e-MANTSHI

A KZNJETCOM Newsletter

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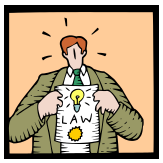
Welcome to the hundredth and tenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 Director -General: Department of Home Affairs, has determined, in terms of section 34(1) of the Immigration Act, 2002 (Act No. 13 of 2002), Lindela Holding Facility and any detention facilities and offices under the management or managed on behalf of or in partnership with the Department of Home Affairs, as places of detention of illegal foreigners pending deportation. The minimum standards relating to the detention of illegal foreigners shall be as prescribed in regulation 33(5) of the Immigration Regulations; 2014.The notice to this effect was published in Government Gazette no 38903 dated 22 June 2015.

2. A notice was published in Government Gazette no 38893 dated 19 June 2015 that the Portfolio Committee on Home Affairs intends to introduce the Refugees Amendment Bill, 2015 into parliament. The Bill will address the Constitutional Court judgment in the Chipu case *Mail and Guardian Media Limited and Others v MJ Chipu and others CCT136/12 [2013]*, which declared section 21(5) of the Refugees Act, 1998, (Act No. 130 of 1998), inconsistent with section 16(1)(a) and (b) of the Constitution to the extent that it precludes members of the public or the media from attending proceedings of the Refugee Appeal Board in all cases and failed to confer

a discretion upon the Refugee Appeal Board to allow the public and media access to its proceedings in an appropriate case.
The amendment seeks to amend section 21(5) of the Refugees Act, 1998, so as to confer a discretion on the Refugee Appeals Authority (the name of the Refugee Appeal Board after the Refugees Amendment Act, 2008 (No. 33 of 2008)), on application and on conditions it deems fit, to allow any person, including the media, to attend or report on its hearings. Interested persons, including institutions and Non-Governmental Organisations (NGOs), are invited to submit written comments on the draft Bill to the Secretary to Parliament by 17 July 2015.

Recent Court Cases

1. S v NTSHONYANE AND ANOTHER 2015 (2) SACR 70 (FB)

Although it was doubtful that a conviction under s 9(4) of the Aliens Control Act 96 of 1991 could be seen as a competent verdict on a charge under s 23(a), in terms of s 54 of the new Act (Immigration Act 13 of 2002) anything done under the provisions of the law repealed by that Act and which could have been done under the new Act was deemed to have been done under the new Act.

The two accused were convicted in a magistrates' court of being in South Africa without being in possession of an immigration permit issued in terms of the Aliens Control Act 96 of 1991 (Aliens Control Act) in contravention of s 23*(a)* of that Act. They were sentenced to a fine of R1500 or three months' imprisonment. Not having the means to pay the fine, the accused were serving the sentence when it was discovered that the Aliens Control Act had been repealed in its entirety by the Immigration Act 13 of 2002. The magistrate submitted the matter on special review to the High Court and requested that the conviction and sentence be set aside.

Held, that s 9(4) was the new version of s 23*(a)* of the Aliens Control Act even though the sections were far from identical. (Paragraph [25] at 75*h*.)

Held, however, that apart from the fact that all the essential elements of the offence of contravening s 9(4) were not encompassed in s 23*(a)*, it was doubtful that a conviction under s 9(4) could be seen as a competent verdict on a charge in terms of s 23*(a)*. (Paragraph [27] at 76*b*.)

Held, further, that in terms of s 54 of the Immigration Act, anything done under the provisions of a law repealed by ss (1) and which could have been done under the Immigration Act was deemed to have been done under the Immigration Act and there did not appear to be any reason therefore why the charge could not have been brought in terms of s 9(4) of the Immigration Act. That would entail that the conviction and sentence of the accused in terms of the repealed Act could, in terms of s 54 of the Immigration Act, be deemed to have been imposed on the accused in terms of the latter Act. (Paragraphs [30] and [36] at 76*g–h* and 77*e*.)

Held, further, that there would be no prejudice to the accused if their conviction and sentence were deemed to have been imposed in terms of the Immigration Act and the court accordingly confirmed the conviction and sentence which were deemed to have been imposed in terms of s 9(4) read with ss 49 and 54 of the Immigration Act. (Paragraph [44] at 78*g*.)

2. S v GR 2015 (2) SACR 79 (SCA)

The failure of the presiding officer to explain accused's rights to legal representation amounts to an irregularity which vitiates the entire trial.

The appellant was tried in a regional court on a charge of the rape of an 11-year-old girl. He was not legally represented at the trial which was brief and resulted in his conviction. The case was then transferred to the High Court for sentencing purposes where the appellant was legally represented but the legal representative did not dispute the fairness of the earlier proceedings. Although the appellant had indicated when he first appeared in court that he wanted legal representation, there was no indication when he changed his mind and decided to waive his rights to legal representation. Neither did the trial magistrate inform the appellant of the consequences of proceeding with the trial without the assistance of a legal representative, nor did the magistrate encourage him to obtain the services of one before he was made to plead to the charge. The magistrate did, however, explain to him after he had pleaded, that, if convicted, the matter would be transferred to the High Court and he could face a sentence of life imprisonment but this was merely communicated to him as a matter of fact and not with a view to encouraging him to obtain legal representation owing to the seriousness of the charge.

Held, that it was clear that if a judicial officer believed that an accused was aware of his rights, the right to legal representation nevertheless had to be properly explained to him in open court. If the accused chose not to have legal representation in serious cases, it was incumbent on the presiding officer to inform the accused of the seriousness of the charges and advise him to make use of a legal representative. It could safely be assumed in any case where the possibility of imprisonment was real, an injustice would result if an accused did not have legal representation. For such explanation to be effective it had to be done prior to the commencement of the trial,

which meant prior to the accused pleading to the charges. (Paragraph [10] at 83*i*–84*b*.)

Held, further, that from the record it was clear that the appellant was an unsophisticated person with no understanding of the law or the legal processes and this was evident if regard were had to his ineptitude when cross-examining the complainant. It was unfair to allow cross-examination of an undefended, unsophisticated accused on his failure to cross-examine, and that should not have been held against him. It was apparent furthermore that there were incongruities and other matters where proper legal representation might have made a difference in the presentation of the appellant's defence. (Paragraphs [23]–[25] at 87*g*–*i*.)

Held, further, that the failure to explain the appellant's right to legal representation constituted an irregularity and this had prejudiced the appellant in the presentation of his case and it therefore vitiated the entire trial. The conviction and sentence accordingly had to be set aside. (Paragraph [31] at 90*a*.)

3. MINISTER OF SAFETY AND SECURITY AND OTHERS v VAN DER WALT AND ANOTHER 2015 (2) SACR 1 (SCA)

For reasons of public and legal policy, a magistrate's negligent conduct is not regarded as wrongful.

The two respondents were arrested on charges of assault with intent to do grievous bodily harm, the unlawful possession of a firearm, and pointing a firearm. When their case was called at their first appearance in court the magistrate abruptly adjourned the proceedings and left the courtroom followed by the prosecutor. The respondents saw the magistrate talking to the prosecutor in the corridor. When the magistrate came back into court she told the respondents that one of the charges they were facing was armed robbery and that they therefore had to bring a formal bail application. They attempted to explain that this was not correct but the magistrate merely told them that they should speak to the senior public prosecutor who was not in court at the time. They were remanded in custody. On the following day their attorney made an attempt to persuade the magistrate that the charge was incorrect but she would not hear his argument. The respondents were then released after having spent six days in custody. They instituted action against the complainant who had laid the charges, the Minister of Safety and Security, the Minister of Justice, and the investigating officer in his personal capacity. The High Court held that the respondents' detention was unlawful and awarded damages against the complainant who did not pursue an appeal against the accused. The court also found that the magistrate had interfered maliciously and intentionally in the formulation of the

charge and held the Minister of Justice vicariously liable on this basis. The court also held the Minister of Safety and Security and the investigating officer jointly and severally liable and awarded the respondents damages in the amount of R250 000 each. The ministers and the investigating officer appealed against the award.

The court on appeal held that the court a quo's finding of liability against the Minister of Safety and Security had to stand but held that on the evidence, the decision that the magistrate had maliciously altered the charges could not be sustained. (Paragraphs [15] at 9*d* and [18] at 9*g*.)

As to the issue of whether the magistrate had been negligent, the court held that the magistrate had been grossly negligent in ignoring the respondents and their attorney and it was as a result of her failure to pay attention to the concerns raised with her that led her to order the continued detention of the respondents. (Paragraph [19] at 10*a*.)

The court held, however, that a magistrate was not liable for his or her negligent conduct when performing his or her judicial functions, because, for reasons of public and legal policy, his or her conduct was not regarded as wrongful. The fact that the magistrate was immune from liability for his or her negligent conduct meant that there was no basis to hold any other party vicariously liable for such negligent conduct. (Paragraph [23] at 11*e*–*f*.)

The court was of the opinion that the amount of R250 000 awarded by the High Court was disproportionate and it reduced the amount to R120 000 in respect of each respondent. (Paragraph [29] at 13*f*.)

From The Legal Journals

Ferreira, S

"Step-parent adoption *Centre for Child Law v Minister of Social Development* 2014 1 SA 468 (GNP)"

THRHR 2015 (78) 140

Mujuzi, J D

"Diversion in the South African criminal justice system: Emerging jurisprudence"

2015 SACJ 40

Visser, J-M

"Defence challenges of forensic scientific evidence in criminal proceedings in South Africa"

2015 SACJ 24

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

Contributions from the Law School

Poor Quality of Conduct of Police, Legal Representatives and the Court

There have been a number of recent cases where the conduct of the police, the court, defence lawyers and public prosecutors have been criticised in strong terms.

Poor handling of forensic ballistics evidence

In the case of *Bamba v S* (20089/14) [2014] ZASCA 219 (11 December 2014), the state's case included expert forensic ballistics testimony. This evidence was crucial to linking the appellant to the crime and proving his guilt beyond a reasonable doubt (para 10). In the trial court, the accused's legal representative did not challenge the fact that the examined bullet head and cartridge matched the appellant's firearm. Only the link between the items and the crime scene was challenged (para 7). The SCA found that the trial court had erroneously held that the link was common cause, and did not consider the reliability of the ballistics evidence 'to prove that these were the same exhibits which were subjected to ballistics testing' (para 10). The SCA ultimately discounted the ballistics evidence as unreliable because of the manner it had been handled by the police. The problems that were identified by the SCA did not relate to whether the items had been found at the scene, but were rather focused on the unreliability of the police officer's evidence regarding the 'preservation and conveyance of the exhibits to the ballistic laboratory' (para 9). The SCA was concerned that they may have been confused with other items in the evidence safe since there was inconsistent evidence about whether the items had been placed in

separate properly marked exhibit bags before being placed in the safe (paras 8,9). In addition, the police officer had referred to an exhibit number of ICD 46/2007 (para 8) whereas the ballistics report which was handed in in terms of s 212 of the Criminal Procedure Act 51 of 1977 referred to exhibit number ICD-10230, and did not mention ICD 46/2007 at all (para 9). In the face of this, the state conceded that no reliance could be placed upon the ballistics evidence. Thus the SCA found that there was no reliable evidence linking the appellant's firearm to the bullet head and cartridge, and the appeal succeeded (paras14, 18).

There is no doubt that the conduct of the police in their handling of the forensic evidence was deserving of censure. However, the outcome of this case is regrettable, in my opinion. The appellant's legal representative did not challenge the conclusion in the ballistics report that the examined items matched the appellant's firearm. He specifically only challenged the link between the items and the crime scene. The mishandling of the exhibits from the time they were found was irrelevant to the link between them and crime scene. It was only relevant to whether they could be linked to the appellant's gun, which he did not challenge. By the time the matter reached the SCA, the appellant had even abandoned the challenge to the link between the items and the crime scene. This is evident from the fact that at the same time as lodging the appeal, the appellant applied for leave to introduce new evidence. The new evidence was 'aimed at establishing that the appellant had in the past fired several warning shots in the informal settlement, to explain the alleged presence of the bullet head and cartridge at the scene' (para 17). This application was abandoned by the appellant when the state conceded that no reliance could be placed on the ballistics evidence (para 16).

Police work is not a spectator sport

In the case of *M Sebofi v S* (2013/A5043) [2014] ZAGPJHC (13 October 2014) the appellant appealed against his conviction and sentence in the court a quo. This comment does not deal with the merits of the appeal, but just with the comments by the court on the manner the case was dealt with by the police, the prosecution, the defence and the regional court; and what the consequences thereof were. In the first place, the court acknowledged that criticism of the prosecution or defence of a case should not be glibly made 'because it is impossible for the critic to know what the instructions were or what enquiries were made that might have produced nothing helpful' (para 61). Mindful of this, the court nevertheless concluded that there were 'inadequacies in this trial that [were] alarming' (para 61).

In the first place the court emphasised the need for police to conduct proper investigations, and to remain involved during the course of the trial, commenting that '[p]olice work is not a spectator sport' (para 63). The court stressed the need to investigate the defence case thoroughly, saying that '[w]hatever rebuttal [the accused] offers must be taken seriously and investigated and reported on in evidence to demonstrate whether it supports or destroys the denial. Medical forensics tests must be properly processed and reported on when they can resolve

critical issues and might exclude a suspect of culpability' (para 68). The court held that this was particularly important in a rape case where invariably the complainant was a single witness. In the same way, the complainant's version should also be properly investigated. The court held that 'any police officer who is involved, and that includes the officer who receives the complaint, the officer who takes the victim's statement, the arresting officer and the investigating officer ought to appreciate that an axiomatic line of enquiry is what circumstances might offer corroboration or throw suspicion on the truth or accuracy of the complaint' (para 67). In addition, the court held that the investigative duties of the police do not end when the trial starts. Instead, the court held that '[i]nvestigating officers should, ideally, participate in the running and presentation of the evidence to court and should be active in assisting the prosecution' (para 69). For example when versions are disclosed for the first time during the trial, or where a witness' evidence requires further investigation, this must be followed up by the prosecutor and the police. The court held that this may necessitate a postponement of the case. The court acknowledged that logistical constraints would have to be considered, but it held that serious matters, such as rape which carry drastic sanctions upon conviction, fall 'into the category of matters in which an active role for the investigating officer ought to mandatory in terms of standard prosecutorial and standard police procedures' (para 69).

In the case before it the court noted that the appellant's version 'warranted investigation on several obvious points which, if corroborated, might have contributed to exonerating him' (para 64). The court noted that it was not disclosed if there had been any investigation into the appellant's version at all (ibid).

As regards the manner in which the case was presented by the prosecutor, the court commented that '[a] prosecutor cannot present a case by just pouring out a jumble of random facts' since this is unfair to the court and 'retards the aim of a fair trial which apart from other factors needs to be coherent and orderly' (para 65). The manner in which the defence was conducted was also criticised, with the court noting that 'the cross examination hardly plumbed the body of evidence and appeared to have no plan or objective and was either blind to or inattentive to several material or potentially material details' (para 65). The court held that '[a]n adversarial process is founded on proper preparation and commitment to testing the testimony available, it is not served by treating the process as a clerical chore' (para 65). It warned that

'[i]f the forensic standards exhibited in this trial are typical of the Regional Court, it begs the question whether the Regional Court is a fit forum to hear matters of such a serious nature. A fair trial is one that is fair to both sides and to the public. A citizen is entitled to sleep at night in the reasonable belief that the innocent are not being convicted because of shoddy work by the police and the lawyers. Moreover, victims of rape, as a class of vulnerable people in our society, ought to have a reasonable expectation that their cases are taken seriously enough to be investigated properly and tried at a standard that the guilty do not wriggle free because of un-insightful and superficial attention to details by those who are supposed to protect them…' (para 66).

Ultimately however, the court noted that 'the duty of ensuring, as far as humanly possible, that a fair trial does take place is that of the presiding judicial officer' (para 81). The court noted that where inadequate information was provided to the court, or where inexperienced counsel appeared before it, it had the power in terms of ss 167 and 186 of the CPA respectively to question and subpoena witnesses (para 83, 84,85). The court acknowledged that magistrates have to walk a fine line between intervening and being condemned for interference, and not intervening and being condemned for not ensuring a fair trial (para 86). However, although not condemning the magistrate in this case, the court found that 'the process was seriously flawed, and more ought to have been done' by the magistrate to ensure a fair trial (para 86).
As a result of the above mentioned problems, the court reached the conclusion that it could not, on the body of evidence placed before it, be satisfied that a fair trial took place (para 80). The court took care to note that it expressed no view as to the guilt or innocence of the appellant (para 80). As regards the appropriate remedy, the appellant argued that in terms of ss 313 and 324 of the CPA, the court should set the conviction aside and direct a trial de novo. The court found that this was not an option because the scope of those sections was limited to matters in which no valid decision could be reached, as a result of technical failures, which was not the situation in the case before it (para 90). Instead, the court took the exceptional step of remitting the case *mero motu* to the court a quo for the hearing of new evidence in terms of s 304 (2) (c) (v) of the CPA (paras 88, 89, 93). The court noted that '[a]n order of remittal for further evidence *mero motu* by a court is exceptional' but held that it was 'appropriate where the interests of justice demand it' (para 89). The court referred to *S v Mafu* 1966 (2) SA 240 (E) at 241H as authority for this. The court limited the new evidence to evidence on two specified issues that had the potential to exonerate the appellant (para 92).

Duty of prosecutor to assist the court to ensure that justice is done

Again in the case of *Maliga v The State* (543/13) [2014] ZASCA 161 (01 October 2014), the court emphasised the duty on presiding officers to ensure a fair trial. In this case, the magistrate admitted an obviously inadmissible confession by the accused. The court held that where a presiding officer makes an error of this type, it is the duty of those appearing before him, both prosecution and defence, to 'remind' him of the dangers in admitting such evidence (para 19). The court noted that it was 'unclear and indeed perplexing that the appellant's representative did not object to the admission of the written statement and the other evidence which also amounted to inadmissible evidence' (para 20). The court found it even more perplexing that the prosecutor did not intervene, holding that '[a] prosecutor stands in a special position in relation to the court. The paramount duty of a prosecutor is not to procure a conviction but to assist the court in ascertaining the truth' (para 20, references omitted).

In this case, the court held that the prosecutor had been duty bound to warn the presiding officer of the danger of admitting the inadmissible confession. At the very least, he should have insisted on a trial within a trial to deal with the issue (para 21). Ultimately the court held that that the accused did not receive a fair trial, and the conviction was set aside (para 22). In closing the court said that:
'[t]he tragedy in this specific matter is that a person who ought to have been discharged after the State's case in 2002 is now free – some 12 years on. There was no explanation offered for this delay when the parties were asked about it. One can only imagine the disastrous effects on his life. It emphasises the need for the administration of justice, especially from the area over which the Venda High Court has jurisdiction, to be vastly improved as quickly as possible. This is not the first time that this court has found it necessary to comment on these problems and their effects on the lives of ordinary South Africans in that region' (para 23).

Deliberate attempt to exclude exculpatory evidence by the court

In the case of *G v S* (A40/2013) [2015] ZANGHCP 16 (28 January 2015) (unpaginated judgement), the court suggested that there was malicious intent in the manner in which the magistrate and prosecutor handled the case. This introduces the possibility of personal liability for the consequences flowing therefrom, which the court did not comment on. The court did however comment on the 'strange attitude of the court *a quo*' regarding the J88 form, which it held was of crucial importance given the complainant's allegation that she had never been penetrated, since it would have 'obviated the need for the court to speculate and make a layman's finding on the question whether what the court noticed on some of the photographs constituted penetration.' The question of whether there was penetration or not made the difference for the accused between 'two sentences of imprisonment for life and a sentence for what could not have been more than an indecent act with a minor in terms of the Act. One would therefore have expected the court to not only welcome the form J88, but also to call the doctor as a witness in terms of sec. 186 of the Criminal Procedure Act if the prosecutor did not do so.' What happened however was that when the defence attempted to cross examine on the J88, the court stopped him saying he could only do so if the prosecution submitted it as evidence. When the prosecution did submit it, the court still refused to allow cross examination on it. Eventually after the appellant's case was closed, the court allowed him to reopen his case and submit the J88. But the damage was done since there had been no cross examination of a relevant witness on the form. The court stated that it was 'left with the uncomfortable feeling that it was a deliberate attempt by the court to exclude evidence that may have been to the advantage of the accused.' The court was also disturbed by incidents which arose during the cross-examination of the complainant. The complainant testified that she had been consulted by a social worker who had compiled a report on that basis. When the appellant's representative sought to use the report, the prosecutor objected on the basis that it was not evidence before the court. Without giving the defence an opportunity to address the court on this, it

immediately and incorrectly ruled that this line of enquiry by the defence was not allowed. The court held that while the objection by the prosecutor was 'surprising', it was equally surprising that the appellant's representative accepted this ruling without demur. There is of course no basis on which defence counsel can be prevented from asking a witness whether he or she had told another person something and, if it is denied, to present the evidence of that other person in order to impeach the credibility of the witness. The court held that what was 'particularly disturbing' was 'the almost inescapable inference that the prosecutor was hiding information that would have assisted the defence and that the magistrate was a knowing party to it… It is simply incomprehensible why the court *a quo* deliberately closed its eyes to this important information.'
The court, rather tamely in my view, concluded by saying that 'the magistrate and the prosecutor would both be well advised to think again about their duly to be fair to an accused person'.

Gambling with the interests of the complainant and the accused

In the case of *K D Ndlovu v S* (A41/2013) [2014] ZAGPPHC (4 December 2014) the appellant appealed against his conviction and sentence for the crime of rape. The appeal court noted the serious nature of the charge against the appellant and expressed concern at the 'desultory manner' in which the case was presented by both the defence and the prosecution (para 4). The court noted that its criticism was not directed at the magistrate because he had no control over the manner in which the case was presented to him (para 4). The court observed that the evidence presented was scant and expressed concern that there was often no attempt to 'clarify inconsistencies by way of proper and determined cross examination or re-examination' (para 5). The cross examination that was conducted was described as 'shallow' and lacking in 'the intention to uncover the truth' (para 6). Further, the court was concerned that witnesses who were 'probably available' were not called to 'fortify the state's case', and that the witnesses who were called 'were clearly ill prepared' which resulted in the 'clumsy presentation of their evidence' (para 5). Further, the court noted that leading questions contaminated the complainant's evidence (para 9) and that the available medical evidence and its implications were neglected (para 7). The Court held that it was 'simply unacceptable for both the state and the defence to gamble with the interests of the victim and the accused' in this way (para 8).

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Matters of Interest to Magistrates

Fixing SAPS should start with Phiyega, but can't end there

The disastrous reign of South African Police Service (SAPS) National Commissioner, General Riah Phiyega, will hopefully come to an end very soon.

It is highly likely that the board of inquiry into her fitness to hold office will end in a recommendation that she be dismissed. However, if the SAPS is to become a well-respected and trusted organisation, known for its professionalism and effectiveness in tackling crime, it will take much more than simply appointing another National Commissioner. Rather, the entire senior management echelon will need to be revitalised to consist only of individuals with appropriate skills and expertise, along with impeccable integrity.

The Marikana Commission found that Phiyega had failed in her duties as SAPS National Commissioner in two important respects. Firstly, she was party to the decision to implement an operational plan in which bloodshed was foreseeable. This stood in stark contrast to her legal and moral duty to ensure that policing operations avoided the loss of life or injury. The outcome of this fundamental failure was that 112 people were shot, resulting in 34 deaths. The shootings were unnecessary and unjustifiable, as the commission could not find that the police were under attack.

Secondly, all police officials sign a code of conduct that emphasises the importance of integrity. As a senior police officer, Phiyega had a formal duty to engage with the commission honestly so that the truth could be established. The commission found significant failings on this score. Phiyega not only misled the people of South Africa through her first public statement after the massacre, she was furthermore party to withholding vital evidence, presenting false and misleading evidence before the commission, and giving untruthful testimony under oath.

Phiyega’s continuation as SAPS National Commissioner is therefore untenable, and she should be suspended as soon as possible. This not only because of the commission’s findings against her, but also because further investigations have been recommended. These could lead to possible criminal prosecutions against a number of police officers under her command. Given what we now know about Phiyega, it cannot be ruled out that she might use her authority to resist or undermine efforts to hold these officers accountable.

Furthermore, we should expect to see the suspensions of all those police officers referred to in the Commission’s report pending the finalisation of criminal and

disciplinary steps against them. These steps are important, not only to satisfy the public and victims' need to see justice done, but also to start the long and difficult process of rebuilding the credibility of the SAPS.

For the past three years, the SAPS has been led by a national commissioner who not only shirked her legal and moral obligations, but is patently dishonest and of low moral character. The consequence has been that professional and honest police officers have been forced out of the organisation. Last year, Phiyega unilaterally and irregularly forced out two well-respected deputy national commissioners, Lieutenant-Generals Godfrey Lebeya and Leah Mofomme for no clear reasons other than perhaps feeling threatened by them. Lebeya and Mofomme have more than 60 years of policing experience between them.

On the other hand, Phiyega has protected and supported various senior officers who are facing serious criminal charges, or who are known to be unethical. For example, she continues to protect current head of SAPS Crime Intelligence Lieutenant-General Richard Mdluli, who is appearing in court on charges ranging from murder to corruption. She also tried to assist Western Cape Provincial Commissioner Arno Lamoer by warning him of a corruption investigation against him. She then victimised the brave intelligence officers who appropriately reported her attempts to undermine their investigations. Lamoer and three other senior police officers are currently facing more than 100 charges of corruption and racketeering.

It is therefore unsurprising that the SAPS has deteriorated notably under her command. Crime intelligence is in a crisis due to her protection of Mdluli and is operating at a substantially reduced level of productivity. Experienced police officers are leaving in droves at well over twice the rate than when she took over. Last year, 1 100 detectives left the SAPS, a crucial resource that the police can ill afford to lose. Police brutality and corruption remain significant challenges, contributing to the 137% increase in civil claims against the police that have been paid out since her appointment.

As a result of these failures, crimes that the police were able to tackle in the past are now spiralling out of control. Since her appointment, there are at least 50 more armed robberies every day on average. These violent attacks are contributing four additional murders taking place every day on average, compared to 2012.

To be fair on Phiyega, it is not all her fault. She has at her disposal around two dozen lieutenant generals and about 50 major generals who should be providing her with sound advice to improve policing and develop clear strategies to reduce the crimes mentioned above. She is clearly not capable of providing them with guidance, as she has no policing experience herself. While many of these commanders are highly skilled and have solid expertise, she is probably receiving much bad and contradictory advice from a number of her senior commanders.

This is because for much of the past decade or more, too many senior appointments have been made for reasons that have nothing to do with policing experience or integrity. Disgraced former SAPS Commissioner Jackie Selebi, for example, appointed a political cadre whom the Public Service Commission had found to be guilty of serious misconduct and maladministration to head the SAPS National Inspectorate. This structure is vital for internal accountability, but collapsed under his mismanagement.

We cannot accept a situation where the president parachutes a loyal comrade to head the SAPS. Such an appointee will make mistakes, and when the police make mistakes people die or are injured. Fortunately for Zuma, he can start the process of fixing the SAPS simply by implementing the recommendations of the National Development Plan (NDP) as they pertain to policing.

The NDP calls for the SAPS national commissioner and deputy national commissioners to be appointed after a comprehensive review by an independent panel, and following a transparent and competitive recruitment process. Moreover, the NDP recommends that a multi-disciplinary National Policing Board consisting of various expertise and skills should be established to independently assess the appointment processes, abilities and expertise of all senior officers. Those who do not possess the necessary skills, expertise or integrity should be replaced by others who are able to fulfil the requirements.

Only a solid senior management team of highly experienced and honest police officers will be able to develop and implement strategies that will reduce police misconduct and improve their performance in reducing crime. Let’s hope that the president implements his government’s own plan so that the many honest and skilled officers working under difficult conditions can start to rebuild the credibility of the SAPS. This would at least mean that the Marikana massacre contributed to something positive, given the massive trauma and pain it has inflicted on its victims and on the psyche of South Africa.

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This article was first published by *The Sunday Independent*

A Last Thought

“A fundamental concern for others in our individual and community lives would go a long way in making the world the better place we so passionately dreamt of.”

Nelson Mandela