e-MANTSHI

A KZNJETCOM Newsletter

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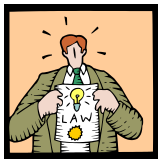
Welcome to the two hundredth and fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. Regulations and Guidelines in terms of the Extension of Security of Tenure Act, Act 62 of 1997 has been published in Government Gazette no 50071 of 2 February 2024. The regulations deals mostly with tenure grants. The Regulations can be accessed here: https://www.gov.za/documents/notices/extension-security-tenure-act-regulations-and-guidelines-amendment-02-feb-2024

Recent Court Cases

1. **Lembore and Others v Minister of Home Affairs and Others (2023-097427, 2023-097292, 2023-097111, 2023-097076,2023-100081, 2023-100526) [2024] ZAGPJHC 102 (8 February 2024)**

Immigration Act 13 of 2002 – section 49(1)(a) – lawfulness of detention of foreign national for illegal entry and stay in South Africa in contravention of Immigration Act 13 of 2002 – such detention is lawful and does not violate section 2 of the Refugees Act 130 of 1998 – the mere expression of an intention to apply for asylum does not trigger the protections in section 2 of the Refugees Act 130 of 1998 until good cause for the illegal entry and stay is shown – Refugees Act 130 of 1998 – section 21(1B) – requirement to show good cause for illegal entry and stay in South Africa is disjunctive to application for asylum – regulation 8(3) – requirement to show good cause for illegal entry into South Africa before being permitted to apply for asylum is consistent with Article 31 of the 1951 United Nations Convention Relating to the Status of Refugees – protection in section 2 of the Refugees Act 130 of 1998 begins when application for asylum has been made.
Stare decisis – whether high court can deviate from Constitutional Court decision – Constitution Seventeenth Amendment Act 2012 – Constitutional Court - highest Court in all matters – decisions binding on all Courts – decision in Ashebo v Minister of Home Affairs has settled the law - binding authority.

The judgment can be accessed here:
https://www.saflii.org/za/cases/ZAGPJHC/2024/102.html

2. **S v Lamb and Another (398/2023; RCA40/2021) [2023] ZAWCHC 292; 2024 (1) SACR 198 (WCC) (21 November 2023)**

The magistrate recused herself suo motu at the end of the first day of the trial after having been approached by the father of one of the accused. She was unaware of the relationship and immediately terminated the conversation upon his disclosing such. The facts of matter were never discussed. The court found that there was no reasonable apprehension of

bias in the circumstances, and that the recusal was improper. It also recommended that the magistrate take guidance in such situations from the magistrates' oath as set out in s 9(2)(*a)* of Magistrates' Courts Act 32 of 1944.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2023/292.html

From The Legal Journals

Phenyane, N

Highlighting the higher courts' obligation to protect vulnerable groups when magistrates fail to conduct the competency test properly.

2023 Acta Juridica 77

Abstract
This article uses a series of judgments to highlight that the review or appeal courts' strict and formalistic application of the competency test and s 164(1) of the Criminal Procedure Act 51 of 1977 has been as detrimental to the rights and interests of vulnerable complainants as the contested rules themselves. The article examines matters where review or appeal courts set aside rape convictions because magistrates failed to conduct the competency test properly. It argues that, while the courts could not avoid setting aside the wrongful convictions, this should not have led to a compromise of vulnerable complainants' right to protection. In addition to setting the convictions aside, the higher courts should have adopted an approach that helped to mitigate the risks faced by the complainants. Therefore, the article suggests that higher courts which are called upon to decide such matters should use the following approach in the future. First, they should use the results of the competency test as an item of evidence and should evaluate the reliability of the complainants' evidence only at the end of the trial. Where a matter goes on review or appeal because a magistrate failed to conduct the competency test entirely or adequately, the higher courts should

evaluate the complainant's testimony before deciding whether to exclude it. In instances where there is a possibility that the complainant's testimony is reliable, the higher courts should remit the matter to the magistrate to address the procedural error. However, in instances where the complainant's evidence is unreliable, and remittal is not possible, the courts should set the conviction aside and assign a social worker to oversee the complainant's protection after the release of the accused.

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

Contributions from the Law School

Criminalisation of the wearing of masks and disguises

It has been reported that new legislation is envisaged in England and Wales to more rigorously regulate behaviour at demonstrations, including a provision which will criminalise protesters who wear masks, with a possible penalty of up to a month in jail and a £1000 fine (https://www.theguardian.com/uk-news/2024/feb/08/masked-protesters-could-soon-face-arrest-says-home-office, accessed 8/2/2024). Police will be empowered to arrest protesters who are wearing face coverings at specific demonstrations.

In terms of the current legislative position, if a s 60AA order of the Criminal Justice and Public Order Act 1994 is in effect in a specific area, a police officer can demand the removal of any item a person is wearing to conceal their identity. Anyone failing to comply with such demand may be arrested. This gave rise to protesters removing their masks temporarily, only to put them back on again under the anonymity granted by disappearing into the crowd. The new proposed provision will now allow arrest for wearing a mask once a s 60AA authorization has been granted, in essence placing a ban on the wearing of masks at a demonstration or mask.

These impending changes in the English law have been criticized by some as an unjustified limitation on the right to protest, but the government have insisted that the primary concern is to clamp down on criminality during demonstrations, rather than to detract from the right to protest itself.

Having recently emerged from the Covid-19 pandemic, the use of masks by persons in public spaces, while increasingly unusual, is generally unremarkable. Nevertheless, the use of balaclavas and masks to facilitate criminal activity remains a significant concern, as it always has done. The most recent legislation on the use of masks in the criminal context, the Prohibition of Disguises Act 16 of 1969, is a product of its times, and is constitutionally deficient. It bears noting however that the difficulties with unconstitutionality have nothing to do with any implication that transvestism or gender-fluid dressing is a target of the legislation. Despite the suggestion that dressing up in the clothing of the opposite sex could give rise to liability under the Act (by no less an authority than Milton – see Burchell & Milton *Principles of Criminal Law* 2ed (1997) 639), this view is clearly mistaken. The unjustified infringement of a right contained in the Act relates to the right to be presumed innocent (s 35(3)(h) of the Constitution), given the presence of a reverse onus in the provision, which holds (in s 1(1)) that the person found in disguise shall be guilty of an offence 'unless he proves that when so found he had no such intention' to commit an offence or incite or aid another to do so. Moreover, in s 1(2) it is specifically stated that it is not necessary for the State to allege or prove 'that the circumstances in which the accused was found gave rise to an inference that he had the intention…to commit…[an] offence'. The burden of proving a lack of intention to commit the offence therefore falls fully upon the accused. This anomalous situation requires legislative intervention.

Nevertheless, despite the current constitutional deficiencies of the provision, it can be contended that such a provision is a necessary tool in the hands of the law enforcement authorities. Merely dressing up does not constitute the offence. What is criminalised is where any person is 'found disguised in any manner whatsoever and whether effectively or not, in circumstances from which it may reasonably be inferred that such person has the intention of committing or inciting, encouraging or aiding any other person to commit some offence or other' (s 1(1)). It has already been noted that placing an onus on the accused to disprove the presence of criminal intent is constitutionally unacceptable. However, the use of an evidential burden is a common – and constitutionally acceptable - means of enabling statutory offences to be as effectively enforceable as possible. Would the use of an evidential burden placed on the accused if he is found disguised, as described in the provision, eliminate objections to the criminalisation of such a disguise?

There are a number of statutory provisions which adopt a similar structure to liability to that of the Prohibition of Disguises Act in circumstances where proof of intent is difficult. For example, both s 36 of the General Law Amendment Act 62 of 1955 (which criminalises the inability to give account of possession of goods suspected stolen) and s 82 of the General Law Third Amendment Act 129 of 1993 (which criminalises the possession of housebreaking or vehicle-breaking implements) provide for the requirements of a reasonable suspicion of unlawful possession or use, along with an inability to give a satisfactory account of such possession. In *Osman v Attorney-General, Transvaal* 1998 (2) SACR 493 (CC), the Constitutional Court held that the provisions of s 36 (of Act 62 of 1955) are not incompatible with the Constitution, including the right to be presumed innocent. The (then) Natal Provincial Division in *S v*

Zondo 1999 (1) SACR 54 (N) came to the same conclusion in respect of s 82 (of Act 129 of 1993). There is no reason to believe that if an evidential burden is substituted for the current reverse onus in the provision in the Prohibition of Disguises Act there will be any difficulties regarding the constitutionality of the provision.

There is another important facet to the offence in the Prohibition of Disguises Act, which accords with the possession of housebreaking implements offence (in s 82 of Act 129 of 1993). Both function as anticipatory offences, which allow for the intervention of law enforcement authorities prior to the intended commission of further harm taking place. Thus, as with attempt liability, the existence of the offence can be justified on the basis of the need for apprehension of potential harm to the community, that is, restraint of the dangerous offender (Burchell *Principles of Criminal Law* 5ed (2016) 529).

It may be noted that s 8(7) of the Regulation of Gatherings Act 205 of 1993 has adopted a similar approach to the envisaged English law relating to demonstrations and gatherings, in that the wearing of a disguise or mask or any other apparel or item which obscures a person's facial features and prevents his identification at a gathering is prohibited. A contravention of this provision can lead to liability for an offence under s 12(1)(c) of this Act, which may incur a fine or imprisonment for a period not exceeding a year, or both such fine and imprisonment.

The more general prohibition of disguises (not just related to the context of protest or demonstration) may also be found in other jurisdictions. Such an offence has been adopted in both New Zealand (s 233(1)(b) of the Crimes Act 1961) and Canada (s 351(2) of the Canadian Criminal Code). In each case the offence is set out under the head of the prohibition of possession of burglary (or break-in) instruments. Although in both jurisdictions the offence of being disguised with intent to commit a crime is not directly linked to the crime of burglary – any crime may be intended to establish liability – the logic of combining these offences under one head is clearly linked to the fact that both possession of burglary instruments and prohibition of disguise with intent to commit a crime are anticipatory offences.

Thus, it may be concluded, although the offence contained in the Prohibition of Disguises Act urgently needs reformulation to negate its current unconstitutionality, it serves a very important crime control function, whatever the context of the criminal activity. After all, it cannot be denied that the use of disguises to avoid detection is widespread, and thus poses a significant problem for the criminal justice system, as the following recent cases show: *S v Ntombana* 2023 JDR 0046 (ECGEL) (rape); *S v Nkabinde* 2017 (2) SACR 431 (SCA) (armed robbery); *S v Libazi* 2010 (2) SACR 233 (SCA) (murder); *S v Bam* 2020 (2) SACR 584 (WCC) (housebreaking with intent to rob).

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Matters of Interest to Magistrates

Changes needed on how Zim police deal with vernacular witness statements – court

Carmel Rickard

A controversial Zimbabwean high court judge, Munamato Mutevedzi, has strongly criticised the way police handle statements by potential witnesses. In a recent judgment, Mutevedzi discussed what he said was a matter of concern arising from 'many criminal trials handled in the courts'. He said witnesses would make statements in the vernacular. These were then translated into English by the police, with the witness signing the English version, even though he or she had no idea of what the English statement said or meant. This was a 'misrepresentation' that could amount to an 'illegality', Mutevedzi said. Sometimes, the police even signed the statement themselves, purporting to be the witness. He said the frequency with which witnesses came to court and claimed 'misrepresentations' of their statements to the police, had convinced the courts that 'something untoward' was happening during the recording of statements. Among his suggestions for dealing with the problem, Mutevedzi urged that police keep the original vernacular statements by witnesses, and that statements in the vernacular be translated by certified translators or interpreters.

The criminal case heard by Harare high court judge Munamato Mutevedzi and two assessors concerned a man killed by a group of other men allegedly for having stolen a cellphone from one of them.

According to the prosecution, the three accused beat the deceased – he was not named in the judgment – hitting him on the head with an empty beer bottle, then kicking and jumping on him and 'repeatedly stepping' on their victim's neck and chest while he lay unconscious.

Though the three accused pleaded not guilty, Mutevedzi convicted them all. But it is the judge's lengthy remarks about witness statements made to the police that are likely to be remembered and reported on, rather than the details of the trial itself.

'Misrepresentations by the police in witness statements'

These comments came just after he recorded the evidence and cross-examination of one of the witnesses in the case, Biggie Kakondowe. Defence counsel grilled Kakondowe about the original statement he had given to the police. Kakondowe said he hadn't made the statement and that the signature at the end of it wasn't his. In fact, he claimed, he had 'never officially given any statement to the police though he had accompanied them for indications' [pointing out procedures].

At this point, the judge said he wanted to deal with an aspect of many criminal trials that was cause for concern, namely ‘misrepresentations by the police in witness statements and the unreasonable expectation by many legal practitioners that a witness statement must contain virtually everything that he/she knows about the case.’ The judge stressed such a statement was ‘simply an individual’s recount of the facts of a case under police investigation’, a ‘synopsis’ of the witness’s account of events.

Torrid badgering

‘We have noted sometimes with dismay, as witnesses undergo torrid badgering about little and often inconsequential inconsistencies or supposed omissions in their statements to the police.’ The courts had also seen witnesses who completely ‘disowned’ statements allegedly made to police.

The frequency with which that happened had left the courts ‘convinced that something untoward is happening at the time witnesses’ statements are recorded.’

The judge continued: ‘Police officers are reminded that investigation of a case does not mean fabricating the evidence of witnesses by adding or subtracting what the witnesses would have told them. The duty of a police officer is not to nail suspected offenders by any means necessary. Rather it is to present the truth.’

English a ‘second language to almost all of us’

Police weren’t supposed to ‘vet’ the evidence of witnesses but to let them tell their stories as they perceived things happening.

Witnesses often gave their testimony to the police in the vernacular and that was later translated into English, the courts’ official language. But English was, ‘to almost all of us, a second language,’ he said.

It was almost inevitable that parts of a witness’s testimony could get lost in translation. Sometimes statements produced in court cases ‘are written in incredibly bad English through which the courts have to work hard to decipher the meaning.’

‘Bordering on an illegality’

To make matters worse, when statements given originally in the vernacular were translated to English, ‘no comparison is ever made to ensure that nothing was lost.’

Witnesses who were ‘overly questioned’ about their statements tell the court that they understand no English at all, and could make no sense out of the English version of their statements.

In the judge’s view, it would be ‘prudent’ for investigating officers to keep the original vernacular versions of witness statements. These were, after all, the original statements, he stressed. To make someone who doesn’t understand any English sign a statement, written in English, to the effect that he or she ‘vouches’ that this is the original statement written by them, was ‘a clear misrepresentation of facts’, he said. In fact, it was ‘wrong and borders on an illegality’.

Artificial discrepancies

Ideally, a witness should sign the original vernacular statement, while the English translation should simply indicate that the witness had signed the original.
The situation was made worse by the rules of evidence that allowed a court to assess the credibility of a witness 'on the basis of the differences between their statement to the police and their testimony in court.'
Defence lawyers quickly latched onto what were on in fact 'artificial discrepancies and perceived inconsistencies'. This in turn could lead to judgments based 'not on the truth of what happened, but on administrative frailties' caused by police investigators.

Height of duplicity

But the judge said there was an even more 'intriguing' problem highlighted by the witness in this case: he didn't say there were 'misrepresentations' in his statement, but that he had never made any statement to the police at all and that the signature on the statement wasn't his. He said that he'd simply 'narrated' his story to the investigating officer and his colleagues.
The judge continued, 'It would appear the officers … in the comfort of their offices at their own time decided to make their own statement which they never bothered to show to the witness.' They either found someone to sign it or signed it themselves.
This would be 'height of disingenuity and duplicity' by an investigating officer, he said.

Witness was clearly honest

In the case being considered by the judge, the witness was clearly honest about what he had seen, and the court refused any suggestions that the testimony was tainted by inconsistencies between his statement to the police and his evidence in court.
Many of these remarks applied to a second witness as well, who had given an original statement in the vernacular. The police had however written it out in English 'which he could neither read nor write' and then asked him to sign, which he did.
'I have already dealt with the impropriety of this police method,' the judge commented.

'Shambolic recording' of statements by police officer

When the investigating officer in the case gave evidence, defence counsel took him to task 'about the shambolic recording of witnesses' statements', recalling the witnesses who had denied making or signing statements attributed to them.
The investigating officer merely made some 'lukewarm responses', said the court, showing that he was 'at best inefficient and at worst totally unconcerned with his work.'
Allegations of seriously shoddy work by police are not new to Zimbabwean courts, but the comments by the judge in this case are unusual, particularly since the trend is simply to believe the version put up by the police.

No court remedy in 'political' land case

The judge in this case, a former chief magistrate, Munamato Mutevedzi, has something of a reputation for controversial decisions. In 2023, he refused to deal with a case that came to him in the high court, challenging the government's seizure of land from a Zimbabwean. He said such matters were political rather than legal, and that someone

unhappy about the expropriation of their land had no court remedy because the courts were prohibited from adjudicating such disputes.
Another case, also decided in 2023, caused concern among activists working to stop violence against children: a woman who had beaten her 12-year-old son to discipline him, was charged with murder after the child died. The judge however said that beating problem children wasn't criminal when the intention was to 'discipline wayward children' and that any reasonable parent who believed in corporal punishment would have done the same thing. 'Our conclusion is that the accused assaulted the deceased in the normal course of parental discipline,' he said.
These and other decisions may have caused concern. But his latest comments about the failure of police to do their duty in relation to witness statements, and his suggestion that vernacular statements, made by witnesses, be kept by the police since they were the original, should find wide support.

The judgment can be accessed here:
https://zimlii.org/akn/zw/judgment/zwhhc/2024/36/eng@2024-02-07

(The above article appeared on the africanlii.org blog on 22 February 2024)

A Last Thought

" The failure of attorneys and their clients, as well as advocates, to take active steps to address briefing patterns skewed by race and gender is also bad for the legal system in general and the judiciary more specifically. It deprives many talented black and women lawyers of the opportunities and experience that would better prepare them for a judicial role, thus either making it more difficult for them to be appointed in the first place, or setting them up for possible failure if they were lucky enough to be appointed.
Section 174(2) of the Constitution rightly states that the "need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed". The effective implementation of this section requires members of the legal profession to play their part in transforming the legal profession.

It is true that the Judicial Service Commission has not always covered itself in glory with its appointment of judges, not least because it has sometimes appointed timid, mediocre, and rather conservative judges — both black and white, both male and female — while declining to appoint or promote some competent, strong-willed judges. But their task has been made more difficult by members of the legal profession who deny that the profession has a race and gender problem and bristle and get defensive when they are called on to account for being complicit."

Prof Pierre De Vos in a post : ***All-white, all-male legal teams are wrong on so many levels*** **on his blog** ***Constitutionally Speaking*** **on 29 February 2024.**