 4(2) of the Maintenance Act) should take note of the case law pertaining to adult dependent children including *Z v Z* and *DWT v MT* and apply it in s 6 applications for discharge based on the young adult children reaching the age of majority as per s 17 of the Children's Act 38 of 2005. The criteria should be that these young adults either still live with the custodial parent, studying at residence but still return over weekends and holidays to their family homes and still in need of financial support from both parents.

Psychological position of young adult children and social impact:
I feel compelled to elaborate on the dire status of young adults who have just turned 18 and reiterate that they do not automatically become independent adults by attaining the s 17 (Children's Act) age of majority. Within the South African context, many 18-year-olds are still completing their final year of secondary schooling, taking a gap year for various reasons. It is imperative that these facts are understood by those working in the space of maintenance and its impact on young adults and be cognisant of where young adult children find themselves. To elaborate on some of these facts, one is that the economic climate does not allow for young adults to forge a way to gain experience and earn an income. We see this with young graduates too. They struggle to land a job even after graduating from tertiary education. As a result, this remains a bone of

contention in the light of what is the acceptable age for parents to stop financially supporting young adult children, but until we understand pragmatically what young adults are facing, we will continue to miss the mark of the best interests of the child and integrating them to becoming self-sufficient citizens, who will contribute to the economy and not be dependent on the state when they fall pregnant or become depressed from low job satisfaction, as a result of taking whatever job they can to earn an income and not pursue better prospects due to lack of financial support from the parent/s.

In many of the cases I have mediated between a parent and young adult child, these young adults experience great amounts of anxiety having to face their parent (usually fathers) in court and plead that their basic needs be met. These young adults are in academic institutions, showing great propensity to finish their studies to truly become self-sufficient. This anxiety affects them enormously, causing insomnia, eating disorders, and having to consult with doctors as a result of the emotional turmoil experienced. Some young adult children end up seeking unhealthy relationships with men and women who can fund their studies. As an advocate fighting against human trafficking, I have interviewed many survivors who saw the red flags but were in desperate need of financial support to complete their studies or help support their households.

These students often have to miss lectures and compulsory practical training to attend court dates, where their fathers do not appear repeatedly and are intimidated by their father's legal representative, causing undue stress in having to get permission to miss practical training, which adversely affects their overall semester marks. In the wake of the SCA acknowledging most children are not financially independent by the time they attain majority at the age 18, it is imperative to realise that they do not have the emotional maturity to defend their contribution to the food bill and electricity while living with the custodian parent and younger siblings. I have witnessed that it causes tension between siblings within the household and strains the relationship between the young adult child and parents. Children do not have the maturity to explain expenses incurred during the course of a month in the household that a custodial parent can easily explain and verify in bank statements and expenditure receipts and, therefore, I accede to the ch 5 recommendations of the South African Law Review Commission Discussion Paper 157 – Project 100B: Review of the Maintenance Act 99 of 1998 (see N Ruiters 'Applying for maintenance on behalf of adult children' 2023 (Jan/Feb) *DR* 17). Chapter 5 deals with the *locus standi* of mothers in the maintenance courts.

Status quo in South African maintenance courts:

It has become common practice for maintenance courts to take maintenance files to magistrates to discharge maintenance orders without calling maintenance dependent mothers and their adult dependent children into maintenance courts to confirm if such maintenance contributions are still needed. This amounts to a practice of unilateral discharging orders without applying the *audi alteram partem* principle and consulting the custodial parent and the adult dependent child in the process.

Proposed way forward:

The DOJ can assist by issuing a circular to the 454 maintenance courts in South Africa with 186 maintenance officers and 229 maintenance investigators. Maintenance clerks at the helm of maintenance courts should also be included in the circular to inform the frontline staff to advise non-custodial parents on 'good cause' and the s 6 criteria before such discharge orders are heard in maintenance courts.

The Legal Practice Council should be encouraging their registered legal practitioners to advise their clients to approach the maintenance courts on a J107 to apply on 'good cause' for a discharge of the maintenance order of adult dependent children and not unilaterally interpret divorce court orders to the benefit of their client but taking the best interests of the adult dependent children to heart. If legal practitioners are encouraged in a circular to advise non-custodial parents to approach maintenance courts for s 6 discharge orders by proving 'good cause', the South African communities might have less estranged relationships between parent and child, and to furthermore preserve these relationships, as family is the fibre of community and will reduce the social ills we are experiencing.

The National Prosecuting Authority (NPA) as s 4(1) deemed maintenance officers, should follow suit and issue a circular and train their prosecutors in the rights of adult dependent children. Maintenance inquiries are included in ch 26 of the NPA Policy on Maintenance and, therefore, place a duty on prosecutors to assist in maintenance inquiries including adult dependent children discharge applications.

Furthermore, it is proposed that maintenance officers and clerks be conversant in mediation as a form of alternative dispute resolution and the tool it can be used to restore relationships while addressing maintenance issues, allowing all parties to be fully heard in a non-threatening environment. This is extremely useful for instances where young adult children are already applicants in the maintenance courts. This would heed to the Supreme Court of Appeal recommending that 'dependent children should also remain removed from the conflict between their divorcing parents for as long as possible, unless they elect to themselves assert their rights to the duty of support' (*Z v Z* at para 17).

Conclusion:

The judgment of *DWT v MT* will hopefully dispel the notion that mothers in the local maintenance courts do have *locus standi* in maintenance matters pertaining to their adult children. Hopefully maintenance officers will be able to use the *Z v Z* and *DWT v MT* decisions to reject non-custodial parent's applications for discharge of maintenance orders solely based on the minor child turning 18 and deemed an adult in terms of s 17 of the Children's Act.

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(This article was first published in *De Rebus* in 2023 (Nov) *DR* 16).

A Last Thought

The state of the Judiciary and Judicial governance unveiled: a necessary reality check

Judicial officers play a central role in our constitutional democracy. They spend most of their time contemplating how the other branches of government do their work, but they will now be turning that critical gaze onto themselves, as the third arm of the state. In an historic judges' conference beginning on Monday, 4 December 2023, judges and magistrates will tackle crucial judicial governance issues which have long been left hanging. While the more immediate issues might be salaries lagging behind inflation, and inadequate infrastructure, there are several much broader issues which need to be dealt with. The most obvious are in the title of the conference – which is "Towards a single, effective and fully independent judiciary."

Independence

In our constitutional democracy, judicial authority, explicitly granted by the Constitution, requires independence. Judges must dispense justice without fear, favour, or prejudice. While individual judges' autonomy is generally safeguarded through tenure conditions and a culture of deliberative independence, achieving genuine institutional independence remains a goal many judicial officers believe is yet to be realised.

The debate surrounding institutional independence has long been a focal point within the judiciary. Former Chief Justice Ngcobo advocated for a judiciary-led administration during his tenure. This approach posited that effective judicial administration is inseparable from judicial independence, free from undue external influences.

The establishment of the Office of the Chief Justice marked progress in reducing executive control over the day to day functioning of the judiciary, and empowered the

OCJ, intended to act as a national department to serve the courts. Although it sounds like it serves the Chief Justice alone, the OCJ is effectively the department of government for the judiciary and was established by Presidential proclamation.

The Committee on Institutional Models for the Office of the Chief Justice, led by Langa and Chaskalson proposed a three-phase approach to establish a judiciary-led administration, positioning the Office of the Chief Justice as an independent entity akin to the Auditor-General. This reorganisation involved direct parliamentary appropriations for funding, with built-in accountability measures, including a dedicated parliamentary standing committee. This has not come to pass.

A next step could potentially be to establish the OCJ in legislation and/or the Constitution. Even if the (implausible) option of leaving the current governance system unchanged were taken, this should at least be qualified by ensuring that the existence and role of the OCJ is established in legislation, if not the Constitution as well. This step alone would be a valuable starting point. For example, the challenges with the division of responsibilities between the OCJ, Department of Justice and Department of Public Works could be greatly clarified and improved by formalising them in legislation. And if the OCJ is to be maintained during the implementation of more ambitious reform measures, for example the establishment of a single judiciary, it will be crucial that it's role and functions are clearly established – and its independence ensured.

It may be so that the step of legislating the OCJ's existence was never taken because the OCJ was indeed only intended to be an interim measure. But even if so, the fact that the OCJ has limped on without a legislative basis for more than a decade means that the need to address this issue becomes even more acute.

… Towards a single, effective and fully independent judiciary."

A glaring contrast emerges when comparing the institutional independence of OCJ to that of the Auditor-General. The latter operates with constitutionally mandated independence, shielded from political influence. It has clear appointment and removal processes involving both the executive and parliament, in an open and transparent manner which emphasises cooperative governance.

Conversely, the OCJ lacks a comparable level of institutional independence. While individual judges and magistrates maintain their independence, the administrative personnel face dual responsibilities, reporting to both the judiciary and the executive, introducing ambiguity and the potential for interference. The appointment of the Secretary-General under the Public Service Act, coupled with limited legislative provisions governing their functions, underscores the lack of clarity and independence in the Office's administrative structure.

But it often boils down to money, doesn't it? Mbekezeli Benjamin analysis reveals a

concerning trend in budget allocation for high court services, stagnating or experiencing cuts since 2016. The 2022/23 OCJ budget of R2.6 billion only marginally surpasses the R1.6 billion allocated in 2015/2016 which primarily due to an adjustment in judges' salaries. However, this adjustment fails to keep pace with inflation, and contributes to the lack of judicial capacity. This effectively worsens case backlogs as an increasing workload is then disproportionally spread amongst fewer judges. So, a completely independent judiciary led administration remains not achieved.

A single judiciary

The Department of Justice's Vision 2000 comments on the crucial role magistrates' courts play, handling over 95% of civil and criminal cases in South Africa. Despite Vision 2000's goals remaining largely unaccomplished, the pursuit of a single judiciary has persisted. The envisioned transformation aims at creating a single judiciary with integrated structures and system, leadership that is foundational to accountability inspired by "professional status to the administrative management of courts."
However, legislative and policy progress toward this goal is challenging to discern. The 2013 Superior Courts Act assigns Judges' President(s) with the responsibility to coordinate the judicial functions of all lower courts within their jurisdiction. Regrettably, this initiative falls short of creating the integrated judiciary envisioned in the policy goals.
In 2022, the Lower Courts Bill and the Magistrates Bill were introduced, intending to repeal the Magistrates' Court Act and the Magistrates Act. Despite expectations for these bills to signal progress towards a single judiciary, they merely reinforced existing structures. Achieving a single judiciary demands a substantial overhaul of current judicial structures and systems. This task is formidable and requires careful consideration in any approach to judicial governance reform.

An effective judiciary

The 2022 DGRU's State of the Judiciary report exposed governance and administration issues, including infrastructure shortcomings like unreliable internet, inadequate digital resources, and poorly maintained court facilities. Despite these challenges, the courts continue to deliver respected, independent judgements in sometimes very difficult working conditions.

Identifying distinct phases of change and implementing incremental reforms may be a pragmatic approach, despite potential dissatisfaction with the slow progress towards a single judiciary or a judiciary-led administration. Given the governance challenges across all court levels, this method appears to be the most sensible way to navigate the complex process. The consequences of a stalled transition are clear—a judiciary lacking proper governance is akin to a judgeless courtroom, prone to chaos and

mistrials. Reforms are necessary to uphold the judiciary's constitutional mandate, particularly in a country grappling with increased litigation and a judiciary functioning in suboptimal conditions.

Does the fate of the institution hang in a balance at the upcoming conference? An open and transparent process is imperative for navigating these high-stake decisions. With less than a year left with the current Chief Justice at the helm, the hourglass is running out. The question echoes: what can realistically be achieved before the sands of time settle?

Article by: Alison Tilley and Vuyani Ndzishe | Judges Matter
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