e-MANTSHI

A KZNJETCOM Newsletter

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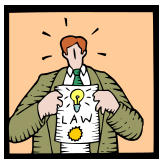
Welcome to the hundredth and twelfth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. A Criminal Matters Amendment Bill has been introduced in Parliament. The explanatory summary of the Bill was published in Government Gazette 39031 dated 29 July 2015. The purpose of the Bill is to provide for changes to the law pertaining to infrastructure related offences by providing stricter provisions for the granting of bail, the sentencing of offenders and creating a new offence to criminalise tampering with, damaging or destruction of essential infrastructure which may interfere with the provision of basic services to the public. Section 3 intends to create the following offence:

"Offence relating to essential infrastructure

3. Any person who unlawfully and intentionally—

(a) tampers with, damages or destroys essential infrastructure; or

(b) colludes with or assists another person in the commission, performance or carrying out of an activity referred to in paragraph *(a)*, and who knows or ought reasonably to have known that it is essential infrastructure, is guilty of an offence and liable on conviction to a period of imprisonment not exceeding 30 years."

2. The president has in terms of section 50(2) of the *Prevention and Combating of Trafficking in Persons Act, 2013 (Act No. 7 of 2013*), fixed 9 August 2015 as the date on which the said Act, except sections 15, 16 and 31(2)*(b)*(ii) came into operation. The notice to this effect was published in Government Gazette no 39078 dated 7 August 2015.

3. The Director -General of the Department of Home Affairs, has in terms of section 34(1) of the Immigration Act, 2002 (Act No. 13 of 2002), determined the Stations of the South African Police Service as places of detention of illegal foreigners pending deportation or transfer to Lindela Holding Facility for purposes of deportation. This notice was published in Government Gazette no 39065 dated 7 August 2015.

Recent Court Cases

1. S v MADLALA 2015 (2) SACR 247 (GJ)

The warning by a presiding officer that evidence in a bail application might be used against an accused at a subsequent trial is equally applicable to evidence on affidavit.

The appellant appealed against his conviction for robbery with aggravating circumstances in a regional magistrates' court. He contended inter alia that the magistrate had misdirected himself in admitting his bail affidavit into the record without proof of substantial compliance with s 60(11B)*(c)* of the CPA, which required that the applicant not only be advised by his attorney that the statements in his bail affidavit could be used against him during his trial and form part of the record, but also that the court itself had to inform him that the statement might be used against him at his trial. His counsel contended that the misdirection had resulted in an unfair trial. Counsel for the state argued that there was no requirement that the presiding officer at the bail proceedings had to inform the accused of his rights if the accused, as in the instant case, had submitted an affidavit. He argued that s 60(11B)*(c)* only required the presiding officer to warn the accused if he elected to testify during the course of the bail proceedings, and an affidavit was not testifying.

Held, that both oral evidence and affidavits were evidence that could be used in the subsequent trial. As such, the requisite warning had to be issued by the court to the accused before he elected to testify orally or by way of an affidavit. (Paragraph [14] at 252*e*.)

Held, further, that, even if the presiding officer did not inform the accused of his rights during the bail proceedings, such misdirection did not warrant a reversal. The admission of inadmissible evidence was material and prejudicial to the accused if it formed the basis for an adverse decision reached. In the present case the failure of the magistrate to exclude the inadmissible evidence was immaterial and non-prejudicial to the accused, as the magistrate did not emphasise the inadmissible evidence in reaching his conclusions as to the factual issues in the case. The magistrate did not hang his hat on internal consistencies between the appellant's statements made during the bail hearing and his testimony at trial, but rather on the general demeanour of the appellant and his co-accused insofar as they presented evidence that was incredible, unreliable and riddled with external contradictions, as against the complainant who was a credible and reliable witness. Even without factoring in the internally contradictory statement made by the appellant during the bail proceedings and at trial, a finding of guilt was still supported by the magistrate's credibility findings, based on the externally contradictory evidence of the appellant and his co-accused at trial. (Paragraphs [16] at 252*g* – 253*a* and [17] at 253*b* – *c*.) The appeal was dismissed.

2. S v MASOKA AND ANOTHER 2015 (2) SACR 268 (ECP)

An interference with a defence witness in a criminal trial can compromise the integrity of such a witness and the accused's right to a fair trial where a prosecutor obtained a witness statement from an alibi witness.

The second accused had indicated in his plea explanation on a charge of robbery, that he had an alibi and disclosed the name and address of the witness. His attorney consulted with the witness on the following day. The prosecutor instructed the investigating officer to obtain a witness statement from the alibi witness, which was obtained but never mentioned until the statement was produced when the second accused completed his examination-in-chief and the prosecutor started cross-examination. When this occurred the magistrate referred the matter on special review to the High Court.

Held, that no legal representative was allowed to consult or influence or interfere in any way whatever with the opposing party's witnesses. In criminal matters an accused who interfered with state witnesses could be imprisoned pending trial, and might be refused bail. The rule was as binding on investigating officers and prosecutors who interfered with defence witnesses. (Paragraph [14] at 272*b*.)

Held, further, that, to interfere with or attempt to influence a defence witness in a criminal trial was to compromise the integrity of that witness. If an accused's witness was compromised, the accused's right to a fair trial was equally compromised. If this happened the evidence became worthless and the true facts could not be ascertained. The entire justice system was then undermined and justice could not be done. (Paragraph [17] at 272*f*.)

Held, further, that the prosecutor was guilty of serious misconduct and had to be duly censured. The proceedings against the accused had to be set aside and the Director of Public Prosecutions had to decide whether or not to commence criminal proceedings against him afresh before another magistrate. If so, the witness statement obtained by the state from the defence witness had to be removed from the police docket and be regarded as *pro non scripto*, and he had to be disqualified as a state witness. (Paragraph [18] at 272*g*–*h*.)

3. S v PAPU AND OTHERS 2015 (2) SACR 313 (ECB)

There is a distinction between private defence and putative private defence and a court should not conflate the two defences.

The three appellants, all seasoned policemen, set out on a night mission to arrest a suspect at the premises of the deceased whose farmhouse was in a remote area. They were armed with R5 assault rifles. Their presence at the farmhouse was detected by the deceased's dogs and this alerted the inhabitants, some of whom ventured into the darkness to ascertain what was happening. The deceased called out to the appellants to announce their presence and when they failed to do so he fired a shot. This led to the appellants retaliating and a shot struck and killed the deceased. At their trial on a charge of murder the court held that the state had discharged the onus of proving that the appellants had not acted in either private defence or putative private defence and convicted them of murder. On appeal against their conviction and sentence of direct imprisonment in terms of the provisions of s 276(1)*(i)* of the CPA,
Held, that that the parties and the court a quo had conflated the two defences and it was apposite to emphasise the disparate nature of the two defences. A person who acted in private defence acted lawfully, provided his conduct satisfied the requirements laid down for such a defence and did not exceed its limits. The test was objective, namely whether a reasonable man in the position of the accused would have acted in the same way. In putative private defence, however, it was not lawfulness that was in issue but culpability, and if an accused honestly believed his life or property to be in danger, but objectively viewed they were not, the defensive steps he took I could not constitute private defence. If in those circumstances he killed someone his conduct was unlawful. His erroneous belief that his life or property

was in danger might well exclude dolus, in which case liability for the person's death based on intention would also be excluded; at worst for him, he could then be convicted of culpable homicide. (Paragraph [3] at 315*c*–*f*.)

Held, further, that it was abundantly clear, as the trial court had correctly found, that none of the appellants could have entertained a reasonable suspicion that their quarry was on the farm. To thus proceed, under cover of darkness, to a remote farm, armed with a battery of artillery, and with a contingency plan foremost in their minds to shoot if they were shot at, was not only unreasonable but also foolhardy in the extreme. (Paragraph [7] at B 317*i*–*j*.)

Held, further, that the appellants' reliance on putative private defence was also correctly found by the trial court to be misplaced. The appellants and, a fortiori, their contingent were all armed with assault rifles. When the deceased fired the first shot, the appellants, by their own admission, took cover behind a trailer before returning fire. The area was enveloped in darkness and they lay prone on the ground and could have retreated from a prone position. They could therefore not honestly have believed that their lives were in imminent danger. Shrouded in darkness and invisible to the perceived threat, they were in comparative safety and it was inconceivable that they could, in those circumstances, have believed they were entitled to fire into the darkness, directly at a would-be attacker, in defence of their lives, without even firing a warning shot. The trial court's finding that the state had proved beyond a reasonable doubt that the appellants subjectively had the requisite intent, to found a conviction for murder, was undoubtedly correct. (Paragraph [12] at 319*a*–*d*.) The appeal was dismissed.

From The Legal Journals

De Villiers, W P

“Section 276b(2) of the Criminal Procedure Act: must the court fix a non-parole period where concurrent prison sentences are imposed, and does the accused have the right to be heard on whether section 276b(2) ought to be invoked and, if so, what should be the length of such a non-parole period? S *v Mthimkhulu* 2013 2 SACR 89 (SCA)”

Van Heerden, C M & Boraine, A

"The impact of section 129(1)(a) of the National Credit Act on the prescription of credit agreement debt"

2015 (78) THRHR 457

Otto, J M

"The surrender of goods in terms of the National Credit Act"

2015 (78) THRHR 487

Lutcman, S

"S v Litako 2014 SACR 431 (SCA): a clarification on extra curial statements and hearsay"

PER / PELJ 2015(18)2

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

Contributions from the Law School

The Nature of Judicial Discretion

The Constitutional Court has said that the exercise of judicial discretion 'lies at the heartland of judicial function' and that judicial officers are perfectly placed to make the necessary value judgements intrinsic to exercising judicial discretion (*Savoi v National Director of Public Prosecutions* 2014 (5) BCLR 606 (CC) at para 69).
Dean Pound, an American jurist, once observed that 'in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule and without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the case before him.'(Cited in Davis *Discretionary*

Justice: *A Preliminary Inquiry* (Louisiana State University Press, Baton Rouge 1969) at 17).

In the case of *Dawood and Another*; *Shalabi and Another*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC) the Constitutional Court held that 'discretion permits abstract and general rules to be applied to specific and particular circumstances in a fair manner' (at para 53).

It has explained further that '[j]udicial officers are provided with discretion to ensure that the principles and values with which they work can be applied to the particular cases before them in order to achieve substantive justice. Discretion is a flexible tool which enables judicial officers to decide each case on its own merits' (*Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and others* (2009) (4) SA 222 (CC) at para 121). It is only through the exercise of discretion that the objective of individualised justice can be achieved (ibid at para 119). The use of discretion permits judicial officers to tailor the application of the law to the unique facts and circumstances of the case before them to avoid the injustice which may result from the mechanical application of the law (id).

However it is trite that discretion cannot be exercised completely unchecked. It must be regulated by the Constitution and general principles of the law (*Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and others* supra at para 20*)*. The spirit and the tenor of the constitution must preside and permeate the processes of judicial interpretation and the exercise of judicial discretion (*S v Acheson* 1991 (2) SA 805 (NmH) at 813).

Discretion is also constrained by the purpose for which it was conferred. For example, in *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and others (*supra) the Constitutional Court emphasised that the judicial discretion as to whether to appoint an intermediary in terms of s 170A of the Criminal Procedure Act had to be exercised with due regard for the purpose for which it was conferred: being to safeguard the best interests of children in accordance with section 28 of the Constitution. Accordingly, the decision as to whether to appoint an intermediary or not must be exercised with due regard to the goal of protecting a child from the undue stress or suffering that may arise from testifying in court in the presence of the accused and without appropriate assistance (at para 125).

General principles dictate further that judicial discretion must be exercised with due regard for all the relevant factors, including public policy and the social interest.
In the case of *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and others (*supra) the Constitutional Court explained what factors may be relevant to exercising the discretion conferred by section 170 A of the Criminal Procedure Act as follows:

'In a matter involving a child, the conferral of judicial discretion enables courts, on a case-by-case basis, to determine whether the services of an intermediary are required. What must be emphasized is that section 170A(1) deals with witnesses generally who are under the age of 18 years. This includes complainants in sexual offence cases, child witnesses to sexual offence cases and witnesses to other offences generally. The nature of the evidence that the witnesses contemplated in the subsection will give, will therefore vary according to the offence in respect of which they testify. So too will the stress of giving the evidence. This variation will invariably influence the necessity or otherwise of appointing an intermediary. Other factors that are relevant include the level of maturity of the child, the age of the child, the nature of the offence, the independence of the child and the feelings and wishes of the child' (at para 122).

'A child who is 17 years old who is outspoken and assertive may consider it an affront to his or her dignity to suggest that he or she should testify through an intermediary. Similarly, it would be absurd to expect a child of that age whose only testimony relates to identifying his or her stolen cellular phone to testify through an intermediary. Yet a child who is of the same age who is a complainant in a rape case, who is shy and was severely traumatised by the rape, may need the services of an intermediary. The exercise of judicial discretion enables the court to apply the provisions in a flexible manner bearing in mind that the primary objective is to give effect to the provisions of section 170A(1) and section 28(2) of the Constitution (at para 123).

The relevant factors which must be taken into account may or may not be specifically enumerated. They are not specifically enumerated in section 170A of the Criminal Procedure Act. In the case of *Savoi v National Director of Public Prosecutions (supra)* the applicants challenged section 2 (2) of the Prevention of Organised Crime Act 121 of 1998 (POCA) inter alia on the basis that it contained no criteria for determining the admissibility of certain types of evidence, which was left entirely dependent on judicial discretion. The Constitutional Court rejected this argument, holding that the exercise of discretion was the essence of the judicial function and something for which judicial officers are specifically equipped to do appropriately.

The Constitutional Court made reference to section 35 (5) of the Constitution which governs the admissibility of unconstitutionally obtained evidence, and provides a good example of the relevance of public policy and social interests in exercising judicial discretion. Schwikkard and Van der Merwe describe the court's obligations in terms of this section as follows: 'There is a duty to exclude [the evidence] if admission would have one of the consequences identified in the section. In this respect there is no discretion but a fixed constitutional rule of exclusion. However, in determining whether admission would have one of the two identified consequences a court is required to make a value judgement and in this respect there is a discretion which must, obviously, be exercised having regard to all the facts of the case, fair trial principles and, where appropriate, considerations of public policy.' (Principles of Evidence 3 ed (2009) 215).

In *S v Tandwa* (2008) 1 SACR 613 the court commented on the operation of section 35 (5) as follows 'The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice … In determining whether the trial is rendered unfair, courts must take into account competing social interests. The court's discretion must be exercised 'by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to … accused persons'. Relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book … though admitting evidence that renders the trial unfair will always be detrimental to the administration of justice, there may be cases when the trial will not be rendered unfair, but admitting the impugned evidence will nevertheless damage the administration of justice. Central in this inquiry is the public interest …' (at paras 116-7).

There are some constitutional rights which may not be left to the discretion of the presiding officer. For example, in *S v Zuma and Others* 1995 (4) BCLR 401 (CC) it was held that the presumption of innocence may not be subject to judicial discretion. However, there are many examples of constitutional obligations which may be properly dealt with in the discretion of the judicial officer (See for example *S v Dlamini; S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (4) SA 623 (CC) at para 50; *Sanderson v Attorney-General, Eastern Cape* 1997 (12) BCLR 1675 (CC) at para 30; and *Shabalala and Others v Attorney-General of the Transvaal and Another* 1995 (12) BCLR 1593 (CC) at para 55).

It should be noted that even where a judicial officer is enjoined to consider a range of specified factors in making a decision, this will not necessarily mean that the decision is a question of discretion. For example Section 3(1)*(c)* of the Law of Evidence Amendment Act allows hearsay evidence to be admitted if 'the court, having regard to –

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice'.

In the case of *McDonalds Corporation v Joburgers Drive-inn Restaurant (Pty) Ltd and another; McDonalds Corporation v Dax Prop cc and another; McDonalds Corporation v Joburgers Drive-inn Restaurant (Pty) Ltd and Dax Prop cc* 1997 (1) SA 1 (A) it was argued that the Court *a quo* exercised a discretion in refusing to admit

the relevant hearsay evidence in terms of s 3 of the Act, and that therefore its decision in this regard could only be set aside if the appellate court found that the discretion was not judicially exercised. The Appellate Division rejected this argument, holding that a decision on the admissibility of evidence is, in general, one of law, not discretion, and an appellate court is fully entitled to overrule incorrect decisions of law made by a lower court. It held that section 3 did not change this (at p 27 E).

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Matters of Interest to Magistrates

The business of (dis)organised crime in South Africa

The concept of organised crime often evokes images of mafia-like figures and secret societies involved in acts like drug trafficking and murder.

Globally, this ‘mafia mystique’ is associated with shadowy organisations such as the Chinese triads or Japanese yakuza, while in South Africa; the focus is often on notorious figures like Radovan Krejcir.

In reality, however, the organised criminal economy is mostly sustained by unsophisticated and ad hoc criminal networks, along with corrupt relationships. Sophisticated and structured criminal groups do exist, but these are not the only form of organised criminality.

Fluid criminal networks and illicit business dealings have an even larger impact on the citizenry, and it is the failure to account for that these leads to systemic organised crime issues. In South Africa, criminal networks that are more commonly associated with organised crime include drug-trafficking syndicates, gangs in the Cape Flats, cash-in-transit operations and poaching syndicates. However, groups like housebreaking gangs, cellular phone thieves, second-hand metal dealers and cable thieves also fuel the organised criminal economy.

Many crimes that are committed by these ‘unsophisticated’ networks also feed into broader networks of organised criminal activity. When researching the effects of

organised crime, it is therefore important to also look at the broader value chain of criminal groups and the supply chain of criminal economies.

This, in turn, should inform both policy and operational responses to threats. Any analysis of organised crime should therefore start from the grassroots and the police station level. This would allow for a better understanding of the impact that organised crime and the criminal economy have on South Africans.

For example, the market for stolen goods in South Africa remains extremely large, particularly in certain communities. This demand for stolen goods is believed to lead to increases in robbery and housebreakings, which could, in turn, lead to increases in violent crime and murder. Research conducted in 2008 suggests that while murder rates in the country had been dropping, this decline was slower in areas where robbery had increased. It is therefore possible that more effective measures to curb illicit commodities and markets could also reduce murder rates.

While there may be a high level of criminal networking between those who commit robbery, the middlemen and the sellers of stolen goods, an interesting feature is the fluidity of groups and their connections. For example, groups committing robberies may change members, and they may choose from a variety of other actors to sell these goods.

After a group (which is on average comprised of four people) commits the initial robbery, they interact with middlemen who often use legitimate businesses to sell the goods or export it to foreign markets. These legitimate businesses can serve as a front to hide the illegal connections of middlemen, and these fall into a ‘grey’ area of engaging in both legal and illegal activities. The majority of those taking part in these crimes are career criminals, driven by economic motives.

Another important example of organised criminal networks can be seen in business robberies. Over the past three years, the country has seen substantial increases in robberies at businesses or at non-residences, indicating a huge increase of 460% from just 3 320 in 2004/2005 to 18 615 in 2013/2014. Armed robberies at shopping malls also showed a staggering increase from 274 to 665 cases: an increase of 142% in the past three years.

It has been reported that the majority of the criminals involved in the spate of 2014 mall robberies were linked to three main networks, with a significant number of gang members and over 400 people linked to the broader network. This points to the fluidity of these networks, which consist of a core group that draws on a larger group and rely on a host of other actors to support them.

Specialised law enforcement agencies are acutely aware that these highly flexible groups are at the epicentre of organised crime, and that the broader network includes those who can move illicit goods transnationally. The supply chain extends beyond the gangs that commit the crimes; and the market for stolen goods remains

strong. This requires input from legitimate businesses, such as the scrap metal dealers who sustain the cable theft economy.

In this way, it mimics more traditional crimes such as poaching, whereby fairly disorganised groups later sell the goods to more sophisticated gangs or individuals. Yet the impact of organised crime is not felt only among high-income groups and businesses.

As author David Bruce has argued, the prioritisation of so-called ‘trio crimes’ (namely carjacking, house robbery and business robbery), which are often carried out by specialist gangs, has been ‘misguided’ and ‘elitist’. Bruce says that ‘street robbery’, which is not an official crime category but which affects the majority of South Africans, has not been prioritised in the same manner.

According to Bruce, many of those involved in street robbery may be ‘generalists’ who also engage in robbing homes and businesses. He adds that ‘many of the former township areas serve as a training ground for robbers who eventually graduate into the specialist robbery gangs.’ Furthermore, many marginalised and poorer suburbs have become breeding grounds for criminality given a lack of socio-economic opportunities and policing.

During the Khayelitsha Commission of Enquiry into policing, many of the problems in South African policing structures were pointed out, including the unfair deployment of policing, overburdened detective services and problems with social conditions. Intelligence gathering at the grassroots and station level remain woefully underdeveloped in these areas, as police have not prioritised intelligence reporting.

If analyses of organised crime fail to include the elements that feed into this phenomenon, subsequent responses to such crimes will remain inappropriate. Investigations into such crimes will be narrowly focused, intelligence will be ineffective, resources would be inadequate and policy responses will be insufficient.

Many organised crime groups develop from a grassroots level and intelligence should be prioritised from the bottom up, focusing on infiltrating and rehabilitating such groups before they engage in serious organised crime. Preventing organised crime in South Africa should therefore start with intelligence that focuses on these loose, informal and ad hoc networks that plague the country, and police structures should urgently re-evaluate police prioritisation and deployment.

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A Last Thought

"[49] The Child Justice Act stipulates that the provisions of the Criminal Procedure Act apply —

'with the necessary changes as may be required by the context . . . except insofar as this Act provides for amended, additional or different provisions or procedures in respect of that person'.

[50] The Child Justice Act makes provision for preliminary inquiries. The preliminary inquiry may be postponed for a period determined by the inquiry magistrate in the case where —

'the child has been referred for a decision relating to mental illness or defect in terms of section 77 or 78 of the Criminal Procedure Act'.

These inquiries are pre-trial procedures, the purpose of which, amongst other things, is to establish whether the matter can be diverted before a plea or to identify a suitable diversionary option. In order for diversionary options to be considered, s 47(2)*(b)*(i) requires the inquiry magistrate to determine whether the child acknowledges responsibility for the alleged offence. The child, given the presence of a mental illness or an intellectual disability and the inability to understand court proceedings, cannot reasonably be expected to acknowledge responsibility. This means that diversionary options under the Child Justice Act — which are a form of punishment, albeit with a more rehabilitative emphasis — cannot apply.

[51] In terms of the Child Justice Act, the inquiry magistrate is then enjoined to refer the child to the child justice court. However, the Child Justice Act makes it clear that the provisions of the Criminal Procedure Act apply unless stated otherwise. The Child Justice Act is, however, silent as to how to proceed once a child is found unable to understand court proceedings. Thus, it seems that if the child is found unable to understand court proceedings, the Criminal Procedure Act applies, and the court will then make a decision in terms of s 79(2)*(c)*. Here a court has a wide discretion. The discretion exercised by the presiding officer in terms of s 79(2)*(c)*(ii), at that point, must be informed by (1) prima facie evidence presented by the prosecutor; and (2) the best interests of the child. Section 28 of the Constitution mandates this.

[52] However, if a child should find himself in a s 77(6)*(a)*(i) process, then the prescripts of the provision apply. The presiding officer will have no discretion to deal with the child appropriately. Once engaged in a s 77(6)*(a)* process, the 'trial of the facts' may reveal that the child did nothing at all or may reveal other important information that the presiding officer, under the current circumstances, would be unable to take into account. I therefore cannot conclude that detention —

which must follow — is being used as a last resort as required by s 28*(g)* of the Constitution. Section 77(6)*(a)*(i) deprives courts of a discretion to deal appropriately with children who fall within the ambit of the impugned section. Thus, to the extent that s 77(6)*(a)*(i) applies to children, it is unconstitutional."

Per Leeuw AJ in ***DE VOS NO AND OTHERS v MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND OTHERS 2015 (2) SACR 217 (CC) at 239***