e-MANTSHI

A KZNJETCOM Newsletter

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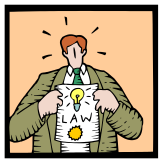
Welcome to the two hundredth and fourteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 National Road traffic Amendment Act 8 of 2024 was published in Government Gazette number 51729 of 10 December 2024. The Act will come into operation on a date to be fixed by the President. The purpose of the amendment is to amend the National Road Traffic Act, 1996, so as to:

- insert new definitions and to amend others;
- to provide for the suspension and cancellation of the registration of an examiner for driving licences or an examiner of vehicles, if such person has been convicted of an offence listed in the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or has a direct or indirect conflict of interest;
- to provide for the registration and grading of training centres;
- to further provide for the registration of manufacturers, builders, body builders, importers and manufacturers of number plates, including manufacturers of reflective sheeting for number plates, suppliers of blank

number plates, suppliers of reflective sheeting for number plates, embossers of number plates, weighbridge facilities, manufacturers of microdots, suppliers of microdots and microdot fitment centres; to extend the right to appeal to a manufacturer of blank number plates, manufacturer of reflective sheeting for number plates, supplier of blank number plates, supplier of reflective sheeting for number plates, embosser of number plates, weighbridge facility, manufacturer of microdots, supplier of microdots and microdot fitment centres;

- to require a provincial department responsible for transport or local authority to register a driving licence testing centre before operating as a driving licence testing centre;
- to further provide for the appointment of inspectorate of manufacturers, builders, body builders, importers, including inspectorates of number plates, microdots and weighbridge facilities;
- to prohibit the wilful or negligent issuing of a learner's licence or authorising the issue of a learner's licence, endorsing or failure to endorse a learner's licence, or to produce, print or manufacture any document similar to a learner's licence, contrary to Chapter IV of the National Road Traffic Act, 1996;
- to prohibit the use of unauthorised aid during a test for a learner's licence or a driving licence test, and the disqualification thereof;
- to provide for the registration and grading of driving school instructors;
- to provide for the registration and grading of driving schools;
- to regulate further on international driving permits and foreign driving licence and permits.

The amendment Act can be accessed here:
https://www.gov.za/documents/acts/national-road-traffic-amendment-act-8-2024-english-afrikaans-10-dec-2024

Recent Court Cases

1. Sithole v S (CCT 118/23) [2024] ZACC 31 (20 December 2024)

Two requirements must be met before a trial court may invoke the fixing of non parole period provisions. These are: the trial court must establish exceptional circumstances that warrant an order for a non-parole period, and

it must have invited the parties to make submissions in that regard before granting such an order. Failure by the trial court to give effect to both these requirements is a material misdirection.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZACC/2024/31.html

2. Jacobs v S (02/24) [2025] ZAWCHC 20 (29 January 2025)

The court *a quo* was bound by the express terms of the written guilty plea. Apart from considering whether the written guilty plea contained admissions of the elements of the crime in terms of ss 66(2) of the Road Traffic Act, the fact remains that the appellant pleaded guilty to a crime with which he was not charged. Upon reviewing the admissions in the written guilty statement, it is clear that the appellant intended to plead guilty to ss 1(1) of the General Law Amendment Act 50 of 1956 and that offence only.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2025/20.html

3. **S v Sani 2025 JDR 0010 (FB)**

In a special review in terms of section 304 of the Criminal Procedure Act 51 of 1977 the High Court reviewed and set aside a conviction due to a materially defective charge sheet, notwithstanding the accused's guilty plea. *Ex abundanti cautela* the court referred to the imposed sentence and explained that the suspension condition was impermissibly vague and would have to be amended if the conviction was in order.

Judgment
Daffue J (Van Rhyn J concurring):

[1] This is a special review in terms of s 304 of the Criminal Procedure Act 51 of 1977 (the CPA).

[2] Upon her plea of guilty of contravention of the Domestic Violence Act 116 of 1998 (the Domestic Violence Act) the accused was convicted in the Magistrates' Court for the Lejweleputswa district held at Winnie Mandela. She was sentenced to 12 (twelve) months' imprisonment wholly suspended for three years on condition that she is not convicted of 'contravening a protection order' committed during the period of suspension. After some correspondence between the learned acting senior magistrate Cummings and the presiding magistrate, the matter was sent on special review to the High Court. The learned magistrate admitted that he erred in passing the sentence as he did.

[3] The letter of senior magistrate Cummings dated 29 November 2024 reads as follows:
'1. . . .
2. . . .
3. I am of the view that the conviction should be set aside due to the lack of averment that the protection order was served on the accused prior to committing the offence in question.
4. I am of the view that the sentence is not in accordance with justice as the suspensive condition does not disclose an offence.
5. I thus request that the sentence be set aside and remitted to the Magistrate for sentencing afresh.
6. Alternatively, the Reviewing Judge should use its discretion and impose a suitable sentence.'
The request in respect of sentence is strange. If the conviction is set aside, the same shall apply to the sentence.

[4] It appears from the correspondence between the two magistrates that the presiding magistrate was merely informed that his sentence was not in order. Nothing was said about the conviction. Upon perusal of the documents provided to me, the following observations are recorded:
4.1 The charge sheet, which is clearly a standard document, is incorrect. The Domestic Violence Act does not contain a s 17(a) quoted in the charge sheet and relied upon by the prosecution. I accept that the prosecution sought to rely on s 17(1)(a) which stipulates that any person that 'contravenes any prohibition, condition, obligation or order imposed in terms of section 7. . . is guilty of an offence' and liable on conviction to be punished. Prosecutors shall ensure that the correct statutory provisions are relied upon in their charge sheets in order to prevent possible future technical defences.
4.2 The prosecution apparently relied upon the contravention of a final protection order. The reference to s 5 (pertaining to interim orders) is irrelevant as only ss 6 and 7, pertaining to the issuing of a final protection order and the prohibitions placed upon the accused in respect of such protection order respectively, are relied upon.
4.3 I accept that neither the interim, nor the final protection order was placed before the court *a quo* as these documents are not contained in the file forwarded to the High Court. It is not clear whether an interim or final order was granted on 26 May 2022. The charge sheet is confusing, not only in this regard, but the wording does not make sense. No allegation is made as to what the accused was prohibited from doing and the relevant case number is not quoted. It is alleged in the charge sheet that the order (interim or final) was served on 23 June 2022. I shall return to this aspect when I deal with the s 112(2) statement of the accused.
4.4 Whoever drafted the charge sheet did not apply their mind. It is wholly deficient and nonsensical. Apparently, unlike as averred, the protection order was never served as provided for in s 6(5)(a) of the Domestic Violence Act, read with s 6(7) and s 13(1) in particular.

[5] Having referred to the obvious problems detected in the charge sheet, I considered the guilty plea and the accused person's statement in terms of s 112(2) of the CPA. The accused was represented by a legal practitioner who made use of a standard document. I do not have any doubt that the accused intended to and indeed pleaded guilty. However, paragraph 3 of the statement is not only incomprehensible, but also false. According to this statement an interim order was granted on 26 May 2022 and on the same day the final order was confirmed. An interim order can be confirmed, not a final order. It is unthinkable that the interim and final orders were issued on the same day. More uncertainty is caused insofar as the accused confirmed that she was present on the day of the final order, to wit 26 May 2022. When dealing with service of the protection order, she inserted the letters 'N/A' which obviously could only mean 'not applicable'. However, she stated that she had been made aware of the final order and its conditions which had been explained to her in her home language. This aspect is again repeated in paragraph 6 of the statement. The accused created the impression that the presiding magistrate explained the order to her. May this be regarded as sufficient and that service of the documents may be done away with? More about this later herein.

[6] A defect in a charge sheet can be amended before judgment, but once the plea has been accepted and the accused convicted, the court becomes *functus officio*. A defective charge sheet which has not been amended may be cured by evidence at the trial proving that which should have been averred. It is also possible for an appellate court to amend a charge sheet on appeal or review, provided the court is satisfied that the defence would remain the same and the accused could not possibly be prejudiced by the amendment. I might have been prepared to uphold the conviction if the only defect was the reference to a wrong section of the Domestic Violence Act, especially bearing in mind the guilty plea. Unfortunately, this is not the case.

[7] It needs to be considered how and by whom a protection order should be served on a respondent. The answer lies in s 13 of the Domestic Violence Act which stipulates that service shall be effected in the prescribed manner by the clerk of the court, the sheriff or a peace officer.

[8] There is a further defect in the proceedings. The accused did not confirm in her s 112(2) statement that the final protection order was indeed served on her as provided for in s 13(1). The purpose of service is to inform the addressee of the contents of the documents and the consequences in the event of noncompliance. In order to consider whether this technical defect could possibly be excused and the conviction be confirmed, I was initially inclined to accept that the accused had been duly warned by the magistrate who granted the final order in her presence. Who could have explained it better, I initially thought, than the presiding magistrate who did it in her home language? This may be a trivial issue, but if the conviction is confirmed, a dangerous precedent would be set that might lead to a miscarriage of justice in future. The prosecutor, the defence attorney and the learned magistrate should ensure that the

interests of justice are properly served. Both legal practitioners are admonished to prepare sensible and legally sound documents for presentation to a court of law. Mistakes like those made in this case should be avoided.

[9] Insofar as the conviction stands to be reviewed and set aside, it is unnecessary to consider the sentence in any detail. However, I would neglect my duty if I do not make some remarks. A sentence of 12 (twelve) months' imprisonment is not only grossly disproportionate with the offence, but the court *a quo* committed a misdirection in imposing an unacceptably vague suspension condition. The suspension condition should have referred to transgression of the relevant statutory offences. If the court *a quo* intended to suspend the sentence as it did, the sentence should have been wholly suspended for a period of 3 (three) years on condition that the accused is not convicted of contravening section 17(1)(a) of the Domestic Violence Act 116 of 1998, read with sections 5, 6 and 7 thereof, committed during the period of suspension.

[10] Therefore, the following order is issued.
1. The conviction and sentence are reviewed and set aside.

From The Legal Journals

Hoctor, S

When Might an Assault be so Trivial as to Not Justify a Criminal Conviction? Assault With Intent to do Grievous Bodily Harm, De Minimis Non Curat Lex, and the Case of S v Rahim 2024 JDR 3448 (KZP)

(2024) *Obiter*, *45*(4).

Abstract
As Hall cogently points out, criminal harms differ in gravity: "[F]irst, because of the differential external effect upon the victim and the community … and secondly, by reference to the degree of moral culpability of the offender". When might criminal conduct be regarded as so trivial as to not be appropriate to visit with the stigma of a conviction? This question engages some important issues concerning criminalisation, and finds practical application in the de minimis non curat lex maxim, which insists that "mere trifles and technicalities must yield to practical common sense and substantial justice", or to put it in simple terms, that the law does not concern itself with trivial things.
This maxim is well-established in South African law, not only finding application in

criminal law but also in relation to such fields of law as insolvency, property law, contract and delict. The de minimis maxim certainly fulfils a practical function, in preventing state resources being wasted on inconsequential wrongs, but in the criminal law context, its functioning underscores the need to protect the rights of the individual accused. These rights may be unjustifiably limited by the state, in the context of the exercise of the blunt instrument which the criminal justice system represents, following the commission of a trivial misdeed. In essence, the maxim concerns itself with prosecutability, with deciding whether the "machinery of the criminal law … [ought to be] set in motion", rather than as a defence excluding unlawfulness. In Snyman's turn of phrase, prosecution should never amount to persecution. On what is the decision to prosecute (or not) based? In essence, this appears to be a value judgment or policy decision.

Feinberg explains that legal coercion should not be used to prevent minor harms, even though in theory a choice to do so would be morally legitimate, because "chances are always good that such a use of power would cause harm to wrongdoers out of all proportion both to their guilt and to the harm they would otherwise cause, even when the priority of innocent interests is taken into account". This reasoning applies equally to more serious crimes such as kidnapping and assault, and even to the grave crime of assault with intent to do grievous bodily harm, which may be defined as "an assault which is accompanied with the intent to do grievous bodily harm".

The crime of assault with intent to do grievous bodily harm, which is a separate substantive crime rather than merely an aggravated form of assault, consists of the following elements: (i) an assault (that is, following Snyman's definition, "any unlawful and intentional act or omission (a) which results in another person's bodily integrity being directly or indirectly impaired, or (b) which inspires a belief in another person that such impairment of her bodily integrity is immediately to take place"; which is (ii) committed with intent to do grievous bodily harm. What constitutes "grievous bodily harm" is a factual question for the courts to decide, but it is clear that the actual infliction of grievous bodily harm is not required for the crime to be committed, but only that the accused intended to commit such harm. In this regard, the practice of listing "grievous bodily harm" as an additional element of the crime is therefore inaccurate and misleading.

The application of the de minimis non curat lex maxim to the crime of assault with intent to do grievous bodily harm, and the considerations involved in making such decision, arose for consideration in S v Rahim (2024 JDR 3448 (KZP)).

The article can be accessed here:
https://obiter.mandela.ac.za/article/view/20972/23467

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

Contributions from the Law School

Antecedent liability and the *actio libera in causa* rule*

The idea of antecedent liability is a ubiquitous feature of both Anglo-American common-law systems and civil-law systems. In South African law, while it is acknowledged that antecedent liability may play a role in ascertaining criminal liability, there is a curious lack of discussion of the idea in both the judgments of the courts and academic writing. The exception to this trend is the discussion of the *actio libera in causa* rule, which is traditionally applied in the context of intoxication, in cases where the accused uses his own drunk body as an instrument to carry out an intent formed while he was still sober.

The *actio libera in causa* rule relates to a situation comprising two stages (Gur-Aye *Actio Libera in Causa in Criminal Law* (1984) 11):

'At the second stage the actor commits the *actus reus* of an offence in a state negating its criminality…At the previous stage, the actor is able to choose between alternative courses of conduct and chooses one that leads him to the second stage.

As mentioned, the rule rests on the doctrine of antecedent liability. It provides for the imputation of criminal liability for an offence, the *actus reus* of which has been committed at the second stage in a state excluding liability, on the basis of the actor's fault at the previous stage (see Rabie 'Actiones libera in causa' (1978) 41 *THRHR* 60). The classic example of the operation of this doctrine is often described as 'Dutch courage' (Charleton, McDermott & Bolger *Criminal Law* (1999) para [17.33]), and entails that

'where an accused forms an intention to commit a crime and purposefully becomes intoxicated in order to give himself the necessary courage, he cannot plead intoxication as a defence as the mental element did exist…prior to the commission of the external element' (Rabie *Bibliography of Criminal Law* (1987) 61).

Thus, where a person renders herself intoxicated, such that she cannot be held criminally liable for any acts she may commit whilst in this condition, the application of the *actio libera in causa* rule allows for the attribution of criminal liability to her, based on her mental state in the preceding period in which she could be held accountable for her actions (ibid).

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* This contribution is extracted from a paper entitled 'Antecedent liability in the criminal law' presented at the Society of Law Teachers of Southern Africa Conference which took place from 15-19 January 2024. It is hoped that the full paper will be published shortly.

Although it appears that a factual scenario comprising the *actio libera in causa* situation has yet to come before the South African courts, the doctrine has been widely accepted to be a part of the common-law rules relating to criminal liability by the writers, as well as the courts.

While policy concerns relating to intoxication no doubt subsist, in the *Chretien* case (1981 (1) SA 1097 (A)) the Appellate Division swept aside the archetypal policy-based decision of *Johnson* (1969 (1) SA 201 (A)) in favour of an approach based on principle, where voluntary intoxication could found an acquittal based on lack of voluntary conduct, lack of criminal capacity or lack of intention.

The seismic effect of the *Chretien* decision, which would provide the basis for not just a defence based on voluntary intoxication as such, but also more broadly the defence of non-pathological incapacity, did not impact on the *actio libera in causa* rule, which had incidentally found support in *Johnson* (at 211E-212A). This was made clear by the cursory statement of Rumpff CJ in *Chretien* that it was not relevant to discuss the instance of an accused who drank in order to commit a crime ('natuurlik nie hier ter sprake nie') (at 1105G-H).

However, in the Northern Cape case of *Baartman* (1983 (4) SA 393 (NC)), decided shortly after *Chretien*, it appears that this was misunderstood, and Rumpff's judgment was given an unintended interpretation.

While there is a distinct lack of cases decided on the basis of the *actio libera in causa* rule, the facts of the *Baartman* case can – almost – described as a *locus classicus*. The accused declared in front of witnesses that the next day he would drink until he was properly intoxicated ('lekker dronk') and would then stab the deceased to death. The next day the accused did indeed imbibe a great deal of alcohol, and whilst in the resulting state of intoxication, did indeed stab the deceased with fatal consequences. The court however held that, despite his intoxicated condition, at the time of the stabbing the accused was acting with the necessary capacity and intention to be convicted of murder. There was consequently no reason to resort to the *actio libera in causa* rule.

Nevertheless, in the course of the judgment, the court made some *obiter* remarks about the rule, in particular stating that in the light of the *Chretien* decision it would be wrong to convict a person who had committed a crime at a stage when he lacked criminal capacity, even though he had previously, whilst sober, decided to commit such crime. Such an outcome would fly in the face of the *actio libera in causa* rule, and would completely undermine it, as a number of commentators have pointed out.

The title of the rule is indicative: *actio libera in causa* may be translated as an action free in its origin/cause, if not in its execution. By definition, the basis for criminal liability is sought at the first stage of the operation of the rule, when the accused is indeed free to choose his actions and has control over his conduct. The rule exists to hold the actor responsible for the consequences of such earlier actions, which were freely chosen. To exclude the operation of the rule where the harm occurs when the accused's conduct is involuntary or occurs in a state of incapacity would eviscerate the rule of most of its rationale and effectiveness. Moreover, to require a further element of directed conduct at the second stage of the operation of the rule would seem

excessive, particularly as all the elements of liability are required to be satisfied at the first stage of the rule. In fact, the actor uses his drunk body at this stage as an instrument to commit the crime.
Such intention must relate to the specific consequences or harm that are envisaged, but foresight of the exact causal sequence giving rise to the harm cannot be required, as this would reduce the applicability of the rule to an absurdity.
It must be acknowledged that establishing liability on the basis of the *actio libera in causa* is very difficult. This is of course the reason for the lack of practical application of the rule in the case law. As it is, proof of intention almost always occurs through a process of inferential reasoning, drawing inferences about the accused's state of mind from the established facts of the case. This process is no doubt complicated by the inevitable dislocation in time which occurs between the first stage in the process, when the elements of liability are sought to be attributed to the accused, and the second stage, when the harm is caused by the accused whilst in a condition which undermines his liability.
Nor would there be any reason to entertain the notion of a negligent *actio libera in causa* in practical terms. For the overarching notion of antecedent liability would be applicable to instances which would not fall within the ambit of an intention-based *actio libera in causa*. Rabie explains antecedent liability (*Bibliography of Criminal Law* 27) such that
'a person may be liable for a crime even though the ultimate conduct which eventually brought about the result was involuntary, as long as at an earlier stage he committed an act which was causally responsible for the prohibited consequence, and he then intended that consequence or was negligent in respect thereof (where negligence is required for criminal liability'.

It is clear that antecedent liability also envisages a two-stage assessment, where the elements of liability are present at the first stage, whereas the harm takes place at the second stage, where the accused cannot be held blameworthy.
Strauss provides an example of antecedent liability (*Doctor, Patient and the Law* (1991) 353):
'A schoolbus driver leaves his bus full of cheerful children parked outside an hotel, in order to have a couple of 'quick ones for the road' in the bar. In due course he becomes hopelessly drunk, but still manages to reach the bus, to start the engine and drive for a small distance. He then collapses in a drunken stupor and the bus collides with a tree. A child is killed in the accident. Although his final act may have been involuntary, the driver can nevertheless be convicted of culpable homicide.'

Strauss points out that the assessment of criminal liability in these circumstances simply requires the application of the ordinary principles: the driver's negligence lies in his voluntary intoxication in the circumstances. Would not the reasonable person have foreseen the possibility of the eventual harm occurring, both at the stage when he began to drink, as well as when the liquor is beginning to take an effect, but the driver is still not so tipsy as not to know what he is doing?

There is a wealth of case law in the context of road traffic law which deals with this question by finding liability where, for example, the accused's significant intoxication was not held to provide a basis for acquittal on a charge of drunk driving (*S v Piccione* 1967 (2) SA 334 (N); *S v Fouche* 1974 (1) SA 96 (A)) or culpable homicide (*S v Kilian* 1964 (1) SA 188 (T)). But this approach to establishing liability has also been applied to circumstances of sudden emergency (*R v Du Plessis* 1948 (2) SA 302 (C)), epilepsy (*R v Victor* 1943 TPD 77), fatigue or exhaustion (*S v Trickett* 1973 (3) SA 526 (T)), and diabetes-related automatism (see *Wessels v Hall & Pickles (Coastal) (Pty) Ltd* 1985 (4) 153 (C), a delict case), where the reasonable person would have been aware of the possibility of these circumstances bringing about involuntary conduct, but the actor in each case failed to take the necessary steps, as a result of which the harm ensued. The same principle applies to circumstances outside of the road traffic context (*e.g. S v Grobler* 1974 (2) SA 663 (T)), and thus where it was held that the accused had not acted negligently in the context of diabetes-related (*S v Van Rensburg* 1987 (3) SA 35 (T)) or epilepsy-related (*R v Schoonwinkel* 1953 (3) SA 136 (C)) involuntary conduct, liability could not follow. The intoxicated individual will no doubt receive less accommodation from the courts – the reasonable person drinks, but never gets drunk – and so voluntary intoxication may in itself be regarded as negligent conduct. However, the negligent intoxication must be linked to a specific crime. This is why the criticism of the Appellate Division decision in *Johnson*, by Rumpff CJ in *Chretien*, as well as by writers, still holds good. The accused should not have been convicted of culpable homicide as a result of involuntary conduct due to intoxication, unless the reasonable person in the circumstances of the accused would have foreseen the possibility of violent conduct while drunk. To hold otherwise smacks of *versari in re illicita*.

As mentioned earlier, there is no reason why the operation of antecedent liability should be limited to where the accused's conduct is automatic at the second stage. In *S v Shivute* (1991 (1) SACR 656 (Nm) 663e-f) the court stated, in the context of an assessment of a defence of non-pathological incapacity based on stress, that if the accused had previously suffered momentary psychological 'impairment' or 'disintegration', and therefore could have foreseen the condition recurring, she could be held liable on the basis of antecedent liability.

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Matters of Interest to Magistrates

Nauru Declaration on Judicial Well-being

RECALLING Article 11 of the United Nations Convention Against Corruption (the Convention), which recognizes the crucial role of the judiciary in combating corruption and requires that States parties, in accordance with the fundamental principles of their legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary, including rules with respect to the conduct of members of the judiciary;

NOTING the role of the United Nations Office on Drugs and Crime (UNODC) in supporting States in their efforts to effectively implement the Convention, including through establishing the UNODC Global Judicial Integrity Network as a platform for judges and judiciaries to share experiences and jointly address emerging judicial integrity-related challenges;

APPRECIATING the knowledge products and tools developed by UNODC and the UNODC
Global Judicial Integrity Network on different aspects of the implementation of Article 11 of the Convention, including the United Nations Convention Against Corruption Implementation Guide and Evaluative Framework Guideline for Article 11 and the Global Survey Report on Exploring Linkages between Judicial Well-being and Judicial Integrity;

ACKNOWLEDGING the findings of the above-mentioned report on the global survey conducted by UNODC, and other studies on judicial stress and well-being conducted in various jurisdictions, collectively revealing high levels of occupational stress within judiciaries globally, and low levels of acknowledgement and action regarding the same;

REAFFIRMING that a well-functioning judiciary exemplifies the six core judicial values enshrined in the Bangalore Principles of Judicial Conduct: Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence;

RECOGNIZING that the judiciary is made of human beings – individual and independent persons appointed to judicial office; therefore, the judiciary is fundamentally a human system, dependent upon the collective human capacities and faculties of individual judges;

APPLAUDING the fact that judiciaries are becoming more diverse and inclusive, and recognizing that this diversity strengthens the judicial system and enhances public trust;

ACKNOWLEDGING that the physical and mental well-being of judges is crucial for promoting competence and due diligence, as acknowledged in paragraph 194 of the Commentary on the Bangalore Principles of Judicial Conduct, which highlights the importance of addressing judicial stress and the necessity of providing appropriate support;

We, the members of judiciaries and other justice stakeholders here gathered, in person and virtually, on 25 July 2024 at the Civic Centre in Nauru, declare:

1. Judicial Well-being is essential and must be recognized and supported.
Judicial well-being may be described as a continuous process enabling judges to thrive across all aspects of their lives, including occupational, physical, social, cognitive, emotional, and spiritual, which are universally recognised well-being domains. Judicial well-being is essential for individual judges' occupational health and sustainability, for court users' experience in court, for the quality of justice and ultimately for public confidence in the courts. As such, judicial well-being warrants attention and investment commensurate with other institutional priorities, such as access to justice, the upholding of judicial values, judicial training and judicial efficiency.

2. Judicial stress is not a weakness and must not be stigmatised.
Judicial stress may be described as the subjectively negative psychological, physiological and/or behavioural responses a judge may have to the demands of judicial work. Judicial work is increasingly demanding, and stress is a natural human response. The historical stigmatisation of stress in legal and judicial culture compounds inherent work challenges with isolation and shame, and is a major barrier to help-seeking and recovery. Judicial leaders have a particular role in promoting healthy cultural messages about judicial stress and well-being.

3. Judicial well-being is a responsibility of individual judges and judicial institutions.
Judicial well-being is a shared responsibility, requiring action on the part of both individual judges and the judicial institutions. Individual judges must take active steps to maintain their well-being. Courts, including the judicial leadership and court management, must create working conditions conducive to judicial well-being.

4. Judicial well-being is supported by an ethical and inclusive judicial culture.
Collegial connection is a key predictor of judicial well-being. All judges should have an equal opportunity to experience well-being in their work. The court environment and

culture must demonstrate zero tolerance for corruption, discrimination, harassment, bullying and other negative behaviours.

5. Promoting judicial well-being requires a combination of awareness-raising, prevention, and management activities.

Judicial leadership and judicial institutions must commit to promote judicial wellbeing. A systemic approach to judicial well-being must be holistic, involving activities that promote judicial well-being and capitalise on available sources of judicial job satisfaction. This approach should raise awareness of judicial well-being and judicial stress, prevent avoidable sources of judicial stress, and help manage the inherent demands of judicial work. Where possible, initiatives and interventions should be evidence-based and continuously assessed and evaluated. Judicial well-being is never 'done'- it must always remain on the agenda.

6. Judicial well-being initiatives must suit the unique circumstances and requirements of national jurisdictions.

The drivers of judicial stress and well-being are strongly shaped by local contextual factors that vary from jurisdiction to jurisdiction, including economic, social, cultural, political, religious, and environmental influences, as well as crisis situations. To be effective, initiatives and activities to enhance judicial well-being must be responsive to relevant contextual factors and cater to the requirements of national jurisdictions.

7. Judicial well-being is enhanced by human rights.

As stated in the Bangalore Principles of Judicial Conduct, judges are entitled to fundamental rights of freedom of expression, belief, association, and assembly, subject to their duty to preserve the dignity of their judicial office and uphold the impartiality, integrity and independence of the judiciary. This balance is vital to maintain both judicial well-being of individual judges and the integrity of the judicial system as a whole.

A Last Thought

[63] Notionally, independence consists of both subjective and institutional (or structural) independence. As was pointed out in *Sonke*, "this distinction has been most clearly expressed in relation to the independence of individual judges and the independence of the courts as institutions". In that regard, this Court

cited *Van Rooyen*, where it had highlighted the distinction between individual and institutional independence. It was described thus in *Van Rooyen*:

"This requires judicial officers to act independently and impartially in dealing with cases that come before them, and at an institutional level it requires structures to protect courts and judicial officers against external interference."

[64] In *Van Rooyen* this Court relied on the minority judgment of O'Regan J in *De Lange*, who cited the following passage from *Valente* with approval:

"It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge, as reflected in such matters as security of tenure, and the institutional independence of the court or tribunal over which he or she presides, as reflected in its institutional or administrative relationships to the Executive and Legislative branches of government. . . . . The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he or she presides is not independent of the other branches of government, in what is essential to its function, he or she cannot be said to be an independent tribunal."

[65] This Court in *McBride* acknowledged the challenge of "attempt[ing] to define the precise contours of a concept as elastic as [independence]". Subjective independence is generally understood to entail an impartial state of mind. In this matter, we are primarily concerned with institutional independence. The test for institutional independence is objective – whether a court "from the objective standpoint of a reasonable and informed person, will be perceived as enjoying the essential conditions of independence".

[66] Institutional independence has to do with the way in which the institution is structured. This Court has pointed out that institutional and operational independence are often discussed alongside each other as they are closely linked. In *Glenister II*, this Court noted that the question is not whether an institution has "absolute or complete independence", but whether it enjoys "sufficient structural and operational autonomy so as to shield it from undue political influence". Testing the independence of a structure does not require actual evidence of violations or undue influence – the real possibility of it occurring is sufficient.

Per Majiedt J in *O'Brien N.O. v Minister of Defence and Military Veterans and Others* (CCT 14/23) [2024] ZACC 30 (20 December 2024)