e-MANTSHI

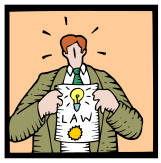
A KZNJETCOM Newsletter

February 2025: Issue 215

Welcome to the two hundredth and fifteenth 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 South African Law Reform Commission, in collaboration with the Department of Justice, has reviewed South Africa's bail regime; the review of the arrest regime; non-trial resolutions; Appropriate (Alternative) Dispute Resolution in Criminal Matters; as part of the review of the criminal justice system in general and the overhaul of the Criminal Procedure Act 51 of 1977. To this end, it has published discussion papers containing its preliminary findings and proposals for law reform in this regard. Comments are invited until 31 March 2025 to the South African Law Reform Commission. The discussion papers can be accessed here:

https://www.justice.gov.za/salrc/dpapers.htm

Recent Court Cases

1. Ngcobo v S (115/2024) [2025] ZASCA 12 (12 February 2025)

Evidence – *Single witness* – Trial court erroneously found corroboration for evidence of witness in photographic evidence – Failed to appreciate material contradictions in his evidence – Wrongly rejected appellant's alibi – Magistrate refused to allow appellant's attorney to present witness statements – Descended into arena at critical stage of the trial, where she should have allowed prosecutor to prove State's case – Several irregularities rendered trial unfair – Appeal upheld.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2025/12.html

2. S v Mtshali (R41/2025) [2025] ZAKZPHC 16 (21 February 2025)

On Review the court found that there is an incongruence between the amount of a fine and the alternative period of detention – Too harsh when compared with quantum of fine imposed – Aggressive attitude manifested by additional magistrate during proceedings – Derogatory and insulting remarks towards accused – Undermined dignity of court and accused – Declaration as unfit to possess firearm unjustified – Conviction confirmed – Sentence replaced – Criminal Procedure Act 51 of 1977, s 112(1)(a).

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAKZPHC/2025/16.html

From The Legal Journals

Le Roux-Bouwer, J

Premeditated Murder and Private Defence: From Life Imprisonment to Acquittal, *Khan v S* (A89/2023) [2024] ZAGPPHC 190 (15 February 2024)

Speculum Juris Volume 38 Issue 2 of 2024 528

Abstract
On 15 February 2024, the High Court of South Africa set aside two murder convictions and a sentence of life imprisonment, thereby acquitting an accused who was convicted on the charge of premeditated murder in the trial court. The sentence was passed in accordance with section 51 of the Criminal Law Amendment Act 105 of 1997, read with Part I of Schedule 2 of the Act after no substantial and compelling circumstances were found that justified the imposition of a lesser sentence. The High Court found that the appellant acted in private defence which led to his total acquittal. In passing this judgment the full bench of the High Court was afforded the opportunity to adjudicate on the proper interpretation of premeditated murder, the application of section 51 of the Criminal Law Amendment Act 105 of 1997 and the proof of the defence of private defence. The decision in Khan v S (A89/2023) [2024] ZAGPPHC 190 (15 February 2024) thus demands critical academic analysis.

This article can be accessed here:
https://specjuris.ufh.ac.za/sj/38/SJ2024-002%20PUBV%20Jolandi%20Le%20Roux-Bouwer.pdf

Carney, T R

Forfeiture to the State: Using Grammar to Interpret Section 35 of the Criminal Procedure Act.

PER / PELJ 2025 (28)

Abstract
Section 35(1)(a)of South Africa's Criminal Procedure Act51 of 1977 allows a court of law to declare items forfeited to the state if they were used as weapons or instruments in aid of committing an offence. However, it is not always clear what qualifies as

potential instruments of crime or what the proximity ofthe instrument is to the offence. For the purpose of statutory interpretation, this contribution identifies a grammatical construction frequently present in abstractions of offence descriptions as a means to identify an instrument and its direct involvement in an offence. It takes the form of the construction, "X does Y to Z with A", which contains the instrument prepositional phrase "with A". Read with other thematic roles like "Agent" and "Patient", the statutory interpreter should be able to determine both the relevant instrument role and its potential to affect a change in the object of a sentence, suggesting direct involvement. To better understand the grammar, this contribution modestly explains the Cognitive Linguistic approach to argument structure and thematic roles and briefly summarises Ronald Langacker's "action chain" model. The grammatical construction is then applied to examples taken from South African and Dutch case law dealing with forfeiture to illustrate its potential as a tool for interpretation.

The article can be accessed here:
https://perjournal.co.za/article/view/19242/23529

Nortje, W

Decolonising the South African Criminal Procedure: Towards a Critical Approach to the Use of Ubuntu in Sentencing.

***Potchefstroom Electronic Law Journal*, *27*, (Published on 11 December 2024) pp 1-35.**

Abstract
South African Criminal Procedure has colonial roots which are yet to be fully uprooted. While several sections of the Criminal Procedure Act 51 of 1977 have been declared unconstitutional, much of the Act remains steeped in colonial legacies. Moreover, the minimum sentencing legislation, passed after democracy, also resembles the laws enforced by colonisers. This article challenges the colonial nature of the South African Criminal Procedure Regime and calls for its decolonisation. It proposes and endorses the use of ubuntu in sentencing proceedings to promote a culture of decolonisation. uBuntu is an African value which confronts the retributive and colonial nature of Criminal Procedure. The article builds on the current literature on decolonisation in South African law by focussing specifically on the decolonisation of Criminal Procedure and on how ubuntu can be adopted to assist in the process. While the Constitutional Court in Makwanyane 1995 3 SA 391 (CC) was praised for its interpretation of ubuntu in the abolition of the death penalty, subsequent criminal courts have been loath to apply it. This needs to change. The article is presented in four parts. Firstly, it looks at the concepts of colonisation, decolonisation and ubuntu. It then examines the historical colonial roots of sentencing in South Africa from 1652 up until the enactment of the Criminal Procedure Act, the current regime. Thirdly it analyses

how ubuntu can be utilised and applied by presiding officers during sentencing. The study concludes by making several recommendations.

This article can be accessed here:
https://perjournal.co.za/article/view/17751

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

Contributions from the Law School

A comment on 'Some remarks on sentencing theory…'

Introduction

Professor Shannon Hoctor (gently) took issue with some of my views on sentencing theory (see Hoctor 'Some remarks on sentencing theory and its application in the retributive context' (Sep 2024) *e-Mantshi* Issue 211); in the same comment, he criticised the Constitutional Court for some of the views expressed in this connection, in *S v Makwanyane* 1995 (2) SACR 1 (CC). These comments are worthy of some response, and this is my response.

Hoctor observed that, 'Doubts have been expressed about the extent to which the theories of punishment play a meaningful role in sentencing… [and that Terblanche is] by no means convinced of the usefulness of these considerations'. This observation involves two issues, which in my view are separate ones. This first matter is the *theories of punishment* and their role at sentencing. The second issue relates to a conclusion I reached (in Terblanche 'How important are the purposes of punishment for the practice of sentencing?' in Schwikkard & Hoctor (eds) *A Reasonable Man – Essays in Honour of Jonathan Burchell* (2019) 270 at 286), that 'these considerations' are of debatable usefulness.

This comment explains why, in my view, the theories of punishment have no role to play in the process of sentencing. It also provides a summary of my views regarding the utility of the purposes of punishment in determining an appropriate sentence.

The meaning of 'theory'

In his comment, Hoctor does not distinguish between theories of punishment and purposes of punishment. His discussion is focused on retribution, which is described variously as a theory, an aspect, a concept, an idea, an approach, an object, a goal,

an argument, and a purpose. However, he observed in brackets that 'the term "purposes of punishment" is used as synonymous with "theories of punishment" in a number of judgments: *S v Makwanyane* 1995 (2) SACR 1 (CC) at [242]; *S v Swarts* 2018 JDR 2010 (WCC) at [8]; *S v Mosikili* 2019 (1) SACR 705 (GP) at [16]'. More about this follows below.

To clear up potential confusion, it is important to consider the ordinary meaning of the word 'theory'. There are two main meanings, according to the *Oxford South African Concise Dictionary* 2nd ed (2010):

'**1** a supposition or a system of ideas intended to explain something, especially one based on general principles independent of the thing to be explained. ▸ an idea accounting for or justifying something.

2 a set of principles on which an activity is based.'

The only reasonable meaning that can be attributed to the word 'theory' in the phrase 'theories of punishment' is the *first* dictionary meaning, namely that it is a set of ideas that *explain* something else. In the current context, the something else that needs explanation is why the state is *justified* to inflict intentional harm on its subjects, through punishment. In other words, theories of punishment explain why punishment by the state is justified. Broadly, the main theories that explain such punishment are the retributive theory and the utilitarian theory or theories; as Hoctor explains himself (at 6, emphasis added), retributive 'theory, simply put, says: punishment is *justified* because' the wrongdoer deserves it (in essence). At their roots, these theories of punishment not only justify punishment, but they justify the existence of criminal law. Therefore, most works on criminal law include a discussion of the 'theories of punishment', not only in South Africa (cf Hoctor *Snyman's Criminal Law* 7ed (2020) 10-13; Burchell *Principles of Criminal Law* 3ed (2005) 69ff), but also internationally.

Notably, in the phrase 'theories of punishment' the word 'sentencing' cannot be used as a substitute for 'punishment': no-one discusses 'theories of sentencing'.

The word theory, in accordance with the *second* meaning, can be connected with *sentencing*. When this is done, 'sentencing theory' explains the 'set of principles on which [sentencing] is based'. In other words, a discussion of the general principles of sentencing is the same as a discussion of 'sentencing theory'. In this use, the words 'sentencing' and 'punishment' *can* be used interchangeably.

In South African law it is rare to find references to 'sentencing theory' (or theories): there is not a single reference to it in the SA Criminal Law Report series (hereafter referred to as 'SACR'), apart from a single reference in *S v Mhlakaza* 1997(1) SACR 515 at 519*f-g* to a book by Walker & Padfield (*Sentencing Theory, Law and Practice* (1996); see also *S v Ndaba* 2019 JDR 0082 (FB) at para [16]; *S v Mazibuko* 2004 JDR 0081 (T)). However, the use of 'sentencing theory' is common in international books on sentencing. As a case in point, one can refer to Petersilia & Reitz (eds) *The Oxford Handbook of Sentencing and Corrections* (2012). In this work, the discussion on sentencing is broadly divided into two sections, the first headed 'Sentencing Theories and Their Application' (pp 131 – 243) and the second headed 'Sentencing Systems' (pp 245 – 335). The theories discussed include chapters on proportionality and desert (by Frase); deterrence 'through sentence severity' (by Webster & Doob); risk

assessment, largely to determine dangerousness (by Slobogin); and restorative justice (by Sherman & Strang). These chapters all discuss various sentencing principles and why they are important, or why they fail, and so on; but there is no attempt to explain or justify the need for a criminal justice system—in other words, there is no discussion of the theories of punishment.

Since there is no reference to 'sentencing theory' in the SACR, there is nothing more to discuss in this connection. However, what is the position regarding 'theories of punishment'?

Case law referring to 'theories of punishment'

There are seven references in reported judgments in SACR to the 'theories of punishment'. These seven cases are noted below, roughly in increasing order of value to the current discussion:

- The court in *NL v Frankel* 2017 (2) SACR 257 (GJ) declared s 18 of the Criminal Procedure Act 51 of 1977 unconstitutional, to the extent that it permitted the prescription of sexual offences. One of the arguments advanced by one of the successful litigants is rendered as follows in the judgment (at para [58]): '...(the LHR) submits that the distinction between sexual offences effected by s 18 of the CPA does not accord with the *theory of punishment* as a principle of criminal law and that it serves to irrationally immunise certain sexual offenders against the interests of a society.' While we learn little about the issue at hand here, it shows that theories of punishment are closely connected to criminal law.
- In *S v M* 1997 (1) SACR 276 (W) at 277*e* the court quoted from Snyman (*Criminal Law* 3 ed at p 280) that attempt is usually punished less severely than completed crime because, 'from the viewpoint of the retributive *theory of punishment*', less or no harm is caused by the attempt. Since the quote comes from a work on criminal law and not the law of sentencing, this use of 'theory of punishment' can be excused.
- In *S v Mosikili* 2019 (1) SACR 705 (GP) at para [16] the court observed: 'Furthermore, in deciding what would be a just and justifiable sentence, I do not believe that imprisonment is the only appropriate punishment in the circumstances, and consider that all four *theories of punishment* are adequately met by a sentence of correctional supervision…'. What could these 'four theories of punishment' be, because, as noted above, there are mainly two such theories? In one of the more thorough local expositions of the topic Rabie et al *Rabie & Strauss: Punishment: An Introduction to Principles* 5th ed (1994) 19 explain that there 'are a number of theories of punishment, but in principle they belong to one of two groups, i.e. the absolute theory of retribution or the relative theories of prevention, or to a combination of these theories'. The relative theories include deterrence, incapacitation and rehabilitation. But to these 'theories' one could add other related concepts, such as individual versus general prevention, the theory of social defence, and the integrative theories (op cit 20 – 53). These do not add up to 'four theories'. Rabie & Strauss 57 explain

that 'the theories of punishment have been developed to *justify* punishment, [but they] have also been commonly applied when questions relating to the *purpose* of punishment are discussed' (emphasis added). And in South Africa, it is widely accepted that there are four purposes of punishment (see below). It is highly likely, therefore, that the court in *Mosikili* had in mind to state that the four *purposes* of punishment were met, in this case, by correctional supervision. Given the fact that the same things that developed as 'theories of punishment' has also come to be accepted as 'purposes' of punishment, it is remarkable that this kind of confusion has only happened once in 34 years of the existence of the SACR.

- Two judgments quoted a substantial portion of the judgment in *R v Swanepoel* 1945 AD 444. These two judgments are *S v Opperman* 1997 (1) SACR 285 (W) at 290*e*-291*f* and *S v Nkambule* 1993 (1) SACR 136 (A) at 145*i-j*. The relevant part of *Swanepoel* (at 454-455) reads as follows: 'In case it be objected that since these authors wrote, the *theory of punishment* has changed, I may cite Salmond *Jurisprudence* (3rd ed) s 28. He says: "The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evil-doer an example and a warning to all that are like-minded with him."' The use of 'theory of punishment' in *Swanepoel* is clearly not in the sense of explaining why the state may punish an offender and would have been more accurately expressed as punishment or sentencing theory.
- There is one reference to 'theories of punishment' in *S v Makwanyane* 1995 (2) SACR 1 (CC) at para [242], where Madala J wrote as follows:

'One of the relative theories of punishment (the so-called purposive theories) is the reformative theory, which considers punishment to be a means to an end, and not an end in itself - that end being the reformation of the criminal as a person, so that the person may, at a certain stage, become a normal law-abiding and useful member of the community once again. The person and the personality of the offender are the point of focus rather than the crime, although the crime is, however, not forgotten. And in terms of this theory of punishment and as a necessary consequence of its application, the offender has to be imprisoned for a long period for the purpose of rehabilitation. By treatment and training the offender is rehabilitated or, at the very least, ceases to be a danger to society.'

It must be mentioned that, as a 'theory of punishment', the reformative theory has been completely discredited. It used to be influential, mainly in the United States of America, where it was dominant in the form of indeterminate sentencing, leaving the decision to release reformed prisoners in the hands of parole boards. But, as condensed by Tonry (M Tonry *Sentencing Fragments* (2016) at 42): 'Indeterminate sentencing … imploded

in the 1970s'. It was largely replaced by a just deserts model – this is trite in international sentencing scholarship.

- The judgment in *S v Mafu* 1992 (2) SACR 494 (A) is one written by Harms AJA, which shows a deeper understanding of the history of the theories of punishment (see SS Terblanche 'Judgments on sentencing: Leaving a lasting legacy' (2013) 76 *THRHR* 95-106). It is useful to quote a whole section of this judgment, because it shows the connection between theories and purposes of punishment (at 497*b*-*e*): 'The next aspect on which I wish to express some views relate to the question of retribution. I do endorse the proposition underlying the learned Judge's finding that where a crime is as horrendous as the present and is *malum per se*, the only moral justification for the sentence can be retribution. The other so-called "theories" or "aims" of punishment may have little, if any, role to play. (See in general on the question of the concept of "theories" of punishment: Rabie and Strauss *Punishment, An Introduction to Principles* 4th ed at 18 and on its "aims": *Alf Ross (op cit* at 60-5).) … Accepting, as I do, that retribution must in this case justify the nature of the sentence, it may be useful to recall that retribution in this context means requital for evil done (*The Concise Oxford English Dictionary* (1990) *sv* "retribution"; Stockdale and Devlin *Sentencing* at 23), or, in the terminology of Du Toit *Straf in Suid-Afrika* at 102-5, "vergelding in verhewe sin". And although there must be a certain proportionality between punishment and the crime, that does not "imply that the punishment be equal in kind to the harm that the offender has caused" (*Rabie and Strauss (op cit* at 21))'.

Conclusion

The only conclusion that can be reached from this overview of case law is that, if anything, 'the theories of punishment explain why punishment by the state is justified', and that this is a philosophical question that does not concern our courts when they perform the task of sentencing a convicted offender. To get back to Hoctor's observation that, 'Doubts have been expressed about the extent to which the theories of punishment play a meaningful role in sentencing…', it should be clear that I, for one, do not doubt whether the theories of punishment play a meaningful role in the process of sentencing or in determining an appropriate sentence—*they simply do not*. If anything needs to be added to this conviction, I find it unimaginable that a concept that only reached the reported criminal justice law reports seven times in the past 34 years could be said to have 'a meaningful role' at sentencing.

This conclusion does not mean that the law, specifically criminal law, should not concern itself with the theories of punishment. This is a different question to the question whether the theories should concern a court when imposing sentence, and I return to it briefly below. First, the purposes of punishment need to be attended to.

Why are the purposes of punishment of doubtful usefulness?

In short, the reasons why I am 'by no means convinced of the usefulness of' the purposes of punishment as a consideration in the process of determining a sentence, are the following:

- The general principles of sentencing (or 'sentencing theory') require a court to consider 'the triad consisting of the crime, the offender and the interest of society' (*S v Zinn* 1969 (2) SA 537 (A) at 540G).
- The forward-looking aims of punishment, being deterrence, rehabilitation and incapacitation (or prevention) promises objectives which punishment is unlikely to deliver; and 'there is nothing to gain from promising what cannot be delivered' (*Essays in Honour of Jonathan Burchell* op cit 282; the reasons cannot be repeated here).
- Retribution, being backward-looking, cannot really be an 'aim' or 'purpose' of punishment, because words like 'aim' or 'object' are essentially forward-looking. However, retribution can be equated to ideas such as an expression of society's denunciation of the crime, or an offender receiving his just deserts, or a sentence in proportion to the gravity of the offence being imposed: all these considerations should be part of assessing the seriousness of the crime, as the first element of *Zinn*'s triad (cf SS Terblanche *A guide to sentencing in South Africa* 3ed (2016) at 181–186).
- Research indicates that there are better purposes of punishment to pursue (see below).

Is it problematic if courts do not make use of the theories or the purposes of punishment?

In his note, Hoctor makes two points explaining why theory is important in connection with sentencing. These are, firstly, that 'there is a general acceptance of the need of courts to consider and make reference to theoretical sentencing considerations in handing down sentence, both in South Africa, and in other jurisdictions'. I fully agree, as long as 'theoretical sentencing considerations' are understood as 'sentencing theory' or 'the general principles of sentencing'. This is achieved when a court refers, in its sentencing judgment, to principles such as the triad of *Zinn* (supra) and the various mitigating and aggravating circumstances, and constitutional principles such as consistency and proportionality, or legislative principles from the Criminal Procedure Act 51 of 1977, the minimum sentences legislation, the Child Justice Act 75 of 2008, and so on.

Hoctor's second important point is that there 'is a constitutional and moral obligation to have a sound basis – a defensible reason – for inflicting punishment', which 'can be supplied by the theories of punishment'. To this statement I can only agree, as long as 'theories of punishment' is understood in this sense: as a 'defensible reason' for 'inflicting punishment'. It should be noted, however, that in South Africa there is very little concern about this issue: it is simply generally accepted that the courts, as judicial arm of the state, *are* fully entitled to inflict punishment on offenders for their offences.

In Makwanyane (supra) the Constitutional Court conducted as wide a judicial investigation into the constitutional and moral issues surrounding criminal punishment by the courts as has been undertaken in South Africa. Far from casting any criticism on criminal punishment, from a moral and constitutional point of view, the Court only managed to find that the state lacked this justification in the case of the death sentence; for other sentences it was simply assumed.

However, there is another reason why purposes of punishment (or aims or objects of punishment) are important. Many have argued that, if there is no purpose to a sentence, that sentence is effectively purposeless. If our courts would just adopt the recommendations of the South African Law Commission, which followed its investigation into sentencing in 2000, more achievable purposes of punishment can become part of sentencing practise today. These recommendations have been phrased as follows (SA Law Commission *Report: Sentencing (A new sentencing framework*) Project 82 (2000) at para 3.1.12):

'Subject to the principle of proportionality… sentences must seek to offer the optimal combination of … (a) restoring the rights of victims of the offence; (b) protecting society against the offender; and (c) giving the offender the opportunity for a crime-free life in future.'

As proven in the Report, these purposes of punishment have been shown to conform to international best practices. Furthermore, the idea that courts seek an 'optimal combination' of punishment aims is vastly better than the vague situation we have at present, where courts usually list four purposes of punishment; these purposes are divergent and need very different conditions to succeed; and our law provides no useful explanation how these purposes should be balanced against each other.

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Matters of Interest to Magistrates

Section 23 of the Children's Act – assignment of contact and care to interested person by order of court

Section 23 of the Children's Act 38 of 2005 provides for the:

'Assignment of contact and care to interested person by order of court –

(1) Any person having an interest in the care, well-being or development of a child may apply to the High Court, a divorce court in divorce matters or the children's court for an order granting to the applicant, on such conditions as the court may deem necessary –
(*a*) contact with the child; or
(*b*) care of the child.
(2) When considering an application contemplated in subsection (1), the court must take into account –
(*a*) the best interests of the child;
(*b*) the relationship between the applicant and the child, and any other relevant person and the child;
(*c*) the degree of commitment that the applicant has shown towards the child;
(*d*) the extent to which the applicant has contributed towards expenses in connection with the birth and maintenance of the child; and
(*e*) any other fact that should, in the opinion of the court, be taken into account.
(3) If in the course of the court proceedings it is brought to the attention of the court that an application for the adoption of the child has been made by another applicant, the court –
(*a*) must request a family advocate, social worker or psychologist to furnish it with a report and recommendations as to what is in the best interests of the child; and
(*b*) may suspend the first-mentioned application on any conditions it may determine.
(4) The granting of care or contact to a person in terms of this section does not affect the parental responsibilities and rights that any other person may have in respect of the same child.'

Sections 23 and 24 cover the court-mandated assignment of caregiving, contact, and guardianship, while s 27 addresses parents assigning care and guardianship to another person who will take on those responsibilities for their child following the parent's death (see s 1(1) for the definitions of 'care', 'contact' and 'guardianship'; see also s 1(2)). These provisions are applicable to all children, regardless of whether their parents are married or not.

Section 23(1) allows any person with a stake in the child's care, welfare, or development to petition the High Court, a regional court handling divorce cases, or the children's court for an order granting them contact with or custody of the child (see s 1(1) for the definition of 'High Court', 'divorce court' and 'children's court'. The divorce courts became courts of the regional divisions of the magistrates' courts in 2010).

According to s 29(1), jurisdiction lies with the court located in the area where the child usually resides.

People who may take an interest in a child's care, welfare, or growth include the child's unmarried father, who has no parental responsibilities or rights according to ss 21 or 22, the grandparents of the child, and the partner of a parent.

In the case *FS v JJ and Another* 2011 (3) SA 126 (SCA), the court held that s 23 allows it to grant contact rights to grandparents. However, it exercised its authority as the upper guardian to rule in favour of the grandparents, as the judgment did not show that they had filed an application under s 23.

In *LH and Another v LA* 2012 (6) SA 41 (ECG), the court granted visitation rights to the grandparents under s 23.

In *CM v NG* 2012 (4) SA 452 (WCC), it was determined that the applicant could be granted either contact, care, or a combination of both under s 23(1). If the court assigns contact or care to a person, it may impose any conditions it deems necessary (s 23(1)). Section 23(2) outlines the criteria that the court must consider when evaluating requests for the assignment of contact or care. These criteria are similar to those found in the now repealed Natural Fathers of Children Born out of Wedlock Act 86 of 1997 concerning an unmarried father's application for guardianship, custody, and/or access (s 313, read with sch 4, of the Children's Act repeals the Natural Fathers of Children Born out of Wedlock Act in its entirety).

Section 23(3) addresses cases where multiple applicants seek assignment of contact or care as well as an adoption order. In these situations, the court considering the application for contact or care must obtain a report and recommendations regarding the best interests of the child (s 23(3)(*a*). On the best interests of the child, see in addition ss 6, 7 and 9). A family advocate, social worker, or psychologist must provide the report and recommendations (s 23(3)(*a*). See s 1(1) for the definition of 'family advocate'). In addition to asking for the report and recommendations, the court might decide to temporarily suspend the request for assignment of contact or care (s 23(3)(*b*)).

Section 23(4) clarifies that when the court grants contact or care to the applicant under section 23, it does not impact another person's existing parental responsibilities and rights concerning the child. For instance, an unmarried mother retains her parental responsibilities and rights, even if the court grants care or contact to the child's unmarried father. However, s 28(2) allows for the combination of an s 23 application with a request to terminate, extend, suspend, or limit parental responsibilities and rights. Therefore, the unmarried father could request the court to suspend the mother's care responsibilities and rights under s 28 and assign them to himself under s 23.

Conclusion

Under South African law, grandparents lack an automatic legal entitlement to visit their grandchildren. If a paternal grandmother wishes to establish contact, she must petition the court according to s 23 of the Children's Act, highlighting her concern for the child's welfare. The court's decision will mainly focus on the child's best interests, considering factors such as the relationship between the grandmother and the child, the child's needs, and family dynamics.

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(This article was first published in *De Rebus* in 2025 (March) *DR* 16).

A Last Thought

The judiciary in 2025: A watershed moment in a watershed year

In many ways, 2025 is a watershed year for the judiciary. Several of the reforms initiated in previous years are meant to start bearing fruit. At the same time, there are major reforms that are yet to get going, without which the judiciary's independence and effectiveness hang in the balance.

Judges behaving badly

The year 2025 started off dramatically. For two weeks in January, the South African public was fixated on the graphic, harrowing testimony and cross-examination of Ms Andiswa Mengo, a judges' secretary who has filed a judicial misconduct complaint against Eastern Cape High Court Judge President Selby Mbenenge, accusing him of sexual harassment.

It is the first time in SA history that a judicial conduct tribunal is investigating sexual harassment allegations against a judge. For many, it was unbelievable to hear such allegations against a senior judge. While the Tribunal is only partly through its work, there are already calls for reforms into how complaints of this nature are investigated, including how complainants are cross-examined.

At her interview for Chief Justice in 2022, now Chief Justice Mandisa Maya undertook to develop a comprehensive policy to deal with sexual harassment in the judiciary. A draft version of this was released by retired Chief Justice Raymond Zondo shortly before his departure. Organisations like Judges Matter have already pointed out flaws in this policy, calling for its revision. This revision process is already underway, led by CJ Maya. While it will not apply to the Mbenenge Tribunal when it resumes in May, the policy will be important for future cases, and the pressure for its implementation will be overwhelming.

In the meantime, yet another judge faces impeachment. In January, the Judicial Conduct Tribunal found Gauteng High Court Judge Nana Makhubele guilty of gross misconduct for simultaneously holding the position of a judge and chairperson of a state rail agency PRASA, which is unlawful. Additionally, the tribunal found her involvement at PRASA, including settling legal claims in favour of a company accused of state capture-related corruption, was incompatible with judicial office.

The Makhubele Tribunal report now goes to the Judicial Service Commission (JSC) (sitting without members of Parliament) to decide her fate. If the JSC confirms the guilty finding, it may recommend her impeachment and removal from office.

Later in February, Western Cape High Court Judge Mushtak Parker is also facing a judicial conduct tribunal. The Cape Bar Council accuses him (and his former law firm partners) of failing to account for millions of rands in client money deposited into their trust accounts. Alongside this, the tribunal will also investigate a complaint filed by 10 fellow Western Cape judges who accuse Parker of lying under oath regarding an incident where former Judge President Hlophe allegedly assaulted him. The tribunal was meant to get underway in 2021 but was delayed by the judge's illness. The JSC is under pressure to finalise the matter, one way or another. The judge has been on suspension with full pay of nearly R2 million a year since 2020.

Gauteng High Court Judge Tshifhiwa Maumela – famously known for presiding over the Senzo Meyiwa murder trial – is also on suspension while his Judicial Conduct Tribunal is paused due to illness. He is accused of taking too long to deliver his judgments, in breach of the Norms of Standards for judges.

While it may raise eyebrows that so many judges are undergoing disciplinary proceedings, it is no cause for alarm. For a long time, the disciplinary system had not been working as it should and was paralysed by litigation (especially involving impeached judges Hlophe and Motata). Now that litigation has been resolved, the system is kicking into gear and working as it should. We expect there to be fewer cases going to tribunals in the future.

Nevertheless, there are structural issues hobbling the system to hold judges accountable. They need the collective attention of the Chief Justice, the Minister of Justice and Parliament.

1. The current process is too convoluted, and the legislation governing judicial misconduct (the JSC Act) needs amending to streamline the process and make it efficient.
2. The entire system needs to be properly resourced to bring in retired judges to speedily adjudicate complaints and a team of dedicated administrative staff (currently, two secretaries and an intern run the whole process).
3. The process needs to be transparent. It is an anomaly that judges preside over cases in open court daily, yet misconduct complaints against them are only open by special permission. The legislation should be amended to ensure that open justice is the default. The JSC should also regularly report to Parliament on the progress of complaints, as required by law.

These three simple steps would go a long way to fortifying the system that upholds judicial ethics and integrity.

Resourcing the Judiciary

On the sidelines of the State of the Nation Address, Chief Justice Mandisa Maya convened an extraordinary meeting between the Ministers of Finance and Justice to plead the case for additional resources to the judiciary. There is a

nationwide shortage of judges across all courts, with a crisis at the Gauteng High Court, where the earliest trial dates are only available in 2030! There is therefore an urgent need to properly resource the judiciary in line with our growing population and complexity of the economy. As an interim measure, the National Treasury needs to immediately allocate funds for the appointment of acting judges to deal with the backlogs. This should be until more funding is found for the appointment of additional judges. The crisis of a shortage of judges is denying hundreds of thousands of people justice and is harming economy and the rule of law.

Governing the judiciary

Closely linked to resources is the question of who has the final say over the governance of the judiciary. The 2023 Judges Conference called for judges themselves to have a greater say in the judiciary's budgets, administrative support systems, and operations of court buildings. They also want magistrates' courts to be fully aligned with the superior courts in what is being called the '*single judiciary'*. Shortly after the 2024 election, both Parliament's justice committee and the Minister of Justice publicly supported this move, but not much progress has been made since. It therefore falls on Chief Justice Maya and the judiciary's leadership collective to drive this initiative in 2025.

Fixing the Constitutional Court

In a 2022 research paper UCT Law researchers Nurina Ally and Leo Boonzaier note a decade-long (2010 – 2021) decline in the Constitutional Court's performance. Appeals are taking longer to be processed, judgments are taking longer to be delivered, and the Court's administrative systems are in disarray. In addition, there has been criticism of the Court's inconsistent jurisprudence in key areas of private law, commercial law, and competition law.

Various factors are attributed to the decline, but the fact that since 2016 the Court has operated without a full complement of permanent justices must be chief among them.

President Ramaphosa needs to urgently nominate the Deputy Chief Justice

President Ramaphosa needs to urgently nominate the Deputy Chief Justice. Chief Justice Maya needs to take proactive steps to invite the brightest judges, with the potential to contribute significantly to the Court's jurisprudence, to apply for permanent appointment. This will also require her to lead the JSC on this laser-focused mission to fill the two remaining vacancies, including one that will arise when current Acting Deputy Chief Justice Mbuyiseli Madlanga retires in July.

Fixing the JSC

Speaking of the JSC, the 2024 elections ushered a fresh crop of MPs who seem to be serious about their jobs on the constitutional body – if the October 2024 interviews are anything to go by. However, a new crisis has arisen in the JSC's failure to attract sufficient quality candidates to appoint as judges. The JSC has twice abandoned interviews for the Constitutional Court, and several high court vacancies were left unfilled in October 2024. This might be due to the legal profession's lack of confidence that the JSC takes its job seriously and will treat aspirant judges with fairness and

dignity. The October 2024 session was therefore a welcome improvement, marked by rigorous questioning and respectful engagement. We hope this will be built upon. The JSC needs to adopt a written code of conduct to set high ethical standards for its current and future members, with the option of recall for members who fail to adhere to it. The current case regarding Dr John Hlophe's membership of the JSC will no doubt provide useful guidance on the quality of JSC members required, but the reforms to the JSC need to already be in motion.

And now, the good news

It's not all gloom and doom, and there's some good news instore.

- In April, the South African judiciary will host the biennial conference of the International Association of Women Judges in Cape Town – the first time on African soil.
- In July, the Constitutional Court will celebrate its 30th anniversary with a conference and art exhibition.
- Later in the year, and alongside South Africa's hosting of the G20 Summit, Chief Justice Maya will host the J20 – a summit of heads of supreme courts and constitutional courts of G20 members to discuss issues of global concern, including the judiciary's response to the climate crisis and the impact of artificial intelligence.

The year 2025 presents a mixed bag of prospects for the South African judiciary. It will require dedicated leadership from Chief Justice Maya, working alongside the judiciary's leadership collective but also with the support of the President, the Minister and Parliament. Six months into the job, the Chief Justice seems to be making positive moves. We await to see if this will yield the necessary outcomes to ensure a strong, independent, and resilient judiciary.

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