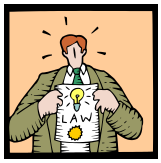
e-MANTSHI

A KZNJETCOM Newsletter

March 2024: Issue 205

Welcome to the two hundredth and fifth 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 Rules Board for Courts of Law has under section 6 of the Rules Board for Courts of Law Act 107 of 1985 amended the rules regulating the conduct of the proceedings of the Magistrates' Courts of South Africa. The amendment was published in Government Gazette no 50272 dated 8 March 2024. The amendment will come into operation with effect from 12 April 2024. The amendments are to Rules 9, 33, 41, 43 and 51.Part I of Table A and Part II of Table C of Annexure 2 to the Rules are also amended.
The amendment can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202403/50272rg11675gon4476.pdf

2. The Minister of Home Affairs has issued an Immigration Directive 1/2024 which was published in Government Gazette no 50257 dated 5 March 2024.It deals with the

implementation of the order of the Constitutional Court in *Ex parte Minister of Home Affairs and Others [2023] ZACC 34 In re Lawyers for Human Rights v Minister of Home Affairs and Others [2017] ZACC 22.* He has also prescribed forms 28, 29, 30, 31, and 32 to be used in the interim pending enactment of remedial legislation referred to in the CC Judgment.
The Directive can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202403/50257gon4472.pdf

Recent Court Cases

1. DR v NM and Another (3358/2024) [2024] ZAWCHC 69 (5 March 2024)

In my view, consistent with the tenets of statutory interpretation, section 23(1) of the Children's Act must be given its grammatical meaning unless doing so would result in an absurdity. This should be done consistent with the three interrelated riders to this general principle, namely: that statutory provisions should always be interpreted purposively; the relevant statutory provisions must be properly contextualised; and that all statutes must be construed consistent with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. (Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) para 28).

The judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2024/69.html

2. S v Nkomo (SH26/2018) [2024] ZANWHC 69 (11 March 2024)

Section 298 of the CPA provides that a sentence may be corrected when by mistake a wrong sentence is passed. The court may before or immediately after it is recorded, amend the sentence. Du Toit et al in the Commentary on the Criminal Procedure Act state, with reference to the authorities cited in the Commentary on section 298, that a wrong sentence refers to 'an incompetent or irregular sentence or a sentence which bears no relation to the merits of the case or which contains a technical mistake', and also

includes 'a sentence which does not accord with the real intention of the court' (Revision Service 65, 2020 ch28-p61).

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2024/69.html

3. Sibeko v S (CA56/2020; 40/2019) [2024] ZANWHC 76 (19 March 2024)

On the authority of *DPP v Viljoen*, the unilateral practice of the Regional Magistrate of introducing the record of the bail proceedings in the judgment on conviction for the first time, constitutes not only a gross irregularity in the proceedings but a material misdirection. This practice was not anchored in the proper interpretation of the admissibility of bail proceedings. Whilst I accept that the Regional Magistrate is an administrator of justice, and not merely a figurehead, it is undeniably expected that the Regional Magistrate should direct and control the proceedings according to recognized rules of procedure to see that justice is not only seen to be done, but is done.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2024/76.html

4. S v Mosito (11/2024; RE655/2023) [2024] ZANWHC 88 (26 March 2024)

The learned magistrate appears to have misconstrued the importance and relevance of proper investigation by qualified professionals in the field of either psychology or psychiatry regarding the accused's pathology and the treatment which they may have recommended. I regret to have to state that despite having referred me to *S v May* the two advocates from the Director of Public Prosecutions appear to have missed the quintessence of the judgment. Selikowitz J incisively made a point, which I feel obliged to reiterate, at 566*j* - 567*a* when he stated:
'It seems to me that the time has come that the Court ought not to be looking towards a simple imprisonment for this appellant, but that in the interests of society some positive steps should be taken to assist her, if not for her own benefit, then at least for the benefit of society.'
Without doubt, I am in respectful agreement with this patently correct and progressive approach towards sentencing an accused who clearly is afflicted by some pathology.

The judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2024/88.html

From The Legal Journals

De Villiers, W P

Plea in terms of section 106(1)(h) of the Criminal Procedure act 51 of 1977: *S v Moussa* [2021] 3 All SA (GJ)

2023 (86) THRHR 503

Hoctor, S

Sharpening the subjective element of criminal liability in South African law

2023 SACJ 462

Abstract
South African criminal law holds to a conception of human beings as morally autonomous, which is consistent with the right to dignity. The individual is the foundation of society and law, and must not be treated as an object or instrument. The right to dignity is limited by a guilty verdict, given the punitive and stigmatising consequences which follow. The infringement of the right to dignity which follows conviction is unjustifiable, unless the finding of liability is based on the offender's control and choice. But a guilty verdict equally resonates with the right to dignity, by treating the offender as a responsible human agent. The basis for a guilty verdict is founded on blameworthiness. It follows that the subjective element of criminal liability is crucial in the just functioning of the assessment of criminal responsibility. Despite an earlier reliance on objective notions, following the pioneering work of JC de Wet, South African law has developed into a system of criminal responsibility based on a subjective, principled approach to liability, the 'psychological approach'. The justifications for, operation of, and opportunities for further refinement of this vital feature of substantive South African criminal law forms the fabric of this article.

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

Contributions from the Law School

Dolus eventualis and premeditation: Like pineapple on pizza?

1. INTRODUCTION

Premeditation usually only becomes relevant at the stage of sentencing, which for obvious reasons is only triggered after an accused person has been found guilty of the intention based crime for which they have been charged. But, evidence of premeditation does present itself during the trial, and so courts must inevitably grapple with premeditation when considering whether an accused had criminal intent.[1]

I turn to this in the light of two high court decisions which concluded in both cases that the accused persons had intention in the form of *dolus eventualis* and reconciled it with premediated murder.[2] In both cases the court identified the following to be the crux of the issue: "How then is premeditated murder reconciled with intention in the form of *dolus eventualis*?"[3]

In South African law, intention can exhibit in a number of ways, including *dolus directus* and *dolus eventualis*. The purpose of this submission is to clarify the relationship between dolus and premeditation, and more specifically, the relationship between *dolus eventualis* and premeditation. Terblanche notes that premeditation and planning are well established and accepted as being aggravating factors when sentencing is being determined,[4] and that *dolus directus* is also deemed to be an aggravating factor.[5] Stated this way however, it is clear that even for purposes of sentencing, *dolus directus* is an aggravating factor separate and distinct from premeditation. The court in *Radebe*[6] had to consider whether a finding of *dolus eventualis* implied that there was also premeditation. Only if there was premeditation could the sentencing legislation[7] related to premeditated murder become engaged. However, as per the court in *Raath*[8] merely because an accused person is found to have acted with *dolus directus* does not

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[1] For present purposes, consideration of intention and premeditation will be had in relation to the crime of murder, which is defined as being the unlawful and intentional causing of the death of another person. SV Hoctor *Snyman's Criminal Law*7 ed.

[2] *S v Dube* 2023 (1) SACR 513 (MM), date of judgment 3 May 2022; *S v Ratu* 2023 (2) SACR 40 (MM), date of judgment 1 August 2022. Both cases were presided over by the same judge. The accused persons in both cases were found guilty of premeditated murder.

[3] *Dube* supra at para 20, *Ratu* supra at para 52.

[4] SS Terblanche *A Guide to Sentencing in South Africa* 3ed at 60.

[5] Terblanche *A Guide to Sentencing in South Africa* op cit at 213. See also *S v Magoro and Others* 1996 (2) SACR 359 (A) at 365C-D.

[6] *Radebe* supra at para 11 identifies several issues related to *dolus eventualis* and premeditation, observing that it had to determine whether a finding of *dolus eventualis* implies premeditation.

[7] Section 51(1) of the Criminal Law Amendment Act 105 of 1997, as amended, as read with Part I of Schedule 2.

[8] *S v Raath* 2009 (2) SACR 46 (C).

automatically mean that the crime was premeditated.[9] Conversely, premeditation can point towards a conclusion that there was direct intention,[10] but direct intention does not without more mean that there was premeditation. The court in *Radebe* noted that "*Dolus directus* and premeditation/preplanning are not synonymous. While premeditation obviously results in *dolus directus*, the converse is not true. That is clear from our case law."[11]

Through *Radebe* the intimation is that establishing premeditation *has to mean* that the type of intention harboured is *dolus directus*. With respect, it is worth reiterating that premeditation is not one of the requirements on which the presence or absence of *dolus* hinges,[12] and that the inquiry into *dolus* is separate from premeditation, although, as will be seen, there may be some co-dependency.[13]

2. DOLUS IN SOUTH AFRICAN LAW

Intention exhibits in several forms, including *dolus directus, dolus indirectus and dolus eventualis*.

2.1 Dolus Directus

Dolus directus can be understood to mean primary intention. It is "intention in its ordinary and grammatical sense and refers to the accused's aim and object to perpetrate unlawful conduct or cause the unlawful consequence."[14]

Dolus directus can be described as the most common understanding of intention. Here the perpetrator has a specific goal or aim in mind and performs an act to realise that specifically desired and intended end result.[15] For murder, the accused would have such direct intention if they had in mind the specific goal of causing the death of the victim and in turn directed that desire into action and caused the death of the victim – they *intend* the result (the death of the victim) and *cause* it to materialise in the way envisaged (in any way imaginable – shooting, strangulation, poisoning or the administration of a lethal dose of medication).[16]

2.2 Dolus Indirectus

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[9] *Raath* supra at para 16. The court in *Radebe* at para 24 quoted *Raath* para 16.

[10] *Raath* supra at para 16 "(O)nly an examination of all the circumstances surrounding any particular murder, including *not least the accused's state of mind*, will allow one to arrive at a conclusion as to whether a particular murder is planned or premeditated." (Emphasis added).

[11] *Radebe v S* [2011] ZAFSHC 118 at para 23.

[12] A Anderson 'General principles and specific offences' 2023 36(3) *SACJ* 304-316 at 313.

[13] Anderson 'General principles and specific offences' op cit at 314: "But how does the test for premeditation differ from the test for intention, since it often happens that the same evidence required to prove the element of intention can also prove premeditation? The intention/premeditation predicament has also been described as a symbiotic relationship between the two concepts, as they both relate to the state of mind of the perpetrator."

[14] JM Burchell *Principles of Criminal Law* 5ed at 60.

[15] Burchell *Principles of Criminal Law* 5ed op cit at 348.

[16] Hoctor *Snyman's Criminal Law* 7 ed op cit at 160: "X is certain that he is committing the prohibited act or that he is causing the prohibited result. He does not regard the commission of the act or the causing of the result as a mere possibility."

Dolus indirectus is literally translated as indirect intention, and exists where the accused desires to achieve a particular result but is aware that, in doing so, a secondary - not directly intended (as in the sense of *dolus directus*) - result will certainly also result. There is a primary aim (goal) to which actions are directed, but there is the certainty that, to achieve the primary aim, an additional result (or side-effect) will inevitably and with certainty occur.[17] The side-effect is unavoidable and accepted as necessary in order to achieve the main aim.[18] As stated, in order to achieve the main aim, the accused appreciates and accepts that some other consequence *must* necessarily occur in order to achieve their primary aim.[19] Thus, *dolus indirectus* is proved when the accused acts with knowledge and appreciation of the *certainty* of the not-directly-intended consequence materialising.[20]

2.3 Dolus eventualis

Where *dolus directus* and *dolus indirectus* consider certainties, *dolus eventualis* considers possibilities. *Dolus eventualis* exhibits when the accused foresees the *possibility*[21] of an act occurring, reconciles themselves that there is a possibility of it materialising, and persists nonetheless, with reckless disregard of the said foreseen consequence materialising.[22] Dubbed as legal intention, *dolus eventualis* has at its core considerations of public policy based on the perpetrator's willingness to take the risk of the possibility materialising, even if remote.[23]

3. PREMEDITATION AND DOLUS

Premeditation refers to the act of planning or thinking about a crime before committing it.[24] In South African criminal law, premeditation and conversely lack thereof often plays a significant role in determining the punishment meted out. If a crime is committed with premeditation, it can be considered more 'serious' than if it were committed impulsively or without prior planning. The Supreme Court of Appeal is *S v Peloeole*[25] noted that "Though the perpetrator is his state of mind may have both the intent and premeditation to commit the crime, the intent has to be present *during* the commission of the crime, while premeditation is, as a matter of logic, limited only to the state of mind *before* the commission of the crime… there is therefore a symbiotic relationship between the two concepts, in that they both relate to the state of mind of the perpetrator."

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[17] Hoctor *Snyman's Criminal Law* 7ed op cit note 2 at 160-161.

[18] Burchell *Principles of Criminal Law* 5ed op cit at 461. See also SV Hoctor 'The concept of dolus eventualis in South African law – an historical perspective' (2008) 14(2) *Fundamina* 15.

[19] SV Hoctor 'Intention: Introduction' In J J Joubert (ed) *LAWSA* 3 ed (2017) vol 11 at para 88.

[20] JM Burchell & J Milton *Principles of Criminal Law* 3 ed (2005) at 60.

[21] SV Hoctor 'The degree of foresight in dolus eventualis' (2013) 26(2) *SACJ* 131 at 135.

[22] *Snyman*'s *Criminal Law* 7ed op cit at 161 and *S v Malinga* 1963 (1) SA) 692 (A) G-H. See also *R v Thibani* 1949 (4) SA 720 (A) 729-730.

[23] Hoctor 'The degree of foresight in dolus eventualis' op cit note 22 at 155. See also Burchell & Milton *Principles of Criminal Law* (2005) op cit note 21 at 60.

[24] SS Terblanche 'Sentencing' 2023 36(3) *SACJ* 510-527 at 514.

[25] *S v Peloeole* 2022 (2) SACR 349 (SCA) at para 9.

From this it is clear that while both premeditation and dolus consider an accused person's state of mind, the point at which the focus on state of mind is to be had is key.

4. CO-DEPENDANCY

The point of commonality for all forms of intention is foresight, and in this respect the degree of foresight not only determines what kind of intention the accused harboured, but also the severity of the sentence imposed.[26] Hoctor notes in relation to *dolus eventualis* that:

"remoteness of the foreseen possibility could be relevant to punishment…Thus even if the remote foreseen possibility founds a conviction, the punishment is likely to be reduced by virtue of the remoteness of the foresight."[27]

It is submitted that where consideration of 'remoteness' in relation to foresight (as in *dolus eventualis*) is a factor for mitigation of sentence,[28] foreseen 'certainties' (as in *dolus directus*) must analogously serve as aggravating circumstances on which a court would base its sentencing determination. Terblanche confirms that this is indeed the case, and states that direct intention to commit a crime is closely connected to factors which indicate premeditation.[29] Thus, while being a subjective inquiry, courts can rely on inferential reasoning based on evidence (objective factors)[30] to draw conclusions regarding an accused person's state of mind,[31] evidence of premeditation can be used to make that determination.[32]

5. INTERENTIAL REASONING, DOLUS AND PREMEDITATION

Given that direct evidence is rarely available to substantiate the subjective foresight of the accused, courts often resort to inferential reasoning to ascertain their mental state. This involves deducing the presence of such foresight from the accused's actions and the circumstances surrounding the crime. Consequently, establishing actual subjective foresight invariably requires drawing conclusions rooted in objective probabilities derived from common human experience.[33]

Similarly, inferential reasoning is called on to make an assessment of premeditation. While the Criminal Law Amendment Act 105 of 1997 uses the words "planned or premeditated" as circumstances which would trigger consideration of life imprisonment for murder, it does not offer a definition for what "planned or premeditated" means. Courts have concluded that the presence of premeditation is determined on a factual

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[26] Where *dolus directus* is an aggravating factor. See Terblanche *A Guide to Sentencing in South Africa* 3ed at 213.

[27] Hoctor 'The degree of foresight in dolus eventualis' op cit at 154.

[28] Support for this can also be found in *Radebe* supra at para 59 and 63.

[29] Terblanche *A Guide to Sentencing in South Africa* op cit at 213.

[30] *Beukes* 1988 (1) SA 511 (A) 552D-E; *Mamba* 1990 (1) SACR 227 (A) 237.

[31] *R v Kweleram* .

[32] *S v Magoro and Others* 1996 (2) SACR 359 (A) at 367E-F in which case the fifth appellant who was found to have had a leading role in the planning and execution of the crime was also found to have acted with *dolus directus*. However, the other appellants, although harbouring *dolus directus* were not found to have acted with premeditation.

[33] SV Hoctor 'Degree of foresight in *dolus eventualis*' at 135. See also *S v Van Wyk* 1992 (1) SACR 147 (NmS) at 161e-h; *S v Dladla*1980 (1) SA 1 (A) at 4H.

and "casuistic" basis.[34] As per *Raath*[35] the amount of time between forming the intention and consummation would be an important fact in determining whether there was premeditation.[36]

6. CONCLUSION

Returning to the definitions of *dolus directus*, *dolus eventualis* and premeditation, the words used to describe *dolus directus* have parity with the words used by courts in finding meaning for premeditation, and less parity in respect of *dolus eventualis*. As discussed above, *dolus directus* and *dolus eventualis* describe specific types of intent, and inferential reasoning is relied on to draw conclusions regarding dolus. Similarly, inferential reasoning is engaged for determinations of premeditation.

Dolus directus refers to a situation where a person commits a wrongful act with the direct intention of causing a particular result. In other words, the individual knowingly and intentionally carries out an action with the specific goal/aim of achieving a certain outcome. *Dolus directus* can be understood as being 'purposeful' intent to achieve a particular outcome, lending towards a question of whether the accused exhibited 'goal directed' behaviour, which creates proximity with the concept of premeditation.

Dolus eventualis refers to a situation where a person foresees the possibility that their actions *could* cause a certain result, and they are reckless or indifferent to whether that result occurs or not. In other words, while the individual may not directly intend (because it is not their main goal/aim, merely a 'side effect') for a specific outcome, they are aware of the possibility of it happening and proceed with their actions regardless.

Terblanche submits in respect to the decisions in *Dube* and *Ratu* that in both cases the court conflated "the concept of *dolus eventualis* and premeditation."[37] I agree with Terblanche. While the concepts of dolus and premeditation exhibit some co-dependency and symbiosis, this appears to extend only in respect to *dolus directus*. This is because premeditation implies deliberate planning or forethought to commit a certain act, which creates proximity to *dolus directus*, and remoteness from *dolus eventualis.* Triers of fact should be cognisant of the requirements for establishing intention and premeditation. They are indeed separate inquiries, the former relating to culpability, and the latter relating to the severity of the punishment. The risk of injustice is real if these concepts are understood, treated and applied as being analogous.

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[34] Terblanche 'Sentencing' op cit at 514. See also *Raath* supra at para 16: "The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis."

[35] Supra at para 16.

[36] *S v Dlomo* 2023 (1) SACR) 314 (KZP) at para 8.

[37] Terblanche 'Sentencing' op cit at 518.

Matters of Interest to Magistrates

Are the courts out of touch with the ordinary, and often poor, people they serve?

Carmel Rickard

This is a question that readers can't help asking, based on a contempt of court conviction and sentence by the magistrate's court in Namibia. The case raises concerns about a lack of sensitivity and awareness of that court to the daily difficulties of poor people it serves. The accused in the case, Festus Shimmy, was sent to prison for three months because he wore 'short pants' to a court hearing and the magistrate convicted him of contempt of court for doing so. Explaining his attire, Shimmy told the court that his long trousers were very dirty and so he had worn the shorts. To make matters worse, his case was not sent to the high court on review 'without delay', as the law requires in contempt of court matters, but only arrived for review well after the three-month sentence had expired. This meant that even though the high court set aside his conviction and sentence, this came too late for Shimmy. Further, the high court pointed out that the magistrate imposed a fine of N$500, though the law clearly states the maximum is N$100.

Several aspects of this special review judgment should be causing concern within Namibia's justice system.

The case, S v Shimmy, results from the conviction of Festus Shimmy for contempt of court by the divisional magistrate's court in Keetmanshoop. His sentence was N$500 or 30 days in prison.

The first problem is that Shimmy was convicted and sentenced on 14 June 2023. But the case was sent on special review from the court with a letter dated 22 November 2023, far later than it should have been - and too late to have been of any help to Shimmy.

Yellow jersey and short pants

Why the contempt of court verdict and sentence in the first place? What had Shimmy done? According to the court, he committed contempt in the face of the court, by appearing in court 'in a yellow jersey and short pants'.

The section of the Magistrate's Court Act under which Shimmy was convicted says that anyone who 'wilfully insults a judicial officer during his sitting' can be liable to removal and detention, and is also liable 'to be sentenced summarily … to a fine not exceeding R100 … or to imprisonment for a period not exceeding three months'.

However, if a court jails or fines anyone under this section, the judicial officer concerned must 'without delay, transmit to the registrar of the court of appeal for the consideration and review of a judge in chambers, a statement, certified by such judicial officer to be true and correct, of the grounds and reasons of [the] proceedings, and shall also furnish to the party committed a copy of such statement.'

Procedure not followed in this case

In their review judgment, high court judges Herman January and Naomi Shivute note that the only concerns raised in the covering letter by the divisional magistrate and the presiding magistrate, related to the fact that the sentence was outside that authorised by the law.

That, however, was not the only concern, the judges point out. The law also lays down a procedure that must be followed in such a case. This including sending a statement to the court of appeal 'without delay'; that the statement, which must be certified to be true and correct, must explain the grounds and reasons for the conviction and sentence, and that the convicted person must also be given a copy of the statement.

This procedure was not followed in the Shimmy case.

Not in accordance with justice

Even before the judges dealt with those problems, however, they noted that the record and warrant of detention reflected that the accused was '99 years old'. In fact, however, the accused explained in mitigation that he was 26.

In addition to this problem, said the judges, the proceedings in the magistrate's court showed that they were not in accordance with justice.

According to the record, the magistrate 'observe[d] that the accused is dressed inappropriately, accused is wearing a short trouser and jersey.' In the proceedings that followed, the accused was told of his right to legal counsel at his own cost, the right to ask for legal aid, and the right to conduct his own defence.

Shimmy said he wanted to defend himself and, asked why the court should not hold him in contempt, he said, 'I did not do it on purpose the trouser I was supposed to wear is very dirty and I cannot come with that trouser because it is very dirty that is why I came with a short.'

'Inappropriately brief' inquiry by the magistrate

The court responded that this wasn't a good enough explanation and found him guilty.

In mitigation, Shimmy said he was 26, unemployed and unmarried but with two children under 18. The mother of the children was unemployed and he was supporting them 'as my grandmother is unemployed'. He continued, 'If I may be warned. I will not do it again.'

Though the state recommended a fine of N100 or 20 days, the magistrate imposed a fine of N$500 or 30 days.

The magistrate's inquiry about the contempt allegedly committed by Shimmy was 'inappropriately brief', said the judges. It didn't cover the question of intent or unlawfulness, and he wasn't asked whether he 'willingly wanted to insult the judicial

officer … or be contemptuous' and whether he knew that it was 'unlawful to appear in court in the manner that he did.'

Reasonable explanation had been given

In fact, the judges added, Shimmy had given a reasonable explanation for his attire. Add to this the further fact that it was the court orderly's duty not to admit an accused into court if his 'appearance was inappropriate and offensive'.

'In addition, there is no evidence or admission that the accused was previously warned of what an appropriate dressing to court is.'

Further, the fine of N$500 was beyond the maximum fine of N$100 stipulated by law.

Clearly, the convictions and sentence were therefore not in accordance with justice and should be set aside. If Shimmy had paid a fine, it had to be refunded to him, the court ruled.

Too late to be of any effect

What should be worrying anyone concerned to see justice in Namibia is the fact that the decision in this case was sent to the high court for review too late for it to be of any effect, despite the fact that the law requires a record of such cases to be sent 'without delay'.

Then, there is the sloppy way in which the record and warrant of detention was compiled, reflecting that a 26-year-old man was actually 99, not to mention the fact that the fine imposed was outside the limits allowed by the law, something the magistrate can hardly have overlooked at the time.

Worrying lack of sensitivity to the community served by the court

But overall, the magistrate's approach seems to speak of someone out of touch with the ordinary people who appear in the courts.

If you have only two garments, namely a pair of trousers and a pair of shorts, what are you supposed to do if one is too dirty to wear to court? Perhaps the magistrate, assured of a monthly salary, can't imagine what it is like to be unemployed and desperately poor?

As the judges point out, the conviction did not follow any serious attempt to establish whether the man's 'inappropriate dressing' was intended to insult the judicial officer or to be contemptuous.

Altogether it speaks of a worrying lack of sensitivity about the community that the magistrate serves. The fact that the divisional magistrate seemed just as unaware of this lack of sensitivity makes the situation even worse.

(The above article appeared on the africanlii.org blog on 6 March 2024. The judgment can be accessed here:
https://namiblii.org/akn/na/judgment/nahcmd/2024/34/eng@2024-02-05

A Last Thought

[1] A magistrate is a person of integrity and as such, is expected to conduct himself in a manner befitting his/her office. As a judicial officer, a magistrate is required to maintain high standards of conduct in both his/her professional and personal capacities. However, failure to meet those standards will not of itself justify removal of the magistrate from office. A magistrate should never be removed from office without good cause. Put in another way, it should be established beyond doubt that his/her misbehaviour warrants removal from the office of magistracy.

[2] In *Freedom Under Law v Judicial Service Commission and Another* the Supreme Court of Appeal dealing with the standard of behaviour expected from a judge quoted from the judgment of Lord Phillips in *Chief Justice of Gibraltar* where the following was stated:

"[30] A summary of the standard of behaviour to be expected from a judge was given by Gonthier J when delivering the judgment of the Supreme Court of Cananda in Canada in *Therrien v Canada (Ministry of Justice) and Another* [2001] 2 SCR 3:

'The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.'

[31] While the highest standards are expected of a judge, failure to meet those standards will not of itself be enough to justify removal of a judge. So important is judicial independence that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function. As Gontheir J put it at paragraph 147 of the same case:

'…before making a recommendation that a judge be removed, the question to be asked is whether the conduct for which he or she is blamed is so manifestly and totally contrary to the impartiality, integrity and independence of the judiciary that the confidence of the individuals appearing before the judge, of the public in its justice system, would be undermined, rendering them incapable of performing the duties of his office.'"

Per Twala J in *Van Schalkwyk v Minister of Justice and Constitutional Development and Others* (24910/2021) [2024] ZAGPJHC 300 (19 March 2024).