e-MANTSHI

A KZNJETCOM Newsletter

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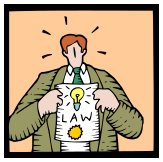
Welcome to the hundredth and third issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now 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.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Justice and Correctional Services has issued a notice in Government Gazette no 38080 dated 10 October 2014 wherein the Director of the Directorate of Animal Health of the Department of Agriculture contemplated in section 2(1) of the Animal Diseases Act,1984 (Act No. 35 of 1984 and an officer under a delegation from or under the control of the Director of the Directorate of Animal Health of the Department of Agriculture have been appointed as Peace Officers for the Gauteng area.

Recent Court Cases

1. VAN HEERDEN V MINISTER OF SAFETY AND SECURITY 2014 (2) SACR 346 (NCK)

A prosecutor can be held liable for damages when acting with animus iniuriandi and not in good faith.

The plaintiff instituted action against the Minister of Safety and Security and the National Director of Public Prosecutions for damages for malicious prosecution and malicious, alternatively unlawful, arrest. The plaintiff was a captain in the South African Police Services and the station commander of the Delportshoop Police Station. A police task team was set up to investigate allegations that certain mineworkers employed by one Mr Visser had been assaulted by Visser and that the police had neglected to investigate the allegations. Amongst others at other police stations, the task team investigated two police dockets at the Delportshoop Police Station concerning assaults on two complainants. The office of the DPP issued an order that the plaintiff be prosecuted on a charge of statutory perjury and of defeating the ends of justice. The two investigating officers obtained a warrant of arrest for the plaintiff and arrested him in accordance with the warrant. He was taken in a police vehicle to his own police station where his fingerprints were taken. He was then taken to the magistrates' court where he was released on bail of RI00. Approximately a year later he was acquitted of the charges at his trial and discharged at the end of the state's case. The court came to the conclusion that the plaintiff had not shown on a balance of probabilities that the first defendant had instigated the prosecution and therefore it could not be held liable for the claim of malicious prosecution. (Paragraph [80] at *366b.)* Similarly, there was no evidence that the second defendant had anything to do with the decision to arrest the plaintiff and he could accordingly not be held liable in this regard. (Paragraphs [206] at *38ge.)*

As regards the second defendant, the court held that the fact that the docket lacked an affidavit that would have been crucial to a successful prosecution of the plaintiff, made it clear that there was no reasonable and probable cause to prosecute the plaintiff. (Paragraph [99] at *370a.)*

The court held further that the concept 'in good faith' in s 42 of the National Prosecuting Authority Act 32 of 1998, that granted an exemption from liability for prosecutors, necessarily embraced a subjective element. The attitude and intention with which the relevant act was committed were, of necessity, important in determining the question whether the relevant prosecutor had acted in good faith. There could be no question of good faith where there was animus iniuriandi, in other words, where the

prosecutor intended thereby to harm the person's dignity or to prejudice him financially or foresaw that his actions could result in that and realised or foresaw that the action was unlawful as there was no reasonable and probable cause for the action. There was no justification for reading into s 42 a strong presumption of good faith on the part of the prosecutor that could not easily be rebutted. (Paragraphs [116]-[121] at *372g-374a* paraphrased.)

As regards the arrest, the decision to bring the plaintiff before court by way of an arrest (with the resultant embarrassment that it held for him as a well-known police officer and leader) was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. The decision was arbitrary, irrational and had not been made in good faith. It was common cause that normally, when police officials were charged with less serious offences, they were brought before the court by way of summons. The first defendant was accordingly liable for the damages arising from the arrest. (Paragraphs [201]-[220] at *388c-e* and *392e* paraphrased.)

2. S V KIRSCH 2014 (2) SACR 419 (WCC)

Where a magistrate discovers during a trial that a friend of his/hers are going to be called as a witness and then recuses him/herself the proceedings can be set aside by the High Court.

During the course of a criminal trial in a magistrates' court it appeared, whilst the evidence of the first state witness was being led, that the state would call a witness who was a friend of the presiding magistrate and in addition the witness's secretary was the magistrate's neighbour. The magistrate adjourned the proceedings to consider her position and formed the view that the accused might have a suspicion of bias if she convicted him. She informed the parties of the need for her to recuse herself and referred the *d* matter to the court for the proceedings to be set aside and for an order that the trial had to continue de novo before another magistrate.
Held, that the court was allowed in the present case, where there was no formal application in terms of rule 53 of the Uniform Rules of Court, in terms of its inherent power under s 173 of the Constitution, to review the proceedings in the interests of justice. The proceedings were accordingly set aside e and the case remitted to the court a quo to be heard by another magistrate. (Paragraphs [18]-[20] at *422h-423d.)*

3. DU PLESSIS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS CASE 17730/2010 GAUTENG HIGH COURT 19 MARCH 2014

A magistrate who acts wrongful and with mala fide can be held liable for damages where a bail application was not heard immediately.

The full judgment is attached to this newsletter in view of the importance thereof for all magistrates.

From The Legal Journals

Budhram, T

"Skimming: a transactional card fraud monster "

Acta Criminologica: Southern African Journal of Criminology 26(2) 2013

Stevens, G P

"Dealing in drugs revisited: S v Mbatha 2012 (2) SACR 551 (KZP)"

SACJ (2014) 1 37

Whitear Nel, N & Badul, C

"The duty of recusal"

SACJ (2014) 1 47

Kemp, G

"Alternative measures to reduce trial cases, private autonomy and "public interest": some observations with specific reference to plea bargaining and economic crimes"

Stellenbosch Law Review 2014 2 425

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

Contributions from the Law School

The admissibility of an extra curial admission by one co-accused against another.

Introduction

The supreme court of appeal (SCA) recently found that the high court had erred on a question of law in the case of *S v Ndhlovu and others* (2001 (1) SACR 85 (W)) (*Ndhlovu's* case). In the *Ndhlovu* case the court invoked s 3 of the Law of Evidence Amendment Act 45 of 1988 to admit the extra curial admission of one co-accused against another. The *Ndhlovu* court reasoned that hearsay evidence could be admitted where the interests of justice permitted it, and that this would include situations where the interests of justice permitted the admission of a co-accused's extra curial admission against the other co-accused, even when the accused disavowed the statement at the trial. The court held that in such circumstances, the accused's right to a fair trial would not be violated even if he was unable to cross examine the maker of the statement, since the right to challenge evidence does not include the right to challenge the original declarant where the interests of justice require the admission of hearsay evidence. This approach was emphatically rejected as wrong in the case of *Litako and others v S* (584/2013) [2014] ZASCA 54 (16 April 2014)) (*Litako's* case). The SCA in *Litako's* case reiterated the old common law rule excluding the use of extra curial statements made by one co-accused against another.

Litako's case

The appellants, and a co-accused who did not appeal, were charged with various offences, including murder, arising out of a robbery. The state's case rested on eyewitness evidence, ballistics evidence and the extra-curial statement of the first appellant. They were convicted, inter alia, of murder in the court a quo. The SCA found that the eyewitness and ballistics evidence was inadequate to found a conviction on any of the charges preferred against the appellants, and that the state's

case hinged on the extra-curial statement of the first appellant (para 23). The extra-curial statement was exculpatory in respect of the first appellant and incriminating as to the other co-accused. The court a quo found that the statement had been made voluntarily and found it to be admissible against the first appellant and his co-accused. It was found admissible against the co-accused on the basis of s 3 of the Law of Evidence Amendment Act 45 of 1988 (para 26). The court a quo found that the extra-curial statement corroborated the eyewitness evidence, and saw no prejudice in admitting it against the co-accused since they had not ambushed by the evidence but had been in possession of the statement since before the trial had started (para 29). The court a quo reasoned that the purpose of the Law of Evidence Amendment Act 45 of 1988 was to allow the admission of hearsay evidence where the interests of justice require it, and it held that if the interests of justice required the reception of hearsay evidence 'the right of an accused person to challenge [that]…evidence does not include the right to cross-examine the declarant' (para 29). The court a quo relied for authority on the *Ndhlovu* case. The appellants (and the co accused who did not appeal) were convicted, and the case duly proceeded to the SCA on appeal.

The SCA held that prior to the *Ndhlovu* case the common law was clear that the extra-curial statement by one co-accused was not admissible as evidence against other co-accused, but that this rule had been changed by the decision in the *Ndhlovu* case (para 42), where the court held that 'a co-accused witness' disavowal of an extra-curial statement does not change the nature of the essential enquiry' which is whether the administration of justice requires the admission of the hearsay evidence (para 45).

In analysing the *Ndhlovu* case, the SCA highlighted how the decision had been criticised. For example, the SCA explained that Ponnan J in the *Balkwell* case (supra) was concerned about how an accused would be able to cross examine on the statement if the declarant disavowed the statement at the trial and was concerned that the accused would be denied the protection of the cautionary rule against a co-accused's evidence. He suggested that this would subvert the accused's right to a fair trial (para 46).

The SCA explained that the rule excluding the use of extra-curial statements made by one accused against another 'was not solely based on its hearsay nature' but also because 'an admission made by one person is normally irrelevant when tendered for use against another' and because it would nullify the constitutional right to challenge the evidence (para 65). An additional concern for the court was the fact that an extra curial statement is not made under oath (para 66). The SCA questioned 'how the rights of an accused person to challenge evidence adduced against him can be more circumscribed under our new constitutional order than they were under the old regime' (para 67).

The SCA concluded that '[c]onsidering the rationale at common law for excluding the use of extra-curial admissions by one accused against another…the interests of justice is best served by not invoking [the law of Evidence Amendment Act 45 of

1988] for that purpose' (para 67). It held that it was 'emphatic about the bar on the use of confessions and admissions by one accused against his co-accused' (para 72).

On the facts, the SCA held that without the first appellant's extra-curial admission incriminating the second to fifth appellants, their convictions could not stand. The only evidence against the first appellant was his admission and this was also insufficient to sustain his conviction (para 68). In the result, the appeal was upheld and the convictions and sentences were set aside (para 72).

Comment and conclusion

Section 35(3)(i) of the Constitution states that '[e]very accused person has the right to a fair trial, which includes the right-…(i) to adduce and challenge evidence;…'. The question is whether this right encompasses the right to cross examine every piece of evidence and thus excludes the admission of hearsay evidence in criminal proceedings.

The Law of Evidence Amendment Act 45 of 1988 makes provision for the admission of hearsay evidence in criminal trials where the interests of justice require it. The constitutionality of this section was challenged in *Ndhlovu's* case and Cameron JA held that the challenge was correctly rejected (para 13). He explained that the 'scheme and formulation' of the Act are in line with the constitution (para 16, 26). He held that it was obvious that the Act must be read in light of the constitution and to give effect to its fundamental values (para 13) and that a court in applying the hearsay provisions of the Act must be scrupulous to ensure respect for the accused's constitutional right to a fair trial (para 17). He approved of the dictum in *S v Ramavhale* (1996 (1) SACR 639 (A)) to the effect that a judge should hesitate long and hard before admitting hearsay evidence which played a decisive or even significant part in convicting the accused (para 16), and articulated three important safeguards to protect the accused's right to a fair trial. Firstly, the judge is under a general duty to 'prevent a witness heedlessly giving vent to hearsay evidence'. Secondly, the Law of Evidence Amendment Act can only be invoked against an unrepresented accused if the effect of the Act has been properly explained to him. Thirdly, the accused 'cannot be ambushed by the late or unheralded admission of hearsay evidence' (para 17). Cameron JA interpreted the constitutional right to challenge evidence as not extending to the right to cross examine the original declarant of a statement in all circumstances – specifically not when the interests of justice permit the admission of hearsay evidence (para 24). Cameron JA referred to the position in the USA in support of his position. He pointed out that the sixth amendment right to confront evidence has never been interpreted as excluding the admission of all hearsay evidence (para 25).

The constitutional court was provided with an opportunity to reconsider the constitutionality of s 3 of the Law of Evidence Amendment Act in *S v Molimi* (2008 (3) SA 608 (CC)) but it declined to rule on the issue (para 47).

In the *Litako* case the court did not find that the Law of Evidence Amendment Act was unconstitutional. All the court did was to find that s 3 of the Act could not be invoked to admit the extra-curial statement of an accused against his co-accused because the interests of justice would never allow this. The SCA was emphatic that the common law rule preceding the *Ndhlovu* case should continue to apply, and that the *Ndhlovu* case was wrongly decided.
It is submitted that the approach of the *Litako* court is excessively rigid, and has the effect of depriving courts of the ability to assess each case on its merits to decide if the interests of justice require the admission of the hearsay evidence, whatever its form and even if it is an admission by a co accused which incriminates another co accused. Section 3 of the law of Evidence Amendment Act provides a list of factors which must be taken into account by the court in deciding on this question, and one of the factors which the court would take into account is the position under the common law in respect of the type of hearsay evidence in question. The Act also explicitly enjoins the court to take account of the nature of the proceedings and whether the admission of the evidence would unduly prejudice the accused. It is submitted that this provides sufficient protection for the interests of the accused and the right to a fair trial.

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Matters of Interest to Magistrates

Is theft a competent verdict on a charge of fraud?

By Michael Miller

In the case of *Kok v S* (WCC) (unreported case no 14552, 2-7-2014) (Henney J), the accused had been charged with fraud. It was alleged that he fraudulently obtained payment of an amount of R 98 668.98 from the Government Employees Pension Fund (GEPF) after he had been dismissed by the South African Police Service (SAPS).

The accused pleaded not guilty to the charge. Before plea, the court 'warned' the accused of a possible competent verdict on a charge of theft. This, the court said, was in terms of s 256 of the Criminal Procedure Act 51 of 1977 (the Act). It is important to note that the accused was not charged in the alternative with theft (as is common practice).

A number of witnesses were called. The nature of their evidence does not appear from the judgment, but it would appear that the eventual conviction resulted mainly from the admissions made by the accused after he obtained the services of a new attorney.

At that stage, admissions were made in terms of s 220 of the Act. The effect of these was that the accused admitted that, although he was not guilty of fraud, he was guilty of the theft of the said amount. On this basis, he was convicted of theft and sentenced to an effective sentence of five years' imprisonment. The five-year sentence was suspended for a period of five years on certain conditions, which included the repayment of the amount to the complainant in full, before 31 July 2013.

Subsequently the matter went on special review in terms of s 304(4) of the Act. That subsection provides for the review of (as opposed to appeal against) a conviction or sentence where the procedure in the trial court was not in accordance with justice. Although the review dealt with the sentence imposed, the court *mero motu* raised the question of whether the conviction should also be reconsidered.

The question arose whether theft was indeed a competent verdict to fraud. This was because the accused had been charged only with fraud, but was convicted of theft, a crime with which he had not been charged. The magistrate purported to convict the accused of theft because he was of the view that in terms of s 256 of the Act, theft was a competent verdict to fraud.

Where the prosecution does not prove the crime charged but proves some other crime, then provided certain conditions are met, an accused person may be convicted of the other crime, even though it was never charged. Basically there are two rules which must be followed in deciding whether a conviction on a competent verdict is appropriate.

The first is that in terms of Chapter 26 of the Act (ss 256 – 270) it must be provided that it is competent to convict an accused person of such other charge. The sections referred to provide in great detail exactly which crimes an accused person may be convicted of if the crime charged is not proven (competent verdicts). Thus, culpable homicide is a competent verdict to a charge of murder.

The second is that, even though such other offence is indeed a competent verdict, its commission must be proven beyond reasonable doubt. Thus if murder is not proven, but culpable homicide is proven beyond a reasonable doubt, the accused person may be convicted of culpable homicide.

In casu, there was no doubt that – because of the accused's admission to this effect – the crime of theft had been proven beyond reasonable doubt. The question was whether in terms of ss 256 – 270, theft was indeed a competent verdict to fraud.

Henney J (with Le Grange J concurring) looked in the first instance at s 256 of the Act (under which the magistrate purported to act). That section merely provides that, where a person is charged with a certain offence but only an attempt to commit the offence so charged is proven, then an accused person may be convicted of such attempt. It makes no provision that an accused person charged with fraud may be convicted of theft.

There is indeed no section that provides for competent verdicts on a charge of fraud.

Henney J, however, confirmed the theft conviction on the basis of s 270 of the Act which provides for offences not specified in ss 256 – 269. That section provides that: 'If the evidence on a charge for any offence not referred to in the preceding sections [in sections 256 to 269] does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved'.

This section has been interpreted in a number of cases referred to by Henney J as meaning that, as long as the essential elements of the lesser offence are included in the offence charged (the more serious offence), an accused may be convicted of the lesser offence.

The main case in this connection is *S v Mavundla* 1980 (4) SA 187 (T) where Le Grange J stated at 190H – 191A as follows (my own translation from Afrikaans) –

With respect I suggest that the question is simply whether the alleged (lesser) offence by reason of its essential elements is incorporated in the offence charged. The inquiry is in the first instance directed at the essential elements of the (lesser) offence, in other words the definition of the crime. The second step is to determine if those (essential) elements are included in the offence charged.

What must, therefore, be considered is whether the essential elements of theft are included in the crime of fraud.

According to Snyman CR *Criminal Law* 5ed (Durban: LexisNexis 2008) at 531 'fraud' is 'the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another'.

Snyman lists the elements of the crime as following:

• a misrepresentation;

• prejudice or potential prejudice;

• unlawfulness; and

• intention.

According to the same writer at 484, the definition of ‘theft’ is –

‘A person commits theft if he unlawfully and intentionally appropriates movable, corporeal property which

(a) belongs to, and is in the possession of, another;

… provided that the intention to appropriate the property includes an intention permanently to deprive the person entitled to the possession of the property, of such property.’

Snyman lists the elements of the crime as:

• an act of appropriation;

• in respect of a certain type of property;

• which takes place unlawfully; and

• intentionally.

A brief look at the elements as outlined above, shows immediately that the essential elements of theft are not included in the essential elements of fraud. There is, in the crime of fraud, no element of appropriation. Nor is it required that fraud be in respect of movable, corporeal property. Nor does the intention in fraud cases have to be to deprive the person entitled to the possession of the property, of such property.

It follows that a person charged with fraud cannot, on the basis of a competent verdict in terms of s 270, be convicted of theft.

Nevertheless, Henney J confirmed the conviction on the charge of theft on the basis of s 270. He agreed with the magistrate that it was proper to convict the accused of theft. However, he differed with the magistrate in holding that to arrive at such a competent verdict on the basis of s 256 was incorrect.

In my view, Henney J was wrong in confirming the conviction on theft as a competent verdict in terms of s 270. As indicated above, the essential elements of theft are not included in the essential elements of fraud.

Accordingly, the conviction on the charge of theft should, in my view, have been set aside. The prosecution, if so advised, would then be at liberty to charge the accused again because the setting aside of the conviction would not be based on the merits of the case.

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A Last Thought

"Courts exist as neutral forums for dispute resolution. Are courthouses then necessary to dispense justice or can a virtual court fulfill this role? A virtual court is a conceptual idea of a judicial forum that has no physical presence but still provides the same justice services that are available in courthouses. Access to virtual courts would be limited to online access, videoconferencing, and teleconferencing. No longer would imposing buildings be the sign of justice. Virtual courts would save on overhead and costs associated with operating court facilities and could improve access to justice, but at what cost? Is the ability to dispense justice from home worth the price of reducing in-person human interaction? Courts are already moving toward virtual courthouses, but the extent to which physical courthouses will be utilized in the future is up to current trends in technology and the importance placed on the traditional role that physical courthouses play in dispensing justice. When looking toward the future, the fundamental purposes of the courts must be taken into account.

Technology Trends

The future of the courts is greatly dependent on technology and how technology can improve the functioning of the courts. Advances in technology can improve the courts and the public's access to court services. Not only will new technology allow for greater access to the courts, but it can also improve how efficiently the courts operate in these difficult financial times."

By Keith B. Kaplan ('Will Virtual Courts Create Courthouse Relics?' *The Judges' Journal* 2013 vol 52(2) 32