e-MANTSHI

A KZNJETCOM Newsletter

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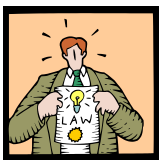
Welcome to the seventy seventh issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. In Government Gazette no 35412 dated 1 June 2012 a notice was given in terms of Rule 241 (1)(b) of the Rules of the National Assembly that the Minister of Justice and Constitutional Development intends to introduce the Prevention and Combating of Torture Bill, 2012, in the National Assembly shortly .An explanatory summary of the Bill was published in accordance with Rule 241 (1)(c) of the Rules of the National Assembly.

The Bill intends to give effect to the Republic's obligations in terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; to provide for the offence of torture of persons and other offences associated with the torture of persons; and to prevent and combat the torture of persons within or across the borders of the Republic; and to provide for matters connected therewith.

A copy of the Bill can be found on the website of the Department at http://www.doj.gov.za

2. A Legal Practice Bill has been introduced in parliament. The explanatory summary was published in Government Gazette no 35357 dated 15 May 2012. The purpose of the Bill is to provide a legislative framework for the transformation and restructuring of the legal profession in line with constitutional imperatives; to provide for the establishment, powers and functions of a single South African Legal Practice Council and Regional Councils in order to regulate the affairs of legal practitioners, and to set norms and standards; to provide for the admission, enrolment and registration of legal practitioners; to regulate the professional conduct of legal practitioners so as to ensure accountable conduct; to provide for the establishment of an Office of a Legal Services Ombud and for the appointment, powers and functions of a Legal Services Ombud; to provide for an Attorneys Fidelity Fund and an Attorneys Fidelity Fund Board of Control; to provide for the establishment, powers and functions of a Transitional South African Legal Practice Council; and to provide for matters connected therewith.

Recent Court Cases

1. S v SMITH 2012 (1) SACR 567 (SCA)

The test of a reasonable prospect of success on appeal means that a court of appeal could reasonably arrive at a conclusion different to that of the trial court based on a dispassionate decision, based on the facts and the law.

[3] In *Matshona v S* [2008] 4 All SA 69 (SCA) para 4 this court endorsed the reasoning in *Khoasasa* 2003(1) SACR 123 (SCA) para 14 and 19-22 , describing it as 'unassailable'. The court proceeded to emphasise that the issue to be determined at this stage is 'whether leave to appeal should have been granted by the High Court and not the appeal itself'(para 5). As a result, the test to be applied 'is simply whether there is a reasonable prospect of success in the envisaged appeal . . . rather than whether the appeal . . . ought to succeed or not' (paragraph 8).

[4] It was argued by counsel for the appellant that the test of reasonable prospects of success means – and I quote from his heads of argument – that leave should only be refused 'where there is absolutely no chance of success or where the court is certain beyond reasonable doubt that such an appeal will fail'. In argument he

articulated the test as being that if there was a possibility of success on appeal, leave must be granted.

[5] Both of these submissions are incorrect and neither is supported by the cases cited by counsel. The first, *R v Ngubane & others*, 1945 AD 185 is to the opposite effect. In that case, the court said the following:(at 186-187)

'It was for the applicants to satisfy the Court that there was a reasonable prospect of success on appeal if leave were granted. When in *Rex v Nxumalo* (1939 AD 580 at p588), the present Chief Justice stated that there was "no probability of the applicant succeeding", that did not mean, of course, that he had merely failed to show that there was a balance of probabilities in his favour. That test would obviously place too heavy a burden upon the applicant. Equally clearly, when Lord De Villiers CJ, in *Rex v Gannon* (1911 AD 269 at p270), spoke of the appeal as "hopeless", or Innes CJ, in *Rex v Mahomed* (1924 AD 237 at p238), referred to "the possibility of success", they did not mean that leave will only be refused where the appeal is hopeless or where the Court is certain beyond all reasonable doubt that the appeal would fail. In all the cases, no matter what form of words was used, the same thing was, in my opinion, intended to be conveyed, namely, that it is for the applicant for special leave to satisfy the Court that, if that leave be granted, he has a reasonable prospect of success on appeal.'

[6] In *S v Ackerman & 'n ander 1973 (1) SA 765 (A)* cited in support of the second proposition set out above, the sentence of the English headnote from which counsel quoted, if taken out of its proper context, does not reflect correctly what was held in the body of the judgment. The Afrikaans headnote is similarly misleading. The court quoted with approval (at 768 D-E) what had been held in *S v Shabalala* 1966 (2) SA 297 (A) to be the correct approach to the granting of leave to appeal, namely:(at 299C-D)

'Omstandigheidsgetuienis kan sterker wees as 'n onbetroubare ooggetuie, en die "moontlikheid" dat die Hof van Appèl 'n "moontlike" fout in die beredenering sou kon vind en "miskien" tot die konklusie kon kom dat die verhaal van die beskuldigde waar kan wees, is so 'n anemiese toets dat 'n aansoek vir verlof in enige saak daarop sou kon slaag. Alleen dan wanneer die Verhoorregter tot 'n weloorwoë konklusie kom dat daar gronde is waarop die Hof van Appèl tot 'n ander afleiding van die feite kan kom as wat hy gekom het, en daar dus 'n redelike moontlikheid van sukses vir die applikant bestaan, behoort verlof toegestaan te word. Bestaan daardie moontlikheid, behoort verlof ook toegestaan te word sonder huiwering of teësin.'

[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a

realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.

2. S v MBUYISA 2012(1) SACR 571 (SCA)

There is no inflexible rule that an accused who pleads guilty cannot be convicted if he uses certain of the phraseology in a charge sheet.

[5] The attack upon the conviction is twofold. The first prong of the attack is based on the contents of the appellant's written plea explanation. In the charge put to the appellant it was alleged that on or about 22 March 2009 at Vosloorus she had 'wrongfully and intentionally' attempted to kill the complainant 'by pouring him with paraffin and setting him alight'. While the grammar of this averment is atrocious, the allegations it contains are clear. To this the appellant tendered a plea of guilty and her attorney read into the record a written statement under s 112(2), signed by the appellant, which read as follows:

'I am the accused person in this matter and I understand the charge preferred against me by this honourable court to which I plead guilty. I confirm that I committed the said offence on the date and place as per annexure to the charge sheet within the jurisdiction of this court.

I admit that I did unlawfully and intentionally attempt to kill the complainant by pouring him with paraffin and lighting him. I acted without any justification in law. I knew that my actions were against the law and a punishable offence.' (My emphasis.)

[6] When asked by the magistrate if she confirmed the correctness of this statement, the appellant replied in the affirmative and was duly convicted as charged. However, despite all of this it was argued on her behalf that there was a reasonable prospect of another court setting aside her conviction as her written plea explanation had amounted to no more than a regurgitation of the allegations in the charge sheet and was thus lacking in essential details relevant to the facts underlying the charge. In advancing this argument, the appellant's attorney seized upon the unfortunate phrase 'pouring him with paraffin' used in the charge sheet and repeated in the s 112(2) statement as the basis for his contention that there had been merely a regurgitation of the facts alleged in the charge which, in the light of the decisions in *S v Mshengu* 2009 (2) SACR 316 (SCA) and *S v Chetty* 2008 (2) SACR 157 (W) in particular, he submitted was impermissible.

[7] However, while it is no doubt undesirable for allegations contained in the charge sheet to merely be repeated in a s 112(2) statement, there is no inflexible rule that an accused who uses certain of the phraseology in a charge cannot be convicted. Each case is to be considered in the light of its peculiar facts and circumstances. What s 112(2) requires is a written statement in which the accused sets out the facts upon which he or she admits his guilt. Where these facts do not cover the essential elements of the charge ─ for example in *Chetty's* case where on a charge of fraud it was not clear whether the person had been induced to act to his or her prejudice as a result of the accused's admitted representation ─ a conviction should not follow. Thus in *Mshengu's* case, in which the offender's age was such that he was rebuttably presumed not to be criminally responsible, it was held that a simple regurgitation of the contents of the charge did not establish that he was indeed capable of forming the necessary criminal intent.

[8] There are no such difficulties in the present case. The essential gravamen of the charge was that the appellant had attempted to kill the deceased by pouring paraffin over him and then setting him alight. This she clearly admitted in the emphasised section of the statement, even if in doing so she used the same unfortunate phrase that had been used in the charge sheet. But the same import would have been conveyed if, for example, she had said she had 'doused' complainant with paraffin or used some similar description. She clearly intended to admit that she was guilty as she had intended to kill the complainant and that she had acted unlawfully and without excuse. Not only did her statement cover the essentials of the charge but it also set out the essential facts upon which she admitted her guilt, namely, that she had poured paraffin over the complainant and set him alight. It is not without significance that the appellant was legally represented at the time, a factor that alleviates the concern expressed in cases such as *S v M* 1982 (1) SA 240 (N) at 244D-E that an unsophisticated person may plead guilty without fully comprehending what doing so encompassed.

3. S v MATSHIBA 2012(1) SACR 577 (ECG)

It is not permissible to amend a sentence in terms of section 298 of Act 51 of 1977 if the original sentence is not wrong.

[12] In the present case the amendment had the effect of imposing additional terms to the sentence. The magistrate's alteration of the sentence did not comply with the provisions of s 298 of the Act. This is so for the following reasons:

[12.1] The original sentence imposed by the magistrate, although it was excessive, was not irregular and therefore was not wrong. When she interfered with the sentence, the magistrate was therefore functus officio.

[12.2] When she amended the sentence the appellant's legal representative was not present. The Act does not say that the accused or his legal representative should be present when the amendment is effected. However, the interpretation attached to the provisions is that the accused should be present when the alteration is made, and it follows a fortiori that, if represented, his legal representative should be present. This is so, as common sense dictates, because the alteration or amendment is a further step in the proceedings, and, therefore, the court should be properly constituted as it was before. See *S v Radebe* 1973 (4) SA 244 (O). In my view, if an accused person has been legally represented throughout the criminal proceedings, no further action concerning the proceedings should take place in the absence of his or her legal representative.

[12.3] Lastly, even if it would have been competent for the magistrate to effect the amendment, when she did so it was already after 20 days of the imposition of the original sentence and, therefore, effected out of the time period required by s 298 of the Act.

4. S v DEWHURST 2012(1) SACR 627 (ECP)

An order in terms of section 78(6) of Act 51 of 1977 can only be made after evidence has been placed before a court linking the accused with the offence.

[1] The accused appeared before the magistrate's court charged in the main with intimidation and in the alternative with assault. The defence counsel requested that the accused be sent for mental observation. Indeed, he was referred for mental observation in terms of Section 79 (2) of the Criminal Procedure Act, Act 51 of 1977 *(the Act).* A joint psychiatric report in terms of Section 79 (1) (iii) of the Act was submitted by Professor H Erlacher and Professor Nagdee. They found as follows:

> "At the time of the alleged offence, the accused was able to appreciate the wrongfulness of the act in question, but unable to act in accordance with such appreciation of wrongfulness."

[2] Their recommendation reads thus;

> "It is respectfully recommended that the accused be dealt with as an involuntary patient, in accordance with Section 78 (6) of Act 51 of 1977, and the provisions of Chapter 5 of the Mental Health Care Act, Act 17 of 2002."

[3] When the report came to hand, the prosecutor presented it to court. The accused through his representative did not dispute the findings and the recommendations made. The prosecutor informed court that there was a *prima facie* case against the accused. The representative of the accused did not add anything to that except to request the court to make an order in terms of Section 47 of the Mental Health Act 17 of 2002 *(the Mental Health Act).* Having heard both counsel, the magistrate made the following order;

> "In the light of what was found by the panel the order is then that the accused be detained in a psychiatric hospital or a prison – that is what the Act says, pending the decision of a judge in chambers, in terms of Sect 47 of the Mental Health Care Act of 2002, if it deems to be in the interest of the public." *(sic)*

[4] The matter was brought on special review by the additional magistrate on the grounds that the order was erroneously granted by the magistrate concerned because he/she failed to make a finding as to whether the accused committed the offence he is charged with in terms of Section 77 (6) (a) (i) of the Act.

[5] The Director of Public Prosecutions (DPP) was given the record and asked to comment. The DPP correctly, in my view, makes the point that:

> "7. Once a court makes a finding that an accused is not fit to stand trial, it is required of the court to consider whether the accused committed the act in question. The legislature did not intend this procedure to be a mini-trial on the merits. A court can rely on information or evidence and need only be convinced on a balance of probabilities that an accused committed the act in question. . .
>
> 9. The prosecutor made no submissions to court as to the circumstances of the case which warranted, in the public interest, committal of the accused to a psychiatric hospital or prison pending the decision by a Judge in chambers, despite the recommendation in the psychiatric report that the accused be dealt with as an involuntary health care user."

[6] Section 77 (6) (a) (i) of the Act provides as follows:

> "If the court which has jurisdiction in terms of section 75 to try the case, finds that the accused is not capable of understanding the proceedings so as to make a proper defence, the court may, if it is of the opinion that it is in the interests of the accused, taking into account the nature of the accused's incapacity contemplated in subsection (1), and unless it can be proved on a balance of probabilities that, on the limited evidence available the accused committed the act in question, order that such information or evidence be placed before the court as it deems fit so as to determine whether the accused has committed the act in question and the court shall direct that the accused –

i. In the case of . . . a charge involving serious violence or if the court considers it to be necessary in the public interest, where the court finds that the accused has committed the act in question, or any other offence involving serious violence, be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of Section 47 of the Mental Health Care Act, 2002." (Emphasis added).

[7] It is apparent from the record that no evidence was placed before court so as to determine whether the accused had committed the offence with which he had been charged. Such could have been done by the prosecutor outlining the nature of evidence he/she had in the docket which links the accused to the commission of the offence. Such facts would probably have been confirmed by defence counsel as it appears *ex facie* the record. It would only be thereafter that the court would have been able to find that the circumstances warranted that the accused be committed in terms of Section 47 of the Mental Health Care Act, No 17 of 2002. The failure by the magistrate to comply with the provisions of Section 77 (6) (a) (i) of the Act constitutes an irregularity.

From The Legal Journals

Watney, M

"The prosecution's duty to disclose: More reason to litigate? "

2012 TSAR 320

De Klerk, W

"The right of the media to report on sexual offences"

2012 SALJ 41

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

Contributions from the Law School

The nature of the threat in the crime of extortion

The central conundrum of the crime of extortion is where to draw the line between legitimate and illegitimate applications of coercive pressure (Burchell *Principles of Criminal Law* 3ed (2005) 826). Given the difficulty in drawing this distinction the crime deserves, and has been subjected to, close theoretical scrutiny (see, for example, 'Blackmail Symposium' (1993) 141 *University of Pennsylvania Law Review* 1565; Berman 'The Evidentiary Theory of Blackmail: Taking Motives Seriously' (1998) 65 *University of Chicago Law Review* 795; Smith 'The Harm in Blackmail' (1998) 92 *Northwestern University Law Review* 861). The scope of this note does not however permit any consideration of this debate.

The form of the crime in Common Law jurisdictions is typically called blackmail (which was originally a form of tribute or protection paid to Scottish border chieftains (Smith *Property Offences* (1994) 419)), although codification has seen the crime being referred to as extortion in some jurisdictions (which, as Charleton, McDermott and Bolger *Criminal Law* (1999) 846 note, 'is a better generic word for the offences which are technically described as demanding with menaces'). In South African law the crime derives from the Roman law crime *concussio*, known as *concussie*, *afpersing* or *knevelarij* in Roman-Dutch law, and the common-law crime of extortion is based on these antecedents rather than the Common Law model (Gardiner and Lansdown *South African Criminal Law and Procedure Vol II* 6ed (1957) 1710). Nevertheless, whatever the developmental path the crime has followed in a

particular jurisdiction, Ashworth's statement that the use of coercive threats constitutes the gravamen of the offence is, it is submitted, correct (Ashworth *Principles of Criminal Law* 5ed (2006) 390; see also Burchell 826). This begs the question: what does the notion of 'threat' mean in the context of the crime?

The crime of extortion in South African law may be defined as occurring

> 'when a person unlawfully and intentionally obtains some advantage, which may be of either a patrimonial or a non-patrimonial nature, from another by subjecting the latter to pressure which induces her to hand over the advantage' (Snyman *Criminal Law* 5ed (2008) 426).

In South African law the threat may either be express or implied from the accused's words and conduct (Milton *South African Criminal Law and Procedure Volume II: Common-law Crimes* 3ed (1996) 690; *S v Gokool* 1965 (3) SA 461 (N) at 464-5). The nature of the test of implication has not been settled.

On the one hand, it can be argued that the test is objective in nature. This is the approach adopted by Gardiner & Lansdown (1712):

> 'The oppressor must have inspired fear in the mind of the victim and, by means of this duress, have caused him to comply wholly or partly with the demand made. That the oppressor did not intend to exercise such duress is a plea which would be little likely to avail him, if, as a fact, his conduct was such as might reasonably cause fear to an ordinary person of the class to which the victim belonged.'

Given the writers's affinity for the English criminal law, it is not entirely unsurprising that the English solution should be adopted in this instance. Some support can also be derived from the judgment of the Appellate Division in *R v G* 1938 AD 246, where in dismissing the appellant's appeal against his extortion conviction, De Villiers JA states that

> 'in all the circumstances of the case the prosecution evidence does disclose a threat of a sufficiently serious nature, such as would *reasonably inspire fear* in the mind of a person of the mentality of, and in the position occupied by the complainant'. (252; my emphasis)

The appellant had argued on appeal that the threat was not sufficiently serious to incur liability, to which the Court responded with the statement that the threat 'must be such as is calculated to influence (or inspire fear) in the mind of a person in the position, and of the mentality, of the person threatened', and that the threat made by

the appellant was indeed of this nature (251). As is evident, the focus of the Court in this statement is on the state of mind of the accused ('calculated to influence (or inspire fear)') rather than the nature of the threat as such. The reference to 'reasonably' inspiring fear in the dictum cited should therefore, it is submitted, be interpreted in this context. This contention derives support from *R v Xalise* 1939 EDL 189 at 192, where the dictum at 251 was applied, as well as the similar approach adopted in *R v Ngqandu* 1939 EDL 213 at 215.

The contrary position has been supported by foremost South African writers. Swanepoel (De Wet & Swanepoel *Strafreg* 2ed (1960) 408) clearly rejects any measure of objectivity in the assessment of the threat:

> 'Waar die beskuldigde dreigemente teen 'n ander uitoefen, is dit natuurlik geen verweer dat die ander hom nie so ligtelik die vrees op die lyf moes laat jaag nie. Die vraag is nie of 'n redelike man hom deur die dreigemente sou laat beweeg het nie, maar of die slagoffer wel deur die dreigemente beïnvloed is en of daar inderdaad vreesaanjaging was.'

Milton agrees, pointing out that (in his view) 'how a reasonable man would have understood the words is only of evidential significance' (Milton 691), and that

> '[t]he question is whether X intended his words and conduct to operate as a threat, and then (in relation to inducement) whether Y actually understood them in that way' (*ibid*).

It is submitted that the Swanepoel/Hunt approach is preferable.

Trying to impose a reasonable person standard on the interpretation of the threat presents practical difficulties. As Milton points out, it will often be very difficult in practice to determine whether the accused's words contained an implied threat (691).

Interpreting whether the accused's words constitute extortion will may be particularly difficult when the threat is clothed in the terms of a reciprocal contract (as in *R(E)*). Writing in the context of English law, Williams (*Textbook on Criminal Law* 2ed (1984) 832) quotes an anecdote which demonstrates such difficulty:

> 'The most notorious instance of such moral blackmail was that by Harriette Wilson, a courtesan of the early 1800s. Finding that her charms alone could no longer sustain her in her style of life, she conceived the idea of writing an account of her many lovers, charging an honorarium for each name left

> out…Harriette went so far as to publish her memoirs by installments, which increased the pressure on her victims.'

Williams states that if well-executed such a plan might not be regarded as blackmail – '[a] man who, having heard of the projected book, took the initiative of offering money to have his own contribution to the author's life passed by, could hardly claim that he had received a demand' (*ibid*; Williams does however suggest that a court would however seek to find an implied demand if possible on these facts).

Whilst this situation may well not found liability in the English law, due to the ongoing application of an objective standard – the reasonable person test – it is submitted that it would indeed found liability in South African law. In terms of the South African crime of extortion, it is contended that if conduct or words are meant as a threat by the accused and interpreted as such by the complainant, there will be sufficient pressure to constitute the crime, even though a reasonable person would never view the conduct or words as a threat. This would further be consistent with the general rationale underlying the crime of extortion, that whilst the nature of the pressure may not be unlawful in itself, it is the purpose underlying the application of such pressure, and the knowledge of the effect of the threat on the complainant, that gives rise to the crime.

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Matters of Interest to Magistrates

In "The Time of the Vulture" we need to pay our judges well.

Jun 4th, 2012

by Pierre De Vos.

We live in the "Time of the Vulture", a time in which cowboy capitalists – who have been with us since the discovery of gold and diamonds in South Africa in the nineteenth century – are becoming ever more rapacious and immoral (if that is at all possible), a time in which the Ministerial Handbook has become a Bible of sorts for some people (to justify the self-important and ostentatious lifestyles of Ministers and government

officials), a time in which the bribing of state officials and politicians are taken for granted by members of the old and new business elites – all in the service of securing humongous bonuses for executives.

It is a time in which the 50 million South Africans who pay some form of tax are required to subsidise the lavish spending habits and the lifestyles of the few rich and famous individuals who are milking the state dry, all in the name of either respect for the free market or for the need to restore the dignity of those who were cruelly oppressed during apartheid (as if a person's dignity can ever be measured in money terms and can be bought and sold like designer trinkets at a Houghton flea market).

It is a time in which voters are increasingly becoming more disillusioned with corrupt and greedy councilors; dithering, self-righteous demagogues masquerading as politicians; and smarmy, rapacious and often incompetent captains of big business.

In these times it is perhaps understandable that a politician languishing in the political wilderness in the National Council of Provinces (NCOP) – the sad and ineffectual second house of Parliament where many political has-beens languish in pristine obscurity, secure in the knowledge that they have been rewarded for showing a special talent for mediocrity, blandness and the ability (so prized by politicians) never to allow an original thought to enter their brains, let alone to pass over their lips – that such a politician would take a stab at saying something he or she believes might be popular with voters.

It is understandable, yes, but not wise. Enters the esteemed Denis Joseph, DA MP in the NCOP, who told an *ad hoc* committee of that august institution during a debate on a draft code of conduct for judges that a strong message needed to be sent out to the members of the judiciary that they were not untouchable.

"Nothing stops this parliament reviewing whatever is on the table and coming up with a new package … I get the impression that the judges feel that, because there was such an agreement, it should not be touched, it should be for life…. I think it's important we tell these judges [that there are] many other laws we are changing, many systems we are changing. The judges must also realise that this new parliament is going to deal with them in terms of fairness and equality [for] all people who work for the state."

The danger is that this populist statement might find favour with the public. After all, are we not wasting money on salaries for judges, money that could be better spent on paying for textbooks and antiretroviral drugs, for houses for the homeless and more free water for those who cannot afford to pay for it?

But in my view this is a dangerous and irresponsible statement. I say so not because I am particularly fond of judges or that I think judges are beyond criticism. When judges act in ways that conflict with the values enshrined in the Constitution, when serving judges resist attempts to force them to declare their financial interests, for example, or

when they interpret and enforce legislation, common law or customary law as if the Bill of Rights was never passed, when they apply the law as if male domination and heterosexism is not only accepted but required, they need to be lambasted in a vigorous manner.

But there are very good reasons why the Judges Remuneration and Conditions of Employment Act provides for the continued payment of judges after their retirement, using a complicated formula to determine the exact amount of such a payment. Simply put: without the financial security provided by these provisions in the Act, the independence and impartiality of the judiciary will be seriously threatened. This is why section 76(3) of the Constitution states that: “The salaries, allowances and benefits of judges may not be reduced”.

In *De Lange v Smuts* the Constitutional Court confirmed that “a basic degree of financial security free from arbitrary interference by the executive in a manner that could affect judicial independence” was an absolute requirement for an independent and impartial judiciary. Quoting from a relevant Canadian judgment, the Court stated that:

The word ‘impartial’ . . . connotes absence of bias, actual or perceived. The word ‘independent’… reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly the Executive Branch of government, that rests on objective conditions or guarantees. Although judicial independence is a status or relationship resting on objective conditions or guarantees, as well as a state of mind or attitude in the actual exercise of judicial functions, it is sound, I think, that the test for independence… should be, as for impartiality, whether the tribunal may be reasonably perceived as independent. Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception. The perception must, however, as I have suggested, be a perception of whether the tribunal enjoys the essential objective conditions or guarantees of judicial independence, and not a perception of how it will in fact act, regardless of whether it enjoys such conditions or guarantees.

First, where Parliament is legally entitled to reduce the salaries or benefits of judges, the judiciary can never be independent or impartial because the absence of financial security for judges would, at the very least, create the reasonable apprehension on the part of the public that judges will be fearful to hand down judgments that might upset the legislature or executive for fear of having their salaries and benefits cut.

In a dominant party system like ours, this problem will be exacerbated because the perception might become a reality and the majority in Parliament might in fact reduce the salaries and benefits of judges to whip them into line, which would automatically bring an end to the independence and impartiality of the judiciary as judges would then be intimidated into making decisions that would not further upset the other branches of government in order to retain their salaries and benefits at a reasonable level.

Amending the Constitution to scrap section 76(3) – something that would be necessary before the honourable Joseph's threats could be carried out in a constitutionally valid manner – would therefore destroy the independence and impartiality of the judiciary and would bring an end to constitutional democracy with a supreme Constitution as we have come to know it in the past 18 years.

But even leaving this crucial issue aside, I would argue that it was imperative that judges be paid what in effect amounts to a generous pension in order to safeguard the independence and impartiality of the judiciary and secure public trust in the institution. Where no provision is made for the payment of some salary to retired judges, judges would have to provide themselves for their retirement. They would have to do so either by doing extensive consulting work after their retirement or by building up a pension during their service as judges.

In the first instance, the need to quickly make lots of money to finance their retirement after they end their term as judges would leave judges wide open to conflicts of interests during their service as they might well act cautiously so as not to alienate either the government or those in big business for whom they would hope to do lucrative consulting work on their retirement. If a perception were to arise that judges were widely influenced by commercial considerations when they had to decide a case in which a big corporation or the state were involved, it would entirely subvert the system and fatally compromise the independence and impartiality of the judiciary. If a perception were to arise that one would not have a great chance of ever winning a case against a big company or against the government, the independence and impartiality of the judiciary would have come to an end.

Where judges are required to fund their pension from their income as sitting judges, there is a real danger that they would be vulnerable to bribes and to corruption. As the financial pressures mount and as their monthly salaries appear insufficient to fund their lives as well as a generous pension plan, the less scrupulous litigants would perceive judges as vulnerable to corruption and would offer direct or indirect incentives to judges to make decisions favourable to them. Before one were able to say "Oasis" – and even if no or very few judges succumb to offers of bribery - the perception that might arise amongst members of the public would itself fatally undermine respect for the judiciary and with it the ability of the judiciary to act impartially and independently.

In the “Time of the Vulture” I am loath to endorse an expensive and wasteful pension scheme for anyone being paid from the public coffers (in other words for anyone being paid by the 50 million people who pay taxes). But for members of the judiciary I happily make an exception. We need to pay our judges well and look after them in their retirement. It is our insurance policy against widespread corruption, nepotism, the flaunting of the Rule of Law and the abuse of power.

In the absence of competitive party political contestation of elections, approaching an independent judiciary to challenge these inherently undemocratic and unlawful actions by the greedy Vultures remains a last resort. Given the South African context, honest, impartial and independent judges may therefore be a prerequisite for safeguarding the democratic space within which active citizens can enforce their rights and fight back against the Vultures. At the price tag, the paying of pensions for life to judges is a huge bargain.

(The above post was published on the *Constitutionally Speaking Blog*)

A Last Thought

Prosecutor attacks a threat to democracy

Last month the Law Society of South Africa (LSSA) and the General Council of the Bar (GCB) spoke out against recent attacks on prosecutors and other members of the legal profession aimed at deterring them from doing their crucial work. These attacks have included threats, harassment, and intimidation, theft of documents and laptops, and even being shot at.

In addition, in the past few months there have been reports of judges being afforded protection after receiving death threats relating to cases they are presiding over, of clients being shot in front of their attorneys and of legal practitioners’ offices and homes being burgled.

Last year it was reported that the National Director of Public Prosecutions, Menzi Simelane, informed parliament that acts of intimidation aimed at prosecutors was both widespread and on the rise. He said that the National Prosecuting Authority (NPA) had spent in the region of R 2 million in 2010 on protecting prosecutors who

faced threats as a result of the cases they dealt with, adding that a number of prosecutors were being protected by police officers and private security guards.

Similarly, in an article in the March 2011 NPA newsletter *Khasho*, Mr Simelane said: 'We have recently seen the prosecutions' environment becoming very ugly and sometimes even dangerous for some of our prosecutors. For example, some prosecutors are making it onto the hit lists of criminals, are being threatened with death, or harassed and intimidated. Due to the nature of their work, many members of the legal profession – judges, magistrates, prosecutors, advocates and attorneys – are at risk of such attacks.

Failure to condemn these actions and provide support to those members of the legal profession who are subjected to them can have a far wider impact than that on the individual member.

These members of the profession play an essential role in attaining justice for their country's citizens and ensuring voices that may otherwise not be heard are heard. Their work is vital to upholding the rule of law.

(This an edited version of the Editorial in the *De Rebus of* June 2012)