e-MANTSHI

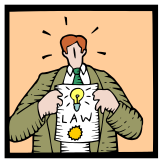
A KZNJETCOM Newsletter

November 2024: Issue 213

Welcome to the two hundredth and thirteenth 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 Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa has been amended with effect from 27 December 2024. The notice to this effect was published in Government Gazette no 1627 of 22 November 2024. The amendment is to Rule 9 and it can be accessed here:

https://www.gov.za/documents/notices/rules-board-courts-law-act-rules-conduct-proceedings-magistrate%E2%80%99s-courts-south-2

Recent Court Cases

1. S v Shrosbree (Review) (23/7627/2023) [2024] ZAKZDHC 86 (8 November 2024)

When an accused pleads guilty to a charge where one of the elements of the crime can only be proven by scientific means, the court must request the prosecutor to hand up the analysis certificate'. The idea of being represented by the legal advisor cannot simply mean to have somebody stand next to one to speak on one's behalf. Effective legal representation entails that the legal advisor act in the client's best interests, saying everything that needs to be said in the client's favour and calling such evidence as justified by the circumstances in order to put the best case possible before the court.'

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAKZDHC/2024/86.html

2. De Bruin v S (Director of Public Prosecutions) and Another (6359/2024) [2024] ZAFSHC 376 (25 November 2024)

The discretion to be exercised by a prosecutor relates also to the decision whether or not to oppose an application for bail or to release an accused person who is in custody following arrest. The process of establishing whether or not to prosecute usually starts when the police present a docket to the prosecutor. Prosecutors must present the facts of a case to a court fairly and they must disclose information favourable to the defence even though it may be adverse to the prosecution case. This notion also applies to bail proceedings. On the one hand, prosecutors should aim to ensure that persons accused of serious crimes are kept in custody in order to protect the community and to uphold the interests of justice. But, 'prosecutors should not oppose the release from custody of an accused person if the interests of justice permit.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAFSHC/2024/376.html

From The Legal Journals

Singh, C

Bye-Bye Mr Postman: A Consideration of the Electronic Delivery of Notices in Terms of the National Credit Act 34 of 2005

PER / PELJ2024(27)

Abstract

The outbreak of the Coronavirus pandemic in South Africa prompted many local companies to consider new ways of conducting business without compromising the legality and compliance aspect of operations. The COVID-19 national lockdown and related restrictions posed a huge challenge in litigious proceedings, in particular with the delivery of legal notices. In South Africa most legislation, such as the National Credit Act34 of 2005, require the physical delivery of legal notices by registered post or by the Sheriff of the Court. The requirement of physical delivery proved difficult during the pandemic due to the existence of various restrictions such as the need for social distancing and the limitations on travel. Electronic delivery consequently became an alternative tool for satisfying the delivery requirement. The electronic delivery of legal notices ensured that notices were correctly delivered to recipients in a timely and cost effective manner. Today the move to the use of electronic services and e-delivery has become more prevalent across all business sectors. However, national legislation has failed to develop in this regard, as most Acts still require the delivery of notices by registered post. This dichotomy has given rise to questioning the legitimacyand security of electronically delivered notices, and to a need to examine whether the time has arisen for legislative change in this position**.**

The article can be accessed here:
https://perjournal.co.za/article/view/17920/23205

Singh, C

Tinashe v University of Limpopo: Turfloop Campus 2023 ZALMPPHC 57 In the 'presence' of the Commissioner: Is there a need for an amendment to the Justices of the Peace and Commissioners of Oaths Act 16 of 1963?

2024 De Jure Law Journal 133

The article can be accessed here:
https://www.dejure.up.ac.za/singh-c

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

Contributions from the Law School

Closed-circuit television - Application of ss 153 and 158 Criminal Procedure Act to adult witness who was likely to be traumatized by testifying in open court or in presence of the accused.

In the case of *S v Lenting* 2023 (2) SACR 409 (WCC), the accused were facing a host of gang-related offences. The state brought applications in terms of ss 153(2)(b) and 158(2)(b) of the Criminal Procedure Act 51 of 1977, in terms of which a state witness would be allowed to testify behind closed doors through closed-circuit television or similar electronic medium, and that her identity should not be revealed or published (paras [1] – [2]). The application was supported by a clinical psychologist who testified that the witness showed signs of anxiety, stress and PTSD when recounting the events she had witnessed (para [4]). The investigating officer also supported the application, saying that the witness was particularly vulnerable as she had minor children and was three months pregnant (para [5]).

Accused 1, 2, 3 and 9 were affected by the applications. Accused 1, 2 and 3 did not oppose the applications but accused 9 did (para [1]). Accused 9 contended that he had a right to a public hearing in an open court as part of his constitutional right to a fair trial. He had not seen the room from which the witness would testify and was concerned that she would read from a prepared statement. He was also concerned to observe her demeanour under cross-examination. Lastly, he said that he knew the witness's identity in any event since her name was at the top of her statement, which his legal representative had shown him (para [6]).
The defence submitted that applications such as in the present case should be granted only in exceptional circumstances since the accused's rights would be compromised. They stated that the case of *S v Staggie* 2003 (1) SACR 232 (C), where the 19-year-

old rape complainant was allowed to testify in camera and via closed-circuit television, was distinguishable from the current case since the court was dealing with a rape complainant (para [19]). It is worth noting that in the *Staggie* case, another witness, who was not a complainant, was also allowed to testify in the same manner. The court in *Staggie* held as follows:
"S 153 (1) provides that a court can close the court if it appears that it would be in the interests of the administration of justice to do so. Witnesses must be able to testify without fear, and thus it must be in the interests of justice that witnesses that may be intimidated must be able to testify in a conducive atmosphere (*Staggie* p 12)."

It should be noted that, like the case under discussion, the *Staggie* case also concerned gang-related activities (*Lenting* para [24]).
In the case at hand, the court (per Lekhuleni J) held that ss 153 and 158 complement each other, with section 153 protecting vulnerable witnesses from public scrutiny, either because disclosure of their identity may threaten their lives or safety or because of the discomfort or embarrassment that may come from having to testify in open court. Section 158 allows a witness not to testify directly from the courtroom. Section 158(4) provides that the prosecutor and the accused have the right to question the witness and to observe the reactions of that witness (para [11], [14]). This right, the court held, acts as a safety net for any prejudice which might be suffered by the accused in cross-examination (para [31]).

Lekhuleni J referred to the case of *S v Jaipal* 2005 (1) SACR 215 (CC), where it was stated that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime (*Jaipal* para [29], *Lenting* para [16]). Lekhuleni J also quoted from the case of *S v Madlavu* 1978 (4) SA 218 (E) at 225G-226A as follows:
"It seems…that the administration of justice is made impossible unless witnesses can give their evidence without fear of repercussions and danger to themselves. It is of paramount importance that the courts should, wherever possible, give such witnesses the protection which the law allows." (para [17]).

At para [18], Lekhuleni J emphasised that ss 153 and 158 were not for exclusive use in sexual cases where the witnesses were children. Instead, they applied "with equal force to adult witnesses whose evidence is likely to be compromised by fear or distress about testifying in open court or in the accused's presence (para [18]; see also *S v Domingo* 2005 (1) SACR 193 (C) at 198d-f)." The mechanisms in ss 153 and 158, Lekhuleni J held further, should not be seen as s 36 limitations on the accused's right to a fair trial but rather as necessary for a trial that is fair to all (*Director Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* 2009 (2) SACR 130 (CC) at para 115, *Lenting* para [18]). Account must be taken not only of the s 35 rights of the accused but also s 12(1)(c) of the Constitution, which guarantees a

person's right to freedom and security and s 12(1)(e), which guarantees them the right not to be treated inhumanely or in a degrading manner (para [20]).

Lekhuleni J distinguished the case of *Shinga v S (Society of Advocates (Pietermaritzburg Bar) intervening as Amicus Curiae); S v O'Connel* 2007 (2) SACR 28 (CC) on the basis that the section which was declared unconstitutional in that matter allowed a criminal appeal to be disposed on in chambers, whereas ss 153 and 158 envisage the presiding officer weighing the competing rights of the parties and determining what would be fair and just in the circumstances (paras [21], [22]). "Undoubtedly, it would be detrimental to the principles of fairness and justice to force an adult witness who is afraid of the accused to testify in open court where she may experience anxiety in recounting what she saw during the commission of the alleged crime … such an approach would have a deleterious effect on the witness and expose her to secondary trauma (para [23])."

As regards the defence's submission that since the accused was aware of the identity of the witness, the applications should be dismissed, the court disagreed on the following grounds:
"...(T)he protection envisaged in ss 153 and 158 is not only aimed at protecting a witness, but, ensures that the evidence that is given to the court is not reduced and diminished in quality because of the witnesses fear or distress … The protection ensures that the witness gives their evidence in a more coherent and relaxed manner … (para [26])."
The court surveyed law in foreign jurisdictions allowing adult witnesses to testify in camera and behind a screen or via closed-circuit television. In Canada, s 486.2 (2) of the Criminal Code (RSC, 1985 c C-46) permits adults who are not disabled to testify from behind a screen or via closed-circuit television, but only if the court is satisfied that the order is necessary to get a full and candid account from the witness or would otherwise be in the interest of the proper administration of justice. (para [28], *R v Pal* [2007] BCJ 2192 (SC)). In making the determination the court must have regard to the following factors:
"(a) the age of the witness;
(b) the witness' mental or physical disabilities, if any;
(c) the nature of the offence;
(d) the nature of any relationship between the witness and the accused;
(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
(f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
(g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and

(h) any other factor that the judge or justice considers relevant" (s 486.2 (3) Criminal Code (RSC, 1985, c C-46)).

In the United Kingdom, s 2 (1) of the Criminal Evidence (Witness Anonymity) Act, 2008 empowers courts to grant a witness an anonymity order, which requires that appropriate measures be taken to protect the identity of the witness provided three criteria are met. First, it must be necessary to protect the witness's safety or that of another or serious damage to property. Secondly, it must be consonant with the accused's right to a fair trial, and lastly, it must be in the interests of justice (para [29]). Section 2 (1) of the Criminal Evidence (Witness Anonymity) Act was repealed by the Coroners and Justice Act, 2009 (c. 25). Section 88 of the Act now provides for the three conditions to be met, and section 89 provides that when deciding whether the conditions in section 88 are met in the case of an application for a witness anonymity order,

"the court must have regard to:

(a) the considerations mentioned in subsection (2) below, and

(b) such other matters as the court considers relevant.

(2) The considerations are—

(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed;

(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant;

(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed;

(e) whether there is any reason to believe that the witness—

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case,

having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;

(f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court" (section 89 Coroners and Justice Act 2009 (c. 25)).

On a conspectus of the evidence, Lekhuleni J was satisfied that the requirements in ss 153 and 158 were met and that in order for the witness to give a full and candid account of what she witnessed, her evidence should be heard in camera, via closed circuit television and that her identity should be protected (para [33]).

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Matters of Interest to Magistrates

The critical role of witness identification in criminal cases: Ensuring reliability and accuracy

It is very important in criminal proceedings that a witness makes a positive identification of the person they claimed was the perpetrator. The court in *Magadla v S* (SCA) (unreported case no 80/2011, 16-11-2011) (Mhlantla JA, Mthiyane JA, Meer AJA) at para 26 echoed the observations of Holmes JA in *S v Mthetwa* 1972 (3) SA 766 (A) to the approach to be adopted when identification of an accused is at issue; 'Because of the fallibility of human observation, evidence of identification is approached … with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.' How is this observation tested?

Factors that will test the reliability of the witness's observations

In *Cupido v S* (SCA) (unreported case no 1257/2022, 16-1-24) (Tokota AJA, Mokgohloa, Mbatha and Goosen JJA and Keightley AJA) at para 21 the court referred to the case of *S v Mehlape* 1963 (2) SA 29 (A), where it was held that it should not be enough for a witness to be honest but in the circumstances, he must have had 'a proper opportunity' to make his observations and that his observations can be relied on. The court further held that such observations should be tested against 'proximity of the persons, or the visibility, or the state of the light, or the angle of the observation, or prior opportunity or opportunities of observation or the details of any such prior observation or the absence or the presence of noticeable physical or facial features, marks or peculiarities, or the clothing or other articles such as glasses, crutches or bag, etc, connected with the person observed, and so on.'

In *Macuvele v S* (GP) (unreported case A748/2013, 9-7-2014) (Makgoka J, Moseamo AJ) at para 12 the court referred to *S v Jochems* 1991 (1) SACR 208 (A) noting that: 'Witnesses should be asked by what features, marks or indications they identify the person whom they claim to recognise. Questions relating to height, build, complexion, what clothing he was wearing and so on should be put.' The fact that the witness just says that 'the accused is the person who committed the crime is not enough.' The court held that it is 'unexplained, untested and uninvestigated' and it makes room for the possibility of mistakes. The accused in *Macuvele* at the time of the incident was unknown to the complainant. These qualifying questions when answered in the affirmative would give the court more assurance that the alleged perpetrator is indeed the accused before court. The identifying witness at the time of the incident may either

know the accused or the accused might be unknown to the witness at the time of the incident.

Identification that was made when the accused is unknown to the witness

In *Magadla* the accused was unknown to the complainant at the time of the incident and the defence placed the identification made by the complainant in dispute. In dismissing the defence's submission that the complainant erred when she identified the accused, the court concluded that she was in 'close proximity' with the appellant when they were driving, she entered a well-lit room with the appellant and 'spent several hours in that room.' At para 32 the court held that: 'In my judgment, the complainant had ample opportunity to make a proper and reliable observation of the appellant.'

In *S v Zwane* (KZP) (unreported case no AR297/2021, 24-1-23) (Henriques J, Mlaba J), the complainant was a single witness and admitted to not knowing the accused prior to the incident. He indicated at para 9 that he was at 'arm's length' away from the accused before being shot. He also testified that he stood approximately ten minutes in front of the accused having an undisturbed view of the accused face in clear daylight conditions. He noticed that the accused had a notable scar on his face, was dark in complexion and it appeared that the accused was cross-eyed. The witness observed that the accused's clothes were dirty. It later transpired that this was a result of his work as a mechanic. At para 25 the court held that the witness 'had ample opportunity to see the [accused] at the time of the incident and kept him under observation for at least five minutes as he was an arm's length away from him.' At the time the police officer received information as to the whereabouts of the accused, he visited the complainant in hospital and on the combined strength of both pieces of information he arrested the complainant who was dark in complexion with a facial scar and had a disfigured eye, as identified by the complainant.

Identification of the accused when the accused is known to the witness

In *Abdullah v S* (SCA) (unreported case no 134/2021, 31-3-22) (Nicholls, Mocumie, Schippers JJA, Tsoka and Meyer AJJA), the court at para 7 held that the witness's observation of the accused must be tested against the 'lighting, visibility, proximity of the witness and opportunity for observation.' The witness identified the shooters as members of the criminal gang called the 'Firm' who operated in Valhalla Park on the Cape Flats. The witness went to school in Valhalla Park and while he was not friends with them, he saw them regularly in that area. He only knew them by their nicknames. The defence argued that the witness did not have a proper opportunity to observe the gunmen due to the fact that he only had two to four seconds of observation. At para 13 the court held that 'had the appellant [shooter] been a stranger to him, this could have been a significant factor. However, when seeing a person who is known to you, it is not a process of observation that takes place but rather one of recognition.' The court went further and held at para 13 that: 'The time necessary to recognise a known face as opposed to identifying a person for the first time, is very different. It has been recognised by our courts that where a witness knows the person sought to be identified,

or has seen him frequently, the identification is likely to be accurate.' Even though the observation period was very brief the witness could identify the shooters on the strength of his previous encounters with them and could recognised them as the perpetrators. The court accepted his identification of the shooters as accurate and reliable. It is more than possible for people in an area, due to their community activity or association, that they are more known to the rest of the people in an area and such person is more recognised than others in that area. The court in *Zulu v S* (KZP) (unreported case no CC32/15P, 22-7-2016) (Dlwati J), at para 54 held that: 'It is natural that people would know a person without that person knowing them.'

When should an identification of the perpetrators be made?

The court in *Phetla and Another v S* (GP) (unreported case no A632/2015, 24-6-2016) (Legodi, Rabie, and Mabuse JJ) at para 27 held that: 'An identifying witness should be asked to give [a] detailed description of the alleged criminal at the earliest possible moment.' In *Langa v S* (GJ) (unreported case no A109/2017, 18-9-2020) (De Villiers AJ, Ismail J, and Malungana AJ) at para 18 the court held that: 'The cautionary practice (to establish a description of the perpetrator as soon as possible) does not mean that evidence of identification will only stand if a witness can recite a list of descriptive factors about the accused's face, build, and dress in his/her original statement.' The court in *Zwane* at para 27 found that the criticism levelled against the witness for giving the police a detailed description of the accused was without merit. The court held that: 'The complainant had been through a traumatic ordeal; had been shot and was laying on a stretcher in the hospital when the police interviewed him. He could hardly be expected at that point in time to provide a detailed description.' The court concluded that it was satisfied that on the totality of the evidence produced that the accused was the one who shot the complainant.

Video footage from a crime scene for the purpose of identifying a perpetrator

In *Kenku v S* (FB) (unreported case no A65/2015, 10-9-2016) (Van Zyl J and Mokoena AJ), the accused was found guilty of nine counts which included two counts of robbery with aggravating circumstances. Two perpetrators entered a shop, a tall man and a short man as described by the witness. The incident was caught on the shop's video cameras which was installed to assist in the shop's surveillance. The video that held the evidence went missing before the trial started. The Regional Court was satisfied that the witness that saw the footage, testified as to what she saw on the footage and could identify the perpetrators. The matter was taken on appeal. The court in *Kenku* at para 17 held that: 'A court needs to be able to assess evidence itself.' At para 17 the court went further where it held that 'it was impossible for the court and the defence to also watch the footage and make their own observations.' The court dismissed the evidence by the witness that related to what she saw on the video footage due to its unavailability for the court to evaluate such evidence for itself. The decision in *Kenku* was confirmed by the Supreme Court of Appeal (SCA) in *Ndimande v S* (SCA) (unreported case no 248/2018, 30-9-2019) (Ponnan, Saldulker, Swain, Mbatha JJA and Hughes AJA). At para 25 the SCA held that 'the reliability of his

subsequent identification of the appellant as a single witness, cannot be properly assessed in the absence of the video footage.' It seems that the courts place a very heavy reliance on evidence regarding the identity of an accused that can be tested and evaluated.

The dangers of dock identification

In *Mabunda and Another v S* (GP) (unreported case no A202/2010, 29-10-14) (Basson J and Beatson AJ) at para 15 the court held that: 'It is accepted that a dock identification has very little probative value.' This value, however, can be increased if the witness on a prior occasion positively identified the accused to the police in a statement or in an identification parade. In *Mbele and Another v S* (FB) (unreported case no A246/2003, 17-8-2006) (Rampai J and Mathebula AJ) the witness during the incident just saw the accused fleetingly. The accused was unknown to her at the time of the incident. An identification parade was held and for some reason this specific witness did not attend it. The court at para 32 held that: 'The value of her dock [identification] was drastically diminished by the fact that no practical steps were taken to protect the first appellant. The trial court should have, at the request of the prosecutor, caused the accused to be removed from the dock before the identifying witness or witnesses were ushered in. In a case such as this justice demands that the accused should mingle with the members of the public, if not in the public gallery anywhere else in the court room, but they certainly should not remain in the dock.' The court at para 33 went on to say that, a witness who sees a person sitting in the accused box naturally 'feels reassured that he is correct in his identification, even though this may not have been the position were they not there.' The court also stated that by standing in the accused box it is 'suggestive of him being one of the parties involved in the crime.'

Conclusion

It is the duty of the State to prove its case beyond a reasonable doubt. Making a positive identification is vital in any criminal case. When doubt is cast on the identity of the person before court, that person is more likely to walk out a free man than being convicted.

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A Last Thought

"Some standards can be prescribed by law, but the spirit of, and the quality of the service rendered by a profession depends far more on its observance of ethical standards. These are far more rigorous than legal standards.... They are learnt not by precept but by the example and influence of respected peers. Judicial standards are acquired, so to speak, by professional osmosis. They are enforced immediately by conscience."
[Judicial Ethics in Australia, 2d ed. Sydney: LBC Information Services, 1997]