e-MANTSHI

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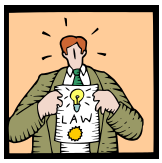
Welcome to the ninetieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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 ensuring that this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions. These should be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. In terms of section 21 of the Correctional Matters Amendment Act, 2011 (Act No 5 of 2011), the 1st of July 2013 has been determined as the date on which section 9 of the said Act shall come into operation, insofar as it relates to section 49G of the principal Act, Correctional Services Act, 1998, (Act No. 111 of 1998). A notice to this effect was published in Government Gazette no 36621 dated 1 July 2013. The section reads as follows;

***9. Substitutes Chapter V of the Correctional Services Act, No. 111 of 1998,**

"Clothing

48. (1) Every remand detainee must wear a prescribed uniform which distinguishes him or her from a sentenced offender for the maintenance of security and good order in the remand detention facility.

(2) No remand detainee is to appear in any court proceedings dressed in a prescribed uniform referred to in subsection (1).

(3) If a remand detainee does not have adequate or proper clothing to appear in court, he or she must be provided at State expense with appropriate clothing to enable him or her to appear in court.

Maximum incarceration period

49G. (1) The period of incarceration of a remand detainee must not exceed two years from the initial date of admission into the remand detention facility, without such matter having been brought to the attention of the court concerned in the manner set out in this section: Provided that no remand detainee shall be brought before a court in terms of this section if such remand detainee had appeared before a court three months immediately prior to the expiry of such two year period and the court during that appearance considered the continued detention of such detainee.

(2) The Head of the remand detention facility must report to the relevant Director of Public Prosecutions at six-monthly intervals the cases of remand detainees in his or her facility that are being detained for a successive six-month period.

(3) Any remand detainee whose detention will exceed the period stipulated in subsection (1) must be referred to the relevant court by the Head of the remand detention facility or correctional centre, as the case may be, to determine the further detention of such person or release under conditions appropriate to the case.

(4) If, subsequent to the referral of the remand detainee to court as contemplated in subsection (3), the finalisation of his or her case is further delayed, the Head of the remand facility or correctional centre, as the case may be, must refer the matter back to the court on a yearly basis to determine the remand detainee's further detention or release under conditions appropriate to the case.

(5) The National Commissioner may, in consultation with the National Director of Public Prosecutions, issue directives regarding the procedure to be followed by a Head of a remand detention facility or correctional centre, as the case may be, and a Director of Public Prosecutions whenever it is necessary to bring an application contemplated in subsection (3) or (4)."

Recent Court Cases

1. S v HUMPHREYS 2013 (2) SACR 1 (SCA)

If an accused did subjectively foresee possible harm but did not think it would actually occur, the second element of *dolus eventualis* would not have been established.

"[1] The appellant, then in his late fifties, was charged in the Western Cape High Court, Cape Town before Henney J with ten counts of murder and four counts of attempted murder. All these charges arose from a single incident which occurred on 25 August 2010 when a minibus, driven by the appellant, was hit by a train on a railway crossing near Blackheath on the outskirts of Cape Town. There were fourteen children in the minibus, ranging in ages between seven and sixteen years. Ten of the children were fatally injured in the collision, which gave rise to the ten charges of murder. Four of them fortunately survived, but were seriously injured. They were cited as the complainants in the four charges of attempted murder. At the end of the trial the appellant was convicted as charged on all fourteen counts and sentenced to an effective period of 20 year's imprisonment. The appeal against both the convictions and the sentences imposed is with the leave of this court.

[4] When the appellant reached Buttskop Road, vehicles were again queuing to cross the railway line. Although the railway line was on the appellant's right side when he reached the T-junction, he therefore had to turn left and make a U-turn in Buttskop Road to join the queue. By all accounts, that is what the appellant did. According to the appellant's version he can remember stopping behind the last vehicle in the queue, but not what he did after that. What then happened, according to the eyewitnesses was that the appellant overtook the line of vehicles on their right-hand side and approached the crossing in the lane destined for oncoming traffic. The crossing is controlled by two booms in Buttskop Road, one for traffic from the east – as the appellant was approaching – and the other for traffic from the west. Because the booms are positioned on different sides of the railway line, they can be avoided, even when they are down, by going onto the lane intended for oncoming traffic and by then returning to the correct lane to pass the boom on the other side. On both sides of the railway line there are also large stop signs as well as other traffic signs indicating a railway crossing. In addition there are large red warning

lights directed at traffic in Buttskop Road that start flashing when a train approaches the crossing and just before the booms come down.

[5] At the time when the appellant overtook the line of vehicles in Buttskop Road, Mr Stewart Pekeur was the driver of the car waiting in front of that queue. He testified that he had stopped because the red lights were flashing. At that stage, Pekeur said, the booms had not yet come down. According to Pekeur they did, however, come down before the minibus came past him. Because the appellant was already in the lane intended for oncoming traffic, he could enter the crossing without any hindrance from the boom on the eastern side, which is what he then did. In sum, Pekeur's version that the minibus entered the crossing in the face of flashing warning lights and by dodging the barrier created by the boom, was confirmed by the two passengers and the train driver. It is common cause that, upon entering the crossing the minibus was hit on its left side by the train which, according to the train driver, had no chance to avoid the collision. From an inspection in loco the court a quo determined that, from the time that the red warning lights start flashing, it takes a few seconds for the boom to come down. Thereafter, it takes about one minute for the train to reach the crossing.

[6] According to the appellant he was also seriously injured in the accident and was admitted to hospital for five days. He further maintained that he remembered absolutely nothing, from the time that he stopped behind the last vehicle in the queue in Buttskop Road, until he regained consciousness after the accident. Both passengers testified that the appellant had successfully executed the same manoeuvre that led to the accident on the fateful day on two previous occasions. According to the one witness, he had entered the railway crossing on those occasions after the booms had already come down while the other witness recalled that on those occasions the red lights were already flashing, but the booms had not yet come down. The appellant emphatically denied that this ever had happened. The court a quo, however, preferred the version of the state witnesses and, in my view, rightly so."

One of the main issues that had to be decided was the issue of *dolus eventualis*.

"In accordance with trite principles, the test for *dolus eventualis* is twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility (see eg *S v De Oliveira* 1993 (2) SACR 59 (A) at 65i-j). Sometimes the element in (b) is described as 'recklessness' as to whether or not the subjectively foreseen possibility ensues (see eg *S v Sigwahla* 1967 (4) SA 566 (A) at 570). I shall return to this alternative terminology, which sometimes gives rise to confusion.

[13] For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his

position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.

[14] Adopting what essentially amounted to this line of inferential reasoning, the court a quo concluded that in the prevailing circumstances, the appellant subjectively foresaw the death of his passengers as a possible consequence of his conduct. I do not believe this conclusion can be faulted. I think it can confidently be accepted that no person in their right mind can avoid recognition of the possibility that a collision between a motor vehicle and an oncoming train may have fatal consequences for the passenger of the vehicle. Equally obvious, I think, would be the recognition on the part of every person that the heedless disregard of clear warning signals of an approaching train, together with the deliberate avoidance of a boom specifically aimed at preventing traffic to enter a railway crossing by reason of the approaching train, may result in a collision with that train. After all, every such person would appreciate that the very purpose of all these preventative measures was aimed at avoiding the possibility of a collision between a motor vehicle and a train, precisely because the consequences of the collision may be so horrific. What follows as a matter of course, I think, is the foresight on the part of every right minded person that disregarding these preventative measures creates the possibility that the foreseeable consequences may actually occur. To deny this foresight would in my view be comparable to a denial of foreseeing the possibility that a stab wound in the chest may be fatal. Since there is nothing on the evidence to suggest a subjective foresight on the part of the appellant so radically different from the norm, I agree with the conclusion by the court a quo that the element of subjective foresight had been established.

[15] This brings me to the second element of *dolus eventualis*, namely that of reconciliation with the foreseen possibility. The import of this element was explained by Jansen JA in *S v Ngubane* 1985 (3) SA 677 (A) at 685A-H in the following way:

‘A man may foresee the possibility of harm and yet be negligent in respect of that harm ensuing, eg by unreasonably underestimating the degree of possibility or unreasonably failing to take steps to avoid that possibility . . . The concept of

conscious (advertent) negligence (*luxuria*) is well known on the Continent and has in recent times often been discussed by our writers. . . .

Conscious negligence is not to be equated with *dolus eventualis*. The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) "consents" to the consequence foreseen as a possibility, he "reconciles himself" to it, he "takes it into the bargain". . . . Our cases often speak of the agent being "reckless" of that consequence, but in this context it means consenting, reconciling or taking into the bargain . . . and not the "recklessness" of the Anglo American systems nor an aggravated degree of negligence. It is the particular, subjective, volitional mental state in regard to the foreseen possibility which characterises *dolus eventualis* and which is absent in *luxuria*.'

[16] The question is, therefore, whether it had been established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw. The court a quo held that he did. But I have difficulty with this finding. It seems to me that the court a quo had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in *Ngubane*. That much appears from the way in which the court formulated its finding on this aspect, namely – freely translated from Afrikaans – that the appellant, 'appreciating the possibility of the consequences nonetheless proceeded with his conduct, reckless as to these consequences'.

[17] Once the second element of *dolus eventualis* is misunderstood as the equivalent of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of this case, seems inevitable. By all accounts the appellant was clearly reckless in the extreme. But, as Jansen JA explained, this is not what the second element entails. The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.

[18] On the facts of this case I believe that the latter inference is not only a reasonable one, but indeed the most probable one. I say this for two reasons: First, I believe common sense dictates that if the appellant foresaw the possibility of fatal injury to one or more of his passengers – as I found he did – he must by the same token have foreseen fatal injury to himself. An inference that the appellant took the death of his passengers into the bargain when he proceeded with his action would unavoidably require the further necessary inference that the appellant also took his own death into the bargain. Put differently, the appellant must have been indifferent as to whether he would live or die. But there is no indication on the evidence that the

appellant valued his own life any less than the average person or that it was immaterial to him whether or not he would lose his life. In consequence I do not think it can be said that the appellant had reconciled himself with the possibility of his own death. What must follow from this is that he had not reconciled himself with the occurrence of the collision or the death of his passengers either. In short, he foresaw the possibility of the collision, but he thought it would not happen; he took a risk which he thought would not materialise.

[19] My second reason for concluding that the appellant did not reconcile himself with the consequences rests on the evidence that the appellant had successfully performed the same manoeuvre in virtually the same circumstances previously. Moreover, as a matter of pure mathematical calculation, a collision with the train could plainly be avoided even if the crossing was entered after the boom came down. It will be remembered that from the inspection *in loco* the court a quo established that the boom came down about one minute before the arrival of the train. It would therefore obviously take substantially less than a minute to cross the railway lines. So, the fact that the manoeuvre which the appellant tried to execute was practically possible and that it had in fact been successfully executed by him previously, leads me to the inference that, as a matter of probability, the appellant thought he could do so again. Differently stated, the fact that the appellant had previously been successful in performing this manoeuvre probably led him to the misplaced sense of confidence that he could safely repeat the same exercise. Self-evidently the fact that his confidence was misplaced does not detract from the absence of reconciliation with the consequences he subjectively foresaw. It follows that in my view the court a quo's finding of *dolus eventualis* was not justified.

[20] I think it goes without saying that the appellant was negligent. It simply cannot be suggested that any reasonable driver would behave as the appellant did on that fateful day. In short, the appellant was negligent and flagrantly so. This means, however, that absent a finding of intent in any form, the convictions of murder must be set aside and replaced with convictions on the alternative charges of culpable homicide that were brought against the appellant. What is more, because (a) intent or *dolus* is required for conviction on a charge of an attempt to commit a crime and (b) as a matter of logic no-one can intend to be negligent, our law knows no such crime as attempted culpable homicide (see eg *S v Ntanzi* 1981 (4) SA 477 (N) at 481G-482F; Snyman op cit 453). The four convictions of attempted murder therefore also fall to be set aside.

[21] The appellant's final argument in support of his appeal against the convictions was that, because the deaths of the ten deceased persons resulted from one act or sequence of actions, he cannot be convicted on ten counts of culpable homicide, but on one count only. The proposition thus raised had been considered and found wanting by this court in *S v Naidoo* 2003 (1) SACR 347 (SCA). As I see it, the crux of that decision is encapsulated by the following statement (para 36):

'Just as in the case of murder it is immaterial whether multiple killings were the result of one act (such as throwing a grenade) and as many counts of murder as the number of people who have been killed may be preferred, so too in the case of culpable homicide where multiple deaths have been caused is it immaterial that they were caused by a single negligent act or omission, provided only that multiple deaths were a reasonably foreseeable consequence.'"

2. S v MAKGATHO 2013(2) SACR 13 (SCA)

The test in respect of intention is subjective and not objective.

The appellant was convicted in a regional court of murder on the basis of *dolus eventualis,* in that he had foreseen that by discharging his firearm twice in a tavern, where there were a number of people, he would cause an accident, but, despite that, had fired the shots which resulted in the death of the deceased. The conviction was confirmed by a high court on appeal. In a further appeal the only issue before the court was whether he had acted with *dolus eventualis* when he caused the death of the deceased. The court on appeal held that the trial court and the high court had correctly rejected the appellant's evidence, and had correctly accepted the evidence of the state witnesses, to the effect that the appellant had entered the tavern to talk to the person he regarded as his girlfriend, but was thwarted in his efforts when the deceased restrained him. He then fired a shot into the air, and later another shot, which struck the deceased.

Held, that a person acted with intention, in the form of *dolus eventualis*, if the commission of the unlawful act or the causing of the unlawful result was not his main aim, but he subjectively foresaw the possibility that in striving towards his main aim, the unlawful act may be committed or the unlawful result may ensue, and he reconciled himself to that possibility. It had to be shown that a real, as opposed to a remote, possibility of the consequence resulting was foreseen. (Paragraph [9] at *16f)*

Held, that the fundamental question was not whether he should have accepted that the result would follow, but whether in actual fact he accepted that it would follow. The test in respect of intention was subjective and not objective. In the present case, the appellant foresaw the possibility that his firing a shot, whether into the ground or into the air, in the presence of many people, would result in harm and he reconciled himself to this possibility. In the circumstances the appeal against the conviction had to fail. (Paragraphs [10] and [15] at *16i/J-17b* and *18e-f)*

3. S v MTHIMKULU 2013(2) SACR 89 (SCA)

In terms of section 276B of the Criminal Procedure Act 51 of 1977 a court is not obliged to fix a non-parole period when sentences are ordered to run concurrently.

"[1] The principal issue for determination in this appeal is whether s 276B(2) of the Criminal Procedure Act 51 of 1977 (the Act) impels a court which sentences a person to imprisonment, following a conviction for two or more offences where the sentences of imprisonment are ordered to run concurrently, to fix a non-parole period in respect of the effective period of imprisonment. The subsidiary issue is whether or not the appellant had a right to be heard before the court below invoked s 276B(2) of the Act.

[2] It is necessary at the outset to mention, by way of background, a brief narrative of certain facts and circumstances, which bear on the questions to be decided in this appeal, as they emerge from the record.

[3] The appellant was convicted in the KwaZulu-Natal High Court, Pietermaritzburg (Koen J) on one count of murder, possession of a fully automatic firearm (an AK47 assault rifle) without a licence to possess such firearm and possession of five rounds of live ammunition (7.62 mm) without the required licence.

[4] He was sentenced to 20 years' imprisonment on the murder count and five years for both unlawful possession of a prohibited firearm and ammunition. The court below directed that the term of five years' imprisonment in respect of the latter two counts run concurrently with the 20 years' imprisonment imposed in respect of the murder count. In fixing a non-parole period the court said:

'In view of my order that the sentence of five years run concurrently with that in respect of count 1 [murder] I am enjoined in terms of section 276B(2) of the Criminal Procedure Act 51 of 1997, to fix a non-parole period.'

It then proceeded to fix a non-parole period of 13 years. With leave of the court below the appellant now appeals to this court against that order.

[5] In granting leave to appeal to this court the learned judge in the court below observed that:

'The application of section 276B of Act 51 of 1977 has, to my knowledge, led to some difficulties in this division and it would appear, from speaking to a number of my colleagues, that its application is not always uniform.'

He continued:

'What the present appeal [application for leave to appeal] raises, apart from the applicability of section 276B(2) of Act 51 of 1977, is also the procedure to be adopted, should a trial court, in invoking that section, fix a non-parole period specifically whether the possible likelihood of it being invoked, should be raised during the sentencing stage, so that counsel may address the Court fully on whether it should apply to its full extent, that is, not exceeding two-thirds of the sentence imposed, or then some lesser parole period.'

I shall return to the foregoing remarks by the learned judge later in this judgment.

[6] It is apposite at this juncture to emphasise that the implication of the statement by the high court that the 'application of section 276B of Act 51 of 1977 has, . . . led to some difficulties' . . . and 'that its application is not always uniform' is that the fate or fortune of accused persons is to a large degree dependent upon the views of individual judges, at least in KwaZulu-Natal.

[7] To my mind, the starting point in the present enquiry must be the provisions of s 276B of the Act itself. Section 276B provides:

'276B Fixing of non-parole-period

(1) *(a)* If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which the person shall not be placed on parole.

(b) Such period shall be referred to as the non-parole period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

(2) If a person who is convicted of two or more offences is sentenced to imprisonment and the court directs that the sentences of imprisonment shall run concurrently, the court shall, subject to subsection (1)*(b)*, fix the non-parole-period in respect of the effective period of imprisonment.'

[8] As mentioned above, the high court felt itself bound to fix a non-parole period in respect of the effective term of 20 years' imprisonment imposed on the appellant. It was driven to this conclusion because it ordered the sentences to run concurrently and that the use of the word 'shall' in s 276B(2) made the fixing of a non-parole period peremptory. This then brings to the fore the question whether the language of subsection 2, viewed in the context of s 276B, can sustain the meaning attributable to it by the court below. This is essentially a question of interpretation of the relevant provision.

[9] In *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd*[1] Ogilvie Thompson JA said:

‘Even where the language is unambiguous, the purpose of the Act and other contextual considerations may be invoked in aid of a proper construction.’

And in *Venter v R* 1907 TS 910 at 914-915, Innes CJ expressed himself in these terms:

‘It appears to me that the principle we should adopt may be expressed somewhat in this way ─ that when to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could lead to a result contrary to the intention of the Legislature, as shown by the context or by such other consideration as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and give effect to the true intention of the Legislature.’

This approach entails that one may:

‘(i) look at the preamble of the Act or other express indications in the Act as to the object that has to be achieved;

(ii) study the various sections wherein the purpose may be found;

(iii) look at what led to the enactment (not to show the meaning, but to show the mischief the enactment was intended to deal with);

(iv) draw logical inference from the context of the enactment.’

[10] Recently, in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18, this court, after an in-depth analysis of the authorities relating to the interpretation of documents stated:

‘. . . Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument . . . having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. . . . consideration must be given to the language used in the light of the rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is diverted and the material known to those responsible for its production. . . . A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

. . .

The “inevitable point of departure is the language of the provision itself” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[11] Moreover, when courts interpret statutes or any statutory instrument they must adopt a construction that is consistent with the Constitution. And in the context of a

criminal trial courts are duty-bound to prefer an interpretation that promotes the accused's fair-trial rights. This imperative was expressed in these terms in *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007(3) SA 484 (CC) by the Constitutional Court:

'. . . Section 39(2) requires more from a Court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights. These are to be found in the matrix and totality of rights and values embodied in the Bill of Rights. It could also in appropriate cases be found in the protection of specific rights, like the right to a fair trial in s 35(3), which is fundamental to any system of criminal justice . . . The spirit, purport and objects of the protection of a right to a fair trial therefore have to be considered.'

[12] Section 276B of the Act was introduced by the Parole and Correctional Supervision Amendment Act (Act 87 of 1997) which came into operation on 1 October 2004. It was introduced after this court had expressed disapproval about sentencing courts fixing non-parole periods, which practice it characterised as 'an undesirable incursion into the domain of another arm of the state' with a potential 'to cause tension between the Judiciary and the Executive.' In similar vein Harms JA had earlier remarked that:

'sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction.' (S v Mhlakaza and Another 1997(1) SACR 515 (SCA) at 521 *g-h*).

[13] In *S v Pakane and Others* 2008(1) SACR 518 (SCA) para 47 this court said that '. . . the legislature enacted the provisions [s 276B] to address precisely the concerns raised therein [*S v Mhlakaza & another*; *S v Botha*] by clothing sentencing courts with power to control the minimum or actual period to be served by the convicted person . . .'. Consequently it went on to fix a non-parole period.

[14] Notably, in the preamble to the Parole and Correctional Supervision Amendment Act one of the stated objectives of this Act is '. . . to make provision that a court sentencing an offender to a period of imprisonment *may* fix a non-parole period . . .' (My emphasis.) The legislature's use of the word 'may' strongly suggests its intention to give courts overall latitude in deciding whether or not to fix a non-parole period.

[15] Accordingly, if one approaches statutory interpretation in the manner adopted in *Secretary of Inland Revenue v Sturrock Sugar Farm (Pty) Ltd* (supra) ie –

(a) studies the terms of s 276B of the Act;

(b) examines what led to the enactment to ascertain the object it was intended to achieve (to clothe a sentencing court with the discretion to fix a non-parole period); and

(c) draws logical inference from the context of the whole of s 276B and the use, in s 276B(2) of the definite article 'the', in the phrase 'fix the non-parole period' which can only denote the non-parole period determined in terms of s276B(1)(a) of the Act; it becomes evident that the legislature did not intend to fetter the discretion conferred on a sentencing court by s 276B(1)(a) of the Act in the way that the court below postulated.

[16] In short, s 276B(2), properly construed, does not oblige a sentencing court to fix a non-parole period in respect of the effective period of imprisonment as a matter of routine whenever it has ordered two or more sentences imposed on a convicted person to run concurrently. What s 276B(2) in fact does is to enjoin a sentencing court, once it has exercised its discretion under s 276B(1)*(a)* against the convicted person, to then fix the non-parole period in respect of the effective period of imprisonment taking cognisance of the provisions of s 276B(1)*(b)*."

From The Legal Journals

Buchner, C & Hartzenberg, C J

"Cashing in on collections"

De Rebus July 2013

Sewsunker, S

"Inexpensive civil remedy for harassment: The Protection from Harassment Act"

De Rebus July 2013

Moosa, F

"Debts – reaching beyond the grave. Marriage, death and the National Credit Act"

De Rebus July 2013

Zaal, F N & Matthias, C R

"Urgent care removals and access to children's courts: an analysis of the implications of C *v Department of Health and Social Development, Gauteng"*

Stellenbosch Law Review 2013(1)

Brits, R

"Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act"

Stellenbosch Law Review 2013(1)

Singh, P P

"**Welcome to Facebook, Pieter Odendaal: you have been served!** *CMC Woodworking Machinery (Pty) Ltd v Pieter Odendaal Kitchens* case no 6846/2006 (unreported) 03-08-2012 (KZD)"

TSAR 2013.2

Friedman, A & Otto, J M

"Section 103(5) of the National Credit Act 34 of 2005 as inspired by the common-law *in duplum* rule (1)*"*

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"Section 170A(1) of the Criminal Procedure Act of 1977: do intermediaries need to be sworn in or not? S *v QN* 2012 1 SACR 380 (KZP)"

THRHR 2013 285

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

Contributions from the Law School

The principle of legality, the right to procedural fairness and salaries for magistrates

1 Introduction

Over the past 18 years the Constitutional Court has handed down approximately 500 hundred judgments. In these judgments it has developed a rich and sophisticated body of constitutional law. One of the more interesting aspects of this body of law is the extent to which the Constitutional Court has relied on the rule of law and in particular the principle of legality to regulate 'non-administrative action'. Non-administrative action includes legislative, executive and judicial action, but not administrative action. This is because administrative action is regulated by the right to just administrative action guaranteed in section 33 of the Constitution and by the provisions of the Promotion of Administrative Justice Act 3 of 2000.

The Constitutional Court's 'legality jurisprudence' may be traced back to its judgment in *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 56 where the Court held that 'the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality'.

Following this judgment, the Constitutional Court went on to find that the principle of legality does not only impose an obligation on the state to act 'lawfully', but also to act 'rationally'. The obligation to act rationally was referred to by the Constitutional Court for the first time in *Pharmaceutical Manufacturers Association: In re Ex parte President of the RSA* 2000 (2) SA 674 (CC) at para 85 where the Court held that 'it

is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise that are in effect arbitrary and inconsistent with this requirement'.

After the Constitutional Court found that the principle of legality imposes an obligation on the state to act rationality, most South African public lawyers expected that the Court would also find that the principle of legality imposes an obligation on the state to act in a procedurally fair manner. This is because it is generally accepted that like lawfulness and rationality, procedural fairness forms a part of the principle of legality or the rule of law (see Cora Hoexter 'The rule of law and the principle of legality in South African administrative law today' in M Carnelley and S Hoctor (eds) *Law, Order and Liberty: Essays in Honour of Tony Mathews* (2011) at 60).

Somewhat surprisingly, however, has not. Instead, it has held in a series of judgments that the principle of legality imposes an obligation on the state to act in a procedurally fair manner only in certain exceptional cases. The key judgments in this respect are *Masetlha v President of the RSA* 2008 (1) SA 566 (CC) ('*Masetlha*'), *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) ('*Albutt*'); and most recently *Association of Regional Magistrates of South Africa v President of the RSA* 2013 (7) BCLR 762 (CC) ('*ARMSA*'). Each of these judgments will be discussed in turn.

2. *Masetlha v President of the RSA*

2.1 Introduction

In *Masetlha* the Constitutional Court held that the President's explicit power to appoint the Head of the National Intelligence Agency ('the NIA') includes the implicit power to dismiss him or her. In addition, the Court also held that the President does not have to follow a fair procedure and give the Head of the NIA a hearing before dismissing him or her.

2.2 The facts

The facts of this case are as follows. In 2005, it was revealed that the NIA had been unlawfully spying on a prominent businessman, Mr Saci Macozoma. Following these revelations, the President dismissed the Head of the NIA, Mr Billy Masetlha, by unilaterally shortening his term of office. When he dismissed Mr Masetlha, the President explained that the relationship of trust between them had broken down.

Mr Masetlha then applied for an order declaring the President's decision to be unconstitutional and invalid. Mr Masetlha based his application on a number of grounds. One of these was that the President's decision to dismiss him was an administrative act and that in terms of the right to administrative justice the President was obliged to follow a fair procedure and give him a hearing before making the decision to dismiss him.

2.3 The judgment

The Constitutional Court rejected this argument. In arriving at this decision a majority of the Court declared that the power to appoint and to dismiss the Head of the NIA arose out of the special legal relationship that existed between the President and the Head of the NIA and was conferred specially upon the President by the Constitution to promote the security of the nation.

These factors, the Constitutional Court declared further, clearly indicated that the power to dismiss the Head of the NIA could not be classified as an administrative act, but rather as an executive act. Given that the President's decision was not an administrative act, the Court went on to declare, it was obviously not governed by the principles of administrative justice.

The mere fact that the President's decision to dismiss the Head of the NIA was not governed by the principles of administrative justice did not mean, however, the Constitutional Court then explained, that the President could exercise this power in any way that he chose to. This is because every executive act, including the President's decision to dismiss the Head of the NIA, had to comply with the principle of legality which forms a part of the rule of law.

While the principle of legality imposed an obligation on the President to act in a rational way, the Constitutional Court explained further, it did not as a general rule impose an obligation on the President to follow a fair procedure. This is because such a requirement would inhibit the President's ability to make and implement policy effectively and to act efficiently and promptly. The only requirement the President's decision had to comply with, therefore, was the test for rationality:

'It is clear that the Constitution and the legislative scheme give the President a special power to appoint and that it will only be reviewable on narrow grounds and constitutes executive and not administrative action. The power to dismiss – being a corollary of the power to appoint – is similarly executive action that does not constitute administrative action, particularly in this special category of appointments. It would not be appropriate to constrain executive power to requirements of procedural fairness, which is a cardinal feature in reviewing administrative action.

These powers to appoint and to dismiss are conferred specially upon the President for the effective business of government and, in this particular case, for the effective pursuit of national security' (at para 77).

Having set out these principles, the Constitutional Court turned to apply them to the facts. In this respect, the Court found that the President's decision to dismiss Mr Masetlha was rational because the President must be able to trust the Head of the NIA.

3. *Albutt v Centre for the Study of Violence and Reconciliation*

3.1 Introduction

Although the Constitutional Court held in *Masetlha* that the principle of legality does not impose an obligation on the President to follow a fair procedure and give the affected parties a hearing when he makes an executive decision, it went on to hold in *Albutt* that the requirement of rationality does impose such an obligation on the President in those cases in which the failure to follow a fair procedure would render the process by which the President arrived at his or her decision irrational (the requirement of rationality applies to both the decision itself and the process by which the decision is made).

3.2 The facts

The facts of this case are as follows. In November 2007 the President announced in Parliament that he intended to create a special dispensation in terms of which those prisoners who had been convicted of a politically motivated offence committed before 16 June 1999, and who had chosen not to participate in the Truth and Reconciliation Commission ('the TRC') proceedings for whatever reason, could apply for an be granted a presidential pardon in terms of section 84(2)(j) of the Constitution.

When he made this announcement, the President explained that those prisoners who qualified for a presidential pardon would have to submit an application to a specially created multi-party Pardon Reference Group ('the PRG'). The PRG, he also explained, would consider each application and make a recommendation to him. He would then consider each recommendation and make a decision based on the information placed before him.

When it came to deciding whether to grant a pardon or not, the President went on to explain, he would be guided by the 'principles and values which underpin the Constitution, including the principles and objectives of national unity and national

reconciliation; and, uphold and be guided by the principles, criteria and spirit that inspired and underpinned the process of the Truth and Reconciliation Commission, especially as they related to the amnesty process'

Following the President's announcement, the respondents (who were a coalition of non-governmental organisations) made numerous attempts to ensure that the victims of the offences in respect of which pardons were sought could participate in the special dispensation process. These attempts were rejected initially by the PRG and subsequently by the President. The respondents then applied for an order preventing the President from granting any such pardons without first giving the victims a hearing.

3.3 The judgment

A unanimous Constitutional Court granted the order. In arriving at this conclusion, the Court started by observing that the exercise of all public power must comply with the principle of legality, which forms a part of the rule of law. This means that while there is no right to be pardoned, a person applying for a pardon has a right to have his or her application considered and decided upon in a rational manner.

The question that needed to be answered, therefore, the Constitutional Court observed further, was whether the decision to exclude victims from participating in the special dispensation process (the so-called 'means') was rationally related to the objectives the President set out when he made his announcement in parliament, namely national unity and national reconciliation (the so-called 'ends').

Apart from setting out these objectives, the Constitutional Court went on to observe, the President also announced in Parliament that they would be achieved by applying the principles, criteria and spirit that inspired and underpinned the process of the TRC, especially as they related to the amnesty process. It was, therefore, important to identify what the principles, criteria and spirit underlying the amnesty process actually were.

In order to identify them, the Constitutional Court stated, there could be no doubt that the participation of the victims was crucial. This is because it not only helped victims to discover the truth of what happened to their loved ones, but also because it contributed to the twin objectives of national building and national reconciliation by assuaging the victims' yearning for the truth and addressing their legitimate sense of resentment and grief.

Given that the objectives of the amnesty process could only be achieved through the participation of the victims, the Constitutional Court stated further, it followed that the

objectives of the special dispensation could also only be achieved through the participation of the victims. This means, the Court concluded that the participation of the victims was fundamental to the special dispensation and their exclusion was not rationally related to its objectives. The participation of the victims therefore was the only rational means of achieving national unity and reconciliation.

Despite having found that the President's decision not to give the victims a hearing before granting a pardon was irrational and therefore unconstitutional, the Constitutional Court emphasised that the principles it laid down in this judgment applied to applications for pardons in terms of the special dispensation only. They did not apply to other categories of applications for pardons. The question whether victims of other categories of applications for pardons are entitled to a hearing in terms of the requirement of rationality, therefore, was left open.

4. *Association of Regional Magistrates of South Africa v President of the RSA*

4.1 Introduction

Although the Constitutional Court limited the principles it laid down in *Albutt* to the special facts of that case, some public lawyers argued that the scope for developing procedural fairness as a requirement of the principle of legality had been considerably widened following this judgment. This is because, they argued further, it is difficult to think of a decision, or a process by which a decision is made, whose rationality would not be enhanced by hearing both sides impartially (see Hoexter *Law, Order and Liberty: Essays in Honour of Tony Mathews* at 61).

While Hoexter's argument appears to be unassailable, at least from a logical point of view, the Constitutional Court has chosen not to embrace it, or at least not to embrace it yet. This is because in its recent judgment in *ARMSA* the Court held that the President's decision to increase the annual salaries of Regional Magistrates and Regional Court Presidents by 5% rather than the recommended 7% was not the sort of decision whose rationality would be enhanced by hearing both sides impartially.

4.2 The facts

The facts of this case are as follows. In September 2010 the Independent Commission for the Remuneration of Public Office Bearers ('the Commission') submitted a report to the President in which it recommended that the annual salaries of Regional Magistrates and Regional Court Presidents should be increased by 7% for the 2010/2011 financial year. After consulting the Minister of Finance, however, the President rejected the Commission's recommendation and decided to increase the annual salaries of these magistrates by only 5%. Shortly thereafter the

President's decision was forwarded to Parliament for approval and Parliament did so in November 2010. The decision was then published in the *Government Gazette*.

After the President's decision was published in the *Government Gazette*, the applicant ('ARMSA'), which represents approximately 90% of Regional Magistrates in South Africa, applied for an order setting it aside. ARMSA based its application on a number of grounds. One of these was that the President's decision was an administrative act and that in terms of the right to administrative justice he should have followed a fair procedure and given ARMSA a hearing before he made his decision to increase the salaries of Regional Magistrates and Regional Court Presidents by only 5%.

4.3 The judgment

A unanimous Constitutional Court rejected this argument. In arriving at this decision, the Court pointed out that when the President made his decision he was exercising a power which impacts on the independence of the judiciary. This is because adequate remuneration is an aspect of judicial independence. If judicial officers lack that security, their ability to act independently will be put under strain. In addition, the President's decision was also subject to a number of checks and balances. Apart from receiving a recommendation from the Commission, he also had to consult with the Minister of Finance and submit his decision to Parliament for approval. The decision also had to be published in the *Government Gazette*.

These factors, the Constitutional Court pointed out further, clearly indicated that the President's decision to increase the salaries of Regional Magistrates and Regional Court Presidents by only 5% could not be classified as an administrative act, but rather as an executive act. Given that the President's decision was an executive act, the Court went on to point out, it was not governed by the principles of administrative justice, but rather by the principle of the rule of law and, in particular, the principle of legality.

In its judgment in *Masetlha*, the Constitutional Court then stated, it held that executive action may be reviewed only on certain narrow grounds that fall within the principle of legality. These grounds include lawfulness and rationality. Unlike administrative action, however, they do not include procedural fairness. This is because procedural fairness is not a requirement for the exercise of executive action. This means, the Court stated further, that executive action cannot be challenged unless a hearing is specifically required by the enabling statute and in this case the Magistrates Act 90 of 1993 – which regulates the payment of salaries to magistrates – did not impose such a duty on the President. Given these principles, the Court went on to conclude, ARMSA's argument had to be rejected:

‘A further issue relates to ARMSA’s contention that neither it nor its members were consulted either by the Commission or the President. The applicant argues that the decision was procedurally unfair. The challenge is without merit. With regard to the decision of the President, a procedural fairness challenge is not competent because the decision he took did not amount to administrative action. As it was pronounced in *Masetlha*, executive action may be reviewed on narrow grounds which fall within the ambit of the principle of legality. These grounds include lawfulness and rationality. Procedural fairness is not a requirement for the exercise of executive powers and therefore executive action cannot be challenged on the ground that the affected party was not given a hearing unless a hearing is specifically required by the enabling statute. Section 12 of the Magistrates Act does not require the President to hear Magistrates before determining their salaries’ (at para 59).

5. Critical comments

The approach adopted by the Constitutional Court in the cases set out above may be criticised on a number of grounds. Many of these criticisms are set out in Ngcobo J’s (as he then was) dissenting judgment in *Masetlha*. Perhaps the most important, however, are as follows:

First, in terms of the common law the principle of the rule of law had both a procedural and a substantive component. The procedural component imposed a duty on the decision-maker to follow a fair procedure, while the substantive component imposed a duty on the decision-maker to act rationally. It is, consequently, difficult to understand how the content of the rule of law principle under the Constitution can be less than what it was under the common law.

Second, the duty to follow a fair procedure has a number of practical advantages. One of these is that it minimise arbitrariness. This is because it provides the decision-maker with the opportunity to hear the side of the individual to be affected by the decision and to gather all of the relevant facts and circumstances before he or she makes a decision. This is essential to rationality, which is the sworn enemy of arbitrariness.

Finally, it ignores the fact that procedural fairness is an inherently flexible concept and that its content depends, *inter alia*, on the source of the power. The fact that the President’s decisions in *Masetlha*, *Albutt* and *ARMSA* were classified as executive acts, therefore, should be relevant when it comes to determining the scope and ambit of the duty, but not when it comes to determining whether the duty exists at all.

Despite these criticisms, it seems unlikely that the Constitutional Court will change its approach in the near future.

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Matters of Interest to Magistrates

Twenty years of justice reform in South Africa: what is there to show for it?

23 July 2013

'South Africa's system of criminal justice is in a crisis. If its ability to prevent, process and deter crime is any measure of its effectiveness, then reforming the system is now not only a necessity but a national priority. Unfortunately, the system is not easily fixed; it is not characterised by a single problem that can be resolved speedily, but is characterised by blockages, many of which cause delays in other parts of the criminal justice pipeline'.

For many, these words by Dr Mark Shaw in an Institute for Security Studies publication ring as true today as they did in 1996 when first published. After twenty years of democracy, it is fair to ask whether South Africans believe that the criminal justice system (CJS), and in particular the courts, has become accessible, effective, fair and impartial. If the latest Human Sciences Research Council (HSRC) findings are anything to go by, the more than R600 billion invested in the CJS since 2001 has not resulted in continuous improvements when it comes to public perception.

Using the annual South African Social Attitude Surveys, the HSRC has analysed trends in the level of trust that citizens place in the courts over a 15-year period from 1998. Interestingly, there were significant increases in the levels of trust in the courts between 2000, when only 37% of South Africans said that they had trust in the courts, and 2004, when trust levels peaked at 58%.

However, trust in the courts then deteriorated until 2007 when they hit a low of 49%, before starting to increase again, reaching a high of 57% in 2009. While we can only

speculate as to the reasons behind these trends, the peaks appear to coincide with election years when the promises of new administrations created hopes of better government services.

Nevertheless, aware that the CJS was not functioning optimally and that public perceptions were deteriorating, the government undertook an in-depth review to identify the key challenges. This resulted in the Seven-Point Implementation Plan, which at the time was driven by an energetic Deputy Minister of Justice and Constitutional Development, Johnny de Lange. The plan provided a clear and practical roadmap for the establishment of a 'single, integrated, seamless and modern criminal justice system'. De Lange did a great job of both rallying the different CJS departments behind the implementation of the plan and ensuring that the public became aware of government's intentions to fix the problems.

This all changed abruptly with the introduction of a new administration following the 2009 elections. The government ceased to give the plan publicity and the CJS appeared to be thrown into turmoil as poor political appointments were made to the senior echelons of the police and the National Prosecuting Authority (NPA). Since then trust levels have declined so that in 2012, exactly half (50%) of citizens displayed some level of trust in the courts. Of course, ongoing and unjustified attacks on the courts by senior African National Congress (ANC) and government officials may also have weakened public confidence among certain constituencies.

An in-depth analysis by the HSRC suggests that disadvantaged and vulnerable groups are less likely to perceive the justice system as impartial and fair and 'therefore, were found to be less trusting of the courts'. About two in five respondents (44%) believed that the courts would be more likely to find persons guilty if they were black and 51% felt people were more likely to be found guilty if they were poor. Only a little more than one in three (38%) felt that the rich and the poor would be treated equally before the criminal courts.

Recognising the challenges facing the criminal justice system, the National Development Plan 2030 (NDP) has recommended that immediate action be taken to continue the implementation of the seven-point plan in an effort to improve public confidence in the courts. The NDP also urged that several processes be put in place before the plan's implementation:

- Departments in the Justice, Crime Prevention and Security (JCPS) cluster must immediately align their strategic plans with the seven-point plan.
- The project manager appointed to the Office for Criminal Justice System Reform must coordinate the plan's activities and programmes to ensure that the JCPS departments implement the seven-point plan in a synchronised manner.

- Dedicated budgets for each participating department must be established and outcomes reported on in relation to the plan.
- Continuous monitoring by the JCPS cluster and regular reporting on the plan's implementation is needed.

Interestingly, while it may not be receiving much publicity, steps are being taken by the JCPS to implement the NDP's recommendations. The Strategic Plan of the Department of Justice and Constitutional Development (DoJ) for 2013 to 2018, released in March 2013, indicates that progress has been made as follows:

- The Regional Court Protocol, the Case Finalisation Protocol and the Trial Efficiency Court Protocol have been implemented through the JCPS cluster.
- A cluster delivery agreement was signed in 2010 as part of government's Programme of Action. This agreement incorporates the implementation of the seven-point plan and progress is said to have been made to ensure greater coordination among cluster partners.
- Processes are under way to review the alignment of the magisterial districts with municipal boundaries, where this is desirable and feasible to enhance access to justice.

Implementation of the seven-point plan is driven by the Office for Criminal Justice Reform, based in the DoJ. A critical component of the plan is the establishment of the Electronic Case Management System (ECMS) to ensure better management of crime information across the various criminal justice departments. This would allow for blockages or shortcomings in the system to be more effectively identified and fixed.

Unfortunately, however, it seems doubtful that the ECMS is anywhere near to being ready. This emerged in parliament on 20 April 2013 when the Portfolio Committee on Police lambasted South African Police Service (SAPS) officials when they said that the system was still being developed – 11 years after its implementation was agreed upon –and that it may take 10 more years to be fully operational.

In the meantime, officials in the JCPS cluster drive the process as best they can. However, the delays experienced since the launch of the plan demonstrate that high-level political champions are required to monitor and drive it. Worryingly, senior political leaders in government appear to be more concerned with reviewing the judgements of the Constitutional Court and Supreme Court of Appeal, which will not tell us how to improve the justice system, and passing legislation that may weaken the independence of the legal fraternity. Ideally, the ministers involved in the criminal justice system should be seen to be at the forefront of driving the implementation of

the seven-point plan to improve the efficiency of the criminal justice system. Until then, we are unlikely to see demonstrable improvements in the near future.

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A Last Thought

“The Foundation therefore wants an order declaring the JSC's decision to appoint some judges, and not others--Jeremy Gauntlett, Stephen Koen and Nonkosi Saba--unlawful and/or irrational and invalid because the JSC misconstrued its powers by elevating factors of race and gender in a way that forestalls consideration of other relevant factors. Alternatively, it wants the process followed by the JSC declared invalid.

In response to the Foundation's papers, I made two observations about these other "relevant factors" in the hope that we might deepen the debate about transformation and who judges should be. According to the Foundation, these factors can be summarized as: knowledge of the law; an ability to assimilate information; analytical ability; intellectual ability; good temperament; compassion; and administrative ability. Importantly, it includes as one of its factors, "a good working knowledge of social, political, and economic reality is essential."

First, I argued that although race and gender (diversity rationale) will continue to be important, the diversity rationale must be understood in terms of class - if we are serious about addressing inequality and "representivity" of society. Second, the mainstream legal debate about "relevant factors" continues to perpetuate legal myth: we think men - compassionate, with a good temperament - who have spent time in a court fussing over procedure and legal technicalities have a better grasp of justice.

Both of these points are important. As Atticus Finch says to his young daughter in To Kill a Mockingbird, a famed story about racial injustice in the American deep South after the 1929 Great Depression, "you never really understand a person until you consider things from his point of view... Until you climb inside of his skin and walk around in it." That is, until you imagine what it would be like to be them: perhaps poor, intersex, in-between jobs, unemployed, an ex-convict, unable to pay rent, or with no place to stay. And by "them" I mean, the majority of people in our country.

But more than just walking around in other people's shoes, we need smart, highly capable, analytical and respected people from a wide range of communities on the bench, who know what it's like to walk inside the skins of different kinds of South Africans; not just on the basis of race, but on life experience. In, "social, political, and economic reality". And that's a hard feat - racial, financial, geographic, education and class inequality makes it impossible for the bench to be truly representative. Yet despite this, and other obstacles, we must develop a programmatic response to the challenges that face the legal profession."…

"Accepting that the pool is thin, and that there are serious barriers to entry, we must then develop plans that have broad buy-in from all stakeholders to widen the pool of judicial candidates on an urgent basis.

I have suggested one possible strategy, which is a two-pronged approach, and doesn't simply look at the JSC in isolation, but rather the legal profession more broadly. First, it is necessary to critically assess the myth behind what it is that judges do and who they should be. We must think creatively about fit and proper candidates who, in a modern, complicated, ambiguous and complex world of economics, politics and social construct, have knowledge of the law; or an ability to assimilate information; or analytical ability; strong intellectual ability; good temperament; compassion; and administrative ability (the relevant factors).

For example, many Treatment Action Campaign (TAC) members certainly know the law as activists took on government policy, scientists, a lack of legislation and intellectual property laws and large multi-national corporations. Would you say this knowledge and experience of the law is inferior to a corporate attorney who specializes in one narrow field, for example, banking and finance? The claim that advocates, legal academics and corporate attorneys are exclusively qualified, or even worse, best suited to act as judges remains substantially unproven - I am yet to see any quantitative or qualitative assessment that shows otherwise. As Noam Chomsky reminds us, it is the responsibility of public intellectuals and critical thinkers to seek the truth and justice "hidden behind the veil of distortion and misrepresentation, ideology and class interest, through which the events of current history are presented to us". We must therefore interrogate who the judiciary should be and develop a more critical understanding of judicial qualities and understanding of how we experience the law in South Africa.

Second, we must develop a plan. One possible solution is to consider widening the pool of candidates by approaching "non-lawyers" who have experience "with the law" and prepare them by sending them off to a highly regarded judicial school where their skills are refined, and then introduced to the bench through a programme that is incremental. This process has already begun. Moreover, we may also want to think about igniting the debate about career jurists. There is an enormous space for reconstruction here and we must approach the problem critically and creatively. The real transformation lies not in black and white, but in how we think of and experience the law - particularly with how we understand "fit and proper"

and appropriately qualified".
South Africa: Go Beyond Lawyers for New Judges By Greg Solik, 3 July 2013