e-MANTSHI

A KZNJETCOM Newsletter

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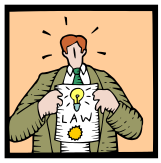
Welcome to the two hundredth and seventeenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Information Regulator (Regulator), has, in terms of section 113(4)(b) of the Protection of Personal Information Act No. 4 of 2013, published the amended Regulations Relating to the Protection of Personal Information Act, 2018 for implementation with immediate effect. The notice to this effect was published in Government Gazette no 52523 dated 17 April 2025. A copy of the amended final version of the Regulations is available on the Regulator's website at https://inforegulator.org.za/wp-content/uploads/2025/04/POPIA-2021-Regulations-FINAL-21-Jan-2025.pdf .

Recent Court Cases

1. S v Mokone (R23/2024) [2024] ZAFSHC 247 (21 August 2024)

The question is therefore whether only a regional court or a high court has the competence to hear cases which carry minimum sentences after a potential conviction. I am of the view that such a proposition cannot be correct, because the section in question only refers to the imposition of sentences, and not to the hearing of cases on their merits. I find support for this view in the unreported review judgment in The State v William Kobe (Case no 50/2023 in the Gauteng Local Division, Johannesburg, dated 16 January 2024.)

A very similar situation to the present matter presented itself in that case, except that the trial magistrate proceeded after conviction to sentence the accused to the relevant minimum sentence, which exceeded the normal penal jurisdiction of the magistrate's court. The review judges could not find any fault with the conviction, and only set aside the sentence and committed the accused for sentence by a regional court having jurisdiction.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAFSHC/2024/247.html

2. S v Matthews (Special Review) (GSH581/2023) [2024] ZAWCHC 418; 2025 (1) SACR 431 (WCC) (11 December 2024)

Magistrates are implored not to merely rubber stamp plea and sentence agreements but has to satisfy themselves not only that the sentence is just, but also that it is a competent one. This is provided for in terms of section 105A (7) (a) and (8) that states: ss (7)(a) "*If a court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement.*
And ss 8 states: "*If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor that the court is so satisfied, whereupon the court shall convict the accused of the sentence the accused in accordance with the sentence agreement."*
Prosecutors and legal representatives by the nature and functions they fulfil in a criminal trial in most cases do not have the necessary training and

experience in formulating and imposing sentencing orders, therefore there rest a duty on presiding officers to carefully scrutinise plea and sentencing agreements in order to ensure that it complies with the law.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2024/418.html

From The Legal Journals

Scott, T J

The pothole scourge as a growing threat on South African roads significantly reflected in recent case law

2025 TSAR 1

Singh, C

The National Credit Act 34 of 2005 and the requirement of 'Esigning in the physical presence of each contracting party': *Firstrand Bank Limited v Molamugae* (24558/2016) [2018] ZAGPPHC 762; *Firstrand Bank Limited v Silver Solutions* 3138 CC (8400/2022P) [2023] ZAKZPHC 26 (7 March 2023); and *Firstrand Bank Limited v Govender* (2021/25131) [2023] ZAGPJHC 610 (1 June 2023)

2024 SA Merc LJ 319

Rosenberg, W

Exposing the bureaucratic red tape of adoptions and the department's underlying prejudices *TT v Minister of Social Development* 2023 (2) SA 565 (GJ)

2025 TSAR 202

Dweba, A, Lerm, H & Gumboh, E

The Criminal Culpability of Health-Care Practitioners in SouthAfrica

1 OBITER 2025

Abstract

Health-care practitioners are not superhuman. They are fallible and prone to making mistakes that have legal consequences. Mercifully, given that medicine is not an exact science and that anything can happen during a surgical procedure or otherwise, mistakes are not a frequent occurrence. From a legal perspective, it remains a challenge to distinguish inadvertence from wilful disregard for consequences. Health-care practitioners are anxious about the perceived eagerness of the law-enforcement agencies, including the South African Police Service and National Prosecuting Authority, to attach criminal responsibility to health-care practitioners and to pursue criminal charges against them, apparently without regard to what type of mistake has been made, nor the degree of deviation from the expected standard of care. The circumstances under which health-care practitioners work are also relevant. This article argues that health-care practitioners, like other professionals such as engineers and architects, as well as members of the community such as motorists where the circumstances so warrant, are criminally accountable for their actions. However, our law, unlike other foreign jurisdictions, does not recognise degrees of negligence in determining criminal liability. As the law in South Africa currently stands, an accused is either negligent or they are not. Even the slightest degree of negligence would be sufficient for the National Prosecuting Authority to sustain a conviction on a charge of culpable homicide. This article advocates that the threshold for measuring criminal culpability is too low, and that, in order to avoid unfair and unreasonable results, it should be increased to the level of gross negligence or recklessness.To achieve this, it will be necessary to bring about law reform in South Africain cases involving all forms of professional liability, and other forms of criminal liability such as that involving motorists.The South African Law Reform Commission has recently announced that it will be investigating the matter under Project 152 Criminal Liability of Healthcare Professionals. It is expected that the Commission will call for submissions from all interested parties to assist in its investigation. It is also anticipated that the Commission will explore whether the South African legal system is ripe for a paradigm shift, adjusting the threshold for criminal liability in cases of culpable homicide. What is suggested is that South Africa should follow the legal systems of Scotland, New Zealand, India and England, which have all changed in the last few decades. The reason these legal systems have been chosen stems from the fact that they all have the same common-law heritage. The inception and initial application of the law of negligence in those countries, especially in criminal-law matters, closely resemble steps in the South African legal system. Ordinary negligence was originally the yardstick by which criminal conduct was measured and judged. Unlike South Africa's legal system, there have been distinct threads of development in the other legal systems. Because of the principles of

fairness and public interests, countries like Scotland, New Zealand, India and England have all moved away from a low threshold involving ordinary negligence, to a high threshold that includes gross negligence or recklessness.

This article can be accessed here:
https://obiter.mandela.ac.za/article/view/21828/23904

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

Contributions from the Law School

The honest belief defence in sexual offences – some thoughts

The law of sexual offences underwent some long-anticipated changes when the Criminal Law (Sexual Offences and Related Matters) Amendment Act ('SORMA') 32 of 2007 commenced almost two decades ago. A number of common-law crimes, including rape, indecent assault, incest, and bestiality were repealed and replaced by statutory offences, which were in turn supplemented by a range of other statutory offences and supporting provisions in the Act. This process brought about more inclusive provisions and categories of liability. Notably in this renewal of this part of the criminal law, the legislature continued to highlight the centrality of the notion of consent. The Act defined consent in s 1(2) as 'voluntary or uncoerced agreement', which applies to offences relating to rape, sexual assault, sexual exposure and display of child pornography, incest, and some sexual offences against children. This definition is expanded in s 1(3) to set out the following (non-exhaustive) list of involuntary or coercive circumstances, in which consent would not be present: where the sexual act is preceded by the use of force or threats, or coercive pressure, or the sexual act is induced by fraud, or where the complainant is incapable of consenting due to unconsciousness or because of being a child under 12 years, or mental disability. These circumstances do not differ from those applied to the assessment of consent for the purposes of the common-law crimes of rape and indecent assault (see Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 452-457; 471-472). Despite these changes broadening the legal protection against unlawful sexual conduct, it is accepted that the scourge of gender-based violence has continued unabated.

While critical questions remain about the effectiveness of the reporting, investigation, and prosecution of rape, in clear-cut cases of stranger rape there are no suggestions

that the definitional aspects of the offence are deficient. It is acknowledged that non-consensual sexual activity between persons who know each other presents different challenges. The concerns which arise in this context may be highlighted by cases such as *S v Coko* 2022 (1) SACR 24 (ECG), where the court set aside the rape conviction of the appellant, in circumstances where the complainant had informed the appellant on a number of occasions that she did not want to engage in vaginal intercourse, although she consented to other forms of sexual contact. The court held that it had not been proved that the appellant lacked an honest belief that when he penetrated the complainant she was consenting to the intercourse.

This judgment was central to *Embrace Project NPC v Minister of Justice and Correctional Services* 2025 (1) SACR 36 (GP), where the constitutional validity of a range of provisions in SORMA was challenged (ss 3, 4, 5, 6, 7, 8, 9 and 11A, read with s 1(2)), on the basis that
'the Act does not criminalise sexual violence where the perpetrator wrongly and unreasonably believed that the complainant consented to the conduct in question, therefore enabling the accused to successfully avoid conviction on the grounds of the subjective belief that consent was given' (para 1).

The presence of consent in the definition of sexual offences was also challenged, on the grounds that the inclusion of consent unreasonably limits individual rights to equality, dignity and to be free from violence (para 2). In the course of its judgment, the court noted the detailed and comprehensive arguments raised, along with weighty supporting evidence, by the applicants in respect of the pervasive nature and harm caused by sexual violence. As noted, the primary question for the court to determine was whether the subjective test for fault in the context of sexual offences, which does not take account of the reasonableness of the accused's belief in consent, unjustifiably violates the rights of victims/complainants, who are mostly women, to equality, dignity, privacy and freedom and security of the person (para 28). The court accepted that this was indeed so, and made an order of constitutional invalidity against the provisions in question (para 78). In respect of the challenge relating to consent forming a part of the definition of sexual offences, this was not upheld by the court, given that the inclusion of consent in the definition of the offences constituted a policy choice by the legislature (para 36).

Such a judgment, which affects not only individual provisions within the context of sexual offences, but has implications for criminal liability more broadly conceived, deserves close and thorough evaluation, particularly since there is very little discussion of subjective fault in the judgment itself. For present purposes, a few questions may be raised.

First, given that blameworthiness provides the justification for constitutionally permissible punishment, what would be the impact of doing away with a subjective honest belief defence, probably in favour of a mistake defence based on

reasonableness (as is the case in a number of other Anglo-American jurisdictions)? It may be contended that only holding the offender liable on the basis of conduct over which he or she had control and choice underlies the moral individualism of the criminal law (consistent with human dignity) that requires that for the state to intervene against an individual, in so doing significantly infringing the individual's rights, it must have good and clear licence to do so.

And indeed, in the context of sexual offences, it is clear that the courts are entirely able to work with this form of fault. It bears emphasis that the state has to prove *dolus eventualis* on the part of the accused in order to satisfy the requirements of subjective liability: subjective foresight of the possibility of harm, along with reconciliation with the risk of the harm occurring. In real terms then, in the particular context of a sexual offence requiring intentional conduct, it must be proved that the accused foresaw the possibility that his act of engaging in sexual conduct in question was unlawful, i.e. non-consensual, and that he nevertheless continued in his course of conduct. It can be accepted that in many cases the non-consensual nature of the sexual conduct will be overt, and there should be no difficulty in the court convicting the accused on this basis. However, where the facts of the case involve circumstances where there this aspect may be called into question, it may be contended that the nature of *dolus eventualis* would provide for liability where the accused, aware of the possibility that the consent of the complainant may be lacking, selfishly and egotistically continued in the face of the foreseen harm.

This is evident from the SCA judgment in *DPP Eastern Cape Makhanda v Coko* 2024 (2) SACR 113 (SCA). Since the court in *Embrace* relies heavily on the decision in *S v Coko* in demonstrating the problematic nature of the honest belief defence in rape, it is surprising that the SCA judgment is not referred to in the *Embrace*. Nevertheless, the SCA dismissed the reasoning of the High Court, which had set aside the respondent's rape conviction. In *Coko* the sexual intercourse occurred in the context of other consensual sexual conduct between the respondent and the complainant, who were involved in the type of relationship which raised the particular concern regarding consent in *Embrace*, where familiarity could give rise to perceptions of consent. The SCA unequivocally held in relation to consent that where the parties were already engaging in certain sexual acts, the 'willingness to engage in other acts should clearly be communicated…either explicitly or tacitly', before consent can be held to be present in respect of such 'other acts' (para 61).

As regards the plea by the respondent that he genuinely believed that the complainant was consenting to sexual intercourse, the SCA in *Coko* confirmed as 'beyond question' that intention was a prerequisite for a conviction, and that 'A must know that B had not consented to a penetrative sexual act' (para 62). The court further confirmed the sufficiency of *dolus eventualis*, such that liability would follow if 'A foresaw the possibility that B's free and conscious consent might be lacking, but "nevertheless continues to act [recklessly] appreciating that [he/she may be acting without her/his

consent], therefore 'gambling' as it were [with the security, bodily integrity and dignity] of the person against whom the act is directed"' (para 62). The court, applying the tenets of inferential reasoning, confirmed the respondent's guilt on the basis of *dolus eventualis*, holding that the respondent, 'in breach of his assurances to [the complainant], intentionally had penetrative sexual intercourse with her, well knowing that she had not consented thereto' (para 64).

The model of the Anglo-American jurisdictions which have resorted to a 'reasonable mistake' standard (referred to in para 69 of the *Embrace* case) is unhelpful to South African law, given that the notion of intent in these systems does not include *dolus eventualis*, which suffices for liability where the actor proceeds with his course of conduct, despite foresight of the possibility that the conduct may be unlawful. This standard of liability, established on the basis of inferential reasoning, can serve to exclude reliance on unreasonable mistake, whilst at the same time upholding the requirement that the most serious offences should be based on subjective fault, rather than the non-attainment of a standard, which is the essence of a reasonableness assessment.

This approach is entirely consistent with a constitutional standard of fault: one which appreciates the individual as a moral being capable of understanding and choosing, who is treated with respect, in that he is condemned for choosing to behave as he did, when it is clearly possible to demand and expect from him to behave otherwise (Kremnitzer 'Constitutional principles and criminal law' (1993) 27 *Israel LR* 84 at 96).

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Matters of Interest to Magistrates

Hidden bias: The indirect gender discrimination against fathers in parenting orders

South Africa's progressive legal framework, grounded in the Constitution and the Children's Act 38 of 2005, advocates for gender equality and the best interests of the child in all matters concerning children. Despite this, mothers are overwhelmingly being granted primary care of their children during divorce litigation and post-divorce,

representing a significant gender-disparity in court ordered parenting arrangements. This trend suggests that the courts may play a prominent, albeit unwitting, role in perpetuating gender bias and must be called to take swift action against it.
This article explores the potential prejudice against fathers in court order parenting arrangements, examining how overall societal statistics likely mirror disparities in legal outcomes. By analysing legislation, case law, psychological research, and available data, it advocates for a critical review of default practices to ensure the best interests of the child are truly served.

The legal framework: Best interests of the child

The Children's Act emphasises that the best interests of the child are of paramount importance in every matter concerning the child (s 9). The Act provides a framework for considering their best interests, including the nature of the relationship between the child and each parent, and the capacity of each parent to provide for the child's needs (s 7).
The language of the Act is gender-neutral, with the supposed intent of placing mothers and fathers on equal footing regarding their parental rights and responsibilities. The Constitution further reinforces equality, prohibiting unfair discrimination against any person based on their gender (s 9).
In practice, however, courts often award primary care to mothers, even when fathers have demonstrated equal or greater involvement in their children's upbringing. This pattern suggests an implicit bias rooted in traditional gender roles, which may influence judicial decisions.
For example, in *B v M* [2006] 3 All SA 109 (W), the father sought primary residence of the children while opposing his ex-wife's international relocation, emphasising his active role in their daily lives. Despite acknowledging his significant involvement, the court awarded primary residence to the mother, citing the need for stability and continuity. The court appeared to favour the maternal bond, reflecting an underlying assumption of mothers as the default primary caregivers.

Psychological impact of limited father-child contact

Psychological research underscores the importance of maintaining strong relationships between children and both parents post-divorce. Reduced contact with fathers, especially when they have been primary caregivers, can adversely affect a child's emotional well-being and development. A study by the Human Sciences Research Council (HSRC) indicates that active fatherhood positively affects children's cognitive abilities, social behaviours, and emotional well-being (L Richter and R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (Cape Town: HSRC Press 2006)).
Studies further indicate that children benefit from the continued involvement of both parents, which contributes to their sense of security and stability. Disruption of the paternal bond may lead to emotional distress, behavioural issues, and difficulties in social relationships. Such outcomes highlight the necessity for care arrangements that facilitate meaningful involvement of both parents, aligning with the child's best interests as mandated by the Children's Act (AL Curcio, AS Mak and AM George 'Maternal and

paternal bonding and self-esteem as predictors of psychological distress among male and female adolescents' (2019) 29 *Journal of Psychologists and Counsellors in Schools* 54).

Societal statistics and implications for primary care awards

According to Statistics South Africa's General Household Survey 2019, 42% of children live only with their mothers, while just 4% live only with their fathers. Approximately 32,7% of children live with both parents, and 21,3% live with neither biological parent.

While these statistics reflect general living arrangements and not primary care awards post-divorce, they suggest that mothers are predominantly the primary caregivers. The lack of detailed national statistics on primary care awards makes it challenging to quantify the disparity directly. However, considering the societal trend and anecdotal evidence, it is reasonable to infer that a similar disparity exists in court-ordered primary care arrangements.

The potential for this societal pattern to be replicated in legal outcomes suggests that fathers may face systemic challenges in obtaining primary caregiving roles post-divorce. This inference underscores the need for scrutinising primary care award practices to identify and address any biases that may disadvantage fathers.

Potential prejudice and gender bias in primary care awards

The disparity in caregiving roles and primary care awards may stem from enduring societal stereotypes that view mothers as the natural primary caregivers. This perception can influence judicial attitudes, leading to decisions that favour mothers, even when fathers are equally capable.

The absence of detailed primary care awards following divorce statistics makes it difficult to quantify this bias definitively. However, the societal trend of children predominantly residing with mothers suggests that similar biases may exist within the legal system. This potential prejudice contravenes the constitutional principle of equality and the gender-neutral intent of the Children's Act.

Legacy of the tender years' doctrine and gender roles

The tender years' doctrine, historically favouring maternal primary care of young children, has been officially abolished. However, its influence lingers in contemporary primary care decisions. Courts often emphasise the need for stability and continuity in the child's life, which can inadvertently favour the mother, especially when traditional caregiving roles have been established.

In *P v P* 2007 (5) SA 94 (SCA), the father was an active participant in his children's lives. Despite his involvement and the testimony of three experts confirming that he is the more capable parent, the court *a quo* granted primary care to the mother, emphasising the importance of maintaining the children's established routines and environments. In addition, and despite recognising the need for a gender-neutral approach to parenting roles, the Supreme Court of Appeal dismissed an appeal against the decision. This decision reflects an ongoing reliance on traditional gender roles, potentially at the expense of recognising the father's caregiving contributions.

Constitutional concerns: Indirect gender discrimination

Section 9 of the Constitution guarantees equality before the law and prohibits unfair discrimination on various grounds, including gender. The apparent preference for mothers in primary care decisions raises questions about indirect gender discrimination against fathers.

'Indirect discrimination happens when a seemingly neutral policy or practice disproportionately affects a particular group' (Casemine 'British Telecommunications Ltd v. Roberts & Anor: Distinguishing Direct and Indirect Sex Discrimination in Employment Law' (www.casemine.com, accessed 15-2-2025)). If primary care decisions systematically favour mothers due to entrenched stereotypes, this could infringe on fathers' constitutional rights to equality and dignity (ss 9 and 10).

In *President of the Republic of South Africa and Another v Hugo 1997 (4) SA 1 (CC),* *the Constitutional Court recognised that practices reinforcing gender stereotypes could constitute unfair discrimination. Applying this reasoning, primary care award practices that favour mothers based on traditional roles may be constitutionally problematic.*

International obligations and comparative perspectives

South Africa is a signatory to the United Nations Convention on the Rights of the Child (UNCRC) and the African Charter on the Rights and Welfare of the Child, both emphasising the child's right to maintain personal relations and direct contact with both parents on a regular basis, unless contrary to the child's best interests.

Comparative studies show that countries like Australia promote shared parenting and have legal frameworks supporting equal care arrangements. According to the Australian Institute of Family Studies, approximately 21% of children have shared care-time arrangements, 45% live primarily with their mother, and 11% live primarily with their father. This demonstrate that gender-neutral primary care award practices can be implemented effectively, benefiting children by maintaining strong relationships with both parents, although it is also evidence that the need for reform is not only limited to South Africa.

Recommendations for reform

To address potential bias and align South Africa with international trends promoting equal parenting, the following measures are recommended:

- Invest in comprehensive data collection on primary care awards post-divorce to assess disparities and inform policy decisions. The fact that this data is not yet available is of great concern.
- Judicial training on gender bias: Implement training programmes for judges and magistrates to recognise and mitigate unconscious gender biases in primary care decisions.
- Promotion of shared parenting: Encourage parenting and care arrangements that facilitate substantial involvement from both parents, reflecting the child's right to maintain meaningful relationships with both.

- Public awareness campaigns: Educate society on the value of father involvement in child development to challenge traditional stereotypes and promote gender equality in caregiving roles.
- Reform in the office of the Family Advocate: Investigations must evaluate each parent's caregiving history and capabilities without presumption based on gender, consider the psychological impact of limiting contact with either parent, supported by contemporary research, and refrain from defaulting to traditional gender roles when determining primary residence.

Conclusion

The potential prejudice against fathers in primary care decisions is a significant concern that warrants attention. While the legal framework in South Africa advocates for gender neutrality and the best interests of the child, societal norms and potential judicial biases may undermine these principles.

By recognising the influence of overall societal disparities on primary care awards, there is an opportunity to critically assess and reform caregiver norms, stereotypes and practices. This will ensure that fathers are given fair consideration in primary care decisions, and that such decisions not only uphold constitutional rights but also serve the best interests of children who benefit from the active involvement of both parents.

It is imperative for the legal community, policymakers, and society at large to work collaboratively towards eliminating gender bias in primary care orders as a result, promoting equality, and fostering environments where children can thrive with the support of both parents. If society would not question a care arrangement during the subsistence of a marriage, then such an arrangement should not be questioned post-divorce, and a father should not be seen as a less capable parent post-divorce based on the paternal parent instead of the maternal.

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A Last Thought

The abuse of the legal system in South Africa: Shielding liability through legal manoeuvring

In South Africa, the legal system is designed to uphold justice, provide recourse for wrongs, and ensure fairness for all parties. However, a growing concern is the extent to which unscrupulous defendants exploit legal mechanisms to delay or outright evade liabilities, even after a court of law or an arbitration forum (with no right of appeal) has found against them. This article delves into the tactics used by such defendants, the implications for plaintiffs and the justice system, and explores potential solutions to combat this troubling behaviour. It also raises the critical question: is the South African legal system truly equipped to serve innocent plaintiffs when it matters most?

Exploiting the system: Tactics used by defendants

While the courts may rule in favour of plaintiffs, ensuring they receive the relief or compensation sought and the enforcement of these judgments often becomes a separate battle. Unscrupulous defendants leverage various tactics to delay or avoid accountability, frustrating plaintiffs and eroding trust in the system.

Common strategies include:

- Appeals and review applications: Defendants frequently file appeals or applications for review, often without substantive merit, merely to delay the execution of judgments. While the right to appeal is fundamental to justice, its misuse burdens courts and obstructs timely resolution for plaintiffs. In many cases, such tactics prolong litigation for months or even years.
- Asset dissipation or concealment: Some defendants resort to transferring assets to third parties, hiding them in trusts, or engaging in other financial manoeuvring to evade attachment orders. This behaviour leaves plaintiffs unable to recover their due even after securing favourable judgments.
- Abuse of insolvency proceedings: Declaring insolvency can be used as a tool to sidestep liabilities. Unscrupulous defendants may liquidate their companies, only to re-establish under a different entity, effectively leaving creditors, including plaintiffs, without recourse.
- Procedural stalling: Defendants may intentionally delay proceedings by failing to respond promptly to summonses, discovery requests, or court orders. These delays increase legal costs for plaintiffs and place undue strain on their resources.
- Technical legal challenges: Technicalities, such as disputing service of process or questioning jurisdiction, are often raised as a means to derail or prolong cases. While such defences may occasionally have merit, their frequent misuse signals bad faith.
- The impact on innocent plaintiffs: For plaintiffs, the consequences of these tactics are profound:

- Financial strain: Prolonged litigation and enforcement battles drain plaintiffs financially, often leaving them worse off than before they sought justice.
- Emotional toll: The frustration, stress, and emotional burden of extended legal battles can be overwhelming. Plaintiffs often feel disillusioned and powerless in the face of systemic abuse.
- Erosion of trust: When defendants evade accountability, public trust in the justice system diminishes, raising questions about its ability to uphold fairness.

Systemic challenges enabling abuse

South Africa's legal framework, while robust in many respects, has weaknesses that create opportunities for exploitation. Key systemic challenges include:

- Overburdened courts: The judiciary faces significant backlogs, which delay case resolutions and create room for stalling tactics to thrive. Limited resources and staff shortages exacerbate the problem.
- Inadequate mechanisms for enforcement: Even after securing judgments, plaintiffs often encounter challenges in enforcing them. For example, the process of attaching and auctioning assets can be slow, leaving room for defendants to act in bad faith.
- Ineffective deterrents for abusive practices: Current penalties for procedural abuse or frivolous litigation are insufficient to deter defendants from engaging in such conduct. Costs orders, while punitive, rarely compensate plaintiffs adequately or discourage systemic abuse.
- Inequality of resources: Wealthy or well-connected defendants can leverage extensive legal resources to outmanoeuvre less-resourced plaintiffs. This imbalance often leads to an inequitable application of justice.

Proposed solutions to combat abuse

Addressing the abuse of the legal system requires a multi-faceted approach. Policymakers, the judiciary, and legal practitioners must collaborate to implement reforms that deter exploitative behaviour and protect plaintiffs' rights.

- Strengthening case management systems: Judicial case management can be enhanced to ensure adherence to timelines and reduce procedural delays. Judges should have greater discretion to dismiss frivolous appeals or applications.
- Increasing penalties for abusive conduct: The courts should impose more significant cost orders and punitive damages against parties that engage in bad faith litigation. Repeated offenders should face additional sanctions, such as restrictions on future litigation or being declared a vexatious litigant.
- Expediting enforcement processes: Reforms should streamline the enforcement of judgments, including faster procedures for asset attachment and liquidation. Technology can play a role in tracking assets and ensuring transparency in financial dealings.

- Reviewing insolvency laws: Legislation governing insolvency should be tightened to prevent its misuse. For instance, new laws could allow for piercing the corporate veil in cases of intentional asset shielding.

Is the legal system truly positioned to assist plaintiffs?

This question strikes at the heart of the justice system's purpose. While South Africa's legal framework aspires to uphold fairness, systemic inefficiencies and unequal access to resources often hinder its effectiveness. Innocent plaintiffs, particularly those with limited means, face an uphill battle against unscrupulous defendants who exploit loopholes by applying fancy legal footwork for the sole purpose of denying a plaintiff the legal recourse to which it is entitled.

Arguments for the system's adequacy

- South Africa's Constitution provides a robust foundation for justice, guaranteeing the right to access courts and equality before the law.
- Progressive reforms, such as e-filing and specialised courts, have improved efficiency in recent years.

Arguments against the system's adequacy

- Delays and backlogs undermine timely justice, which is crucial for plaintiffs relying on judgments to recover financially or emotionally.
- The cost of litigation is prohibitive for many, creating a justice gap between wealthy defendants and less-resourced plaintiffs.
-

Conclusion: Balancing rights with accountability

The abuse of South Africa's legal system by scrupulous defendants is not merely a technical issue; it is a moral and ethical failure that undermines justice. Reforms are urgently needed to close loopholes, deter abusive practices, and restore public confidence in the judiciary.

The system's credibility hinges on its ability to protect innocent plaintiffs, particularly in cases where they have already secured favourable judgments or arbitration awards. Without meaningful changes, the promise of justice for all risks becoming a mere illusion.

As legal professionals and stakeholders in the justice system, we must collectively advocate for reforms that ensure fairness, accountability, and accessibility. Only then can we truly answer the question: is the legal system positioned to assist innocent plaintiffs when it matters most?

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