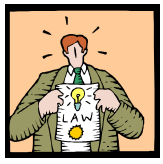
e-MANTSHI

A KZNJETCOM Newsletter

June 2011 : Issue 65

Welcome to the sixty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to gvanrooyen@justice.gov.za.



New Legislation

1. An explanatory summary of a *Judicial Matters Amendment Bill* has been published in Government Gazette no 34338 dated 27 May 2011 by the Minister of Justice and Constitutional Development.

The Bill intends -

(a) to amend the following Acts, namely –

the *Magistrates' Courts Act, 1944*, so as to bring the Afrikaans text relating to causes of action over which magistrates' courts have jurisdiction in line with that of the English text; and to further regulate the jurisdiction of magistrates' courts in line with a decision of the Constitutional Court;

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the *Criminal Procedure Act, 1977*, so as to effect technical corrections; and to further regulate the provisions relating to the expungement of certain criminal records;

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the *Small Claims Courts Act, 1984*, so as to further regulate the appointment of commissioners;

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the *Special Investigating Units and Special Tribunals Act*, 1996, so as to further regulate the litigation functions of a Special Investigating Unit; and to provide for the secondment of a member of a Special Investigating Unit to another State institution;

the *Criminal Law Amendment Act, 1997*, so as to exclude persons under the age of 18 years from the operation of that Act;

the *National Prosecuting Authority Act, 1998*, so as to further regulate the remuneration of Deputy Directors and prosecutors;

the *Maintenance Act, 1998*, so as to further regulate the area of jurisdiction of a maintenance court; to further regulate the circumstances under which maintenance orders may be granted by default; to clarify the legal position relating to the amendment of a maintenance order made by a High Court by a subsequent order made by a maintenance court; to further regulate the transfer of maintenance orders; to increase the penalties for certain offences; to create certain new offences; and to further regulate the conversion of criminal proceedings into maintenance enquiries;

the *Domestic Violence Act, 1998*, so as to further regulate the powers of members of the South African Police Service in domestic violence matters;

the *Prevention of Organised Crime Act, 1998*, so as to make it clear that the Administration of Estates Act, 1965, applies to a *curator bonis* appointed under Chapter 6 of that Act;

the *Promotion of Access to Information Act, 2000*, so as to extend the time periods within which to bring court applications;

the *Regulation of Interception of Communications and Provision of Communication-related Information Act, 2002*, so as to amend certain definitions; to provide that the designated judge may consider applications for the issuing of archived communication-related directions; to provide that electronic communication service providers, other than mobile cellular electronic communication service providers, must electronically record and store information relating to customers; and to further regulate the provisions relating to penalties;

the *National Credit Act, 2005*, so as to determine the jurisdiction of magistrates' courts for the purposes of debt review proceedings;

to amend the *Children's Act, 2005*, so as to allow for information in the National Child Protection Register to be made available in the case of applications for the expungement of certain criminal records;

the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007*, so as to allow for information in the National Register for Sex Offenders to be made available in the case of applications for the expungement of certain criminal records; and to further regulate the issuing of directives by the National Director of Public Prosecutions;

the *Child Justice Act, 2008*, so as to further regulate the evaluation of the criminal capacity of a child; to further regulate the reporting of any injury sustained or severe psychological trauma suffered by a child while in police custody; to further regulate the holding of preliminary inquiries; to provide for the delegation of certain powers and assignment of certain duties by the Cabinet member responsible for social development in respect of the accreditation of diversion programmes and diversion service providers; to effect certain textual corrections; to repeal provisions that make the *Criminal Law Amendment Act, 1997*, applicable to persons under the age of 18 years; and to further regulate the expungement of records of certain convictions of children;

the *Reform of Customary Law of Succession and Regulation of Related Matters Act, 2009*, so as to effect certain textual corrections;

(b) to establish the Limpopo High Court, Polokwane and the Mpumalanga High Court, Nelspruit; and

(c) to provide for matters connected therewith.

A copy of the Bill can be found on the websites of the Department of Justice and Constitutional Development and the Parliamentary Monitoring Group at http://www.justice.gov.za and http://www.pmg.org.za, respectively.

2. A *Correctional Matters amendment Act,* Act 5 of 2011 has been published in Government Gazette no 34315 dated 25 May 2011. The purpose of the Amendment Act is as follows:

To repeal provisions establishing an incarceration framework introduced by the Correctional Services Amendment Act, 2008; to amend the Correctional Services Act, 1998, so as *to* amend a definition and insert new definitions; to provide for a new medical parole system; to clarify certain provisions relating

to parole; to provide for the management and detention of remand detainees; and to provide for matters connected therewith.

3. The following variation order was made by the North Gauteng High Court in respect of foster care orders in terms of the *Childrens Act:*

CASE NO: 21726/2011

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

PRETORIA 08 JUNE 2011

BEFORE THE HONOURABLE MR JUSTICE CLAASSEN

In the matter between:

CENTRE FOR CHILD LAW	APPLICANT
AND	
MINISTER OF SOCIAL DEVELOPMENT	1ST RESPONDENT
SOUTH AFRICAN SOCIAL SECUIRTY AGENCY	2ND RESPONDENT
MEC FOR HEALTH AND SOCIAL DEVELOPMENT LIMPOPO	3RD RESPONDENT
MEC FOR HEALTH AND SOCIAL DEVELOPMENT, MPUMALANGA	4TH RESPONDENT
MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG	5TH RESPONDENT
MEC FOR SOCIAL DEVELOPMENT, WOMEN, CHILDREN AND PEOPLE WITH DISABILITIES, NORTH WEST	6TH RESPONDENT
MEC FOR SOCIAL DEVELOPMENT, FREE STATE	7TH RESPONDENT
MEC FOR SOCIAL DEVELOOPMENT, NORTHERN CAPE	8TH RESPONDENT
MEC FOR SOCIAL DEVELOPMENT, KWAZULU-NATAL	9TH RESPONDENT
MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE	10TH RESPONDENT
MEC FOR SOCIAL DEVELOPMENT, WESTERN CAPE	11TH RESPONDENT

PRIVATE BAG/PRIVAATSAK
2011 -06- 22
T. M. LEGODI
PRETORIA 0001
GRIFFIER VAN DIE NOORD-GAUTENG
HOË HOF, PRETORIA

HAVING HEARD counsel(s) for the party(ies) and having read the documents filed of record

IT IS ORDERED

1. THAT varying paragraph 5 of the order by writing in at the end of paragraph 5: 'excluding all foster care orders that have expired due to the child turning 18 years of age';

2. THAT varying paragraph 6 of the order by writing in at the end of paragraph 5: 'excluding all foster care orders that have expired due to the child turning 18 years of age';

3. THAT striking out the whole of paragraph 7 and replacing it with the following:

   During the two year period allowed in paragraphs 5 and 6, the 3rd to 11th respondents shall direct the relevant social workers to identify and investigate foster care orders referred to in paragraphs 5 and 6. Subsequent to the investigation, in the case of each foster care order identified, the social worker must decide whether the foster care order must remain extended for the full two year period ordered in paragraph 5 and 6. If a foster care order should not remain extended for the full two year period ordered in paragraph 5 and 6, or should be extended for longer than 2 years, the social worker may approach the Children's Court for an appropriate order in terms of the Children's Act.

4. THAT writing in a new paragraph 8 which reads as follows:

   Nothing in this order shall prevent a Children's Court from hearing a matter and making an appropriate order in terms of the Children's Act when approached by a social worker with an application concerning a foster care order falling within the ambit of this order, which may include terminating or varying the foster care order in terms of section 159 or extending the foster care order in terms of section 186 of the Children's Act.

5. THAT making the consequent amendments to the numbering of the paragraphs, paragraph 8 or the order to read as paragraph 9, paragraph 9 of the order to read as paragraph 10 and paragraph 10 of the order to read as paragraph 11.

BY THE COURT

REGISTRAR

☐ Att: KARABO RL NGIDI

HIGH COURT TYPIST: C BUYS

2011 -06- 22

T. M. LEGODI
PRETORIA 0001
GRIFFIER VAN DIE NOORD-GAUTENG
HOË HOF, PRETORIA

Recent Court Cases

1.Minister of Safety and Security v Kruger 2011(1) SACR 529 (SCA)

A warrant of arrest should reflect the offence in respect of which it was issued otherwise it is defective and invalid.

The terms in which a warrant of arrest must be framed are not expressly stated in the Criminal Procedure Act 51 of 1977 but it is implicit in ss 39(2) and 43(2) that it was intended that it should reflect the offence in respect of which it has been issued. Section 39(2) requires a person who effects an arrest without a warrant to inform the arrested person of the cause of the arrest. Where the arrest is effected in execution of a warrant the arrestor must, upon demand of the arrested person, hand him or her a copy of the warrant. Quite clearly, that contemplates that the cause of the arrest will appear from the warrant. Moreover, s 43(2) provides that a warrant of arrest must direct the arrest of the person named in the warrant 'in respect of the offence set out in the warrant'. Those two provisions make it abundantly clear that it was considered by the draftsman to be self-evident that a warrant must describe the offence and it was not considered necessary to express that in terms. It must be taken to be axiomatic that a warrant that is formally defective in such a material respect is invalid. It is immaterial that it is apparent from another source, even if that source is readily to hand. (Paragraphs [11] and [12] at 532*j*–533*d* and 533*e*–*f*.)

Section 55(1) of the South African Police Service Act 68 of 1995, which provides that any police officer 'who acts under a warrant or process which is bad in law on account of a defect in the substance or form thereof shall, if he or she has no knowledge that such warrant or process is bad in law and whether or not such defect is apparent from the face of the warrant or process, be exempt from liability in respect of such act as if the warrant or process were valid in law', does not exempt the State from civil liability for the unlawful act. A police officer — or anyone else, for that matter — who deprives a person of his or her liberty without legal justification commits a delict, and is ordinarily liable for the damage that is caused by the delictual act. The section does not purport to render the act lawful. In its terms it does no more than to relieve the police officer of the consequences of the delictual act. The act remains unlawful and, in accordance with ordinary principles, the employer is vicariously liable for its consequences. (Paragraphs [15]–[17] at 534*d*–*h*)

The police have a duty to carry out policing in the ordinary way. When executing a warrant of arrest the police are obliged to do so with due regard to the dignity and the privacy of the person being arrested. The conduct of the police in permitting — indeed, inviting — a television cameraman to invade the premises of the person being arrested, in order to witness the arrest, warrants censure. The police have no business setting out to turn an arrest into a showpiece. (Paragraph [31] at 538*f*–*h*.)

2. S v Dyantyi 2011(1) SACR 540 (ECG)

Public interest dictates that society's concerns and disapproval of certain crimes should be reflected in sentences imposed for offences striking at the heart of the values of the Constitution.

The principles which can be extracted from *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220) and many other cases — in regard to the correct approach to be adopted in the exercise of the discretion conferred on the sentencing court, in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997, to find substantial and compelling circumstances justifying the imposition of a lesser sentence than the sentence prescribed in s 51(1) or (2) — may be summarised as follows:

- The point of departure is that the prescribed sentence must ordinarily be imposed.
- It is only if a court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, that it may depart from the prescribed sentence.
- In deciding whether substantial and compelling circumstances exist, the court is required to look at all the traditional mitigating and aggravating factors, and consider the cumulative effect thereof.
- If the court concludes that the minimum prescribed sentence is so disproportionate to the sentence which would be appropriate — to the extent that an injustice would be done by imposing that sentence — it would be entitled to impose a lesser sentence.
- The specified sentences are, however, not to be departed from lightly and for flimsy reasons. (Paragraph [14] at 547*d–g*.)

Many cases in the recent past have described rape as a scourge in our society, which therefore places an obligation on our courts to send a clear message to rapists and potential rapists that the rights of women in general, and children in particular, will be protected to the extent that the full might of the law permits. Furthermore, the seriousness of the crime of rape is aggravated by the fact, where that is the case, that the accused takes unfair advantage of someone who is mentally retarded and thus a vulnerable member of the community. (Paragraphs [11] and [19] at 546*e* and 549*i*–550*b*.)

Much has been said by communities in all walks of life in South Africa in relation to crimes such as rape in particular, and abuse of women and children in general. One can thus safely say that all right-thinking members of the public view such crimes with revulsion. Taking this factor into account in determining an appropriate sentence for rape therefore enjoins the court to view crimes such as rape in an extremely serious light, and consequently when it comes to punishment, courts must — after taking due cognisance of all relevant factors — impose sentences that reflect the revulsion of society at the commission of such crimes. This is, however, not to say that the courts should abdicate their sentencing discretion and allow

themselves to be swayed by public opinion. It is, rather, more to say public interest dictate that the concerns of society and society's disapproval of certain crimes should receive some recognition in the sentences that courts impose, especially those offences that strike at the very heart of the values and ethos of our Constitution. (Paragraph [21] at 550*e–h*.)

In considering the prospect or possibility of the rehabilitation of the offender as a factor in determining an appropriate sentence, it should be borne in mind that the seeds of rehabilitation can, in a manner of speaking, germinate only if the convicted person him/herself has, first and foremost, expressed contrition for his/her criminal wrongdoing, thereby accepting the gravity of the criminal act of which he/she has been convicted, and commits to return to the path of rectitude. Without expression of contrition, any hope of rehabilitation becomes illusory and thus an unrealistic expectation. (Paragraph [26] at 552*c*.)

3. S v Block 2011(1) SACR 622 (NCK)

Where the result of criminal proceedings in a magistrates court is attacked, appeal is the appropriate procedure – where the method of proceedings are assailed review is the proper remedy.

Generally speaking, where the *result* of criminal proceedings in an inferior court is attacked, appeal is the appropriate recourse, while, in instances where the *method* of such proceedings is assailed, review would be the proper remedy. Refusal by a magistrate to grant a postponement may constitute a ground for an appeal, but same may only be reviewable where a gross irregularity is committed in arriving at that decision. A gross misdirection on the facts and/or the law may constitute a ground of appeal, but not of review. Thus, where the postponement of an application for bail is sought to be reviewed in terms of s 24(1)*(c)* of the Supreme Court Act 59 of 1959, on the ground that the magistrate had grossly misdirected himself on the facts and on the law, s 24(1) of the Act cannot assist the applicant for review. (Paragraphs [14] – [15] at 99*a – d*.)

The review powers of a High Court have been considerably extended by the Constitution, 1996. Thus, greater flexibility is possible in the application of s 24 of the Supreme Court Act. Ultimately, what must be determined is the fairness of the proceedings. It is striking that, in regard to bail applications, both s 35(1)*(f)* of the Constitution and s 50(6)*(d)*(v) of the Criminal Procedure Act 51 of 1977 contain the 'interests of justice' criterion. In applying the 'interests of justice' criterion, both trial-related and extraneous factors are taken into account. This criterion requires a weighing-up of the interests of the accused in liberty against those factors which suggest that bail be refused in the interests of society. This differs from, for example, the balancing required by s 60(11)*(a)* of the CPA — where the 'exceptional circumstances' criterion is applied. In the latter instance the balancing of the accused's liberty interests against society's interests in denying bail will favour the denial of bail, unless 'exceptional circumstances' are shown by the accused to exist

— thus a more stringent test than the 'interests of justice' D criterion. (Paragraphs [16] and [18] at 99*e – f* and 100*d – f*.)

4. S v Mkhize 2011(1) SACR 554 (KZD)

Where a confession was obtained from an accused during his unlawful detention by the police such confession is inadmissible.

Where a confession was obtained from an accused during his/her unlawful detention — for want of compliance with s 35(1)*(d)* of the Constitution, 1996, and/or s 50(1) of the Criminal Procedure Act 51 of 1977 — such confession cannot be said to have been properly and legally taken. Section 35(1)*(d)* of the Constitution has placed an imperative on all criminal trials to be conducted in accordance with the 'notions of basic fairness and justice'. Evidence obtained in violation of the accused's fundamental right to a fair trial is inadmissible. There is no discretion afforded to a judicial officer when he/she is confronted with a situation where evidence is obtained unconstitutionally. To admit such evidence, contaminated as it is, will be a violation of the accused's rights, and, above all, will be prejudicial to the administration of justice. (Paragraphs [48]–[51], at 564*b–f*,)

5. S v Klaas 2011(1) SACR 630 (ECG)

Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

"[5] In *S v Le Grange and Others* 2009 (1) SACR 125 (SCA), Ponnan JA said at para 21:

'It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer.

Impartiality can be described — perhaps somewhat inexactly — as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial office. In common usage bias describes ''a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders

a judicial officer unable to exercise his or her functions impartially in a particular case.'"

[6] If one considers the remarks of the magistrate in the light of the above passage it is very clear, in my view, that the appellant did not have a fair trial. The initial remark after the plea explanation could only be interpreted as an expression of disbelief of the appellant's defence, before any evidence at all had been heard. What the magistrate effectively said was that he had already made up his mind that the appellant's version would be rejected, and that he was guilty. In my view, this expression of actual bias and disbelief rendered the subsequent proceedings a complete sham and a nullity. There was no point in carrying on with the trial. An accused cannot be said to have had a fair trial when the presiding officer states at the outset that he is not going to believe the accused's version. The remark made during judgment confirmed the magistrate's earlier expression of disbelief.

[7] In my view, it is irrelevant that the trial was otherwise conducted apparently fairly, that the convictions were justified by the evidence, and that the sentences were suitable. The conduct of the magistrate vitiated the entire proceedings. In *S v Le Grange and Others* (supra) the trial court had engaged in lengthy questioning of the accused. Ponnan JA said at para 13:

'Where the offending questioning sustains the inference that in fact the presiding judge was not open-minded, impartial, or fair during the trial, this court will intervene and grant appropriate relief. . . . In such a case the court will declare the proceedings invalid without considering the merits.'

In the present matter, the appellant's right to a fair trial was fundamentally violated and the proceedings must be declared invalid.

[8] I add that I consider the magistrate's conduct, in making the remarks that he did, to be most unfortunate, not only because of the bias displayed, but also because such remarks lower the dignity of the court, undermine the seriousness of a trial, and have the potential to undermine the public's confidence in the courts. In addition, an accused having to undertake his own defence, after his attorney fails to appear, is not a matter for humour."

From The Legal Journals

Coertse, N

"How to deal with previous convictions in terms of the Criminal Procedure Act."

De Rebus June 2011

Otto, J M

"Notices in terms of the National Credit Act : Wholesale national confusion*. Absa Bank v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services; Starita v Absa Bank Ltd ; FirstRand Bank Ltd v Dhlamini."*

SA Mercantile Law Journal 2010 595

Tennant, S-L

"The incorrect understanding of an incidental credit agreement leads to undesirable consequences : *JMV Textiles Ltd v De Chalain Spareinvest"*

SA Mercantile Law Journal 2011 123

Van Heerden, C & Boraine, A

"The conundrum of the non-compulsory compulsory notice in terms of Section 129(1)(a) of the National Credit Act"

SA Mercantile Law Journal 2011 45

Kelly-Louw, M

"The default notice as required by the National Credit Act 34 of 2005"

SA Mercantile Law Journal 2011 568

Van der Walt , T

"The use of force in effecting arrest in South Africa and the 2010 Bill : A step in the right direction?"

Potchefstroom Electronic Law Journal 2011 Volume 14 No 1

Stoop, P N & Kelly-Louw, M

"The National Credit Act regarding suretyships and reckless lending"

Potchefstroom Electronic Law Journal 2011 Volume 14 No 2

Van Heerden, C & Coetzee, H

"Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005"

Potchefstroom Electronic Law Journal 2011 Volume 14 No 2

De Vos, W le R

"Illegally or unconstitutionally obtained evidence: a South African Perspective"

TSAR 2011 268

Terblanche, S S

"The punishment must fit the crime: Also when the offender has previous convictions? "

Stellenbosch Law Review 2011 188

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

Contributions from the Law School

Of motorists and murder

Is it appropriate to find a motorist guilty of murder? In principle such a finding was sanctioned by the Appellate Division in the case of *S v Van Zyl* 1969 (1) SA 553 (A), where Steyn CJ stated (at 557B-C):

> 'Waar 'n bestuurder se besef van gevaar of moontlike gevaar wat hy op die pad skep, gepaard gaan met onverskillige aanvaarding daarvan en voortsetting van sy handelswyse, sou sy optrede moet deurgaan as roekeloosheid in die sin van 'n doen of late met risiko-bewustheid, maar dit sou regtens buite die grense van die grofste nalatigheid val en op *dolus eventualis* neerkom; en as dit lewensgevaar is wat op 'n ander se dood uitloop sou die bestuurder aan moord skuldig wees en nie aan manslag nie.'

As the dictum indicates, when dealing with homicide in the context of a motor vehicle it is rare to encounter direct intention to kill. However, the presence of *dolus eventualis*, consisting of the accused's foresight of the possibility that his driving endangers life ('besef van gevaar of moontlike gevaar wat hy op die pad skep') and his reckless acceptance of this risk as reflected in his continuation in his course of conduct ('onverskillige aanvaarding daarvan en voortsetting van sy handelswyse') would suffice for a murder conviction. The policy underlying this approach is founded

on the fact that a motor vehicle is indeed a lethal weapon if used with indifference for other road users. As the court stated in *R v Nthithe* 1958 (1) PH H84 (T):

> 'We are inclined to take too light a view altogether of the misconduct of motorists. If a man were to take a gun and fire it off down the street without taking care to see that there was nobody who could be hurt we could regard his conduct as outrageous. If he fired a gun down a street recklessly and someone were killed he could be guilty of murder. Yet when a man drives a vehicle weighing several tons, on a road, without any care for the safety of other people we seem to think that after all it is excusable. It is nothing of the sort; it is a dreadful deed that he has done. When he kills people in these circumstances the killing must be regarded as a very serious matter indeed.'

Nevertheless, whilst there is no shortage of culpable homicide verdicts in the context of road traffic collisions, there is a residual reluctance to charge a motorist who has caused the death of another with murder. This reluctance cannot simply be ascribed to the difficulties of proof of intent to cause death (albeit in the form of *dolus eventualis*). There are policy concerns in extending the ambit of murder to include those who cause death on the road. As Whiting has pointed out in his discussion of the ambit of *dolus eventualis* ('Thoughts on *dolus eventualis*' (1988) 3 *SACJ* 440) driving a motor car is an activity which is 'not merely socially acceptable but also legally permissible notwithstanding that [it involves] some risk of harm, even of death, to others'. Thus the law tolerates or even encourages driving a motor car on the basis of its social utility, 'while at the same time circumscribing the manner in which [it] may be performed so as to limit…potential for causing harm' (ibid 441).

Whiting addresses the question of liability for intentional killing whilst driving in terms of practical scenarios. What if a person drives in a manner forbidden by the law, such as driving a vehicle at a substantially excessive speed?

> 'Here it might well be possible for it to be proved against him not only that he knew he was driving at a substantially excessive speed but also that he realized that in doing so he was endangering the lives of others to a degree which was clearly impermissible. Yet if this were to be proved and if in addition such driving had resulted in an accident in which someone else was killed, *one's sense of what is right would surely be very considerably offended by any suggestion that this would make him guilty of murder*.' (ibid, my emphasis)

Whiting suggests that a court would ignore the fact of foresight of the (slight) possibility of someone being killed by such dangerous driving, and convict on the basis of culpable homicide (ibid). But what if the case were considerably stronger, where for example the accused knowingly drove at a grossly excessive speed whilst being aware that the brakes of his car were defective?

> 'Here it might well be possible to show that he realized that he was endangering the lives of others to a degree which was substantially beyond what was permissible. Yet if this were to be proved and if in addition such driving had resulted in a fatality, *one's sense of what is right would still be offended*, though

> to a lesser extent than in the first situation, *if it were suggested that these facts were sufficient in themselves to make him guilty of murder*.' (ibid, my emphasis)

The writer's views clearly reflect the desire not to extend the considerable stigma of a murder conviction to someone who has been participating in a socially sanctioned activity, albeit in an excessive and reckless manner. Related concerns about extending murder liability arise in the context of the question as to what degree of foresight is required. In supporting a qualified degree of foresight as a requirement for *dolus eventualis* (foresight of a 'real or reasonable' possibility), Snyman (*Criminal Law* 5ed (2008) 185) states that

> '[a]ny normal person foresees that there is a remote or exceptional possibility that an everyday activity, such as driving a motor car, may result in somebody else's death, and if he nevertheless proceeds with such an activity, it does not mean that he therefore has *dolus eventualis* in respect of the result which he foresees only as a remote possibility'.

In the case of *S v QeQe* (case no CC37A/2011 (ECG)) these matters of policy and principle in the context of driving a motor vehicle converged. The accused, who had stolen a vehicle, was being pursued by the police. In the course of his desperate attempt to evade his pursuers the accused struck and killed three children. The accused admitted one count of culpable homicide in respect of the deaths, but denied any knowledge of the other fatalities. The court (per Grogan AJ) noted that given the manner and location in which the vehicle was driven, if the vehicle driven by the accused struck all three children, he would be guilty of culpable homicide in respect of all three deaths (at page 4 of the judgment). Nevertheless, the State elected to charge the accused with three counts of murder.

Having established that the deaths of other two children were also caused by the accused, Grogan AJ proceeded to assess whether he had the necessary intention to be held liable for murder in respect of the victims, systematically setting out the distinction between murder and culpable homicide (14-15), and the various forms of intention (15). Grogan AJ was particularly careful to stress the need to distinguish clearly between *dolus eventualis* and negligence, and the key requirement that actual subjective foresight on the part of the accused must be proved in order for *dolus eventualis* to be established (16-17). Thus, the court correctly stressed the need for actual foresight on the part of the accused to be proved beyond reasonable doubt.

Significantly, whilst defence counsel cited academic authority opining that foresight of only a remote or slight possibility of harm (i.e. of less than a 'real or reasonable' possibility of harm, to use Snyman's phrase) should only be regarded as negligence, the court held (at 18) that although foresight of a remote possibility may be more difficult to prove, the prevailing view (following such decisions as *S v De Bruyn and another* 1968 (4) SA 498 (A) and *S v Ngubane* 1985 (2) All SA 340 (A)/1985 (3) SA 677 (A)) is that such degree of foresight suffices for the purposes of establishing *dolus eventualis*. Indeed, while the debate about the requisite degree of foresight required for *dolus eventualis* has given rise to much ink being spilt in

academic debate, the real question is simply whether there was actual foresight on the part of the accused, and this is typically the approach adopted in the courts. Once it has been established that the accused continued in his course of conduct despite foreseeing the possibility of harm, then liability has been established, and the degree of foresight is relevant only for purposes of sentencing.

Having set the legal framework in place Grogan AJ assessed the accused's intention on the facts of the case, concluding that:

> 'the accused must have known in the subjective sense that he was executing a highly perilous manoeuvre, perilous not only to himself and his passengers, but also to pedestrians in the vicinity. He must also have known, again in the subjective sense, that the manoeuvre might not succeed and that somebody might be struck by the vehicle.'(at 23)

The accused was thus convicted of murder on all three counts.

Does this judgment signal a change in prosecutorial policy in respect of drivers who kill, or perhaps merely a renewed commitment to the approach suggested in *Van Zyl*? Could it be said that Whiting's views that murder is not an appropriate charge in this context no longer have currency in a South Africa engaged in an ongoing battle with a tragic death toll on the roads?

So it seems. Grogan AJ's remarks at the end of the judgment (at 24) are illuminating (and resonate with the remarks quoted from the *Nthithe* case above):

> 'Had the accused fired bullets in the direction in which he steered his motor vehicle he would certainly in the circumstances have been liable for murder. As it was the accused was in possession and control of an instrument potentially no less lethal than a firearm. He used it with fatal effect.'

To be fair to Whiting, he did not exclude the possibility of a finding of *dolus eventualis* in circumstances where the risk taken is not 'of a generalized statistical nature' but constitutes a 'specific concrete risk' to the life of another - using the example of a driver who wishes to make a quick getaway and drives at a person standing in his path, hoping that he will get out of the way (op cit 441-442). His reasoning and example entirely accords with the facts of *Qeqe*.

And so it must be. For when a person, with the conscious awareness that his actions may possibly endanger the life of another, and having full control over the consequences of his actions, chooses to rather continue in his course of conduct than to avoid the possibility of loss of life, such a choice is so inherently selfish and indifferent to the lives of others that it is worthy of founding the most serious of convictions: murder.

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Matters of Interest to Magistrates

Reforming judicial processes and the legal profession

Mario GR Oriani-Ambrosini

I discussed this paper with two iconic senior counsel. One advised me not to publish it in fear that it may deteriorate my precarious relationship with the legal fraternity. The other urged me to publish it, pointing to its necessity.

As a member of the National Assembly's Portfolio Committee on Justice and Constitutional Development, I have already repeatedly expressed these views in political circles. It is now incumbent on me to put them to the legal fraternity, in the hope of a possibly not too defensive response.

The President has pledged to promote the efficiency of the judiciary so that justice may no longer be the privilege of the rich. His sentiments have been echoed by the Chief Justice. Yet the most obvious reforms to achieve this goal have been ignored for years. Former Minister of Justice and Constitutional Development Enver Surty referred them to the Rules Board, but there they stopped.

Among the many reforms passed since 1994, the reform of the judicial process is still missing. The racial and gender composition of the judiciary has been changed. The laws the judiciary is enforcing are now radically different. But the way the civil justice system operates has not substantially changed. There is even misplaced pride in the judicial process being more similar than dissimilar to what it was two centuries ago.

A sacramental aura protected by antiquity and tradition surrounds the legal system as if only lawyers can change it. As lawyers, we are inclined to resist change, as our worth depends on our mastering the practices of the judiciary, which if radically changed would set lawyers back to the starting line, with the possibility of junior lawyers outranking in skills and expertise entrenched hierarchies of seniority.

While parliament has asserted its power to legislate and change any aspect of society, even doing so forcibly, in respect of the legal profession and the judicial system, an attitude has prevailed that only the hierarchy of the legal fraternity can bring change about.

Envisaged changes are passed through the South African Law Reform Commission, which often acts as the keeper of the old when it comes to the preservation of the matrix of the legal and judicial system. It is almost its mandate to ensure that reforms are consistent with the legal system, with the unintended consequence of the legal system remaining the same even when everything else around it changes. Justice is

now a privilege for the poor. The judicial system has collapsed. The situation is now serious enough to bring about change that lawyers may not like.

Mangosuthu Buthelezi MP was the first to propose in parliament a foreign tried, tested and simple way to fix ailing aspects of the judiciary almost overnight, pointing out that its problems are not remediable within the old British paradigm.

This solution can multiply almost tenfold the available judges' hours, court rooms, judicial assistants' hours and all that which is otherwise required for the daily court administration of justice, especially in civil matters. All this at no cost to the state, taxpayers or clients.

A reform of the court rules can introduce the discovery-based evidentiary system used for almost two centuries in the United States of America (USA). In this system, all witnesses, including expert witnesses, are called and preliminarily deposed, examined and cross-examined in lawyers' offices, under oath and in the presence of private court reporters. Lawyers have the power of resorting to a court's subpoena if needed to compel people to appear or answer.

This is in addition to the power of each party to issue to the other written interrogatories and demands for admission, and to receive not only copies of all the documentation relevant in the case but also all that is conducive to the discovery of relevant documentation.

All evidence is available and can be fully examined by opposing lawyers long before trial.

This system reduces trial time dramatically, to the point that an eight month trial may become a single day trial. Lawyers would submit to trial only disputed evidence or points of law relevant to the decision of the case, thereby limiting examination and cross-examination, without fishing expeditions. Moreover, in this manner, usually a trial holds no surprises, which prompts a much larger number of cases to be settled beforehand.

This system would not require relinquishing the adversarial system.

From a client's viewpoint there is no increased cost, as the number of lawyer's hours remains the same whether witnesses are deposed in lawyers' chambers or in court rooms. It could even be cheaper as lawyers are not required to wait for court time or charge fees for court cancellations or postponements.

Through this type of discovery the judicial system can also address the skills crisis. As the bulk of trial activities moves from court rooms to lawyers' chambers, judges will be required to have less experience. They will need to hear less evidence and be required to focus on fewer issues. This system also simplifies the writing and rendering of judgments, many of which at present remain outstanding for years.

This step would also bring the South African judicial system up to the best available standards, taking it out of its obsolete British tradition, which does not necessarily match today's and tomorrow's litigation challenges.

For instance, one cannot see how the present system could handle complex antitrust cases, which would require the judge to understand complex economic arguments. In the modern world, lawyers are becoming increasingly specialised, but one cannot require the same of judges.

The discovery-based procedural system has enabled the judicial system of the USA to remain effective and efficient, in spite of the USA being the most litigious society on Earth embroiled in the administration of laws and regulations far more extensive and complex than those in force in South Africa.

South African laws will need to become more complex to match present and future requirements, which, in turn, will put additional pressures on the judicial system, requiring a degree of knowledge from each judge exceeding what is currently available. Conducted in lawyers' offices, the discovery-based system produces an optimal allocation of skills. It enables different lawyers to handle the aspects of discovery in which they are respectively most skilled. This reform would also offer the opportunity of introducing a much needed and long overdue reform of the legal profession. One can no longer justify the division of the legal profession in terms of attorneys, junior and senior counsel.

It is irrational to differentiate between lawyers on the basis of seniority, for there is no basis to believe that an older lawyer is a better lawyer. It is also a violation of the principle of equality before the law. If litigants are to be equal before the law, so must their legal representatives be. The poorer litigant who cannot afford senior counsel and must make do with a junior is already at a disadvantage. All lawyers should appear the same before a judge.

There are many aspects of the legal profession which to American or continental lawyers alike would seem incestuous and repugnant to their binding rules of ethical conduct. Often our advocates are more concerned with being highly thought of by colleagues who will foster their passage into 'silk-hood' than to represent clients' interests to the fullest.

Advocates refer to one another as 'learned colleague' and to the judge as 'your lordship'. This goes beyond mere pomposity as it shapes a mindset in which cordial relationships with an opponent's lawyer become more important than the zealous advocacy of one's own client's interests. Clients come and go, but the brotherhood of advocates remains. It is saddening that the racial transformation of the judiciary has often placed a new breed of young lawyers in the same stagnant mould of old British practices that survived in England because of its chronic affectations, but have long been abandoned elsewhere in the modern world.

The arrangement of advocates dwelling in the same building and close chambers creates a proximity breeding potential conflicts of interest. The abolition of the split Bar should pave the way to the formation of law firms impermeable to conflicts and in which some lawyers may specialise as litigators.

In this context, the practice of having lawyers acting as judges should also be terminated as it prompts lawyers to be nicer to colleagues than their clients would wish them to be, just in case one of their colleagues ends up on the Bench. The divide between judges and lawyers should also become impermeable once their

respective jobs become more sharply differentiated on account of the discovery-based system.

A reform of the legal profession would enable the creation of a long overdue and much needed delict of ‘legal malpractice’ based on, and backed by, enforceable high canons of professional ethics and responsibility to replace the ineffective and questionable present low standards of the profession. This would make lawyers accountable to their clients for professional negligence, while rendering unethical actions negligent.

Originally the advocates’ profession was a medieval guild. It still employs anti-competitive rules such as the prohibition of dealing with clients directly, discounting fees or consulting outside chambers, which are typical of a guild. The Portfolio Commitee on Trade and Industry requested the Competition Commission to look into such practices, and it may just happen that for once a committee report passed by the National Assembly is implemented. It would be better for the legal profession to act before the Competition Commission does.

Because of the split Bar, a client ends up having to pay for three generic lawyers where, in the modern world, one specialised lawyer would do. Our lawyers are among the most expensive worldwide and our judicial system is tied to forms and formalities long abandoned elsewhere.

Other professions’ antiquated features were forced to meet international standards after 1992. The legal profession did not have to make such an adjustment, because of its inherently insular nature.

It is now time to abolish the split Bar and the differentiation between junior and senior counsel, so that in South Africa, like in other countries, lawyers can be identified in the market place as good or bad, irrespective of age, so that the citizenry can receive the best possible and most affordable legal services to enhance both justice and economic growth.

Mario GR Oriani-Ambrosini is an Inkatha Freedom Party MP.(The above opinion appeared in *De Rebus* of June 2011.)

A Last Thought

[43] I am mindful of the extreme pressures under which High Court judges have to perform their judicial functions, especially in busy urgent courts. These pressures cannot be underestimated and this Court acknowledges and appreciates the considerable pressure under which High Court judges sitting in urgent motion courts work. These pressures were aptly described by the judge in this matter as —"horrible". I am also aware that the North Gauteng High Court is one of the busiest divisions in South Africa, a factor that in itself gives rise to extreme pressures on the part of the judges sitting in an urgent motion court to ensure efficient case management.

[44] However, even allowing for: (a) the pressures of a busy urgent court like the North Gauteng High Court, (b) the absurdity of the set down, and (c) the inept manner in which the applicant's attorney prepared the application given his 22 years' experience, the judge's conduct during the proceedings is unacceptable. The remark made by the judge that the applicant's attorney was —"lying" is most unfortunate. It displays a lack of courtesy that is required from a judge in the execution of his judicial duties, no matter how trying the circumstances are.

Per Khampepe J in *Stainbank v South African Apartheid Museum at Freedom Park & Another* Case CCT 70/10 [2011] ZACC 20