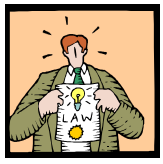
e-MANTSHI

A KZNJETCOM Newsletter

April 2011 : Issue 63

Welcome to the sixty 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 all the 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 key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to gvanrooyen@justice.gov.za.



New Legislation

1.Civil Practice Directives for the Regional Courts in South Africa were adopted by the Regional Court Presidents' Forum and were effective from 15 November 2010. Although these directives are only applicable (at this stage) to the Regional Civil Courts they are worth implementing on a wider scale. They have been published in the new Magistrates' Courts Rules of the authors *Jones and Buckle* and are also available online at
http://www.lawsoc.co.za/upload/files/civil/civil_practice_directives2010.pdf.

The directive in respect of reserved judgments is worth implementing in the Magistrates Courts too. It reads as follows:

"8 RESERVED JUDGEMENTS
8.1 Judgments may not be reserved sine die and the presiding officer shall indicate the date on which judgment will be delivered or handed down which should be within a reasonable time from date of hearing the matter.
8.2 Judgment delivery should be, where reasonably possible, done in open court."

Recent Court Cases

1. Minister of Safety and Security v Sekhoto and Another 2011 (1) SACR 315 SCA

An arrestor was not called upon to determine whether or not a suspect ought to be detained pending trial; It is for the court to determine that.

In defending a claim for unlawful arrest, the four jurisdictional facts set out in s 40(l)(b) of the Criminal Procedure Act 51 of 1977 must be pleaded: that the arrestor was a peace officer; that he or she entertained a suspicion; that the suspicion was that the arrestee had committed a Schedule 1 offence; and that the suspicion rested on reasonable grounds. In Louw v Minister of Safety and Security 2006 (2) SACR 178 (T), which was subsequently followed in a number of other decisions, the court laid down a fifth jurisdictional fact: that there must have been no less invasive options available in order to bring the suspect before court. The respondents in casu had been arrested for stock theft, but discharged at the close of the State's case. They were subsequently awarded damages for unlawful arrest on the grounds that there had been other means available to bring them before court. The appellant's appeal to a full bench was dismissed, after which he approached the Supreme Court of Appeal.

Held, that it was unclear whether the courts below, when formulating the fifth jurisdictional fact, had done so by direct application of provisions of the Bill of Rights; by developing the common law; or by way of interpretation of 40(1) of the CPA. Bearing in mind the principles of interpretation and the manner in which statutes were to be interpreted in light of the Bill of Rights, there was nothing in s 40(1) (b) that could lead to the conclusion that its words contained a hidden fifth jurisdictional fact. And since legislation overrode the common law, the meaning of a statute could not be changed by developing the common law. (Paragraphs [14]-[15] and [22] at 323b-c and 325e.)

Held, further, that none of the High Courts had considered whether or not 40(l)(b) was unconstitutional and, if so, whether 'reading in' the fifth jurisdictional fact could save it from unconstitutionality. It could hardly be suggested that an arrest under the circumstances set out in s 40(1)(b) could amount to a deprivation of freedom which was arbitrary or without just cause and thus in conflict with the Bill of Rights. A lawful arrest could not be arbitrary. (Paragraphs [24]-[25] at 326b-d.)

Held, further that, once the required jurisdictional facts were present, the discretion whether or not to arrest arose. Peace officers were entitled to exercise this discretion as they saw fit, provided they stayed within the bounds of rationality. This standard was not breached because an officer exercised the discretion in a manner other than

that deemed optimal by the court. The standard was not perfection, or even the optimum, judged from the vantage of hindsight, and, as long as the choice made fell within the range of rationality, the standard was not breached. (Paragraphs [28] and [39] at 327b-c add 330e.)

Held, further, that it was clear that the power to arrest was to be exercised only for the purpose of bringing the suspect to justice; however, the arrest was but one step in that process. The arrestee was to be brought to court as soon as reasonably possible, and the authority to detain the suspect further was then within the discretion of the court. This discretion was subject to a wide-ranging statutory structure and, if a peace officer were to be permitted to arrest only when he or she was satisfied that the suspect might not otherwise attend the trial, then that statutory structure would be entirely frustrated. To suggest that such a constraint upon the power to arrest was to be found in the statute by inference was untenable. The arrestor was not called upon to determine whether or not a suspect ought to be detained pending trial; that was for the court to determine, and the purpose of an arrest was simply to bring the suspect before court so as to enable it to make that determination. The enquiry to be made by the peace officer was not how best to bring the suspect to trial, but only whether the case was one in which that decision ought properly to be made by the court. The rationality of the arrestor's decision on that question depended upon the particular facts of the case, but it was clear that in cases of serious crimes, such as those listed in Schedule 1, an arrestor could seldom be criticised for arresting a suspect in order to bring him or her before court. (Paragraphs [42]-[44] at 331c-332a.)

Held, further, regarding onus, that the party who alleged the infringement of a constitutional right bore the onus of establishing it. Furthermore, a party who attacked the exercise of a discretion where the necessary jurisdictional facts were present bore the onus of proof. This was so whether or not the right to freedom was compromised. It could not be expected of a defendant to deal with a claim—as *in casu*—in which no averment had been made, save the general one that the arrest had been unreasonable. Were it otherwise, the defendant would be compelled to cover the whole field of every conceivable ground for review, knowing that, should he or she fail to do so, a finding that the onus had not been discharged could ensue. Such a state of affairs was quite untenable. (Paragraphs [49]-[50] at 333a-e.)
Appeal upheld. Order of the magistrates' court amended to read 'absolution from the instance.'

2. S v Molawa; S v Mpengesi 2011 (1) SACR 350 GSJ

A Magistrate has a duty to provide full reasons for a judgment at the conclusion of a trial.

In each of these matters the accused had appeared before the same magistrate on criminal charges—of robbery and of assault with intent to do grievous bodily harm, respectively. After evidence had been led and the prosecutor and the undefended, accused had addressed the court, the magistrate had simply pronounced that they

were ‘found guilty as charged’, before moving on to sentencing proceedings. No reasons for the convictions were given. Furthermore, after hearing evidence in mitigation, sentences of 12 and 6 months’ imprisonment, respectively, were imposed, once again with no reasons whatsoever being provided. When the matters came before the High Court on automatic review, the court requested the magistrate to provide reasons for the convictions and sentences in both matters. Having received these, the court was in a position to confirm their correctness, and to satisfy itself that the proceedings had otherwise been in accordance with justice. However, the court deemed it necessary to deal with the magistrate’s failure to provide reasons at the time of delivering his judgments.

Held, that the magistrate’s failure to supply full reasons at the time of the judgment was an unacceptable practice. It was clear from s 93ter(3)(e) of the Magistrates’ Courts Act 32 of 1944 that a magistrate had a duty to provide such reasons; and such reasons were to be provided at the conclusion of the trial—not only when they were requested by the reviewing judge. Since a court of review was not bound by the four corners of the record, but could take account of issues not appearing on the record, a magistrate’s failure to furnish reasons for judgment at the conclusion of a trial could severely hamper the review function. Without such reasons, the reviewing court would be disadvantaged in applying the test as to whether the proceedings had been in accordance with justice. Similarly, the court would not be able to have regard to the factual and credibility findings made by the trial court, with all the advantages it would have had during the trial. (Paragraphs [11], [12], [13] and [17] at 355c, 355i, 356e-g and 358b-e.)

Semble: While courts and judicial officers were not ‘organs of state’, nor their functions and decisions ‘administrative action’ under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), it made perfect sense for courts to adopt, unreservedly, the rationale for furnishing reasons as prescribed for administrative action under PAJA. The criminal justice system, and in particular the review process, could only benefit therefrom, and achieve the ideals of a fair trial as envisaged in s 35(3) of the Constitution of the Republic of South Africa. (Paragraph [20] at 361a-362d.)

Convictions and sentences confirmed.

3. S v Londe 2011 (1) SACR 377 ECG

The interests of minor children must be investigated if a judicial officer is contemplating sending their mother to prison.

A 22-year-old female first offender was convicted of assault with intent to do grievous bodily harm, and sentenced to 36 months’ imprisonment. Upon automatic review the court found that, in addition to various mitigating factors, the most important aspect of the accused’s personal circumstances was the fact that, at the time of sentencing, she was seven months pregnant and had two children aged 5 and 7 years. There had been no investigation into the welfare of the children if the

accused were sent to prison. Given the duties of a court in sentencing a primary caregiver of children, it was essential to obtain a pre-sentence report and a correctional supervision report—this form of sentence possibly being appropriate in all the circumstances. In order to avoid any possible prejudice to the children, the sentence must be reviewed and set aside, without the magistrate's reasons first being obtained. (Paragraphs [1]-[3] at 377h-378e.)

Conviction confirmed. Sentence set aside. Matter remitted to court a quo for the obtaining of pre-sentence and correctional supervision reports, and for the consideration of sentence afresh. (Paragraph [4] at 378 f)

4. S v Cwele and Another 2011 (1) 409 KZP

Evidence of cellphone communications which was monitored and intercepted in terms of the Interception and Monitoring Prohibitions Act, Act 127 of 1992 can be accepted.

In a challenge to the admissibility of evidence of cellphone communications intercepted and monitored pursuant to a judge's direction in terms of s2(2) of the Interception and Monitoring Prohibition Act 127 of 1992 (the Act), the accused contended that, because the Act predated cellphone communications, the monitoring and interception of cellphone communications was ultra vires the Act; and, even if it were authorised, evidence of cellphone communications should nevertheless be ruled inadmissible, as it offends against the accused's constitutional rights to privacy and denies them their right to a fair trial.

Held, that a direction by the designated judge authorising the interception and monitoring of cellphone conversations was not ultra vires the provisions of the Act. It was not conclusive, in establishing the legislature's intention, whether the particular device responsible for the communications intercepted and monitored was in existence at enactment, but whether the wording employed was such as to have also authorised the interception of conversations and communications on handsets and other technology which came into existence subsequently. In interpreting the Act, there was no scope for a restricted interpretation of the provisions of s 2(2) of the Act to favour the liberty of an accused—no potential jeopardy to liberty being suffered by an accused against whom intercepted or monitored communications were sought to be used, but at best in respect of the prosecution of an unrelated offence in which the intercepted communications may merely have afforded potential evidence. The definition of 'telecommunications line' in the Act was very wide and included any apparatus, instrument, pole, mast (as opposed to wire, pipe, pneumatic or other tube) which was or may have been used for, or in connection with, the sending, conveying, transmitting or receiving of communications. Furthermore, the direction was expressly recorded to be one in terms of s 2(2)(b)(c) - which included particular communications 'transmitted by telephone or in any other manner'. (Paragraphs [20], [18], [12] and [17] at 417c, 416i-j, 4l4i-4l5a and 416g-h.)

Held, further, that the fundamental right to privacy and dignity was subject to limitation—inter alia, in accordance with what was reasonable and justifiable in an open, democratic society—and had to yield to the objectives of the Act: the authorised interception and monitoring of the cellphone calls in affording evidence of the commission of a 'serious offence'. In the absence of an attack on the constitutionality of the relevant provisions of the Act, it would be incongruous to find that evidence, lawfully obtained and permitted in terms of the Act, was to be excluded on some other basis. (Paragraph [26] at 418c-d.)

From The Legal Journals

Carnelley, M & Soni, S

"Surrogate motherhood agreements"

De Rebus May 2011

Marumoagae, C

"The role of the police in fighting acts of domestic violence"

De Rebus May 2011

King, B

"Are our criminal courts failing society and victims of crime in particular? "

De Rebus May 2011

Manyathi, N

"How to run effective trials"

De Rebus May 2011

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

Contributions from the Law School

CIVIL AVIATION – REFINING THE ENFORCEMENT REGIME

The passing of the Civil Aviation Offences Act 10 of 1972 into law was a significant development in South African law. This Act not only created a number of specified offences related to aviation, and more particularly relating to conduct on board an aircraft, but also gave effect to a number of Conventions: the Convention on Offences and certain other acts committed on board Aircraft; the Convention for the Suppression of unlawful Seizure of Aircraft; the Convention for the Suppression of unlawful Acts against the Safety of Civil Aviation. Having been amended on a number of occasions, this Act was recently repealed and replaced by the Civil Aviation Act 13 of 2009 (which commenced on 31 March 2010). The nature of the changes in respect of the regime of offences detailed in the 1972 Act will be examined below.

All of the offences created in the 1972 Act are carried over into the 2009 Act, albeit with certain significant modifications in respect of particular offences. Thus the offences created in s 2(1)(*a*) of the 1972 Act (relating to seizure of an aircraft or violent conduct on an aircraft) are set out in s 133(*a*) of the 2009 Act, although in the latest legislative formulation it is not required that this conduct occurs whilst the aircraft is 'in flight' (as defined in s 1(3) of the 2009 Act (s 1(2) of the 1972 Act) as 'when the external doors of the aircraft are closed following embarkation until the moment when any such door is opened for disembarkation' (the definition also provides for forced landings)). Thus any attempt to seize the aircraft (or to assault or interfere with a crew member) now need not take place after embarkation or before disembarkation to fall within the ambit of this provision. Section 2(1)(*a*)(ii) of the 1972 Act criminalized an assault on board an aircraft 'if such assault is likely to endanger the safety of that aircraft', and whilst the equivalent provision in the 2009 Act retains this purpose, the description of the prohibited conduct is extended to 'an act of violence, including an assault or threat, whether of a physical or verbal nature'. Thus the prohibited conduct still includes an assault (whether in the form of an application of force to the person of another or the inspiring of a belief in the other person that force is immediately to be applied to him – see Burchell *Principles of Criminal Law* 3ed (2005) 680), but, it seems, extends to a threat which does not constitute the crime of assault, such as a threat of future harm to the complainant or of harm to property or a third person. The 1972 version of this provision criminalised an assault on 'any person' if such assault was likely to endanger the aircraft's safety; the 2009 version adds 'including a crew member' to the prohibited target of the assault, which adds nothing to the ambit or utility of the provision.

The next three offences target destructive (or potentially destructive) behaviour. Section 2(1)(*b*) of the 1972 Act prohibited the destruction of an aircraft in service or the wilful causing of damage to such an aircraft 'which renders it incapable of flight or which is likely to endanger its safety in flight'. The 2009 version of this provision (s 133(*b*)) clarifies that the destruction of the aircraft must be 'wilful' in order to fall within the ambit of this provision - a welcome qualification limiting liability for this serious offence. In addition the new provision adds 'or causes damage to it' to the consequences of the causing of intentional harm to the aircraft. Again, it is unclear how the iteration of these words adds anything to the intelligibility of the section, which already specifies the nature of the prohibited conduct: wilfully causing damage. Section 2(1)(*c*) of the 1972 Act prohibited the placing of a potentially destructive device or substance on an aircraft. The 2009 version of this provision (s 133(*c*)) makes it clear that such conduct must be 'wilful' to attract liability for contravening this provision.

Once again, this is a welcome change to the provision, which excludes potential liability for falling foul of this serious offence through merely negligent conduct. Whilst the ambit of the provision has been narrowed (or at least overtly qualified) by the addition of the word 'wilful', the *actus reus* of the provision has however been broadened by the reformulation of the words of the provision in the 2009 version thereof. The initial formulation criminalised the placing on an aircraft in service by any means a device or substance 'which is likely to destroy that aircraft or to cause damage to it which renders it incapable of flight or is likely to endanger its safety in flight'. The revised version is framed as follows: 'which is likely to destroy that aircraft or to cause damage to it, render it incapable of flight or endanger its safety', which thus no longer qualifies the causing of damage by the rendering of the aircraft of being incapable of flight. Thus the provision now seems to include the placing of a device (or substance) on an aircraft which may cause damage which would not be so extensive as to render the aircraft as being incapable of flight, a notable extension to the original ambit of the offence.

The revised version of the provision relating to the destruction, damage or interference with air navigation facilities (s 2(1)(*d*) in the 1972 Act, contained in s 133(*d*) of the 2009 Act) is praiseworthy, inserting the word 'wilfully' before the word 'destroys' to indicate that the same fault requirement is in place for destruction of such facilities as is in place where the prohibited conduct is damaging or interfering with such facilities. Moreover, the addition of the qualifying phrase 'which interference is likely to endanger the safety of aircraft' after the prohibition of wilful interference with such facilities usefully limits the offence to appropriately harmful conduct.

Whilst the prohibition of the communication of false information which gives rise to the safety of an aircraft in service being endangered has not been altered (from s 2(1)(*e*) of the 1972 Act to s 133(*e*) of the 2009 Act), the other provisions have also been moulded to both include other forms of conduct and exclude conduct which does not fit the rationale for the offence. Thus the offence of placing any device or substance calculated to cause injury or damage at any airport (the location 'designated airport' has been omitted from the earlier formulation), heliport or air

navigation facility, now includes placing such device or substance which is calculated to disrupt any property or facility (s 2(1)(*f*) original formulation; s 133(*f*) revised formulation). On the other hand, a phrase has been added at the end of this provision: 'thereby endangering safety at such airport, heliport or aviation navigation facility'. It is submitted that this includes an objective assessment of danger into the evaluation of the accused's conduct, and that where danger cannot be objectively verified, the accused's actions would not constitute the offence, but at most an attempt to commit the offence. Similarly, the offence previously contained in s 2(1)(*fA*) of the 1972 Act of wilfully polluting any aviation fuel has now been recast to require an intention to 'jeopardise the operation of an air carrier, the safety or security of an airport, heliport, aircraft in service, persons or property' before the act of contaminating aviation fuel can amount to the offence set out in s 133(*g*) of the 2009 Act. The ambit of the offence contained in s 2(1)(*g*) – performing an act which jeopardises the operation of an air carrier or the safety of an airport, heliport, aircraft in service or of persons or property thereon – has also been more clearly designated by the introduction of the term 'wilfully' preceding the description of the prohibited conduct in the reformulated offence (in s 133(*j*) of the 2009 Act), and the deletion of the broadly formulated part of the offence criminalising 'any act…which may jeopardise good order and discipline at a designated airport, airport or heliport or on board an aircraft in service'.

The 2009 Act contains two new offences relating to the causing of injury or destruction which were not part of the 1972 Act: the commission of an act at an airport which causes (or is likely to cause) serious injury or death (s 133(*h*)); and the wilful destruction or damaging disruption of the facilities or services of an airport or an aircraft not in service (s 133(*i*)).

The seriousness of the offences discussed above is reflected in the prescribed punishment set out in s 133 of the 2009 Act: a fine or imprisonment not exceeding 30 years or both such fine and imprisonment (the 1972 Act prescribed punishment of imprisonment for a period of not less than five years but not exceeding 30 years in s 2(1)). It is thus crucial that these offences are formulated in such a way as to ensure that whilst the targeted prohibited conduct is effectively criminalised, that the offences are not defined so broadly as to subject conduct which is not part of the rationale for these offences to the stigma of criminalisation along with the possibility of swingeing punishment. In *S v Hoare and others* 1982 (4) SA 865 (N) at 871H, James AJP characterised the operation of the 1972 Act as follows:

> '[I]t [does not] seek to distinguish between differing types of unlawful interference in the operations of civil aviation…[it] treats virtually every unlawful interference with the smooth operation of civil aviation with the utmost seriousness and takes little or no account of the motive for such interference…'.

The need to protect civil aviation in the most effective manner is strongly buttressed by policy concerns, but in a constitutional democracy it is very important for the criminal law to ensure that necessary distinctions 'between kinds of offences and degrees of wrongdoing are respected and signalled by the law' and further to ensure

'that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking' (the principle of 'fair labelling' - Ashworth *Principles of Criminal Law* 5ed (2006) 88). In this regard, as the discussion above reveals, the 2009 Act, despite some infelicities of phrasing, takes a number of steps in the right direction, sharpening the description of both the prohibited conduct and the requisite fault component in respect of most of the offences which have been discussed.

Space does not permit more than the briefest discussion of the remaining provisions. Section 134 of the 2009 Act, which criminalises interference with the operation of an air carrier, airport or heliport (by means of threat, attempt or conspiracy to commit any offence set out in s 133, false allegation or communication of false information) essentially repeats the original formulation (in s 2(2) of the 1972 Act), although the prescribed sentence is altered from a maximum of 15 years to a fine or imprisonment for a period not exceeding ten years or both. Section 135 of the 2009 Act criminalises nuisance, disorderly or indecent conduct on board an aircraft. Whilst the initial prohibition of nuisance and disorderly and indecent conduct (in s 2(3) of the 1972 Act) remains, the balance of the offence has been changed. Whereas the initial formulation penalised someone who 'behaves in a violent or offensive manner to the annoyance of any other person on the aircraft or uses abusive, indecent or offensive language', the new formulation is much more purpose-oriented, stating that one who 'behaves in a violent manner towards any person including a crew member which is likely to endanger the safety or security of the aircraft or of any other person on board such aircraft' commits the offence. Furthermore, in s 139 an expanded version of the offence contained in s 2A of the 1972 Act is set out, relating to prohibition and control of persons in possession of harmful articles.

The new offences in the 2009 Act, unrelated to the provisions of the 1972 Act, may simply be listed for sake of completeness: interference with the Director of Civil Aviation or other staff of the Aviation Safety Inspection Board or the Civil Aviation Authority (s 136); smoking on board an aircraft and related offences (s 137, reflecting the general trend towards prohibition of smoking in public places); illegal practices in connection with cargo, baggage or mail (s 138, reflecting the need to address sharp practices in the handling of cargo and baggage at aerodromes/airports); prohibition and control in restricted areas (s 140); prohibition and control in aviation facilities and air navigation facilities (s 141); prohibition of conveyance of conventional arms, drugs or animal products in aircraft (s 142); and threats to safety and security (s 143).

It is hoped that through the extensive set of offences discussed above the new Civil Aviation Act will fulfil its purpose in achieving more effective control of the safety and security of civil aviation in this country.

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Matters of Interest to Magistrates

AN ACCUSED'S RIGHT TO REMAIN SILENT DURING PLEA PROCEEDINGS COMMENT ON *THSABALALA V S* [2011] JOL 26774 (GNP)

The recent 'online' judgment of *Thsabalala v S* [2011] JOL 26774 (GNP) makes for difficult, if not interesting, reading. It begins with a reference to a ground of appeal that does not appear, with respect, to be worthy of being a ground of appeal in the circumstances, namely, as the judge mentions in paragraph [4]:
"*(I)t was submitted that the magistrate erred in not warning the appellant that he has a right to remain silent when purportedly explaining the provisions of section 112(2)*" (*sic)*.

Firstly, throughout the judgment reference is made to section 112(2) which appears to be blatantly incorrect as the provision 'under attack' by the court was section 112(1)(b) and it's procedure.

The Law in regard to the 'right to remain silent'

Section 35 of the Constitution of the Republic of South Africa is taken as the starting point, it being the supreme law of the land. Subsection 35 grants the 'right to remain silent' to arrested, detained and accused persons in the following circumstances:
Section 35(1)(a) reads:

"*(1)Everyone who is arrested for allegedly committing an offence has the right-*

(a) to remain silent;"

Section 35(3) extends the right in as many words when an arrested person is actually charged; section 35(3)(h) reads:

"*(3) Every accused person has a right to a fair trial, which includes the right-*

(h) to be presumed innocent, to remain silent, and not to testify during the proceedings;"

Subsection (j) expounds on this to the following extent:

"*not to be compelled to give self-incriminating evidence;*".

It is interesting to note that the interim Constitution (Act 200 of 1993) contained a section that read slightly differently to the current provision. Section 25(3)(c) of the interim Constitution, dealing with the right to remain silent, read as follows:

"*(c) to be presumed innocent and <u>to remain silent during plea proceedings</u> or trial and not to testify during trial*;" (my emphasis).

Section 35 of the Constitution omits the words “during plea proceedings”. The effect of this omission makes the judgment in *Damons* 1997(2) SACR 218 (W), (discussed *infra*), all the more logical and clearly places the cases decided in terms of that provision in their correct context.

A few sections of the Criminal Procedure Act, 1977 (Act 51 of 1977) are also relevant to the discussion because the Constitutional right to remain silent arises at various stages of criminal proceedings against a suspect, arrested person or an accused.

To begin with, Section 109:

> “***Accused refusing to plead***
> *Where an accused in criminal proceedings refuses to plead to any charge, the court shall record a plea of not guilty on behalf of the accused, and a plea so recorded shall have the same effect as if it had been actually pleaded*.”

Why will this section be relevant?
It all goes to the timing of the explanation of the right to silence to an accused, despite the fact that, I think, by now there must be very, very few people in Southern Africa who are not aware of their rights, including the so-called ‘right to silence’.

However, be that as it may, assuming that a court, following religiously the remarks in the Tshabalala case, indeed informs an accused upon his or her arrival in court, before anything takes place, of the right to remain silent “at all stages” during the proceedings, what may then occur.

Following such explanation the prosecutor would then presumably read the charge to the accused.

The court would then require the accused to plead, as it is obliged to do in terms of section 105 of the Criminal Procedure Act, 1977, which reads:

> “***Accused to plead to charge***
> *The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and <u>the accused shall</u>, subject to the provisions of sections 77, 85 and 105A, <u>be required by the court forthwith to plead thereto</u> in accordance with section 106*”. (own emphasis)

[Sections 77, 85 and 105A are not of any relevance to this discussion and thus not dealt with].

This accused, if he or she had been informed of a ‘right to remain silent’, would, in such circumstances, be entitled to look at the presiding officer with something of a quizzical expression because he or she has just been told in as many words that you do not have to say anything, yet here the court is specifically requiring a reply in the form of a plea.

What must the accused now do? Exercise his or her right to remain silent or respond to the court’s question, thereby effectively giving up the right.

Two scenarios are imaginable as a result of the given explanation of remaining silent: the first, when so asked to plead, is that the accused remains tight-lipped, silent, refusing to utter a word, despite possible encouragement in order to get the proceedings under way. (For the sake of this argument I'll leave the use of an interpreter out of the equation as it only serves to confuse the issue further – we'll assume the accused is spoken to in a language he or she understands and does not require the services of an interpreter).

Given this situation the court will have to accept that the accused is refusing to plead and thus apply section 109 of the Criminal Procedure Act whether the accused likes it or not. Any attempt to explain to an accused that he or she ought to answer would be self-defeating of the very explanation the court gave in the first place.

The second scenario is simpler, less time consuming and less confusing to all present and is probably a daily occurrence in most courts. The accused, when asked to plead, actually does so, (whether or not he or she was informed of the right to silence prior plea), giving an indication of what he or she perceives to be his or her acknowledgment or 'liability' in regard to the offence mentioned in the charge.

For the sake of this discussion we will assume that in the second scenario the accused pleads guilty. [I'm leaving aside a plea of not guilty at this stage (whether tendered by the accused or whether recorded in terms of section 109) because the explanation following such (if correctly given) will inform the accused that he or she need not reply to the questions relating to the basis of his or her defence, etc and differs entirely from a guilty plea process].

Returning to the second scenario: the court would then usually give an explanation as to the process it intends embarking on (see the suggestion of the format for such below) in order not only to satisfy itself that the accused admits all the allegations in the charge but that, with reference to the alleged facts of the case, he or she is 'in law' guilty of the offence charged.

Let us now assume that the accused at this stage decides to avail him- or herself of the so-called 'right to remain silent'. Obviously the court cannot be satisfied as to an accused's guilty in such circumstances and would be obliged to enter a plea of not guilty (in terms of section 113) and direct the prosecution to proceed. Possibly not what the accused envisaged because as far as he or she was concerned there was no issue between him or her and the State but due to exercising a given right their matter is now protracted into a trial thus defeating the whole object and purpose of section 112(1)(b).

In which of these two scenarios is an accused better off?
In both instances he or she could possibly have entrusted the court with its duty in such situations, namely the 'testing' process as opposed to the process resulting in something the accused never intended to deny or dispute in the first place. Bearing in mind of course, the accused, who may be appearing before court for the very first time in his or her life, would probably expect the presiding officer to be someone who

will not mislead him or her but offer the correct guidance and give logical and understandable explanations.

Various judgments over the years, pre-Constitution and post-Constitution have had a say in regard to the 'right to remain silent'. Several of the very judgments are indeed mentioned by Mavundla J in the *Tshabalala* case. I was of the humble opinion, following Nugent J's eloquent setting out of the legal position in *Damons* 1997(2) SACR 218 (W), post-Constitution, as well as other case law relating to the matter, that there was no longer an issue in regard to a plea of guilty.

Mavundla J points out in paragraph [10] in *Tshabalala's* case that the Supreme Court of Appeal mentioned in the *Director of Public Prosecutions, Natal v Magidela and Another* 2000(1) SACR 458 (SCA) case (wrongly cited in footnote (5) as a SA Law Report case instead of a SA Criminal Law Report case) that the previous Appellate Division cases, (namely *Nkosi* 1984(3) SA 345 (A) and *Mabaso* 1990(3) SA 185 (AD)) may have to be revisited.

Mavundla J, in an apparent attempt to re-visit those decisions of his own accord, states the following at paragraph [19]:

> "*It is therefore, in my view, necessary that an accused who intends to plead guilty be informed of this right to remain silent before he is questioned in terms of section 112(2).(**sic**) The unrepresented untutored accused might think that he is obliged to answer the court's questions. It is necessary that an accused be informed of his right to remain silent, even if he has pleaded guilty so that he can make an informed decision. I am of the view that a different approach to this question would not be consonant with the ethos of the Constitution. There is, in my view, an obligation on the presiding officer to inform an accused of his right to remain silent before he is questioned in terms of section 112(2)".(**sic**)*

Mavundla J eventually reaches the conclusion that the proceedings in *Tshabalala* were fair and not so tainted by the failure of the judicial officer to warn the accused of his right to remain silent and not to testify during the proceedings or of the right not to be compelled to give self-incriminating evidence.

In *Damons* 1997(2) SACR 218 (W) Nugent J (as he then was) analysed the issue of the 'right to remain silent' versus a 'guilty' plea and stated the following:

"The second ground of objection is founded upon s 25(3)(c) of the Constitution which guarantees to every accused person the right to a fair trial, including the right 'to remain silent during plea proceedings or trial and not to testify during trial'. It was submitted that the magistrate was obliged to inform the accused of this right, and that his failure to do so renders the statements which they made to him inadmissible. In my view counsel's reliance upon s 25(3) of the Constitution is misplaced. The magistrate was bound to act in accordance with the provisions of the Criminal Procedure Act, and in doing so to assume that they conform with the Constitution. The only rights which he may have been obliged to bring to the attention of the accused were those rights which they indeed had. The first enquiry then must be to

establish what rights they had. Counsel's first submission was that the accused were entitled literally to remain silent when the charges were put to them, ie not to plead at all, and that they should have been informed of this.

I have already indicated that the correct approach is to ask whether this is what the Criminal Procedure Act allows. If not, the magistrate was not obliged, nor was he entitled, to accord them a right which they did not have.

Section 119 of the Act is quite explicit. When a charge is put to an accused person he 'shall . . . be required by the magistrate to plead thereto forthwith'. He has no right to elect not to plead at all and nor may the magistrate offer him that election. Although s 109 directs the magistrate to enter a plea of not guilty if the accused refuses to plead, this ought not to be construed as conferring upon an accused the right to refrain from doing so. It merely directs what consequences follow if the accused refused to do what is required of him.

I might add that if s 25(3)(c) of the Constitution were to be applicable, I would in any event reach the same conclusion. The section ought not to be construed literally. Its purpose is to protect an accused person against being compelled to incriminate himself. By being compelled to plead he is not being asked to do so. The following dictum of Hoexter JA in S v Mabaso and Another (supra) at 208E - I seems to me to be apposite:

'Under s 119 an accused is obliged to plead forthwith. But here too his response relates exclusively to the very offence with which he is charged, and; logically, there is no room whatever for the privilege against self-incrimination. Any attempt to import it at this stage of the proceedings would represent a complete stultification of the requirement to plead. There is a further and compelling consideration which must not be overlooked. At the very heart of the privilege against self-incrimination lies the notion of testimonial compulsion. In R v Camane and Others 1925 AD 570 Innes CJ remarked at 575:

"Now it is an established principle of our law that no one can be compelled to give incriminating evidence against himself. He cannot be forced to do that either before the trial, or during the trial."

In the case of an accused called upon to plead under s 119, however, the essential attribute of testimonial compulsion is entirely lacking. At that stage of the proceedings the accused has simply to exercise a choice between two alternatives. He may, through a plea of guilty, choose the course of inculpation; but he may just as well elect, by pleading not guilty, to exculpate himself. His choice is entirely uncoerced and unfettered. The fact that the accused is obliged to plead does not mean that he is compelled or forced to plead guilty. His choice between a plea of guilty and a plea of not guilty is an untrammelled one.'

It was submitted in the alternative that once an accused person pleads guilty he must be informed that he has the right to remain silent before the magistrate proceedings to question him. It is common cause that the magistrate did not so inform the accused in the present case.

Again the first question is whether an accused person who tenders a plea of guilty may indeed decline to answer questions relating to his plea. Only if he has that right does the further question arise, viz whether the magistrate has a duty to inform him thereof before proceeding to question him. It is only if the Criminal Procedure Act is silent on the issue that the Constitution may become relevant. If the Act compels him to answer questions the magistrate is obliged to give effect thereto unless and until the section is amended or set aside by a competent authority.

In support of the submission that the accused had such a right, and were required to be informed thereof, counsel relied upon a decision of Borchers AJ in this Division in the matter of S v Maseko case no 170/95 in which 'the s 119 proceedings' were ruled to be inadmissible. The facts in that case were not materially distinguishable from those which are before me.*

Answering the initial question to which I have referred above, Borchers AJ said that:

'. . . even before the enactment of the Constitution, it was settled law that an accused person, who is questioned in terms of s 112(1)(b) of the Criminal Procedure Act has the right to remain silent'.

This conclusion was central to the further reasoning of the learned Judge and to the eventual decision in that case. The learned Judge held that the accused was entitled to be informed of that right, departing in this respect from the Appellate Division's decision to the contrary in S v Nkosi en 'n Ander 1984 (3) SA 345 (A), which she said was no longer sound in the light of the Constitution. Precisely what it was in the Constitution which had that effect is not clear to me from the judgment. Her conclusion on the initial question though, which is whether the accused has that right at all, was based upon the following dictum of Milne JA in S v Mabaso (supra) at 211C - D:

'The appellants had the right to remain silent when questioned by the magistrate in terms of s 115. S v Daniels en 'n Ander 1983 (3) SA 275 (A) at 299F - H. They also had the right to remain silent when questioned by the magistrate in terms of s 112(1)(b). S v Nkosi en 'n Ander 1984 (3) SA 345 (A). In that case this Court held that a magistrate who questions such an accused is not obliged to warn him of his right to remain silent, but is clearly implied that he has such a right and I do not understand this to be questioned.'

The issue which had arisen for decision in S v Mabaso was whether the accused was entitled to be informed that he had a right to legal representation before being called upon to plead in terms of s 119. Whether he was entitled to remain silent was only incidental to that issue, and the remarks by Milne JA in that regard were obiter. Furthermore, his opinion represented that of the minority of the Court. An obiter dictum in a minority judgment cannot be regarded as having settled the law on a subject.

Furthermore, in my respectful view, the decision in S v Nkosi does not 'clearly imply' that an accused has a right to refrain from answering questions put to him in terms of s 112(1)(b). In my view the most that can be said is that the Court assumed that the accused had such a right, without pertinently considering the question. I think it

is clear from the reasoning in that case that the Court was of the opinion that for an accused person to refrain from replying to questions would be contrary to the very purpose of s 119, read with s 121(1) and s 112(1)(b) (see 353B - I). If that is so, I see no reason to assume that he has such a right at all. I would be most reluctant to accept that the Appellate Division was of the opinion that an accused has a right to remain silent, but should not be encouraged to exercise it.

I am not aware of any other decisions dealing directly with the issue. In my view Borchers AJ was clearly wrong in concluding that the question was one which had been settled. I do not think I am bound by that conclusion, and it is open to me to consider that question afresh.

Section 121(1) casts a duty upon a magistrate, by questioning an accused who has pleaded guilty, to satisfy himself that the plea has been correctly tendered. Conversely, there must be an obligation upon the accused to answer the questions if he wishes his plea to be accepted. He cannot tender a plea of guilty and at the same time decline to answer questions directed towards establishing whether the plea has been correctly tendered.

The matter can be tested by asking what the magistrate is expected to do if the accused tenders a plea of guilty, and then decline to answer questions. Counsel submitted that the magistrate should then enter a plea of not guilty, if necessary against the wishes of the accused. That seems to me to beg the question and demonstrates the fallacy underlying the submission. Quite obviously an accused person cannot require that a plea of guilty be accepted without at the same time accepting the obligation to answer questions. A right to continue to remain silent is inherently incompatible with a plea of guilty.

An accused person has a right to remain silent, by which I mean a right to refrain from incriminating himself, in the face of a charge which is brought against him, but he is not obliged to exercise that right. When called upon to plead he may exercise that right by pleading not guilty, thereby calling upon the State to prove each element of the charge; or he may abandon that right and plead guilty. As pointed out in S v Mabaso at 205I - J:

'By a plea of guilty, an accused incriminates himself fully; he acknowledges that he committed or participated in the commission of the offence; and he admits all the essential allegations in the charge. . . . The object of questioning in terms of s 121(1) read with s 112(1)(b) is not further incrimination, but to test the accused's plea of guilty in order to ascertain whether he understands the elements of the offence and whether he does in truth admit all the allegations in the charge. The object of the questioning is to prevent the entering erroneously of a plea of guilty.'

To speak of a right to silence as if it can survive its abandonment seems to me to be inherently contradictory. By tendering the plea, if it was correctly tendered, the accused has chosen to incriminate himself on each and every element of the charge, and has abandoned his right to silence in its entirety. If the plea was incorrectly tendered his right to silence will survive only in those respects in which he has not chosen to incriminate himself. This is recognised by the Act, which requires

the magistrate to warn him before asking whether he wishes to disclose the basis of his defence on those issues.

In my view the accused has no right to refrain from answering questions in relation to a plea of guilty. If he wishes to preserve his right to silence, his only course is to plead not guilty. In those circumstances the magistrate was not required to inform the accused in the present case that they had such a right before questioning them in relation to their pleas of guilty. That is in accordance with the Appellate Division's conclusion in S v Nkosi (supra). I have adopted the unusual course of questioning that conclusion only because of the suggestion that it is no longer sound.

I am alive to the potential for injustice of ill-informed choice, and I share the concerns expressed by Milne JA in S v Mabaso at 212A - J in this regard. However, I do not think that the solution lies in attempting to interpose what purports to be a safeguard after the choice has been made. The proper solution lies rather in ensuring that the proper choice is made in the first place.

It ought not be assumed that it is always in the interests of an accused person to exercise his right to silence. Whether it is in his interests to do so will depend on the circumstances of the particular case. Certainly the judicial officer ought not be expected to play a role in determining which course of action will be in the accused's best interests. The proper solution lies rather in ensuring that the accused has access to proper advice before he is called upon to plead. As Milne JA concluded in his minority opinion in S v Mabaso at 216:

'In my judgment, public policy requires that before a man condemn himself out of his own mouth in preliminary court proceedings he should be fully advised of his right to remain silent and as to whether it is in his interest to do so. The proper person to advise him of this is a legal adviser and public policy requires that he should be advised of his rights in this regard as well.' (Emphasis added.)

I have already indicated that in the present case the accused were indeed informed of their right to receive that advice. There was no evidence that they were inhibited from exercising it. I do not think that the magistrate was obliged to do more." (own emphasis).

I quote at length from *Damons'* case for three reasons: (1) I cannot say it any better than Nugent J (as he then was) did; (2) it clarifies the pre-Constitutional judgments which were not adverse an accused's rights even then; and, (3) because the court in Tshabalala seems to do a 'hair splitting' exercise with regard to the 'right to remain silent' and the 'right not to be compelled to give self-incriminating evidence'.

The issue that arises from the *Tshabalala* judgment is the problematic application of the suggested way forward. In attempting to train or educate newly appointed presiding officers in the correct application of the Criminal Procedure Act on the plea proceedings issue, also something encountered in regard to various other statutory provisions as well, is that the actual practicality of the situation must be considered at all times.

It appears that in the *Tshabalala* case the practicality of such situation was lost or ignored. It is all good and well to make the claim that the Constitution grants such a right, as it indeed does, but it must not be taken out of context and then applied because it sounds like the right thing to do.

How does one explain, in layman's terms, such a contradictory principle, particularly when what you are explaining may have to be interpreted into another language? The accused would stand staring at you and wondering whether you actually know what you are talking about.

Take for example the current generally utilized explanation (whether in this exact form or something along similar lines) given to an unrepresented accused following upon his or her guilty plea. It would normally read something like the following:

> "*The procedure in a criminal trial is usually that the prosecutor calls witness to testify on behalf of the State to prove the commission of the offence by you in order to satisfy the court of your guilt.*
> *However, when you plead guilty, the procedure changes to the extent that the court is obliged to question you with regard to the facts of the matter in order to satisfy itself that you are in fact so guilty.*
> *The court will now put certain questions to you with reference to the alleged facts of the case in order to ascertain whether you admit all the allegations in the charge and whether you are in law guilty of the offence to which you have pleaded guilty.*
> *If the court is satisfied that you admit all the allegations you will be convicted without any evidence being heard by the court on the merits.*
> *If the court is not so satisfied or if it appears that you may have a valid defence to the charge or if the court is in any doubt whether you are in law guilty of the offence to which you pleaded guilty, a plea of not guilty will be recorded and the prosecutor will proceed with the prosecution against you*."

The question I now must ask is, where does the explanation of the accused's right to remain silent fit in, in this explanation?

If it is done prior or after the first paragraph of this explanation it seems premature as the accused is, at that stage, still totally unaware of what is going to transpire. If it is done following the 2nd paragraph it would appear to contradict what one has just said, namely I'm going to ask you questions to ensure you are legally guilty but you can choose to keep quiet! If done after the 3rd paragraph it is just as ludicrous as the accused would then wonder why you are telling him or her that you are going to ask questions but that he or she needn't respond thereto. It would be just as out of place if given after the 4th or 5th paragraph.

The 'introductory' questions that would usually follow the explanation set out above are the following:

> "Q Do you plead guilty out of your own free will?
> Q Did anyone influence you to plead guilty?
> Q Are you in sound and sober senses?
> Q Explain to the court what resulted in you being arrested and charged?"

Following each of these questions the accused's response thereto would be recorded. [Obviously if the answer was an unexpected negative to any of the first 4 questions the process ought to (would) change in the circumstances].

Does the accused have the right to silence after each question? What if he or she elects to exercise their 'right' to silence after the first question? Would the court be entitled to proceed with the matter?

I can't think of anything more ridiculous or ludicrous than to tell an accused who has pleaded guilty, that you are now going to question him or her on the facts of the matter to ascertain whether he or she is in fact guilty, primarily in order to determine whether he or she admits all the allegations in the charge to satisfy you of his or her guilt and to then say something along the lines of: "But you don't have to answer my questions because the Constitution gives you the right to remain silent".

Is there any reason why *Damons'* case is not good law on this issue, namely that the 'right to remain silent' is incompatible with a guilty plea?

It would be appreciated if any colleagues who deal with such matters on a daily basis would afford others the benefit of their explanations in this regard.

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A Last Thought

"Society is... entitled to demand from judges fidelity those qualities in the judicial temper which legitimize the exercise at judicial power. Many and subtle are the qualities which define the temper. Conspicuous amongst which these are scholarship, experience, dignity, rationality, courage, forensic skill, capacity for articulation, diligence, intellectual integrity and energy. More difficult to articulate, but arguably even more crucial than temper, is the quality called wisdom, enriched by a substantial measure of humility, and by an instinctive moral ability to distinguish from wrong and sometimes the more agonizing ability to weigh two rights or two wrongs against each other which comes from the consciousness of our imperfection."

Late Chief Justice Ismail Mohamed in respect of the qualities a judge must have.