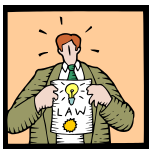
e-MANTSHI

A KZNJETCOM Newsletter

April 2014: Issue 97

Welcome to the ninety 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. The Minister of Justice has under section 63 of the Drugs and Drug Trafficking Act, 1992 (Act No. 140 of 1992), amended Schedules 1 and 2 to the said Act as set out in the Schedule. The notice to this effect was published in Government Gazette no 37495 dated 28 March 2014. The amendments are the following:

Amendment of Part I of Schedule 2 of the Act
2. Part I of Schedule 2 of the Act is hereby amended by the substitution for paragraph 2 of the following paragraph:
"2. Unless expressly excluded, all substances included in this Part include the following:
(a) The salts and esters of the specified substances, where the existence of such salts and esters is possible; [and]
(b) all preparations and mixtures of the specified substances; or
(c) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2.".

Amendment of Part II of Schedule 2 of the Act

3. Part II of Schedule 2 of the Act is hereby amended by the substitution for paragraph 2 of the following paragraph:

"2. Unless expressly excluded, all substances or plants included in this Part include the following:

(a) The isomers of the specified substances or plants, where the existence of such isomers is possible;

(b) the esters and ethers of the specified substances or plants and of the isomers referred to in subparagraph *(a)*, as well as the isomers of such esters and ethers, where the existence of such esters, ethers and isomers is possible;

(c) the salts of the specified substances or plants, of the isomers referred to in subparagraph *(a)* and of the esters, ethers and isomers referred to in subparagraph *(b)*, as well as the isomers of such salts, where the existence of such salts and isomers is possible; [and]

(d) all preparations and mixtures of the specified substances or plants and of the isomers, esters, ethers and salts referred to in this paragraph; or

(e) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2.".

Amendment of Part III of Schedule 2 of the Act

4. Part III of Schedule 2 of the Act is hereby amended by—

(a) the insertion in paragraph 1—

(i) after the substance "Bufotenine (N,N-dimethylserotonin)." of the substance "Cannabicyclohexanol.";

(ii) after the substance " Cathinone." of the substances:

"CP-47,497.

CP 47, 497-C6.

CP 47, 497-C7.

CP 47, 497-C8.

CP 47, 497-C9.";

(iii) after the substance "Dimethyltryptamine [3-(2-(dimethylamino)-ethyl)-indole]." of the substance "Etilamfetamine (N-ethylamphetamine).";

and

(iv) after the substance "Heroin (diacetylmorphine)." of the substances:

"HU-210.

JWH-018.

JWH-073.

JWH-200.";

and

(b) the substitution for paragraph 2 of the following paragraph:

"2. Unless expressly excluded, all substances or plants included in this Part include the following:

(a) The isomers of the specified substances or plants, where the existence of such isomers is possible;
(b) the esters and ethers of the specified substances or plants and of the isomers referred to in subparagraph *(a)*, as well as the isomers of such esters and ethers, where the existence of such esters, ethers and isomers is possible;
(c) the salts of the specified substances or plants, of the isomers referred to in subparagraph *(a)* and of the esters, ethers and isomers referred to in subparagraph *(b)*, as well as the isomers of such salts, where the existence of such salts and isomers is possible; [and]
(d) all preparations and mixtures of the specified substances or plants and of the isomers, esters, ethers and salts referred to in this paragraph; or
(e) all homologues of the listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance or exhibit pharmacodynamic properties similar to the listed substances in this Part of the Schedule), unless listed separately in any Part of Schedule 2.".

Recent Court Cases

1. S v MELAPI 2014 (1) SACR 363 (GP)

A child who has turned 18 during the course of proceedings may be sentenced to compulsory residence in a child and youth care centre.

The accused was convicted in a magistrates' court of murder. At the time of the offence he was 17 years and 2 months old, but at the time of conviction he was 18 years and 2 months. He was sentenced to five years' imprisonment from which he could be placed under correctional supervision at the discretion of the Commissioner of Correctional Services in terms of the provisions of s 276(1) *(i)* of the Criminal Procedure Act 51 of 1977. The magistrate wished to have the accused detained at a youth care facility, but the local facility would not accept him, as he was over the age of 18 years when he was sentenced. The matter came on review and the reviewing

judge had the benefit of opinion from the Child Law Centre (CLC) and the Office of the Director of Public Prosecutions (DPP). The court considered the circumstances of the accused and the nature of the crime, and held that, in circumstances where the accused came from a dysfunctional family background, had no history of violent behaviour or any other behavioural problems prior to the incident in which he killed the deceased, and was subjected to abuse by the deceased, the court ought to have considered the imposition of alternative sentencing options. The imposition of direct imprisonment in the present circumstances was inappropriate. The court accordingly set aside the sentence and imposed a wholly suspended sentence of imprisonment. Although this effectively disposed of the review, the court nevertheless examined the question whether a sentence of compulsory residence in a child and youth care centre could be imposed on a youth who had already turned 18 years of age when sentence was imposed.

Held, that the provisions of the Constitution plainly favoured a conclusion that 9 s 76 of the Child Justice Act 75 of 2008 remained a competent sentence for a child who turned 18 during the course of the proceedings, rather than an interpretation that excluded a child from the protection of that Act if he turned 18 during the course of proceedings. A youth care facility could not refuse to accept an offender who was under the age of 18 years at the time when the offence was committed, but still under 21 years when he was sentenced. (Paragraph [53] at *376c* and [61] at *377c.)*

2. S v MAQUBELA 2014(1) SACR 378 (WCC)

A court is entitled to amend a charge sheet in terms of section 86(1) of Act 51 of 1977 *mero motu.*

The two accused were on trial on a charge of murder of the husband of accused No 1 (count 1), and accused No 1 also faced charges of forgery (count 2) and fraud (count 3). The latter two counts related to an alleged attempt by accused No 1 to inherit from her late husband's estate in terms of a will which she produced, instead of inheriting on an intestate basis, the deceased having apparently left no will. The trial was a lengthy one, the state having called 56 witnesses during 70 court days over a period of almost two years. After accused No 1 testified in her own defence and called a handwriting expert and a medical expert, the matter had then been adjourned for almost two months, as the court indicated that it was considering making an order in terms of s 86(1) of the Criminal Procedure Act 51 of 1977, to the effect that certain particulars that ought to have been in counts 1 and 2 had been omitted, and that they be amended to supply the

admissions. Counsel were requested to address the court on the proposed amendments. Counsel for the accused indicated that they would object to the proposed amendments on the grounds of prejudice, and indicated that they were of the opinion that the onus rested on the prosecution to show that there would be no prejudice if the amendments were ordered.

Held, that s 86(1) of the Act did not require the prosecution to make an application to amend; it was permissible for the trial court to act mero motu. A prudential or cost-benefit analysis of the intention of the legislature supported an interpretation that the court could act sensibly as the guardian of the proper administration of justice to amend a faulty indictment before judgment. It could do so in appropriate cases in order to avoid rendering otherwise unassailable proceedings invalid for irregularity, and thereby necessitating a retrial at substantial cost and inconvenience. (Paragraph [23] at 387 *e-f.i*

Held, further, that, where the court acts of its own motion to amend a defective or incomplete charge, the incidence of the burden of proof did not rest on the prosecution to prove the absence of prejudice. The court was merely required to notify the accused of its intention and to afford the defence an opportunity to show prejudice. Failure by the accused to use that opportunity and to place appropriate information before the court, or to spell out the reasons he or she may be prejudiced, may result in a finding of no prejudice. But, even in the absence of such information, the court should decide for itself whether or not the amendment would prejudice the accused, on the basis of common sense and judicial knowledge. (Paragraph [26] at *388h-389h.)*

Held, further, that it was apparent from the provisions of s 86(2) of the Act that the legislature foresaw that where there was potential prejudice the court could mitigate that possibility by making the amendment on such terms as to an adjournment of the proceedings as it deemed fit. (Paragraph [27] at a *389b.)* The court accordingly adjourned the proceedings to afford the accused an opportunity to adduce evidence and to make submissions for the purpose of showing that the proposed amendments would prejudice them in their defence.

3. S v ROSSOUW 2014(1) SACR 390 (WCC)

A prosecutor and court has to be attentive to the provisions of the minimum sentencing legislation in regards to the unlawful possession of firearms in terms of section 3 of the Firearms Control Act 60 of 2000.

The appellant appealed against his sentence of six years' imprisonment imposed for the possession of a 9 mm semi-automatic firearm in contravention of s 3 of the Firearms Control Act 60 of 2000, and one year's imprisonment imposed for the unlawful possession of eight rounds of ammunition for the firearm in contravention of s 36 of the Arms and Ammunition Act 75 of 1969. It was contended on behalf of the appellant that the court had placed too much emphasis on the seriousness of the crime and the interests of the community, as well as the appellant's two previous convictions for the unlawful possession of firearms, and had not paid sufficient attention to the period of time that appellant had been incarcerated awaiting trial.

Held, that the prosecutor and the magistrate had ignored the provisions of the Criminal Law Amendment Act 105 of 1997 which provided for a mandatory minimum sentence of 15 years' imprisonment for the possession of a firearm such as the one in the present case. Prosecutors and courts were warned to be more attentive to these statutory provisions to prevent the goals of the legislation being thwarted. (Paragraphs [5] at *393b* and [11] at *394d.)*

Held, further, that the court had taken into account sufficiently the appellant's personal circumstances and had not overemphasised the seriousness of the offence and the effect of the previous convictions: if the law had been properly applied the appellant would possibly have been sentenced to a period of 25 years' imprisonment. Furthermore, the sentence was proportionate to the crimes and the appeal accordingly had to be dismissed. (Paragraphs [17]-[19] at *395c-h.)*

From The Legal Journals

Bekker, T

“Rescission of judgments by consent – a critical analysis”

Curlewis, L

"Sugar coating guilt : Admission of guilt fines – no easy fix"

De Rebus April 2014

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

Contributions from the Law School

Deoxyribonucleic acid (DNA) Evidence: recent cases

There are three recent cases which revolve around the use of DNA profiling in criminal cases. In the first case which I will consider, **S v SB 2014 (1) SACR 66 (SCA),** the Supreme Court of Appeal provided a useful explanation of how DNA evidence works , and the manner in which DNA profiling is most commonly done in South Africa.

I will set out the explanation of how DNA profiling works, and will then proceed to discuss the merits of the **SB case**. I will then proceed to discuss the cases of **S v Nyembe 2014 (1) SACR 105 (GSJ),** and **Mugwedi v The State (694/13) [2014] ZASCA 23 (27 March 2014).**

General explanation of DNA profiling

DNA is genetic material inherited by a child from its parents. There are two identical sets of DNA molecules in every human cell. Nuclear DNA is the DNA found in the nucleus of the cell, while mitochondrial DNA is the DNA found in the mitochondria of the cell. Nuclear DNA is used for DNA profiling. The DNA of every person is unique (except for identical twins) (S v SB 2014 (1) SACR 66 (SCA) at para 8).

DNA is a double stranded molecule comprising 46 chromosomes. Each chromosome contains genetic information arranged in lines on threadlike structures. The chromosomes are arranged in 23 pairs. One chromosome per pair is inherited

from each parent. The 23rd chromosome is different from the rest, and determines the sex of an individual (para 9).

Each of the chromosomes consists of linked base pairs, which form a double helix structure. Every person has a different sequence of base pairs in the 22 chromosomes – and thus can be identified on this basis. However, identifying a person on this basis is not practical since there are approximately 3 billion base pairs in the DNA contained in each human cell nucleus (para 10).

Scientists have however identified specific locations (loci) on a chromosome which are known to vary among individuals. Each locus can be identified, and is assigned a 'name' (para 11).

A gene is found at a particular locus on a particular chromosome. An allele is each of the two forms of a gene at a particular locus. At each locus a person has two alleles – one inherited from the mother, and one from the father. The pair of alleles is called a genotype. A DNA profile is the set of genotypes at two or more loci (para 12).

The form of DNA profiling which is most commonly used in South Africa is known as the short tandem repeat (STR) method. A STR is a short sequence of base pairs which is repeated multiple times in tandem. The number of repetitions differs between individuals. The number of repetitions gives an allele its name. For example, 5 repeats of a sequence will be called allele 5. As every person has two alleles at each locus, a STR profile will indicate the alleles at a particular locus as, for example 15:15. If the alleles bear the same number, this indicates that the allele was inherited from both parents, ie: each parent contributed allele 15 at that particular locus. If, say, the allele was 15:16 at a particular locus this would indicate that one parent contributed allele 15, and the other allele 16 (para 13).

The South African Police Service determines alleles at 9 loci as well as the sex of the person from the person from whom the DNA sample derives (para 14).The 9 loci chosen are known for their high degree of variability between individuals. The STR method makes use of the polymerase (PCR) technique which produces multiple exact copies of the DNA at each of the 9 loci to be examined (para 13).The PCR technique produces DNA fragments which are subject to a process called electrophoresis – which produces a computer generated graph called an electropherogram. The alleles at each of the 9 loci are indicated as peaks on a baseline (para 15).

If only one allele (peak) shows at a particular locus, this indicates that the individual inherited the same allele from both parents. Two different alleles (peaks) indicate that a different allele was inherited from each parent for that locus. Since there can be no more than two alleles at a locus, if the electropherogram shows three different peaks at a single locus, this indicates that the DNA which has been tested is a mixture of more than one persons DNA (a mixed sample) (para 15). The higher the peaks on the electropherogram, the greater the sample of DNA used. The

electropherogram may also indicate material not naturally present in DNA – this is known as an artefact (para 16).

The probative value of DNA profiling in any particular case will depend on a number of different factors which must be assessed in the context of the facts of that case. Firstly, an important factor will be whether the samples were properly taken so that they were not contaminated or otherwise compromised. Also, the samples must be shown not to have been tampered with before they were tested in the laboratory. This is known as the chain of custody. Secondly, the equipment used to produce the DNA profile through the processes explained above must be shown to have been working properly. Thirdly, the electropherogram must have been properly analysed and interpreted based on logical and cogent reasoning. Fourthly, the probability of the profile match occurring in the particular relevant population must be considered. This is because STR profiling does not conclusively identify an individual because only 9 loci plus gender are analysed (paras 19,20). If the profile which has been revealed on the electropherogram potentially matches many people within the population to which the tested individual belongs, the probative value of the evidence is low (para 21). Because a DNA profile does not identify a person with 100% accuracy it is imperative that other evidence implicating the accused must be considered with the DNA result to determine whether the state has discharged its burden of proving the accused's guilt beyond a reasonable doubt before the accused is convicted (para 23).

If the STR profile of an accused person differs from the profile recovered from the crime scene in question, even in respect of only one allele, the accused person must be excluded as the source of the crime scene DNA (para 20).

S v SB 2014 (1) SACR 66 (SCA)

In the case of **S v SB 2014 (1) SACR 66 (SCA),** the appellant appealed against his conviction of the rape of his 4 year old daughter. The conviction was based on DNA evidence by a state expert, which was challenged by a defence expert. The DNA evidence was collected from the child by placing a clean sanitary pad on the child's private parts to retain the fluid emanating therefrom. Tape was used to keep the pad in place. Two samples were cut from the sanitary pad and were then analysed for DNA at the Biology Unit of the Forensic Science Laboratory of the South African Police Service (para 6).The electropherograms showed mixed DNA on both samples – the state's expert indicated that the samples had come from at least 3 males (para 24). The manner in which the samples had been collected, and the chain of custody was not disputed, nor was the STR profile of the appellant (para 25). The alleles of the appellant's STR profile coincided with the alleles reflected on the two sanitary pads, except for the appellants allele 22 at locus FGA (para 25). The electropherograms reflect what was described as a 'little block' at the relevant spot, but not a peak labelled allele 22 at locus FGA (para 25). Nevertheless, the state expert opined that the appellant's profile could be read into the sample. She

suggested that the mixed sample could have caused the anomaly, and that the 'little block' could be an indicator of allele 22 (the appellant's allele) in the crime scene samples (para 26). The defence expert disagreed and argued that if the 'little block' was an indicator of allele 22 it should be shown in both the pad samples, especially in the pad sample which was more enriched with DNA material, which it did not. The defence expert opined that the 'little block' on the electropherogram was an artefact (ie non DNA material) which had contaminated the sample (para 27)

The court a quo preferred the version of the state witness for three stated reasons. Firstly, that the defence expert had only analysed the electropherogram, and not the sample itself; secondly, that the defence expert had not testified about control measures in the laboratory, and thirdly that the defence expert had not provided reasons for his findings (para 28). The Supreme Court of Appeal analysed the evidence and concluded that the first two reasons given for preferring the evidence of the state witness were irrelevant to the issue in dispute since the only issue was the correct interpretation of the electropherogram; and that the third reason was factually incorrect – in reality cogent reasons for his opinion had been provided by the defence expert (para 29). The Supreme Court of Appeal found that the evidence of the defence expert, which created reasonable doubt as to the appellant's guilt, should have been accepted since it was supported by strong reasons and it accorded with the strong probabilities of the case in favour of the accused (para 30,31). In any event, the Supreme Court of Appeal pointed out that the state's expert witness had not provided any clear evidence regarding the probability of the STR profile on the crime scene sample occurring in the relevant population (para 32).

The appeal was thus upheld and the appellant's conviction was set aside (para 34).

S v Nyembe 2014 (1) SACR 105 (GSJ)

In the case of **S v Nyembe 2014 (1) SACR 105 (GSJ),** the appellant was charged on a number of counts including three counts of rape which occurred in three separate incidents over a period of three months in the same general area, which was where the accused lived. While all of the complainants testified, none of them could identify the accused (at para 6). The sole issue in dispute was the identity of the accused.

The state relied on DNA evidence, which was the only evidence implicating the accused in the commission of the crimes (para 4). DNA evidence had been collected from each of the three complainants. The state's expert evidence regarding the DNA evidence was not challenged, nor was the chain of custody disputed (para 47). The accused just tendered a bare denial of his guilt coupled with an alibi.

The court discussed the general principles regarding alibi evidence and how it must be evaluated, but did not discuss the appellant's alibi evidence specifically. Nevertheless, from the outcome of the case it is clear that it was rejected.

The court accepted the DNA evidence implicating the accused and confirmed his conviction on the basis that 'the DNA result obtained … [was] corroborated by the similar fact evidence of the three incidents, in the course of which similar offences were committed, within a time span of less than three months in the same area, at the same time by one man who lives in the area' (at para 9). The court described the similarities between the three incidents of rape as described by the complainants as being strikingly similar (at para 6).

The SCA in **S v Nduna 2011 (1) SACR 115 (SCA)** confirmed that it was impermissible to use similar fact evidence to prove the commission of a crime – or to act as "confirmatory material on another count" (at para 17). However, it held that it was permissible to invoke similar fact evidence to "establish the cogency of the evidence of a systematic course of wrongful conduct in order to render it more probable that the offender committed each of the offences…" – such as where the evidence establishes the accused's modus operandi (at para 18, 19).

In other words, it is impermissible to take account of evidence relating to the propensity to commit a crime to support the inference that the accused is in fact guilty thereof, but it is admissible if there is another legitimate reason for considering the evidence relevant (at para 18). Such was the situation in the Nyembe case.

Mugwedi v The State (694/13) [2014] ZASCA 23 (27 March 2014)

In the case of **Mugwedi v The State (694/13) [2014] ZASCA 23 (27 March 2014)** the appellant appealed against his conviction and sentence, in respect of two counts of rape. Before dealing with the merits of the appeal, the Supreme Court of Appeal noted 'regrettable occurrences before and during the trial (at para 2).In respect of the investigation of the case, the court noted its displeasure at the fact that no steps were taken to obtain DNA samples for analysis despite the fact that the complainant was taken by the police to the trauma centre for an examination on the same day as the incident.

The court referred to the case of **S v Carolus 2008 (2) SACR 207 (SCA)** where the court had emphatically stated that it was of the utmost importance that DNA tests were conducted in cases involving sexual assault, especially in cases involving children (at para 32). This is because it is rare for there to be witnesses to crimes of sexual assault against children, and the evidence of a single child witness must be treated with caution by the courts (Benson, Horne and Coetzee The significance of the crime scene in the investigation of child rape cases 2010 11(1) CARSA 16,27; Horne and Benson The Significance of Evidence Recognition in Child Rape cases 2011 12(1) CARSA 1). Further, the existence of DNA evidence often informs the decision as to whether to prosecute the alleged crime or not (Banoobhai and Whitear-Nel Children's Evidence in Sexual cases in the Context of S v QN 2012 (1) SACR 380 (KZP) 2013 34(2) Obiter 359 at 367.)

In the Mugwedi case, the SCA stated that it found it difficult to understand why the relevant authorities did not ensure that rape testing kits were available to investigators so that judicial pronouncements regarding the imperative for DNA testing could be acted upon (at para 2).

A similar comment was made by the Supreme Court of Appeal in the case of **S v Nedzamba 2013 (2) SACR 333 SCA** where Navasa JA criticised the fact that the investigation and medical examination did not include the collection of DNA samples which may have provided conclusive evidence of the identity of the perpetrator of the rape (at para 35). While in the Carolus case the reason for the failure to collect DNA samples was the unavailability of DNA testing kits, in the Nedzamba case no explanation was proffered for the failure to conduct DNA tests.

It is submitted that the failure to collect and provide real evidence in the form of DNA evidence is subversive of proper criminal justice (S v Msane 1977 (4) SA 758 (N)). In cases where available real evidence is not gathered, and where no satisfactory explanation for this is provided it is submitted that the courts should indicate their extreme displeasure by drawing an adverse inference against the state. Likewise in cases such as **S v QN 2012 (1) SACR 380 (KZP)** where DNA evidence is collected but is not produced in court and where no satisfactory explanation is provided.

Nicci Whitear-Nel
School of Law
Pietermaritzburg

Matters of Interest to Magistrates

Facilitative mediation

Seeing more than the tip of the iceberg

By Lieselotte Badenhorst

The practice of ‘legal’ mediation has – for many years now – been widely accepted in the United Kingdom (UK), on the European continent, the United States (US) and Australia. But court-annexed mediation is a new concept in South Africa. ‘The

Summary of Mediation Rules' was released by the Department of Justice on 3 May 2013. According to this summary, the following people can be mediators –

• accredited attorneys;

• advocates;

• traditional leaders;

• members of existing mediation forums; and

• any fit and proper person who has undergone appropriate prescribed training.

An attorney's response to mediation may be: What can a mediator do to help this case that I, as an experienced negotiator, cannot do? In this instance, it can be suggested that the outcome of negotiation or bargaining results in parties realising that some form of compromise has to be made. It often leaves people dissatisfied, because each party is left wondering whether they might have achieved more had they pursued their claim further. F Strasser and P Randolph *Mediation. A Psychological Insight into Conflict Resolution* (London: Continuum, 2004) surmise: 'Where negotiation has failed or left parties to the dispute dissatisfied, because of the perceived "sacrifices" they had to make, mediation can overcome this, since during mediation parties are truly "heard".'

To prevent court-annexed mediation becoming just another 'fad' to free courts from litigation, I would suggest that, in South Africa, we should take the route of facilitative mediation rather than evaluative mediation.

Facilitative and evaluative mediation follow two different pathways. During evaluative mediation, the mediator assumes that participants want or need the mediator to provide direction as to the appropriate ground for settlement, based on law, industry practices or technology. The mediator should also be qualified to give direction by virtue of experience, training and objectivity (L Riskin 'Mediator Orientations, Strategies and Techniques, Alternatives' (1994) 7 *Harvard Negotiation Law Review* at 23-4).

In contrast to evaluative mediation, facilitative mediation does not necessarily presuppose any knowledge of the technical aspects of the dispute or provide direction. It goes deeper than evaluative mediation. According to S Hawker, C Soanes and A Spooner *Oxford Dictionary Thesaurus & Wordpower Guide* (Oxford: Oxford University Press 2001) 'facilitating' means 'to make easier', but facilitation can also be used as a mechanism to uncover underlying issues. Furthermore, facilitative mediation enhances the likelihood for the mediator to remain 'neutral'.

Strasser and Randolph (*op cit*) mention that 'once the mediator embarks on evaluating a claim, he/she surrenders his/her neutrality, and this can hamper the continuity to act impartial and without prejudice'. While evaluative mediation relies on

the ability of the mediator to make the central decision based on ‘sound judgement’, Riskin (*op cit*) asserts ‘that facilitative mediation is based on the belief that the opposing parties to the process are intelligent and insightful enough to understand their situations and problems better than their mediator or their attorney’.

Although some form of negotiation takes place during the process of facilitative mediation, this form can be described as ‘principle’ negotiation rather than ‘positional or strategic’ negotiation employed by an attorney. The opinions, belief systems and attitudes of the opposing parties are explored during facilitative mediation and underlying issues are brought to the surface, before any principle negotiation takes place.

This can be illustrated using the iceberg metaphor. Only a small percentage of an iceberg is visible above the water level, while the largest and most powerful part remains unseen below the surface. Our personalities and behaviours can be linked to an iceberg. What we see and hear about an individual is only the tip of the iceberg, while underneath, and not visible and often unconscious to ourselves, rest hidden motives, needs, wants, concerns and fears. A psychologically trained mediator, knowing about these hidden needs, wants, fears and concerns, has the ability to communicate ‘under the iceberg’ by using facilitative language. Using hard facts to resolve a dispute will be like sailing the Titanic into the iceberg; if you do not anticipate what is underneath the ‘water’, your efforts to mediate may sink with catastrophic results.

According to Strasser and Randolph (*op cit*), the facilitative form of mediation is based on the humanistic–existential model of the psychologist, Carl Rogers. The model originates in phenomenology and therefore suggests that all of us live in our own subjective world, which can only be known in any complete sense to ourselves.

The self is the central aspect in this paradigm, and seeks protection at all times from ‘injury’, according to Rogers’ theory. Hence, we protect the self by way of how we behave. However, our behaviours are more often than not deeply rooted at the unconscious level. The mediator should therefore act as a catalyst to allow the unconscious to come to the surface.

Two examples of behaviours that serve to protect the self are: During conflict, an individual who continually interprets his or her opponent’s behaviour as conspiratorial or politically inspired might have a tendency to project his or her own desire to cheat in some way, by unjustifiably accusing the opponent of cheating or undermining the process.

A person who harbours deep antisocial feelings towards people may develop pleasant mannerisms and good social skills in dealing with opponents during a dispute as a means of keeping his or her feelings in check. If an occasion arises when the mechanism fails to function properly, opponents will be shocked by the individual’s outburst of hostility.

Furthermore, individuals strive to maximise rewards and try to minimise sanctions or penalties in their external environment, and hence develop favourable attitudes towards objects that satisfy their needs, and unfavourable attitudes towards objects that thwart their needs. These favourable or unfavourable attitudes may be aroused by internal and external threats, by frustrating experiences, or by a build-up of pressures, and are displayed in our behaviours, as mentioned in the above examples (E McKenna *Business Psychology and Organisational Behaviour: A Student's Handbook* 3 ed (Hove: Psychology Press 2000)).

Since our attitudes help us to adopt a stable view of the world that we live in, which contributes to the reduction of uncertainty and discomfort, formed attitudes are difficult to change (Strasser and Randolph (*op cit*)). Nonetheless, the psychologically trained mediator, who employs the facilitative method, has an advantage over the evaluative mediator in changing attitudes that may hamper the mediation process.

Facilitative mediation helps individuals to become cognisant of the root causes of their misdirected attitudes and behaviours. Because facilitative mediation focuses on the individuals as human beings rather than on the facts of the case, individuals feel empowered and a shift in attitude and behaviour is based on new insights gained through the process. This moves participants from conflict to a 'working alliance', and allows the mediator to stay neutral and without prejudice.

Facilitative mediation is non-interventionist. It only assists parties to reach a measure of accord, based on self-discovery and insight. It does not presuppose knowledge of any specific law, industry practices or technology. Evaluative mediation, in contrast, is more directive and interventionist. The evaluative mediator provides the parties with an evaluation of the respective merits and demerits, and strengths and weaknesses of the parties' cases, but does not uncover the underlying issues of the conflict. Strasser and Randolph (*op cit*) point out that evaluative mediation 'discourages self-evaluation, prevents self-determination, promotes positioning, results in polarisation and encourages parties to focus on their rights and liabilities rather than interests and needs'.

Lieselotte Badenhorst *BCom (Hons) (Unisa) MCom (UJ) PhD (Industrial Psychology) (University of Koblenz-Landau, Germany)* is the director of the Centre for Alternative Mediation in Johannesburg.

(The above article appeared in the March 2014 issue of *De Rebus*)

A Last Thought

Letter: Concourt saves justice system

Several high-profile criminal trials have brought forth consternation at perceived shortcomings in the South African justice system, notably some notoriously lax sentencing.

Some folk have even called for a major judicial reform, and perhaps also of the National Prosecuting Authority.

There are certainly many deficiencies but I doubt if they are as dire as pessimists contend. Such judicial glitches occur worldwide and are not unique to South Africa.

There is nothing that some earnest remedial endeavours cannot rectify.

Thank goodness we have our world class Constitutional Court overseeing all the lower courts and upholding the constitution.

Concourt has handed down many superb judgments over the years, and it gives one much confidence in the future when we have this bedrock of justice as the final arbiter.

A recent Concourt judgment aptly illustrates the court's great worth to South Africa.

For many years people have sought financial relief in personal injury and medical negligence claims from the Road Accident Fund (RAF) and many who have not been able to afford quality legal representation have approached legal firms who offer a no-win, no-pay service to litigants.

Such firms are selective in who they agree to represent, and only take on what they consider to be certain successes, but they do service a need to many desperate, low-salaried road accident victims.

However, many of them have unfortunately fallen prey to the plethora of unscrupulous ambulance chaser lawyers who shame the legal profession by charging outrageous legal fees far in excess of the prescribed rate, which allows for a maximum of only 25 percent of the settlement granted by a court to be retained by the litigant's legal representatives.

None of us know if we will be the next motorist or pedestrian maimed on our roads of mayhem and death, and obviously every cent of an award would be desperately needed merely to survive in a society of constantly rising costs.

Many legal vultures illegally add a raft of extra charges termed disbursements.

Juanne de la Guerre was awarded R2 million in an injury claim – of this, R1m was appropriated by her greedy lawyers.

That's a whopping 50 percent of desperately needed money going to the fatcat legal practitioners.

Even R2m doesn't go far considering the astronomical cost of future medical

expenses, and to provide sustenance over a possible long lifetime for a paraplegic victim.

Thankfully the Constitutional Court has provided protection against improper overcharging of future accident victim litigants by upholding the maximum 25 percent proviso as prescribed in the Contingency Fees Act, and rejected a legal firm's application to appeal judgments against them in the lower courts for overcharging.

In another recent important judgment, Concourt granted a sizable financial award against a security company which it deemed to have been negligent during a home robbery.

It is an important judgment against an industry that has generally considered itself immune from reproach.

So our justice system may not be in crisis mode, but there is certainly a need for South Africans to be eternally vigilant and insist on meaningful improvements that will provide equal justice for all.

Many accused people cannot afford quality legal representation, certainly not a costly appeal to the Supreme Court of Appeals, and definitely not access to the Constitutional Court, although the very fabric of its magnificent court buildings conveys access to the masses.

Access is only the preserve of the privileged few.

Far more effort must be made to make justice more affordable.

If the average Joe Soap and Thandi Citizen cannot afford access to our formal justice system, both criminally and civilly, maybe the tribal courts are not such a bad alternative after all, as long as the appearance before those courts is voluntary, that previous discrimination of women is eliminated, and that there is an automatic right to appeal to the formal courts if people feel aggrieved at the verdict of the tribal elders.

The legal terrain can be likened to a minefield, and it is imperative that South Africans become as knowledgeable as possible about South African jurisprudence and precedence setting court judgments, so they are fairly well prepared for any legal eventuality.

J Heinrich Mueller

Edenglen, Edenvale

(The above letter appeared in *The Star* newspaper on 14 April 2014)