e-MANTSHI

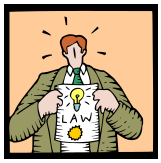
A KZNJETCOM Newsletter

January 2024: Issue 203

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

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

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



New Legislation

1. The *Extension of Security of Tenure Act (Act 02/2018*) comes into operation on the 1st of April 2024. The notice to this effect was published in Government Gazette no 50014 dated 19 January 2024. The notice can be accessed here: https://www.gov.za/sites/default/files/gcis_document/202401/50014proc146.pdf

Recent Court Cases

1. Cupido v The State (1257/2022) [2024] ZASCA 4 (16 January 2024)

Criminal law and Procedure – reliance on single witness – whether the court applied the cautionary rule in respect of single witness–admission of hearsay evidence – section 3 of the Law of Evidence Amendment Act 45 of 1988 – admissibility of the photo identification in terms of s 37 of the Criminal Procedure Act 51 of 1977 – circumstances where no rules of identification parade applicable – evidential value of statement made in terms of s 115 – whether the appellant's alibi is reasonably possibly true.

The judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2024/4.html

2. B.M.G.S v M.B.S and Others (26675/2022) [2024] ZAGPPHC 24 (8 January 2024)

In terms of a court order, the applicant was granted full parental rights and responsibilities, together with the first respondent in terms of section 18 of the Children's Act. He was also "granted reasonable contact to the minor child on every alternate weekend and reasonable consultation and contact at all relevant times to a maximum of two hours per day". The respondent didn't comply with the court order and was eventually sent to prison for this failure to comply with the court order.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPPHC/2024/24.html

3. S v Kobe (B180/23) [2024] ZAGPJHC 50 (26 January 2024)

The magistrate erred in sentencing the accused as her jurisdiction was ousted by the amendment of Part 3 off schedule 2 of the Criminal Law Amendment Act 105 of 1997 which since is operation, included a victim that is or was in a domestic relationship as defined in Section 1 of The Domestic

Violence Act. The import thereof meant that the accused was eligible to be sentenced in terms of section 51(2) of the Criminal Law Amendment 105 Of 1997 to 10 years imprisonment in the absence of a finding of compelling reasons justifying departure from the mandatory sentencing regime. The sentence imposed by the magistrate was reviewed and set aside and, in its place, replaced with the following order: "the proceedings are stopped, and the accused is committed for sentence by a regional court having jurisdiction".

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPJHC/2024/50.html

From The Legal Journals

Boggenpoel, Z T & Mahomedy, S

Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where Do Some Gaps Still Remain?

PER / PELJ 2023(26)

Abstract
The issue of unlawful occupation and homelessness has been a very prominent topic for many decades. While our approach to evictions and unlawful occupation has clearly shifted from a draconian approach under the Prevention of Illegal Squatting Act 51 of 1951 (hereafter PISA) to an approach that focusses on human rights under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (hereafter PIE), there are still various aspects that potentially fall short in protecting the rights of the various stakeholders involved in these disputes. In particular, this paper focusses on three areas where PIE potentially falls short. In this regard we examine cases of the impossibility of eviction orders, our current understanding of the notion of "home", and whether or not PIE applies to both occupied and unoccupied structures. We also briefly explore issues relating to the non-implementation of PIE, especially in relation to the government's goal of preventing unlawful occupation. Central to these

discussions is whether our current approach is sufficient and in line with constitutional obligations or whether we need to rethink our approaches to ensure that we do not undo the progress made since apartheid.

This article can be accessed here:
https://perjournal.co.za/article/view/14687/20965

Hoctor, S

Distinguishing the forms of common purpose liability: S v Govender 2023 (2) SACR 137 (SCA)

Obiter 2023 913

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/17597/20938

Le Roux-Bouwer, J

Putative private defence in criminal law :Tuta v The State 2023 (2) BCLR 179 (CC)

Obiter 2023 926

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/17598/20939

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

Contributions from the Law School

Some thoughts on the liability of adults where a child uses or possesses dagga (cannabis)

In *Minister of Justice and Constitutional Development v Prince* 2019 (1) SACR 14 (CC) the Constitutional Court held that the possession of drugs offence set out in s 4(*b*) of the Drugs and Drug Trafficking Act 140 of 1992 should be further limited in ambit beyond the statutory grounds of justification included in the provision, on the grounds that the offence was unconstitutional. Specifically, the court held that criminalising possession or cultivation of dagga (cannabis) by an adult in private amounted to an unjustified limitation of the right to privacy. Criminal prosecution for use of possession of cannabis in other circumstances remains an offence in terms of s 4(*b*).

What of the possession or use of cannabis by children? In *Centre for Child Law v Director of Public Prosecutions, Johannesburg* 2022 (2) SACR 629 (CC) the court clarified that processing a child through the criminal justice system could lead to enhanced risk of harm to such child, which would run contrary to the child's rights set out in s 28 of the Constitution. Therefore, it was held, there was a need for decriminalisation, and the institution of a non-punitive, rehabilitative alternative to prevent children from using cannabis. The criminalisation of the use or possession of cannabis by a child was therefore confirmed to be unconstitutional. The order of the court confirming such finding of unconstitutionality was suspended for 24 months to enable the legislative reform process to be finalised.

It follows that since the order of unconstitutionality of the s 4(*b*) offence in the *Centre for Child Law* case, a child cannot commit this offence. The court ordered that there could be no arrest or prosecution or diversion of a child in respect of the use or possession of cannabis, and that only civil processes as per the Children's Act 38 of 2005 and the Prevention and Treatment for Substance Abuse Act 70 of 2008 could ensue in these circumstances.

But could adults be held liable for contravening s 4(*b*) in the context of a child using or possessing cannabis? The brief comment that follows addresses the last line of the judgment of the court prior to the finding as to costs and the order (para [98], per Mhlantla J, all other justices concurring):
'…[A]ny adult who utilises or implores a child to be in possession of cannabis or to use cannabis can be held criminally liable'.

On what basis could there be liability? At first glance at the court order one might conclude that the offence no longer exists in respect of children. However, as indicated, the terms of the order state that the offence remains on the statute book until the legislative revision takes place, despite the finding of unconstitutionality. While it is clear that a child can no longer be prosecuted, and so it follows, be held criminally liable for contravening s 4(*b*), this is not the case for an adult. However, the preceding finding of the unconstitutionality of the prohibition of the private use or possession of cannabis by adults in *Prince* provides the context for this inquiry.

Based on the statement of the court, when could such liability for adults be incurred in the circumstances of the use or possession of cannabis by children?
The wording of the court's statement needs to be parsed in order to answer this question. Criminal liability can follow for an adult who 'utilises…a child to be in possession of cannabis or to use cannabis'. It seems that what is envisaged here is where an adult uses a child to commit the s 4(b) offence, the *qui facit per alium facit per se* maxim, which may be translated as (Burchell *Principles of Criminal Law* 5ed (2016) 475-476) 'he who does an act through another, does it himself' (for an application of this rule, see *R v Nlhovo* 1921 AD 485). Liability would apply to the adult and not the child if the child was an innocent party in the endeavour, but equally, liability could not be construed for the child even if the child could be culpable on the basis of common purpose (discussed in Kemp (ed) *Criminal Law in South Africa* 4ed (2022) 283ff) and joint possession (see Hoctor *Snyman's Criminal Law* 7ed (2020) 56-57), given the order of the court in *Centre for Child Law*.

The further basis on which the statement of the court provides for liability for an adult is where such adult 'implores a child to be in possession of…or to use cannabis'. The use of the word 'implores' ('beg earnestly for', according to the *Concise Oxford Dictionary*) is somewhat unusual, but it seems clear that what is countenanced in the court's statement is where an adult incites a child to commit the offence of use or possession of cannabis. In this regard it may first be pointed out that where a person who has been incited to commit a crime (an 'incitee') lacks criminal capacity, then no liability for incitement can follow (Hoctor *Snyman's Criminal Law* 261). Based on the regime governing the capacity of children in s 7 of the Child Justice Act this statement could therefore only apply to an inciter who incites an incitee who has criminal capacity to commit a crime – in this case, a child over the age of 12 years. However, even if the incitee does have criminal capacity, there could be no liability for incitement if what the incitee is incited to do is not a crime. As a child can no longer commit the s 4(b) offence, it may be questioned whether liability could indeed follow in these circumstances. Once again, it could be concluded that although a child can no longer be found guilty of committing the s 4(b) offence, nevertheless the subsistence of the offence until the envisaged legislative amendment would allow for a successful conviction for incitement, provided that the adult inciter genuinely believed that the offence could be committed. This would not amount to incitement to commit the legally impossible, where the inciter urges the incitee to commit a non-existent crime. In such cases (of

incitement to commit the legally impossible, there could not be criminal liability (Burchell *Principles of Criminal Law* 537).

It may further be remarked, in passing, that it is evident from the statement of the Constitutional Court that, given that there could be liability for an adult who incites a child to commit s 4(b), that such incitement would not be excluded from the bounds of criminal liability on the basis that the unlawful use or possession of cannabis did not amount to a 'serious' offence. It will be recalled that the Constitutional Court (in a majority verdict) in *Economic Freedom Fighters v Minister of Justice and Correctional Services* [2020] ZACC 25 held that s 18(2)((b) of the Riotous Assemblies Act 17 of 1956, which contains the offence of incitement, is unconstitutional in criminalising the incitement of 'any offence', and that the word 'serious' should be read into the provision, in place of the word 'any' until the legislature remedies this constitutional defect (para [78]). Given that the s 4(b) offence can be committed by the possession of a very small quantity of cannabis, and that it is clear that a large part of the community does not regard the personal possession of cannabis as a serious crime or major social evil (*S v Motsiawedi* 1993 (1) SACR 306 (W); *Prince v Minister of Justice* 2017 (4) SA 299 (WCC) paras [32]-[33]) it may be doubted whether this offence could indeed be regarded as 'serious'. Or would the fact that it is an adult urging a child to commit the s 4(b) offence make it especially egregious, and worthy of prosecution? It is in any event evident that the majority judgment in *Economic Freedom Fighters* has painted the law of incitement into an interpretive corner from which there is no easy logical escape (see further Hoctor *Snyman's Criminal Law* 256-257). One can only hope that the required legislative reformulation will bring some clarity.

Shannon Hoctor
Stellenbosch University

Matters of Interest to Magistrates

Prosecution in Malawi corruption case concedes it has no evidence against accused, but refuses to discharge him – or give reasons for that position

Carmel Rickard

A new ruling by the financial crimes division of Malawi's high court has raised questions about the prosecution of the case: a cabinet minister in the previous government was arrested and charged with fraud, and a prosecution was begun, even though the prosecution later conceded in court that it had no evidence against him. In the end, the minister concerned had to bring a formal application to the court to be discharged, since the prosecution said it would not do so.

If there is anything that unites the people of Malawi right now, it's a strong desire to see corruption stamped out. In its most recent survey, Afrobarometer found well over 80% of Malawians agreed that 'cabinet ministers and government officials charged with corruption should be fired immediately', and there's a general feeling that corruption has increased – some even feel that it's increased by 'a lot' – in the last year.
But while there's continuing suspicion that influential business people are involved in 'state capture' under the current government, there's also a sense in some sectors of society that the hunt for people involved in corruption might sometimes go astray, with certain people being targeted merely because they were part of the previous government, and without real evidence of wrongdoing.
Given this background, a new ruling in the case of R v Mwanamvekha shows the importance of judicial officers being on their toes to ensure that justice is truly impartial.

Abuse of office, misleading the IMF
The case concerns three people facing criminal charges over a potentially serious issue: the prosecution says they gave incorrect information to the International Monetary Fund. As a result of being fed this wrong information, the IMF cancelled a significant extended credit facility to the government of Malawi.
They are also charged with abuse of office.
Two of the three accused are the governor and deputy governor of the reserve bank at the time. The third, Joseph Mwanamvekha, was at some stage the minister of finance.

'Mistake about the dates'
During the most recent hearing of the case, Mwanamveka brought an application to be 'discharged' from the proceedings, saying that the prosecution had made a mistake

about the dates when he was finance minister, and that he did not, in fact, hold that office during the period that the alleged offences were committed.
Furthermore, said Mwanamveka, the state had no evidence that implicated him in relation to the charges brought in the case.
According to the particulars of the offence put up by the prosecution, and outlined in an official IMF statement, the 'misreporting' occurred between the reporting dates from the end of December 2018 to the end of June 2019.

'No iota of evidence'

However, Mwanamveka said, he had been the minister of agriculture, irrigation and water development at the beginning of this period, and wasn't appointed finance minister until just after the critical reporting period.
In addition, Mwanamveka said the bundles of evidence put together by the prosecution, copies of which had been given to the accused, showed 'no interface' between himself and any staff of the reserve bank during the critical time. Thus, it was not possible for him to have been involving in deceiving the IMF through non-disclosure of information.
He pointed to other factual information that made it clear that he hadn't been involved in the IMF-related problems and said that it was contrary to his rights that he should be forced to undergo a criminal trial where was 'no iota of evidence disclosed, linking him to any of the charges.'

'Vexation, abuse of court process, ulterior ends'

He claimed that the criminal trial process was being used against him arbitrarily 'and for … reasons of vexation'. It amounted to an abuse of court process, and was being continued against him 'for ulterior ends', he said, urging that the court should use its powers to stop this abuse.
The state's response will surely come as a surprise to readers of this ruling. But it's just the first of two such surprises. Senior state advocate Festas Sakanda clearly conceded in an affidavit that the state didn't have the necessary evidence against Mwanamveka, adding that, based on the evidence in its possession, chances of a conviction against Mwanamveka were 'unrealistic'.
Given its evidence, the state had only a 'remote possibility' of a conviction against him, said Sakanda. It had 'no direct evidence' to link Mwanamveka to the offence with which he was charged. There was no circumstantial evidence strong enough to link him, and, given the totality of the evidence, there was no realistic chance of a conviction.

'Staggering concessions'

The presiding judge, Redson Kapindu, reacted as any reader might expect: he described these as 'staggering concessions' and asked the state why it couldn't simply enter a discontinuance of proceedings against Mwanamveka, since it had been the state itself that arrested him and had been accusing him of offences about which it says, under oath, that it had no evidence.
Now comes the second surprise from the state: after some beating round the bush, counsel said that even though they had no evidence against Mwanamveka, they

wanted to leave it to the court to discharge him, rather than doing it themselves. But counsel gave no reason for taking this stand.
One immediate problem was that the section under which the state proposed that the court should discharge Mwanamveka was clearly inapplicable and couldn't be used in the case.

'**Why was the accused arrested in the first place?'**
Kapindu had some things to say about this extraordinary situation:
'In the present circumstances, we are thus faced with a scenario where the state, to all intents and purposes, is both unable to proceed with the prosecution of [Mwanamveka] on account of lack of evidence on the one hand; and unwilling to enter a discontinuance in respect of his case on the other.
'I must state … that the court has been left to wonder, under the present circumstances, why [Mwanamveka] was arrested in the first place, let alone taken through [the first stages of prosecution] when the state was at all material times aware that it did not have evidence against him. Was it a case of arresting him with a view to investigating later, only to realise that there was actually no evidence?'
'Perverse' to arrest with no evidence
The judge quoted from an earlier appeal court decision to the effect that where there was no evidence there should be no arrests, and that it would be 'perverse' for law enforcement to 'arrest with a view to investigate'.
This proposition should not be 'understated', said Kapindu. It was a feature of the rule of law that individuals had to be protected from arbitrary or unjustified arrests and prosecutions. The earlier decision reflected the need for a 'strong commitment to upholding people's liberty rights and preventing the abuse of state power in the criminal justice system.'
In the case before him, said Kapindu, it was indeed 'rather perverse' that there should be a prosecution 'where there is no credible evidence against an accused person. Such approach would amount to an abuse of the process of the court,' he added.

Constitutional obligation
The prosecutorial authorities had 'a constitutional obligation' to make sure that they stopped the prosecution process 'at the earliest opportunity' once they realised that they had no evidence against an accused person who had already been arrested and against whom the process had already begun.
In this case, the state was under an 'obligation' to stop the prosecution process. But where the state was unwilling to do so, the court was duty bound to find a remedy.
The judge pointed to a section of the Criminal Procedure and Evidence Code under which he could act to discharge Mwanamveka, given that the state was 'both unable and unwilling' to continue its case against him. Using that section, he formally discharged Mwanamveka, though he stressed that the section would allow the state to charge him again on the same facts within a year. If it did not do so, then the discharge would become 'absolute' and automatically operate as an acquittal.

Comment:
There's much here that begs for an answer from the prosecution, though if answers weren't forthcoming in response to questions from the presiding judge, they aren't likely to emerge in any other way.
It's particularly unfortunate that the prosecuting authorities took the position they did, and clung to it: this could well add to the claim by some members and supporters of the previous government, that corruption prosecutions are largely aimed at retribution against those who have now lost political power.

The judgement can be accessed here:
https://malawilii.org/akn/mw/judgment/mwcommc/2024/1/eng@2024-01-09/source.pdf

(The above article appeared on the africanlii.org blog on 25 January 2024.)

A Last Thought

MAGISTRATES' PERCEPTIONS SURVEY 2022

- *Posted: 24/01/2024*
- *By: Magistrates Matter*

This report is part of the Democratic Governance and Rights Unit's (DGRU) research project on the South African Magistracy.
In 2019, the DGRU conducted its inaugural survey of South African Magistrates, investigating their perceptions of their work environment. The research highlighted several challenges that Magistrates face, ranging from high work pressure to inadequate physical infrastructure and administrative support.
This 2022 iteration of the survey sought to track change in these measures and to introduce a new set of questions relating to issues of concern. Questions in 2019 and 2022 related to workload, administrative and mental health, court infrastructure, safety and security, and stress levels. New questions in 2022 related to corruption, sexual harassment, and issues relating to career progression.
This report, as well as previous research, and the companion report "South African Magistrates Courts: A Court User Perspective 2023" are a part of the DGRU's efforts

to better understand trends in the South African judiciary over the past 15 years. This second iteration of the South African Magistrates' Perception survey was made possible due to the generous support of the Millennium Trust.

SURVEY'S KEY FINDINGS

More magistrates responded in 2022 than in 2019. The profile of respondents is broadly in line with that of the magistracy in relation to seniority and gender, while minority racial groups are somewhat better represented in the survey than in the magistracy. Significant differences by race were however not observed and accordingly the survey was not weighted. Responses were received from all provinces.

WORK PRESSURE, SAFETY AND SEXUAL HARRASSMENT

The 2022 survey reveals a magistracy under increasing pressure, both from within and outside it. Almost a quarter of magistrates have received physical harm or threats in the last 12 months relating to their work, while 16 percent of female magistrates have been sexually harassed or know a magistrate who has been sexually harassed – with the most commonly identified perpetrator being another magistrate.

CORRUPTION IN THE MAGISTRACY

Perceptions of corruption within the ranks of the judiciary and the magistracy have worsened but remain better than the perceptions of citizens. Nevertheless, the fraction of magistrates being aware of attempted bribery of a magistrate is at 1 in 8, with other magistrates being identified in 1 in 10 cases as the bribe offeror, is cause for concern.

The survey reveals a magistracy under pressure and in need of support and attention to the key issues identified.

REMUNERATION AND BENEFITS, COURT INFRASTRUCTURE AND RESOURCES, MORALE

Reported working hours remain very high for some magistrates but not for others, with time in court taking up the bulk of their time. This must be reconciled with court hours data, which should be carefully scrutinised and disaggregated to better identify the courts and magistrates under pressure. Most magistrates continue to report being under a great deal of stress, with the vast majority reporting multiple symptoms of stress.

Court infrastructure and court staff ratings have not improved, and Covid-19 did not yield improved IT and other resources, yet it increased the pressure on magistrates in terms of backlogs created and management of restrictions.

Remuneration and benefits, court infrastructure and resources, morale in the magistracy, and ability to attract and retain the best people, were most likely to be identified as major issues in the magistracy. Remuneration, benefits, and career pathways were identified as key to retaining skills in the magistracy, while

opportunities for career progression and mental health support were highly likely to be identified as important.
The survey reveals a magistracy under pressure and in need of support and attention to the key issues identified.

The full report can be accessed here:
https://www.magistratesmatter.co.za/wp-content/uploads/2020/08/DGRU-Magistracy-after-Covid-19-Research-report.pdf