e-MANTSHI

A KZNJETCOM Newsletter

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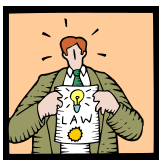
Welcome to the seventy fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 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 Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1**.** The Minister of Police has, under section 41(1) of the Second-Hand Goods Act, 2009 (Act No. 6 of 2009), made Regulations for dealers and recyclers which will come into operation when the Second-Hands Goods Act, 2009 comes into operation. The regulations were published in Government Gazette no 35220 of 3 April 2012.In Government Gazette no 35270 dated 20 April 2012 a proclamation was published which indicated that all sections of the Second-Hand Goods Act, 2009 which have not yet been put into operation, shall come into operation on 30 April 2012.

2. In Government Gazette no 35093 dated 1 March 2012 the following notice was published: In terms of section 21 of the Correctional Matters Amendment Act, 2011 (Act No 5 of 2011), It was determined that 1 March 2012 is the date on which all the sections of the said Act shall come into operation, except section 9 which only comes into operation with regard to sections 46, 47, 49, 49 A, 49B, 49C, 49D, and 49F of the principal act, Correctional Services Act, 1998, (Act No. 111 of 1998). An important amendment is the amendment to section 5 which reads as follows:

"Section 5 of the principal Act is hereby amended—

(*a*) by the substitution in subsection (1) for the words preceding paragraph *(a)* of the following words:

"The Minister may by notice in the *Gazette,* establish and review the establishment of correctional centres and remand detention facilities for—"; and

(*b*) by the substitution for subsection (2) of the following subsection:

"(2) (*a)* Any correctional centre or remand detention facility established under subsection (1) may serve one or more districts as circumstances may require, and for the purposes of any law relating to magistrates' courts any correctional centre or remand detention facility established to serve more than one district is deemed to be the correctional centre or remand detention facility of each district served by that correctional centre or remand detention facility.

(*b)* If there is no correctional centre or remand detention facility in a district an inmate may be detained in a police cell but not for a period longer than seven days "

Recent Court Cases

1. S v MATHONSI 2012 (1) SACR 335 (KZP)

The time has come for the rule limiting the use of prior inconsistent statements to impeaching the credibility of the witness to be replaced by a new rule recognizing the changed means and methods of proof in modern society

"[28] The Canadian Supreme Court in R.V.B (K.G) **[1993] 1 S.C.R 740** on the prior inconsistent statement held that if it could be found to be both necessary and reliable, it could be admitted as an exception to the hearsay rule. The court held that a prior inconsistent statement should be admitted for all purposes if upon *voir dire* the trial judge is satisfied beyond reasonable doubt that the following conditions are fulfilled: Firstly, the evidence contained in the prior statement is such that it would be admissible if given in court; Secondly, the statement has been made voluntarily by the witness and is not the result of any undue pressure, threats or inducements; Thirdly, the statement was made in circumstances, which viewed objectively would bring home to the witness the importance of telling the truth; Fourthly, the statement is reliable in that it has been fully and accurately transcribed or recorded. Fifthly, that

the statement was made in the circumstances that the witness would be liable to criminal prosecution for giving deliberately false statement.

[29] The following was also held to be sufficient circumstantial guarantees of reliability for the use of the prior inconsistent statement for substantive purposes: The statement was made under oath, solemn affirmation or solemn declaration following an explicit warning to the witness as to the existence of severe criminal sanctions for the making of a false statement, the statement was videotaped in its entirety; and the opposing party, whether the Crown or the defence, had a full opportunity to cross-examine the witness at the trial respecting the statement.

[30] The facts in R v B case, where the Crown asked the court to reconsider the common law rule which limits the use of prior inconsistent statements to impeaching the credibility of the witness, were briefly as follows: The accused and three of his friends had been involved in a fight with two men. In the course of the fight, one of the youths, pulled a knife and stabbed one of the men in the chest and killed him. The four youths immediately fled the scene. Two weeks later, the accused's friends were interviewed separately by the police and with their consent the interviews were videotaped. In their statements they told the police that the accused had made statements to them in which he acknowledged that he thought he had caused the death of the victim by the use of a knife. The accused was charged with second degree murder and tried in Youth Court. At trial, the three youths recanted their earlier statements and, during the Crown's cross-examination pursuant to section 9 of the Canada Evidence Act, they stated that they had lied to the police in order to exculpate themselves from possible involvement. Although the trial judge had no doubt that the recantations were false, the witness's prior inconsistent statements could not be tendered as proof that the accused actually made admissions.

[31] Under traditional common law position, they could only be used to impeach the witness's credibility. In the absence of other sufficient identification evidence, the trial judge acquitted the accused and the Court of Appeal upheld the acquittal. Prior to the hearing in Canadian Supreme Court, the three witnesses pleaded guilty to perjury as a resultant of their testimony at the trial.

[32] Although technically the decision of the Canadian Supreme Court is not binding upon this Court, in my view, is a decision of the greatest persuasive power, and one which this Court must gratefully accept as a correct statement of the law applicable to the present appeal.

[33] I fully subscribe to the view expressed in R v B case, supra, that the time has come for the rule limiting the use of prior inconsistent statements to impeaching the credibility of the witness to be replaced by a new rule recognizing the changed means and methods of proof in modern society. This will be in keeping with the development in other democratic societies. "

2. S v KRUGER 2012(1) SACR 369 (SCA)

The cumulative effect of more than one sentence has to be taken into account when sentencing an accused person who has been convicted of more than one offence.

"[8] In considering an appropriate sentence on appeal one must not lose sight of the settled principle of law that sentencing is pre-eminently a matter for the discretion of the trial court. However a court of appeal may interfere with the sentence imposed provided the trial court materially misdirected itself or where the sentence imposed is shockingly inappropriate – (*S v Malgas* 2001 (1) SACR 469 (SCA) para 12 and *S v Pillay* 1977 (4) SA 531 (A) at 534H – 535A).

[9] In the present case the trial and high courts considered the previous convictions as an aggravating factor. I too agree. The trial as well as the high court reasoned that it was inappropriate to order the sentences to run concurrently because the offences were committed at different places and on different times. While this may be a consideration, it cannot justify a failure to factor in the cumulative effect of the ultimate number of years imposed. I believe that a sentencing court ought to tirelessly balance the mitigating and aggravating factors in order to reach an appropriate sentence. I also acknowledge that it is a daunting exercise indeed.

[10] There is no doubt that all the offences forming the subject of this appeal are serious and have to be punished seriously. Although we also have to admit that they were not of a violent or heinous character. The appellant broke into people's houses wherein they believed themselves to be safe. He then removed their goods and exchanged them for cash. Clearly he committed these offences for his personal gain and financial reasons. It is undisputed that he cared for his sickly parents. He even lied to them that he was employed whereas he lived and supported them on proceeds of crime, which they did not know. It is no justification to turn to crime because one is destitute, but it may be a mitigating factor when balancing the cumulative effect of the whole sentence. It is said to be undesirable to impose a globular sentence where there are multiple different counts.(*S v Immelman* 1978 (3) SA 726 (A) at 728E-729A.) However the practice of taking more than one count together for purposes of sentence is neither sanctioned nor prohibited by law. In *S v Young* 1977 (1) SA 602 (A) at 610E–H Trollip JA said:

'Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused.'

[11] In the present case clearly the trial and high courts materially misdirected themselves by ignoring the cumulative effect of the sentences. The relative youthfulness of the appellant, despite the previous convictions, should have tipped the scales in his favour. An effective sentence of 26 years, in the circumstances of this particular case is disproportionately harsh and induces a sense of shock. The other consideration is the period spent in prison by the appellant while awaiting trial. It is only fair to consider that period especially where it is a lengthy period. In the present case the appellant was incarcerated for a period of 3 years and 8 months before he was finally sentenced on 24 February 2000. One way of factoring this period into a sentence is by antedating the sentence to the date on which he was sentenced or an earlier date by simply deducting the 3 years and 8 months from the imposed sentence. (See *S v Vilakazi* 2009 (1) SACR 552 (SCA) para 60.) Punishing a convicted person should not be likened to taking revenge. It must have all the elements and purposes of punishment, prevention, retribution, individual and general deterrence and rehabilitation."

3. S v QN 2012(1) SACR 380 (KZP)

If an intermediary is not sworn in no irregularity occurs but it is a salutary practice to do so.

"The requirement for implementing s 164(1) of the Criminal Procedure Act 51 of 1977 is that the witness does not understand the import of the oath or affirmation. The effect of the witness not understanding the import of the oath or affirmation is not to render the evidence of the witness inadmissible, but to constrain the court to consider whether, notwithstanding that fact, the person concerned is a competent witness. The evidence of such a witness is admissible if the requirements of the section are satisfied. (Paragraph [10] at 385a-c).

The purpose of s170A of the Criminal Procedure Act, which provides for the giving of evidence through an intermediary, is met by the intermediary mediating the questions put to the witness, not the answers given by the witness. There is no reason for the intermediary to become involved in the answers given by the witness. Once it is recognised that the witness must give his/her own answers to questions, however, and by whom they have been formulated, the intermediary is not conveying the evidence to the court as does an interpreter. The analogy between an intermediary and an interpreter is therefore a false one. Thus, the approach in certain decided cases to the role of the intermediary is that, if the intermediary is not sworn in, as an interpreter is, it amounts to an irregularity. But the practice that has grown up of swearing in an intermediary should not be denigrated. The function of the intermediary is extremely important. That function is to minimise the mental stress or suffering of the witness by employing the intermediary's specific expertise

whilst the witness gives evidence. Requiring an intermediary to discharge this function under oath seems to me a salutary practice. But if this is not done , an irregularity does not occur. No form of any such oath has been prescribed. If an oath is administered it should be to honestly and faithfully and to the best of her or his ability discharge the function of an intermediary.(Paragraphs [21], [22] and [26] at 392h-393e and 394f-h)

From The Legal Journals

De Klerk, R

"Section 85 of the NCA - a lifeline for debtors"

De Rebus April 2012

Otto, J M

"The National Credit Act: default notices and debt review ; The Ultra Duplum rule: Nedbank Ltd v National Credit Regulator 2011 3 SA 581 (SCA)"

THRHR 2012 133

Zaal, F N

"A first finding of unconstitutionality regarding the Children's Act 38 of 2005: C v Gauteng Department of Health and Social Welfare [2011] JOL 27 290 (GNP)"

THRHR 2012 168

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

Contributions from the Law School

A caution on the cautionary rule

In the case of *S v Hanekom* 2011 (1) SACR 430 (WCC), the appellant appealed against his conviction in the court *a quo* on a count of indecent assault. The only direct evidence against him was that of his 8 year old daughter, who was 5 at the time of the alleged incident. His appeal was on the basis that the court *a quo* had misdirected itself in assessing the evidence. The court of appeal agreed, specifically with respect to the following issues.

Firstly, the magistrate had failed to take sufficient cognizance of the fact that there were two cautionary rules which applied to the evidence of the complainant (the complainant was both a single witness and a child), and had failed to apply them with the degree of attention to detail that the case demanded (at para 6). The court held that although the magistrate had paid lip service to the rules, he had not demonstrated the required degree of analysis in his approach to the inconsistencies and contradictions in her evidence (at para 7). The court also found that the court *a quo* had erred in finding corroboration for the complainant's version (at para 28), and had made a factual error when concluding that the complainant's 'first report' of the crime to her mother was consistent with her version in court (at para 16) and that it corroborated her version (at para 29). Also, the court *a quo* had failed to take adequate note of the features of the appellant's evidence which supported his version of events (at para 29).

The cautionary rule which applies to a single witness requires that the court be alive to the danger of relying on only one witness, because it cannot be checked against other evidence (at para 8). This rule is not controversial and was uncritically applied in the recent case of *S v Mahlangu* 2011 (2) SACR 164 (SCA), as well as *Maake v DPP* [2011] 1 All SA 460 (SCA) (see Meintjes-Van der Walt (2011) 24 *SACJ* 224-225).

The cautionary rule which applies to children is on the other hand highly controversial. The court referred to *R v Manda* 1951 (3) SA 158 (), and indicated that it fully intended to following its warning to treat child witnesses, like accomplices, with suspicion (at para 12). The court also referred to *S v Viveiros* [2000] 2 All SA 86

(SCA), stating that the reason behind the cautionary rule was the potentially unreliable and untrustworthy nature of a child's evidence. The court held that 'it could also be as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct — which is normally beyond the experience of small children, who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity' (at para 9); as well as the 'general difficulty a child has in separating reality from fantasy' (at para 13, referring to *S v V* 2000 (1) SACR 453 (SCA). See also *S v S* 1995 (1) SACR 50 (ZS) at 54G-H).

It is of concern that the court did not refer to the more recent research in the area of child psychology and development which reveals that children's ability to give reliable evidence has been greatly underestimated (Schwikkard 'Getting somewhere slowly' in Artz and Smythe (eds) *Should we consent? Rape law reform in SA* (2008) 79). There is a strong argument that just as the cautionary rule applicable to complainants in sexual cases was found to be irrational and based on stereotypical notions and therefore abolished (*S v Jackson* 1998 (1) SACR 470 (SCA)), so too should the cautionary rule applicable to children. The South African Law Commission noted the paucity of evidence establishing that children are more unreliable than adults and recommended the abolition of the cautionary rule attaching to children in 2002 (SALC *Project 107: Report on Sexual Offences* (2002) at p 187). The trend internationally has also been to abolish this cautionary rule (Schwikkard ibid). This is not to suggest that there may not be good reasons for treating a child's evidence with caution, but that this issue should be decided on the basis of the case before the court and not on the generalised and unsubstantiated notion that children are unreliable.

The court delivered two contradictory messages about how to assess the evidence of a child in the course of its judgement. On the one hand it strongly endorsed the *Manda* case, but it also held that the fact that the cautionary rule attaches to the evidence of the witness does not mean that the evidence of such a witness must be evaluated in a way fundamentally different to that of the evidence of any witness in a criminal case (at para 12).The court stressed that there was a single test to be applied, and that was whether the evidence is sufficient to establish the accused's guilt beyond any reasonable doubt.

In casu, there were good reasons for treating the child's evidence with caution, which were correctly noted by the court. Firstly, the complainant was unable to answer certain fundamental questions concerning the alleged incident – for example, when the incident was reported and to whom (at para 14). Secondly, there

were many material inconsistencies and contradictions in her evidence in chief, as well as in the evidence she gave under cross examination – for example, she initially said there had been one incident, but later said there had been two, and she gave three different versions of the one incident (at paras 18-26).Thirdly, there was a lapse of a significant period of time (3 years) between the incident complained of and the trial (at para 14). Fourthly, there was evidence that the complainant did not get on well with her father, the accused, and (more significantly) that her mother's relationship with him was acrimonious and that she had allegedly threatened to 'get him' with false allegations (of sexual harassment) in a telephone call after their separation (at para 29). Lastly, the child had demonstrated her suggestibility by changing her version of events in accordance with a leading question put to her by the prosecutor (at para 14). The court held that this demonstrated not only suggestibility, but also that she had difficulty distinguishing reality from fantasy, referring to *S v V* 2000 (1) SACR 453 (SCA).

The court held that the court *a quo* had not taken sufficient note of the above listed factors, nor of the fact that the child was a single witness of such tender years. In addition, the court held that the court *a quo* had erred in finding that the complainant's version of events was corroborated by her statement to the police, because this was contrary to the rule against self corroboration (at para 27). Further, the court found that the court *a quo* had erred in finding that the medical evidence supported the version of the complainant. Although the medical evidence established that there had possibly been forcible penetration of the complainant, there was nothing in that evidence which linked the penetration to the appellant (at para 28). However, it should be noted that there are cases in which it had been held that the cautionary rule may be satisfied by corroboration of any aspect of the witnesses testimony, even if the corroboration does not link the accused to the crime (see *S v Hlongwa* 1991 (1) SACR 583 (A); *Stevens v S* [2005] 1 All SA 1 (SCA); *S v Artman* 1968 (3) SA 339 (A) (these cases are all referred to in *S v Mahlangu* 2011 (2) SACR 164 SCA)).

In contrast to the complainant's testimony, the court found that the appellant's evidence did not contain any inconsistencies or contradictions, that his evidence had the ring of truth to it and that his evidence was entirely probable. The court noted further that the court *a quo* had not made an adverse credibility or demeanour finding against the appellant (at para 29). Therefore, although sometimes the court is able to find satisfaction of a cautionary rule in the poor quality of the evidence of the accused (cf *S v Dyira* 2010 (1) SACR 78 (ECG) at para 12), or the improbability of his version (cf *S v Mahlangu* 2011 (2) SACR 164 SCA), this was not such a case. The court concluded (at para 30) that 'having regard to the totality of the evidence, and with the cautionary rules in the forefront of one's mind, the conclusion is inevitable that the evidence of the complainant does not have that degree of

trustworthiness which would allow the State to overcome the burden of proof beyond a reasonable doubt'.

The decision of the court is undoubtedly correct – but the same result would have been achieved even without the application of the cautionary rules.

In the light of the recent uncritical acceptance of the cautionary rule applicable to children by the Supreme Court of Appeal in *Maemu v S* (147/11) [2011] ZASCA 175 (29 September 2011) it is becoming less likely that this application of the cautionary rule will be abolished without a constitutional challenge. What is clear is that the time is ripe for a proper and full ventilation of the issues relating to children's evidence. There is a wealth of recent research in this area and South Africa's high levels of child abuse and low rates of conviction for such crimes demand that the issues be considered systematically and carefully. It is dangerous to continue to blindly rely on old authorities (such as *R v Manda* 1951 (3) SA 158 (A) and *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A)) to justify applying the cautionary rule to children.

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Matters of Interest to Magistrates

How Poor Leadership Undermines the Work of the South African Police Service

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The South African Constitution places the South African Police Service (SAPS) in the frontline against crime and obliges it 'to protect and secure the inhabitants of the Republic and their property.' At one level, this has been taken seriously and in the last decade the SAPS has expanded to a huge organisation of more than 194 000 people, including approximately 160 000 trained police officials and around 34 000 civilian support staff. Its budget for 2012/13 is R62,5 billion, which represents 65,3% of the total criminal justice budget. However, in order for the police to be effective against crime, it has to ensure that the public has confidence in

it. This will only occur if the SAPS leadership consists of men and women who are highly skilled professionals with the appropriate expertise and whose integrity is beyond reproach.

The question is whether the current state of leadership in the SAPS is able to ensure that the SAPS becomes the type of professional police agency that will be respected by all people.

There can be little doubt that the many examples of senior officers being implicated in criminal activity and corruption is eroding both public trust and police morale. Furthermore, it is demonstrative of the extent to which effective leadership is lacking in the SAPS. The leadership problem starts with who is appointed as the most senior and the most powerful police officer, the National Commissioner of Police. The previous national commissioner of the SAPS, Jackie Selebi, who had no experience in policing when he was appointed by then President Thabo Mbeki, made many poor decisions regarding the structure of the SAPS, for example closing down important specialised units. In 2010 he was convicted on a charge of corruption and sentenced to fifteen years in prison. In July 2009 Bheki Cele was appointed by President Jacob Zuma and like his predecessor, was not a career policeman, having previously served as a politician in the KwaZulu-Natal Provincial Government.

Cele soon gained media prominence more for his often tactless, and some may argue, irresponsible public utterances than for his police leadership qualities. In 2011 the South African Police Union (SAPU) publicly accused him of nepotism, after the appointment of close family members and friends to senior positions in the police. These allegations followed shortly after the release of the report by the Public Protector in February 2011 into alleged irregularities relating to the leasing of office accommodation for the SAPS. The Public Protector found, *inter alia,* that Cele's conduct in this regard was 'improper, unlawful and amounted to maladministration'. In October 2011, almost eight months after the release of the report, President Zuma announced Cele's suspension and the appointment of a Board of Inquiry to investigate, amongst others, whether he acted 'corruptly or dishonestly or with an undeclared conflict of interest in relation to the two leases (police offices in Pretoria and Durban). The Board concluded its inquiry in the first week of April 2012 and the country now waits for its findings into whether Cele is fit to hold the position of SAPS National Commissioner.

The consequences of poor choice of leadership in the SAPS over the years are becoming abundantly clear. Allegations of ongoing irregularities relating to the business of the SAPS' Supply Chain Management prompted President Zuma to request the Special Investigating Unit (SIU) to investigate possible corruption in the allocation of contracts handled by this division in August 2010. This investigation is

not yet concluded, but since it began its work, three generals connected to Supply Chain Management took early retirement and another is currently suspended.

The Crime Intelligence Division has also for many years been fraught with allegations and reports of criminal conduct and abuse of power. For example, Mulangi Mphego, head of the division during Selebi's term of office, was accused of various unlawful activities such as interfering with a key state witness, Glen Agliotti, during Selebi's corruption investigation. This led to criminal charges being laid against Mphego and his subsequent resignation in 2009.

He was succeeded by the now infamous Lieutenant General Richard Mdluli, who appears to be protected at the highest level given that criminal charges of murder and corruption have been controversially withdrawn in spite of a large amount of evidence against him. Additionally, investigations into a substantial number of separate allegations of Mdluli's involvement in corruption into misuse of the SAPS Secret Service Account have inexplicably been shut down.

A further example of how poor leadership at the highest levels is undermining the SAPS can be found with the sudden closure of the apparently successful Cato Manor Organised Crime Unit in Durban in March 2012. Members of the Cato Manor Unit were as recently as February 2012 praised by a judge in the Pongola High Court for their professional work on the case involving the 'KZN-26' gang, notorious for cash-in-transit heists, robberies and murder. This followed sensational claims made by a police officer charged with corruption that the unit was operating as a 'hit squad.' The unit was quickly closed down without the allegations against its members being properly investigated first. Of concern was that a notice of intended suspension was served on the provincial Head of the Hawks, Major General Johan Booysen to whom they ultimately report

The closing down of the unit and attempts at suspending Booysen must be viewed against the background of corruption and fraud charges being investigated by the Hawks against a prominent Durban businessman, Thoshan Panday. According to media reports the corruption charge followed the alleged attempt by Panday and Colonel Navin Madhoe from the SAPS KwaZulu-Natal Supply Chain Management in Durban to bribe Booysen with R2 million to assist Panday with the withdrawal of the fraud charges against him. It has been reported that KwaZulu-Natal SAPS Provincial Commissioner Monnye Ngobeni, had tried to halt the investigation into Panday. She became a subject of the Hawks investigations after it emerged that Panday had paid for her husband's birthday celebration. Interestingly, the NPA declined to prosecute her, alleging that there was 'insufficient evidence' to prove that there was corruption involved in her relationship with Panday. Furthermore, the *Sunday Tribune* reported a link between Edward Zuma, a son of President Zuma, and Thoshan Panday.

Apparently, Edward Zuma unsuccessfully attempted to exert pressure on Booysen to release a R15 million payment that was allegedly owed to Zuma by Panday and had been frozen as part of a criminal investigation.

Booysen successfully fought his suspension by approaching the Labour Court, which ruled that he had been unfairly suspended. However, the court order was ignored by powerful figures in the SAPS who went ahead with the suspension regardless. Booysen was then forced to approach the Labour Court a second time to have the suspension overturned once again and is back at work but facing an uncertain future.

Ongoing problems at the highest levels of the SAPS are starting to take its toll on station level police men and women. On 10 April 2012 *The Star* published an article titled, 'Stress, frustration, wreck police force', that pointed out how allegations of mismanagement at the highest levels has tarnished the image of the police and how it complicates the lives of ordinary police members. The negative impact of bad leadership on the morale of police members cannot be separated. A police service suffering from poor leadership and low morale cannot effectively perform its mandate. The situation has clearly deteriorated to the point where the credibility of police leadership at both a political and operational level have been so severely undermined that external intervention is sorely needed. The Minister of Police who would ordinarily be responsible for addressing leadership problems, now stands accused of interfering to protect Mdluli while also irregularly benefiting from the Secret Service Account to the tune of R195 000 for renovations to his private residence and lying about it to the media.

The ISS reiterates its call for a judicial commission of inquiry with strong powers of investigation and subpoena and the necessary resources to allow it to independently and authoritatively probe the allegations of corruption, their underlying causes and then to make practical recommendations for corrective measures. It is unfair to expect the many hardworking, honest men and women in uniform to place their lives on the line when those at the helm of the organisation have lost credibility.

A Last Thought

"But judging remains an extremely complex, sensitive and difficult exercise. It is not a mechanical exercise. That is why there are often differences of opinion. Many express the view that judges must be objective in making their decisions. In my view however there is a difference between objectivity on the one hand and independence and impartiality on the other. The latter are essentials but the value of the former is doubtful. All judges are human beings who determine issues that concern other human beings. An element of subjectivity in the decision-making process is not only inevitable but in my view necessary. The job of a judge is not to pretend objectivity but to be continuously vigilant to ensure that decisions are not the product of over-subjectivity. We can never escape our own humanness.

As Cardozo J said:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. . . . In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. . . . .

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge (Benjamin N Cardozo in The Nature of the Judicial Process (1921) at 12-13, and 167).

The fact that judges differ with each other is therefore not something to bemoan. Differences of opinion are vital to a healthy judiciary and to the development of a vigorous jurisprudence. As has been said many times, the dissent of today could be the majority judgment of tomorrow. I would be perturbed indeed if eleven judges of the Constitutional Court agreed with each other judgment after judgment, year after year. This would be an indication of a judiciary that is not sufficiently representative, and lacking the strength required for true independence and impartiality."

From "Dynamic Constitution" the opening address by Justice Yacoob, Judge of the Constitutional Court of South Africa (Acting Deputy Chief Justice of South Africa) presented at Constitution Week on Monday 12 March 2012 at the University of Cape Town, South Africa.