e-MANTSHI

A KZNJETCOM Newsletter

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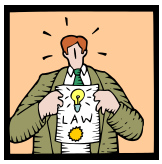
Welcome to the hundredth and ninety second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is 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.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. Act No. 14 of 2022; the Drugs and Drug Trafficking Amendment Act, 2022 was promulgated on 14 December 2022 in Government Gazette no 47736. The purpose of the amendment Act is to amend the Drugs and Drug Trafficking Act, 1992, so as to 1:repeal the Minister's delegated plenary legislative powers to amend Schedules 1 and 2; to amend Schedule 1 and Schedule 2; and to provide for matters connected therewith. The act came into operation on the date of publication.
The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202212/47736drugsanddrugtraffickingamendmentact14of2022.pdf

2. The Protection of Constitutional Democracy against Terrorist and Related Activities Amendment, Act, 2022 (Act 23 of 2022) has been put into operation on the 29th of December 2022. The notice to this effect was published in Government Gazette no

47820 dated 4 January 2023. The purpose of the Act is to amend the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004, so as to delete, amend and insert certain definitions for purposes of alignment with international instruments adopted upon the implementation of the Act; to provide for offences related to terrorist training and the joining and establishment of terrorist organisations; to provide for offences related to foreign travel and attempts to leave the Republic under certain circumstances; to provide for offences in respect of the possession and distribution of publications with unlawful terrorism related content; to provide for authorisation to be obtained from the Director of Public Prosecutions in respect of the investigation and prosecution of certain offences; to provide for the issuing of warrants for the search and cordoning off of vehicles, persons and premises; to provide for a direction requiring the disclosure of a decryption key and the effect of a direction to disclose a decryption key; to provide for the removal of, or making inaccessible, publications with unlawful terrorism related content; and to provide for matters connected therewith.

The Amendment Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202212/47803-protectionofconstidemocracyagainstterroristrelatedactivamendmentact-232022.pdf

3. The Criminal Law (Forensic Procedures) Amendment Act, Act 8 of 2022 has been promulgated on 14 December 2022 in Government Gazette no 47735. The purpose of the Act is to provide for the enforcement of the obligation to submit to the taking of a buccal sample; and to provide for matters connected therewith. The Act will come into operation on a date to be determined by the President. The amendment act can be accessed at:
https://www.gov.za/sites/default/files/gcis_document/202212/47735criminallawforensicproceduresamendmentact8of2022_0.pdf

4. The Children's Amendment Act, Act 17 of 2022 has been promulgated on 5 January 2023 in Government Gazette no 47828. The purpose of the amendment Act is to amend the Children's Act, 2005, so as to amend and insert certain definitions; to extend the children's court jurisdiction to also deal with guardianship; to further provide for the care of abandoned or orphaned children and additional matters that may be regulated; to provide for additional matters relating to children in alternative care; and to provide for matters connected therewith. The amendment Act will also come into operation on a date to be determined by the President. The Amendment Act can be accessed at:
https://www.gov.za/sites/default/files/gcis_document/202301/47828gen1543_0.pdf

5. An explanatory summary of the Repeal of the Transkeian Penal Code Bill, (To Repeal the Transkeian Penal Code 1983 (Act No. 9 of 1983), of the Republic of Transkei, has been published in Government Gazette No. 47637 of 2 December

2022. The primary aim of the Repeal of the Transkeian Penal Code Bill, 2022 (''the Bill'') is to provide for the repeal the Transkeian Penal Code, 1983, to extend the application of certain laws to the area formerly known as the Republic of Transkei, to provide for transitional arrangements and to provide for matters connected therewith. When the area formerly known as the Republic of Transkei became 'independent', the Code was enacted. Almost 20 years after the reincorporation of the area formerly known as the Republic of Transkei into South Africa, the Code remains of full force and effect. The continued application of the Code has created an untenable situation and resulted in legal uncertainty as to whether the Code superseded the common law. In the rest of the Republic of South Africa, a large part of substantive criminal law has not been codified and specific crimes, for example, murder, assault and theft, are not statutorily defined and their requirements are still found in the common law. However, in the area formerly known as the Republic of Transkei, as a result of the application of the Code, the National Prosecuting Authority is obliged to frame criminal charges in terms of the Code. The Portfolio Committee on Justice and Correctional Services invites submissions to Mr V Ramaano at Penalcode@parliament.gov.za by no later than Friday, 3 March 2023. The bill can be accessed here:
https://static.pmg.org.za/B34-2022_Repeal_of_Transkeian_Penal_Code.pdf

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Recent Court Cases

1. *Kapa v The State* [2023] ZACC 1

Where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed.

(I have only cited the majority judgment here. The full judgment including the minority judgment can be accessed here: http://www.saflii.org/za/cases/ZACC/2023/1.html)

Majiedt J (Kollapen J, Madlanga J, Mathopo J, Mhlantla J and Tshiqi J concurring):

[1] I have had the pleasure of reading the judgment of my Sister, Mbatha AJ (first judgment). I agree on the granting of condonation. Save for what I say in relation to the appeal against sentence, I agree that the appeal against the applicant's conviction engages our jurisdiction and that the interests of justice require that we grant leave to appeal. In respect of the appeal against the conviction, this

Court's jurisdiction is engaged on the basis that there is sufficient evidence on record to suggest, *prima facie*, that there *may* have been a serious breach of section 35 of the Constitution.[1] In addition, I am of the view that it is in the interests of justice for this Court to hear the appeal against the conviction. This is because the question of when it is in the interests of justice to admit hearsay evidence in terms of section 3(1)(c) of the Hearsay Act – the central issue in this case[2] – is clearly of sufficient interest beyond those of the parties in this case. In this case, that admissibility question concerns, in the main, the probative value of Ms Dasi's statement.

[2] As regards the application for leave to appeal against sentence, it is clear from this Court's judgment in *Van der Walt* that in order for the Court to entertain an appeal against sentence, the appeal must either raise a constitutional issue or it must raise an arguable point of law of general public importance which the Court ought to consider.[3]

[3] The main thrust of the applicant's argument is that the High Court should have deviated from the prescribed minimum sentence due to his personal circumstances which, according to him, mitigated against imposition of the prescribed minimum sentence. The applicant argues that the High Court, instead, "[paid] lip service to the *Zinn* triad".[4] This is so, according to the applicant, because the High Court overemphasised the seriousness of the crime, the applicant's role in the commission of the crime, and failed to consider the interests of society. The sum of the applicant's argument, thus, is that the High Court did not evaluate and weigh the facts or evidence placed before it in a satisfactory manner.

[4] It is clear from the above that the appeal against the sentence does not raise an arguable point of law, let alone one of general public importance which this Court ought to consider. Consequently, the Court's extended jurisdiction is not engaged and nothing more needs to be said on that score. The question becomes whether it engages the Court's constitutional jurisdiction.

[5] In *Bogaards*, this Court held that:

> "[A]bsent *any other* constitutional issue, the question of sentence will generally not be a constitutional matter. It follows that this Court will not ordinarily entertain an appeal on sentence merely because there was

[1] Compare *S v Van der Walt* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at para 15.
[2] The first judgment correctly confines its deliberations to this aspect. The other grounds argued for the setting aside of the conviction were all unmeritorious and require no consideration at all.
[3] *Van der Walt* above n 1 at paras 18-21.
[4] In *S v Zinn* 1969 (2) SA 537 (A) at 540G, the Court held that what has to be considered, when determining the suitable sentence in each circumstance, is "the triad consisting of the crime, the offender and the interests of society".

> an irregularity; there must also be a failure of justice. Furthermore, *this Court does not ordinarily hear appeals against sentences based on a trial court's alleged incorrect evaluation of facts*. For instance, this Court will not, in the ordinary course, hear matters in relation to sentence merely because the sentence was disproportionate in the circumstances. Something more is required."[5] (Emphasis added.)

[6] The Court, albeit in a footnote, then states that "[s]ome irregularities are considered per se failures of justice. These are irregularities which are so gross a departure 'from established rules of procedure that it can be said that the appellant was not properly tried'."[6] As is clear from the applicant's argument as summed up above, he simply takes issue with the High Court's evaluation of the facts; there is no indication or a suggestion of a failure of justice, actual or otherwise. Consequently, the appeal against sentence does not engage the Court's constitutional jurisdiction and leave to appeal against the sentence falls to be refused. I discuss next the merits on conviction.

[7] My Sister has set out the material facts in substantial detail and I gratefully adopt that exposition. For purposes of emphasis and context, I may repeat some of them or elaborate, where necessary. The first judgment correctly accepts that this incident emanated from an apparent act of vigilantism. Plainly, the High Court convicted the applicant primarily on the strength of Ms Dasi's statement. This view is supported by the following:

(a) The only evidence that pertinently related to the role that the applicant directly played in the murder of the deceased and in the death of the second deceased was the statement of Ms Dasi.

(b) Ms Dasi's statement attributed an active role to the applicant in the death of the deceased and little to no role at all in the death of the second deceased.

(c) As a result, and notwithstanding the fact that both deceased persons' blood was found at the applicant's house and that both were suspected of having stolen the applicant's property, the Court found the applicant guilty of the murder of the deceased and acquitted him in respect of the murder of the second deceased.

[8] The provisions of section 3(1)(c) of the Hearsay Act have been set out in the first judgment. The factors listed in section 3(1)(c) must be viewed holistically and weighed collectively in determining whether it is in the interests of justice to admit the

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[5] *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC); 2012 (12) BCLR 1261 (CC) at para 42. The "any other constitutional issue" must be an issue relating to sentence as was the case in *Bogaards*. See also *Van der Walt* above n 1 at paras 18-21.

[6] *Bogaards* id at fn 41.

hearsay evidence.[7] The factors that bear consideration when a court is determining whether it is in the interests of justice for the statement to be admitted are:

(a) the nature of the proceedings;
(b) the nature of the evidence;
(c) the purpose for which the evidence is tendered as evidence;
(d) the probative value of the evidence;
(e) the reason why the evidence is not given by Ms Dasi;
(f) any prejudice which the admission of the evidence might entail for the applicant; and
(h) any other factor which should, in the opinion of the court, be taken into account.

Nature of the proceedings

[9] It is has been suggested that the likelihood of hearsay evidence being admitted in civil application proceedings is greater than in criminal trial; and it is least likely to be admitted in criminal proceedings.[8] Here, the nature of the proceedings self-evidently militates against admission.

Nature of the evidence

[10] In essence, the enquiry under this rubric is, first, the extent to which the evidence can be considered reliable; and, second, the weighing of the probative value of the evidence against its prejudicial effect.[9]

[11] There are a number of factors relevant to the reliability question, namely:
(a) any interest in the outcome of the proceedings by the witness;
(b) the degree to which it is corroborated or contradicted by other evidence;
(c) the contemporaneity and spontaneity of the hearsay statement; and
(d) the degree of hearsay.[10]

[12] In *Savoi*, this Court explained that courts' aversion to hearsay evidence stems from its *general* unreliability as it is not subject to the reliability checks applicable to other evidence – such as cross-examination – and as its nature makes it difficult for a party to effectively counter inferences drawn from it.[11] This Court noted, however, that notwithstanding hearsay evidence being untested, and despite the possibility of

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[7] Schwikkard and van der Merwe above n **Error! Bookmark not defined.** at 298.
[8] Id at 296. This is "because of the presumption of innocence, and courts' intuitive reluctance to permit the untested evidence to be used against the accused in a criminal case". See also *Ndhlovu* above n **Error! Bookmark not defined.** at para 16.
[9] Schwikkard and van der Merwe above n **Error! Bookmark not defined.** at 298.
[10] Id.
[11] *Savoi* above n **Error! Bookmark not defined.** at para 38, quoting *Ndhlovu* above n **Error! Bookmark not defined.**.

risks of faulty memory or erroneous perception, insincerity or ambiguities in narration, hearsay evidence may prove to be reliable.[12]

[13] Ms Dasi arguably had an interest in the deceased's killers being brought to book,[13] which in principle adversely affects the reliability of her evidence. However, that interest must be viewed in the context of seeking justice for a loved one. There is nothing untoward in seeking justice in those circumstances, indeed it is to be expected. Attributing any measure of potential bias to her as a factor adverse to the probative value of her statement is based purely on conjecture and is misplaced. Furthermore, there is corroboration of her evidence, an aspect to be addressed presently.

[14] In respect of the contemporaneity and spontaneity of the hearsay statement, it must be borne in mind that the statement was taken two days after the events occurred. Like reliability, probative value is enhanced by the existence of admissible evidence which is consistent with the hearsay evidence.[14] Ms Dasi's statement has significant probative value to the extent that it is corroborated by circumstantial evidence. However, it is true that, given that hers is the only version of the assault itself, its probative value diminishes in this respect.

The purpose of the evidence

[15] Ms Dasi's statement was the only available eyewitness account. One eyewitness inexplicably disappeared. The other recanted his statement while testifying. Ms Dasi's statement fulfils two main important functions. In the first instance, it serves to identify the parties that were involved. In the second, it serves to tell the court the role that each party played in the assault and murder of the victims. It thus plays a significant part in the matter.

The probative value of the evidence

[16] In *Ndhlovu*, "probative value" was defined in the following terms:

> "'Probative value' means value for purposes of proof. This means not only, 'what will the hearsay evidence prove if admitted?', but 'will it do so reliably?' In the present case, the guarantees of reliability are high. The most compelling justification for admitting the hearsay in the present case is the *numerous pointers to its truthfulness.*"[15] (Emphasis added.)

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[12] *Savoi* id at paras 42-6.
[13] The deceased, Mr Bungane, was her boyfriend.
[14] Schwikkard and van der Merwe above n **Error! Bookmark not defined.** at 299.
[15] *Ndhlovu* above n **Error! Bookmark not defined.** at para 45.

[17] In order for Ms Dasi's statement to be reliable or for it to have probative value in its entirety, it is not required that every material aspect of the statement must be corroborated. The requirement is that there must either be corroboration of every material aspect of the statement or corroboration of a significant number of material aspects. In the latter instance, all the aspects of the statement that have not been corroborated by other pieces of evidence, first, cannot contradict other objectively proven facts and, second, must fit into the picture that has been established by all of the other objectively proven facts. The fact that Ms Dasi's statement is corroborated by other witnesses' testimony and the objective medical evidence point to its truthfulness, reliability, and probative value.

[18] Ms Dasi's account of events is based on first-hand experiences – she was present at the scene and she alleged that she was one of those being assaulted. This is undisputed. This was an extraordinary event and of considerable importance to her; she witnessed her boyfriend being seriously assaulted and she was allegedly also on the receiving end of the assault. This would have impressed upon her the importance of noting who did what and to whom at the scene.

[19] The corroboration of her first-hand account, outlined in the impugned statement, consists of other compelling circumstantial evidence:

(a) Ms Bungane's testimony, to the extent that she recalls Mr Makoma's admission of having collected the deceased from the applicant's house;
(b) Mr Makoma's statement recording some knowledge of assaults occurring at the applicant's house; seeing multiple victims there with signs of assault and that the deceased had been collected from the applicant's house;
(c) the post-mortem report;
(d) the blood spatter evidence; and
(e) the DNA evidence confirming that the blood found at the applicant's house belonged to the deceased.

[20] I commence with the extracts from the post-mortem report. The pathologist report of Dr Inglis records:

> "The following was noted on external examination of the body. Abrasions were noted to the face and forehead. Multiple lacerations of the scalp were present. Extensive circumferential swelling and bruising of both arms were present. Extensive swelling and bruising of both lower legs were present. Tramline bruises were present on the posterior and lateral aspects of the left thigh. Multiple abrasions were present on both arms, both thighs and both legs. Multiple lacerations were present on both shins. Extensive bruising and scattered abrasions were present on the lower back. On internal examination of

> the body traumatic subarachnoid haemorrhage of the brain was present. Haemorrhage was noted into the eighth intercostal muscle on the left."

As a result of her observations, Dr Inglis then concludes that—

> "the cause of death was consistent with extensive blunt-force injury to the head and body and the consequences thereof."

[21] Dr Inglis testified:

> "[T]he bruises noted to the arms and the legs and the lower back as well as the lacerations on the scalp and then all the multiple abrasions . . . these are all consistent with the application of a blunt force to the body. There were two wounds that were a bit different in their pattern . . . . [These are described in the report] as tramline bruises or they're also known as a railway bruise. . . . [A] tramline bruise is typically two parallel bruises with a centre that is spared in the middle. And these wounds are typically caused as a result of a rod-like object. An everyday example would be the top part of the stick of the broom."

[22] The injuries and the objects that may have caused them, as described by Dr Inglis in her report and oral testimony, are consistent with the events described by Ms Dasi in her statement. Ms Dasi's statement in relevant part, reads:

> "I did saw Makhuze [the deceased] desisting [sitting]. Both hands were tied up with a rope. Also his legs were tied up with yellow-and-black rope. They did took off his trouser. Bongane was carrying a plank hockey stick, busy beating Makhuze on his hands. Azizo was carrying a silver golf stick, hitting Makhuze over his head. Makhi [the applicant] did pull Makhuze to other room as he was bleeding over his hedge [head] and mouth. . . . Big also did came inside the room and hit Makhuze with sjambok over his face. Makhi also hit Makhuze with golf stick over his body. Bongane also hit Makhuze with empty bottle over his head. Anele did stepped Makhuze on other leg twice and Anele did hit Makhuze with chisel on other leg four times."

[23] In respect of the blood spatter at the applicant's house, Sergeant Msolo testified that:

> "I requested Captain Joubert from the Plattekloof lab to go to [the applicant's house] . . . where the alleged offence took place. I requested him to go and see whether there was any blood or anything

> that he might [find] there. He did go there during one night. . . . Captain Joubert told me that he did find some blood on the tiles on the floor and also on the walls were red that was also already washed off."

[24] Captain Joubert, in a report headed "Bloodstains and bloodstain patterns observed at the scene", concluded:

> "17.1 The mechanisms responsible for the deposition of these bloodstains, B1 to B7, when considered contextually, the bloodstains may have been created due to the following mechanisms and/or a combination thereof. Impact resulting from force applied to a blood source or sources, like wounds of the victim, expirated bloodstains when the victim exhaled blood from the victim's respiratory system (mouth and nose) during the incident, which resulted in blood being deposited onto the living room wall, or projected an object covered with the victim's blood, blood projected from an object in motion which resulted in blood being deposited onto living room wall.
>
> 17.2 Diluted bloodstains documented in bathroom, B8, B9, B10, may indicate the following. Area cleaned after blood-shedding events and/or blood was transferred from the soles of a shoe or shoes or other objects contaminated with blood, which resulted in blood being deposited or transferred onto bathroom floor and/or diluted blood accumulated on tile areas."

[25] DNA analysis was later conducted on the blood samples collected at the scene and the results revealed that the blood in question belonged to the two deceased.

[26] As regards the post-mortem report, in particular, Ms Dasi would have to have had direct knowledge (or received peculiarly accurate second-hand information) of the kinds of wounds sustained by the deceased for the narrative in her statement to accord in such significant detail with the post-mortem report. That report, supporting Ms Dasi's statement, concomitantly undergirds, to a large extent, Ms Dasi's version as it lends credence to her being at the scene during the alleged assault of the deceased and honestly and reliably having witnessed the events. In fact, Ms Dasi's statement is uncontroverted. The only respect in which the statement is not directly supported by other evidence is in identifying the applicant as present at the scene of the alleged crime. That appears to be the principal basis on which the first judgment holds that the applicant's conviction is legally unsound.

[27] As I understand it, the first judgment holds that Ms Dasi's statement has limited probative value that is confined to the fact that—

(a) the deceased was assaulted at the home of the applicant (corroborated by the forensic evidence); and
(b) that the deceased was assaulted with a golf club or similar blunt instrument (corroborated by the post-mortem report).

[28] The first judgment also holds that Ms Dasi's statement does not reliably prove that the applicant was the assailant; or that the applicant actively associated with other assailants in the assaults; or even reliably places the applicant at the scene of the assaults at the relevant time. It also finds that Ms Dasi's evidence is defective in a further respect, that her statement only accounts for a small portion of the time during which the deceased was away from home.

[29] In this approach, the first judgment impermissibly evaluates the probative value of the statement in a piecemeal fashion. It should instead apply a holistic approach, assessing whether on the whole the statement was of adequate probative value in light of all of the other circumstantial evidence taken together. Approached in this way, the outcome must be different.

The reason why the evidence is not being given by Ms Dasi

[30] The reason the State seeks to rely on the statement is because Ms Dasi sadly passed on before the trial commenced.

The prejudice occasioned to the accused

[31] The prejudice occasioned to the applicant as an accused person by the admission of the hearsay evidence is significant. The accused was deprived of an opportunity to cross-examine the witness, which could have shed light on the credibility and reliability of the witness, her powers of observation, and so forth.

[32] The Supreme Court of Appeal in *Ndhlovu* considered whether the admission of hearsay evidence in itself violates the constitutional right to challenge evidence as entrenched in section 35(3)(i) of the Constitution and, consequently, the right to a fair trial. The Court held that the criteria in section 3(1)(c) – which must be "interpreted in accordance with the values of the Constitution and the 'norms of the objective value system' it embodies" – protects against the unregulated admission of hearsay evidence and thereby sufficiently guards the rights of an accused.[16] The Supreme Court of Appeal emphasised:

> "The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of section 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to

[16] *Ndhlovu* above n **Error! Bookmark not defined.** at para 16.

> resist its admission and to scrutinise its probative value, including its reliability. The provisions enshrine these entitlements. But where the interests of justice, constitutionally measured, require that hearsay evidence be admitted, no constitutional right is infringed."[17]

[33] It bears emphasis that the fact that the evidence in question evidently strengthens the prosecution's case does not render the evidence prejudicial to an accused. In this regard, the Supreme Court of Appeal in *Ndhlovu* held:

> "The suggestion that the prejudice in question might include the disadvantage ensuing from the hearsay being accorded its just evidential weight once admitted must however be discountenanced. *A just verdict, based on evidence admitted because the interests of justice require it, cannot constitute 'prejudice'*. Where the interests of justice require the admission of hearsay, the resultant strengthening of the opposing case cannot count as prejudice for statutory purposes, since in weighing the interests of justice the court must already have concluded the reliability of the evidence is such that its admission is necessary and justified. If these requisites are fulfilled, the very fact that the hearsay justifiably strengthens the proponent's case warrants its admission, since its omission would run counter to the interests of justice."[18] (Emphasis added and footnotes omitted.)

[34] There can hardly be any doubt that the applicant is being substantially prejudiced by the admission of the statement as he is deprived of the opportunity to cross-examine the deponent. But that is not the only consideration – the Court must also consider the fact that the witness is deceased, and the overriding consideration of the interests of justice. Ultimately, the question is whether there are adequate pointers of truthfulness, reliability, and probative value for the statement to be admitted as evidence.

The interests of justice

[35] It is a well-established principle that a trial court's decision must be based on the totality of evidence available to the court.[19] In respect of the applicant's

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[17] Id at para 24.
[18] Id at para 50.
[19] In *S v Trainor* [2002] ZASCA 125; 2003 (1) SACR 35 (SCA) at para 9, Navsa JA said:

> "A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong."

conviction, the High Court reasoned, based on the section 220 admissions, the forensic evidence, Ms Dasi's statement, and Sergeant Msolo's testimony, that "there is no disputing that [the applicant's] house was the crime scene".[20] No direct inference can, however, be drawn between the crime scene at the applicant's house and his participation in the events that led to the death of the deceased. The High Court relied entirely on Ms Dasi's statement to place the applicant on the scene and to establish his involvement in the fatal assault. Ms Dasi's statement, therefore, plainly played a decisive role in the conviction of the applicant.

[36] On the indisputable or, at least, undisputed version advanced by the State:

(a) Prior to the incident in question, some of the applicant's possessions had gone missing, including his car radio.
(b) People who were apparently regarded as suspects in the disappearance of these items were being rounded up in the township – so too, the deceased, who was fetched at his house.
(c) The deceased was severely assaulted at the applicant's house.
(d) The deceased died, as a result of the assault, shortly after being returned to his grandmother's house.
(e) The statement of Ms Dasi not only places the applicant at the scene of the assault, but directly implicates him as one of the perpetrators of the severe assault upon the deceased.

[37] In the face of this damning prima facie evidence directly implicating him in the fatal assault on the deceased, the applicant elected to leave the evidence unanswered. That of course does not provide any corroboration of the State's case, nor does it attract an adverse inference for the applicant's case *qua* accused.[21] But it does leave the State's compelling case unanswered.

[38] I take the view that the impugned statement is reliable and is sufficiently corroborated by the circumstantial evidence. The State has established a strong prima facie case that the applicant was not only present at the scene where the deceased was severely assaulted, but that he actively participated in that assault by beating the deceased with a blunt object. The conviction is sound in law and the appeal against conviction ought to be dismissed.

[39] For these reasons, leave to appeal should be granted, but the appeal dismissed.

See further *Savoi* above n **Error! Bookmark not defined.** at para 55; *Doorewaard v S* [2020] ZASCA 155; 2021 (1) SACR 235 (SCA) at para 133; and *Maemu v S* [2011] ZASCA 175.

[20] *S v Kapa,* unreported judgment of the Western Cape Division of the High Court, Cape Town, Case No SS45/2017 (30 May 2018) at 60.

[21] *Osman* above n **Error! Bookmark not defined.** at para 22.

Order

[40] The following order is made:

1. Condonation is granted.
2. Leave to appeal is granted.
3. The appeal is dismissed.

2. The State v Samora Kansas Mashaba - Mpumalanga High Court (High Court Ref No: R29/2022 (Review Judgment) - Judgment on 8 December 2022

This case signifies the need to have well trained and experienced magistrates to preside in Family or Maintenance Courts.

Ratshibvumo J

[1]. This is a bizarre case in which a man who did not stand trial or face any charge, found himself being convicted and sentenced by a court of law. How this came about would be difficult to explain as there is not even a proper record of proceedings that captured the events of 22 July 2022 at Nkomazi District Court held at Komatipoort. The presiding Magistrate noted that the court recording machine was not operational that day. What is contained in the file falls short of long hand recording of the proceedings. The file content is referred to by the Magistrate as "a record reconstructed from the notes". There is no explanation as to why there was a need for the record to be reconstructed or who else took part in the reconstruction besides the magistrate herself.

[2]. What can be gleaned from the submitted "reconstructed record" is that the accused was summoned to appear in court on 22 July 2022 in order to face a charge of contravening section 31(1) of the Maintenance Act, no. 99 of 1998 (the Maintenance Act); following his failure to comply with an order made against him to make payments for maintenance of a child. Before this matter was called, the accused approached the Public Prosecutor and made arrangements that he would pay off the amount in arrears totalling R6 000.00 in two instalments of R3 000.00 each. The first payment was to be made later that day and another one to be made in September 2022, which was just over a month away. The Public Prosecutor was happy with this arrangement and called the case for a postponement to allow the accused to pay the maintenance arrears.

[3]. When the case was called, the Public Prosecutor informed the court of the arrangement he reached with the accused and requested it to confirm this and if he admitted that he owed R6 000.00 in arrears for maintenance of the child. In the process of asking this, things took an about turn when out of nowhere, the accused

suddenly heard the court pronounce that he was found guilty as charged and he was called upon to address it in mitigation.

[4]. When the Public Prosecutor was invited to address the court for sentencing purposes, he had no submissions to make. At this stage of proceedings, the Magistrate contemplated converting the “trial” into an inquiry in terms of section 41 of the Maintenance Act. She invited the Public Prosecutor to comment on this, but the offer was not accepted, as the State made no submission in this regard. The court then decided on its own to convert the proceedings into an inquiry as envisaged. For some unexplained reason, the accused was still sentenced with the “reconstructed record” reflecting, “see J15 for sentence.” I suppose the Magistrate meant J605 instead of J15.

[5]. The following is reflected as the sentence on J605: “Accused fined R6 000.00 (six thousand rand) or 6 (six) months imprisonment. [Sentence amended in terms of S 298 of CPA 51/1977]. Matter converted to a Maintenance Court in terms of S 41 of the Maintenance Act 99/1996 (sic). Arrears deferred: R2 000.00 on the 29/07/2022 and R4 000.00 on/before 29/09/2022.”

[6]. After reading this inscription several times, I still struggle to understand the sentence imposed on the accused. Is the fine of R6 000.00 the outcome of the sentence after it was amended in terms of section 298 of Act 51 of 1977? If not, what is the amended sentence? I can only wonder if the clerks of the court who had to implement this, understood it any better. It seems the Magistrate realised after imposing the sentence that after the conversion of a “trial,” the accused should not have been sentenced. She may have decided to order the accused to rather pay the maintenance arrears instead. The inscription does not reflect this though, I merely make presumption from the words, “arrears deferred.” It is not clear as to whether the order to pay the arrears amount is over and above the fine or it was meant to be the new sentence she referred to when she wrote, “see J15 for sentence”. But surely an order to pay the arrears amount cannot be construed to be a sentence.

[7]. Of importance though is that the Magistrate decided to have the matter sent on special review. This must have been in terms of section 303(4) of the Criminal Procedure Act, no. 51 of 1977. The covering letter thereof is dated 25 July 2022. It is not clear as to what caused her to submit the matter on review or whether her hand was forced by any other person. She however raised a query as to whether it was procedurally correct for an accused to be convicted through merely admitting the elements of a crime without the State putting a charge against him and without affording him a chance to plead. In conclusion, she concedes by remarking that the proceedings were not in accordance with the law. She only fell short of asking that they should be set aside.

[8]. Office of the Director of Public Prosecutions (the DPP) Mpumalanga, was requested to opine on the proceedings and the query raised by the Magistrate. The Court is indebted to Adv Mpolweni, the Deputy Director of Public Prosecutions who together with Adv Lusenga, submitted comprehensive views. This judgment acquired its shape from their profound submissions. It suffices for present purposes to state that the DPP agrees that the proceedings were not in accordance with justice and that they should be set aside.

[9]. It is important to note that the DPP understood the sentence that was imposed as "a fine of R6 000.00 or six months' imprisonment." This conclusion was reached by the DPP without any trouble involving the interpretation reflected in paragraph 6 above. This amplifies my worry on how the Clerk of the Court understood the sentence to be.

[10]. Some of the basic rights enshrined in our Constitution are contained in section 35 which provides, "Every accused person has a right to a fair trial, which includes the right, To be informed of the charge with sufficient detail to answer it. To have adequate time and facilities to prepare a defence. To adduce and challenge evidence."

[11]. These basic rights need to be read alongside the provisions of section 105 of the Criminal Procedure Act, which provides,
"105 Accused to plead to charge
The charge shall be put to the accused by the prosecutor before the trial of the accused is commenced, and the accused shall, subject to the provisions of sections 77, 85 and 105A, be required by the court forthwith to plead thereto in accordance with section 106."

[12]. When a criminal trial does not commence through the charge(s) being put to the accused and affording him an opportunity to plead thereto, everything that follows is not a trial in term of the laws of the country. A trial that is not preceded by a charge being put and the accused pleading is a mistrial, a gross irregularity and a misdirection on the part of the presiding officer. It is this misdirection that invites interference by the Review Court without any further consideration.

[13]. In *S v Gumbi and Others 2018 (2) SACR 676* at para10, Ponnan JA said,
"In terms of s 105 the charge must be put to an accused by the prosecutor before the trial is commenced. As soon as the charge is put to an accused he or she must plead to it. The plea determines the ambit of the dispute between the accused and the prosecution. It is only after the accused has pleaded to the charge that the lis is established between the accused and the prosecution. It is the function of the prosecuting authority, not the court, to decide the charges upon which an accused should be brought to trial and the function in that regard extends up to the time when

a plea is tendered and the decision has to be made whether the plea is to be accepted or not."

[14]. Ponnan JA also referred with approval to *S v Mamase and Others 2010(1) SACR 121 (SCA)* at para 7 where the Supreme Court of Appeal said,
"At the time that the issue was raised and decided in the court below the appellants had not been asked to plead. Thus there was no plea in terms of s 106(1)(f) of the CPA that raised the absence or presence of jurisdiction as a justiciable issue for decision. A plea in criminal proceedings is peremptory in terms of s 105 and it is done in terms of s 106(1) and (2). It is therefore clear that the point that was decided was not an objection to the indictment, was not a reservation of a question of law and was not a plea of lack of jurisdiction."

[15]. It is clear from the above that the proceedings were irregular and should be set aside. I have also noted that the State did not take part in the prosecution and the conviction of the accused which appear to have come from one source being the court. In so doing, the Magistrate failed to promote the judicial independence which stems from the separation of powers, with the prosecution authority on one side and the judicial one on the other. The Magistrate also failed to protect the accused's constitutional rights in this matter. She could have simply refused a request for a postponement if the that did not appeal to her. This would have afforded the State an opportunity to choose between withdrawing the charges or commencing with the trial through putting the charges against the accused.

[16]. The last issue of some great concern to the court was not raised in the special review. It is with regard to the passing of the sentence even after the trial was converted into an inquiry in terms of section 41 of the Maintenance Act. The said section provides as follows,
"41. Conversion of criminal proceedings into maintenance enquiry. If during the course of any proceedings in a magistrate's court in respect of- (a) an offence referred to in section 31(1); … it appears on good cause shown that it is desirable that a maintenance enquiry be held, the court may, of its own accord or at the request of the public prosecutor, convert the proceedings into such enquiry."

[17]. The enquiry referred to above would be as provided in section 10 of the Maintenance Act. The kind of orders that the court can issue are to be found under section 16 of the same Act. A sentence can only be imposed after a criminal trial and not after an enquiry. It was another misdirection on the part of the Magistrate to impose a sentence after the conversion of the "trial" into an enquiry.

[18]. This is one of the cases that expose the need for continuous peer training on the part of the judiciary. Mistakes such as this have a potential to bring the judiciary into disrepute and can cause grave injustice to members of the public with serious repercussions to judicial officers, including but not limited to being sued. It is

incumbent upon members of the judiciary to always remember the oath of office we took, in which we swore to protect every citizen's rights enshrined in the Constitution and apply justice to all without fear, favour and prejudice. Every case we handle in court should be accorded the necessary weight because while it may appear to be a trivial matter in our view, it could mean everything to the litigants appearing before us.

[19]. I suppose this case also signifies the need to have well trained and experienced magistrates to preside in Family or Maintenance Courts. For too long, these courts have been neglected alongside the Traffic Courts as courts where only the inexperienced magistrates would be allocated to work. It is in these courts where persons of various classes of our community, some of whom, very popular often appear. Unless this trend is changed, the embarrassment that flows from the inaction could just be beginning. I will refer this matter to the Chief Magistrate, Mpumalanga so that she is able to identify the areas of need when it comes to training of judicial officers including but not limited the one who presided over this case.

[20]. I therefore propose the following order.
[20.1] The conviction and sentence are set aside.
[20.2] The Registrar should make a copy of this judgment available to the Chief Magistrate, Mpumalanga.

From The Legal Journals

Kruger, H

The invisible children – protecting the right to birth registration in South Africa.

Journal for Juridical Science 2022:47(2):55-87

Abstract
Birth registration is fundamentally important for the protection of the rights of children. It is the key that unlocks their fundamental rights. Children without birth certificates can be regarded as "invisible". Given the importance of birth registration, the United Nations Children's Fund set a target to achieve universal birth registration (i.e., birth registration for all children) by 2030. This target flows from the adoption of the

Sustainable Development Goals (SDGs) by the United Nations General Assembly in 2015. The SDGs includes a dedicated target in goal 16 to provide a legal identity for all, including birth registration, by 2030. South Africa's birth registration rate has remained stagnant at 88.6 per cent from 2011 to 2016. (This figure will be reviewed when the Census 2022 data becomes available.) Although South Africa's birth registration rate is higher compared to some other countries in Africa, it still falls short of the UNICEF target of universal birth registration. This article centres around the overarching question as to whether the legislative framework for birth registration in South Africa is optimal for achieving the UNICEF target of universal birth registration by 2030. It starts off with an investigation of the causes of low birth registration rates and the concomitant classes of children who are vulnerable to low birth-registration rates. Next, the importance of birth registration and the devastating consequences of failure to obtain a birth certificate are considered. This is followed by a review of the relevant provisions of international human rights instruments and the Constitution of the Republic of South Africa, 1996. Next, the legal framework, particularly the Births and Deaths Registration Act 51 of 1992 and its regulations are critically analysed, with a view to identifying inadequacies in legislation, improper implementation of legislation, and failure to remove limitations and barriers to birth registration. Finally, recommendations are made for law and policy reforms to remedy these shortfalls.

This article can be accessed here:
https://journals.ufs.ac.za/index.php/jjs/article/view/6916/4599

Marais, E J

Considering the boundaries of possessory protection in the context of incorporeals – should the *mandament van spolie* protect access to an email address? Critical reflections on Blendrite (Pty) Ltd and Another v Moonisami and Another 2021 5 SA 61 (SCA).

Journal for Juridical Science 2022:47(2):26-54

Abstract
The case under discussion considers whether the mandament van spolie (mandament) may be used to protect access to a director's company email address. The Supreme Court of Appeal confirmed that the mandament only protects the quasi-possession of rights linked to tangible things, particularly land. Absent this link, the quasi-possession simply does not qualify for possessory protection. As the first respondent's access to his email address was not linked to the use and enjoyment of a tangible thing, the appeal was upheld. The outcome of the judgment cannot be faulted, as it accords with previous case law on quasi-possession, as well as with the views of scholars. Nonetheless, it raises an interesting question, namely whether the thing-oriented nature of protection under the mandament is desirable. Reason being

that the range and value ofals unrelated to tangible things are increasing at an astonishing rate. This article analyses whether the mandament should perhaps be available to protect the quasi-possession of these interests from two perspectives, namely the nature and purpose of possessory protection and a systemic constitutional approach towards remedies. The first shows that the thing-oriented nature of possessory protection comes from Roman law and is thus unsurprising. Yet, Radin's personhood theory draws this nature into question. According to her, property enables persons to attain human flourishing, and it thus enjoys protection in constitutional law. The fact that an email address, which is most probably constitutional property, promotes human flourishing suggests that access to this interest is worthy of protection. Whether the mandament is the appropriate remedy to offer such protection is then considered in terms of a systemic constitutional approach towards remedies. This approach, which flows from the single-system-of-law principle, indicates that the remedy should not be extended to the quasi-possession of incorporeals unrelated to tangibles if such quasi-possession enjoys protection under remedies that are analogous to the mandament. One such remedy seems to be sec. 163 of the Companies Act 71 of 2008, which was arguably available to the first respondent and could have restored access to his email address. Access to an email address might even enjoy protection by way of specific performance in contract law, especially when obtained by way of an urgent interdict. These reasons, which the Supreme Court of Appeal did not consider, support the outcome of the case and the decision is, therefore, welcomed.

This article can be accessed here:
https://journals.ufs.ac.za/index.php/jjs/article/view/6915/4598

Wessels, B

Policy Considerations that Could Justify the Enactment of a Crime Victim Compensation Fund in South Africa.

PER / PELJ 2022(25)

Abstract
It may be argued that the current legal position relating to crime victim compensation is unsatisfactory. It should therefore be asked whether there is a potential alternative for crime victim compensation. Many foreign jurisdictions have elected to enact a statutory compensation fund. In its report on the viability of enacting a similar type of fund for crime victims in South Africa, the South African Law Reform Commission stated that a justification for the establishment of a statutory crime victim compensation fund in South Africa remains absent. This article focusses on the justification issue. To determine whether a fund could be established in the South African context the following two-step approach has been outlined. First, a general theoretical framework must be advanced based on which future statutory reform of the law of delict may be justified. Elsewhere I have already done this by identifying

policy considerations which the legislature has used to reform specific areas in the law of delict. These considerations include the risk of harm and the concomitant risk of receiving no compensation if the risk of harm materialises; the promotion of the right to social security and the evidentiary difficulties associated with proving fault (in the form of negligence). The second step towards justification is to establish whether these considerations could also justify the proposed development of the law through the enactment of a crime victim compensation scheme in South Africa.

This article can be accessed here:
https://perjournal.co.za/article/view/14262/19536

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

Contributions from the Law School

Does the Unlawful Entry on Premises Bill trespass on homeowners' rights?

There is a clear stated objective of ridding our statute book of any legislation passed in the apartheid era which, even though it may not be 'overtly unconstitutional, unjust or anti-democratic', suffers from the taint of being associated with the discriminatory laws of this period. Amongst the laws identified in this regard is the Trespass Act 6 of 1959. The Department of Justice and Constitutional Development has drafted a bill to repeal and replace this Act, the Unlawful Entering on Premises Bill, 2022. As Minister of Justice and Constitutional Development Lamola has stated in respect of such laws which are not constitutionally offensive in terms of their provisions, but suffer from the apartheid taint, 'great care should be taken to ensure that the abrogation of these statutes does not leave or create a lacuna in the law'. When the provisions of the Bill came to the public attention, there was widespread concern that the Bill would undermine private property rights. This short piece, written in the style of Glanville Williams's textbook as a series of questions and answers, addresses some of the perceptions relating to the Bill.

The Bill, like the 1959 Trespass Act, will also prohibit unlawful entry on premises. But does it have a different purpose to the Act? The rationale for the new legislation is to replace the existing colonial/apartheid era legislation, but it also provides a more extensive legal framework with regard to unlawful entry, compared to the existing Act. There are certain places and persons (such as labour tenants, and occupiers in terms of the Extension of Security of Tenure Act) excluded from the operation of the Bill (see cl 2).

But the Bill has created a great deal of debate amongst South Africans, some of whom believe that given the country's crime-ridden state, the Bill, if passed, will exacerbate the crime situation. Can you explain further? The Bill says that if someone unlawfully gains entry to an enclosed property without permission from the property owner or lawful occupier they are guilty of an offence? Not just an enclosed property, the Bill includes land of any description, and also anything on the land - any building or structure or vehicle or vessel or aircraft or caravan or trailer or even a 'sheet of water' - all these and others are defined as 'premises' for the purpose of the Bill - this certainly expands the existing Act's protection against unlawful intrusion.

And someone caught on or in a premises without the explicit or implied consent of the owner is presumed to be trespassing? 'Unlawful entry' is committed by unlawful entry into or onto a premises - there is an evidential presumption that any person who is not a lawful occupier or employee of a lawful occupier, who does not have permission/consent of the lawful occupier (not necessarily the owner) to be there has entered unlawfully (see cl 3(2)).

And now property owners need to give notice – either by putting up clear signage or giving an oral warning to the perpetrator – that indicates that entry is prohibited?
There seems to be some confusion around this aspect - the issue of notice arises in the context of 'limited permission' to be on premises - that where there is a notice that a particular activity is prohibited on a premises then entry for all other activities is allowed, and vice versa (see cl 4). The Bill then sets out the methods of giving notice (see cl 5), and enforces the importance of respecting such notice by creating an offence relating to removal, altering or damage of such notice in the form of a sign (see cl 6). But as stated earlier, the offence of unlawful entry itself (set out in cl 3(1)) is not defined in terms of disobeying a notice, it is simply defined in terms of unlawfully entering a premises, which is any entry without the expressed or implied permission by a lawful occupier. The Bill does not require every house to now have a notice prohibiting entry. Neither is an oral (or written) warning a requirement in the offence, simply that there has been an unlawful entry (without permission) into/onto the premises. It does not matter for the purposes of liability under the Bill whether the intruder, after unlawful entry, occupies the premises (see cl 2(1)).
Where an oral (or written) warning comes in is where a person has been told to leave the premises by a lawful occupier or other authorised person, and doesn't leave as soon as practicable (or leaves and returns). If this occurs, then the offence of

unlawful entry is (also) committed (see cl 3(3)). It may also be that someone comes onto/into premises (e.g. land or buildings) without permission (i.e. unlawfully) whether intentionally or unintentionally - then the lawful occupier/authorised person is required to tell the intruder to leave immediately, and if the intruder fails to do so he has committed the offence of unlawful entry. The lawful occupier/authorised person is then required to notify the police (see cl 7), who must remove the intruder(s). This is another aspect of the Bill - the duty on police to act - which is not in the existing Act. As regards the police role as set out in the Bill, it is clear that the Bill envisages police intervention in the context of illegal land invasion (see cl 8).

But trespassers can defend against the charge if there is a reasonable belief that they have title or interest on the premises that entitles them to enter the property? In the existing Act the trespass offence is committed if someone has 'lawful reason' to be there. The same applies in the Bill, but there is also the provision that the offence is not committed if there is a reasonable belief that they are acting lawfully in coming into/onto the premises (see cl 9 - this would also be the case in terms of the existing Act, but the Bill makes it explicit). What this provision indicates is that you can't be held liable for the unlawful entry offence if you genuinely and reasonably believe that you are entitled to be there.
However, even if the intruder's belief is reasonable, and he is ultimately acquitted on the basis of lack of intention, this does not mean that his entry is lawful. It can't be lawful without the lawful occupier's permission, whatever the intruder thinks he is entitled to do. And a lawful occupier is entitled to defend his/her interests against an unlawful infringement (provided the requirements of the justification ground of private defence are met). Also, this proposed statutory defence (found in cl 9) only applies to someone who either unlawfully enters premises or is found on or in premises without permission to be there. The Bill specifically does not provide that this defence of reasonable mistake applies where someone has been told to leave the premises by a lawful occupier/authorised person, and he does not do so (see cl 3(4)). If the lawful occupier instructs an intruder to leave, what basis is there to claim that he thought that he was entitled to stay?

But in the Bill it is presumed that access to the door of the property is not prohibited if you've provided the means to access it? This would typically relate to the situation where a business provides a means of access to customers/clients - this would be 'access for lawful purposes' (see cl 3(5)). However, it would be open to the lawful occupier to counteract this presumption by means of a notice restricting lawful access or by means of an instruction to someone to leave the premises. Permission to be on premises, once granted, can also be withdrawn.

If someone is found guilty of trespassing, they could face a fine, up to two years in prison, or both? This penalty(found in cl 10) is the same punishment as in existing Act, which shows continuity with regard to the perception of the seriousness of the trespass between the Act and its proposed successor some 63 years later.

Some have interpreted the Bill as the government putting the lives of South Africans at risk and deemed it as 'ludicrous'. Is this a misinterpretation? Yes. In fact, the Bill extends the protection against unlawful entry by widening the understanding of 'premises' (no longer just land or buildings as in the existing Act) and by explicitly placing a duty on police to respond in cases of unlawful intrusion. Further, the Bill continues to criminalise the same conduct as in the existing Act: unlawfully entering, or unlawfully being present/remaining. There seems to be a misunderstanding that the Bill will restrict people's rights to defend against unlawful intrusion onto their property. This is not the case. The right to defend your property against unlawful intrusion is still available (provided all the requirements for private defence have been met). Nothing in the Bill undermines this right.

What will this proposed law mean for ordinary citizens? Does it pertain to any home invasion, including by potential robbers? Could this affect people's rights to defend their property and lives in the event of a criminal attack, as many have interpreted? Again, there is nothing in the Bill that in any way dilutes the right to defend yourself, or your family, or your property. This right is still intact and could certainly be relied on wherever someone unlawfully enters your property, all the more so where the intrusion is with the goal of committing violent crime. The right to self-defence is deeply entrenched in our law, as was stated by Judge Chaskalson in the case of *Makwanyane* 1995 (2) SACR 1 (CC) at par 138: 'To deny the innocent person the right to act in self-defence would deny to that individual his or her right to life.'

Shannon Hoctor
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Matters of Interest to Magistrates

Zuma's private prosecution of Ramaphosa raises red flags about abuse of judicial process

Prof Pierre de Vos

The attempt by Jacob Zuma to privately prosecute Cyril Ramaphosa for failing to interfere in an internal National Prosecuting Authority matter raises broader questions about the potential abuse of private prosecutions by politically powerful or wealthy individuals.

As former president Jacob Zuma and his supporters have often pointed out, a decision to charge and prosecute an individual may cause serious harm, including to the reputation of the accused person.

If the accused is not a wealthy person and does not have access to unlimited funds from other sources to defend him or herself, they may also be financially ruined by the prosecution. Even if the case is later dropped, or if the accused is ultimately acquitted, it will not undo some of the harm caused.

The problem is well illustrated by the facts of the case of *Nundalal v Director of Public Prosecutions KZN and Others* (in a judgment of a full bench of the KwaZulu-Natal High Court).

In this case, Mr Nundalal was being privately prosecuted by a certain Mr Singh on charges of defeating the ends of justice and making a false statement. Seemingly, Mr Singh, a wealthy businessman, was using the private prosecution to avenge a previous court loss against the impecunious Mr Nundalal. The high court took a dim view of this abuse of the private prosecution process in the following terms:

Dragging the applicant, a man who cannot afford to pay his legal costs, through years of litigation, at costs to time, energy, expenses and most importantly, state resources are disproportionate to the alleged offences… Disappointingly his legal team has not dissuaded him from persisting with this debilitating exercise. Indulging the private prosecutor because he has the means to litigate is grossly unfair and disproportionate to its impact on the public purse, the allocation of state resources and the administration of justice.

Because decisions to prosecute or not to prosecute are open to abuse, the South African Constitution establishes an independent National Prosecuting Authority (NPA), and requires prosecutors to make decisions to prosecute or not to prosecute without fear, favour or prejudice, and in accordance with lawfully adopted policy directives, including a prosecution policy.

The current prosecution policy requires prosecutors to act in good faith when they make prosecutorial decisions, and reminds prosecutors that decisions whether or not to prosecute should "be taken with care, because it may have profound consequences for victims, witnesses, accused and their families".

As the policy makes clear, a decision to prosecute should only be taken if "there is sufficient and admissible evidence to provide a reasonable prospect of a successful prosecution".

Section 179(5)(d) of the Constitution provides a further safeguard against abuse, by allowing the National Director of Public Prosecutions (NDPP) to review a decision to prosecute or not to prosecute after taking representations from the accused person, the complainant, or any other relevant person. (Of course, if the NDPP is not independent or honest, this provision can also be abused to facilitate political interference in decisions to prosecute or not to prosecute – as happened when the then acting NDPP dropped charges against Jacob Zuma back in 2009.)

The Constitutional Court explained in *Corruption Watch NPC v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC* that the independence of the NPA was pivotal in upholding the rule of law, pointing out that many criminals – especially those holding positions of influence – will rarely, if ever, answer for their criminal deeds, if the prosecuting authority is "malleable, corrupt or dysfunctional".

There is also the danger that functionaries within that prosecuting authority would be unlawfully "pressured into pursuing prosecutions to advance a political agenda".

While the NPA showed worrying signs of malleability, corruptibility and dysfunction during the Zuma years, unconstitutional and unlawful interference in its affairs preceded the election of Zuma as president of the country. The most glaring example was the decision of then president Thabo Mbeki to suspend Vusi Pikoli as NDPP after Pikoli decided to proceed with the arrest of the then police commissioner, Jackie Selebi, and to prosecute Selebi on corruption charges.

To make matters worse, president Kgalema Motlanthe subsequently decided to remove Pikoli from office (a decision that was almost certainly unconstitutional and invalid), despite the fact that Pikoli had done nothing to warrant such a removal.

But even at its most malleable, the NPA seldom instituted prosecutions for actions that do not constitute criminal offences, or where there was not sufficient evidence to provide a reasonable prospect of a successful prosecution.

Notably, in the many, many, legal challenges brought by Zuma to delay or end his own prosecution, he has never made a serious attempt to show that insufficient evidence exists to meet the "reasonable prospect of success" standard for prosecution.

But as the attempt by Zuma to prosecute Ramaphosa illustrates, private persons can also abuse the criminal justice system to advance a political agenda or their own personal or financial interests by launching a spurious private prosecution. Worryingly, in the case of private prosecutions, there are fewer safeguards in place to protect ordinary citizens from such abuses.

As I have pointed out before, on paper section 7 of the Criminal Procedure Act only allows for the private prosecution of individuals in narrowly defined circumstances. But in practice, these restrictions may not prevent the abuse of the system as intended.

First, while a private prosecution can only proceed once the NPA has refused to prosecute and has issued a *nolle prosequi* certificate, such a certificate does no more than simply confirm that the NPA had declined to prosecute the individual.

While our law is not entirely clear on this point, the NPA may believe that it is obliged to issue such a certificate when it declines to prosecute – even when the impugned act does not constitute a criminal offence, and even if there is no or little evidence to link the investigated individual to the alleged crime. (This is so despite the fact that a single judge held in *Singh v Minister Of Justice And Constitutional Development And Another* that the prosecuting authority is not obliged by the provisions of s 7(2) to issue a certificate.)

Ramaphosa's case illustrates why the NPA should not issue *nolle prosequi* certificates in cases where the alleged acts do not constitute a criminal offence. Recall that Zuma is attempting to prosecute Ramaphosa for *not* committing a criminal offence as he is claiming to want to prosecute Ramaphosa for failing to launch an inquiry into the conduct of the NPA and of Billy Downer. This is despite the fact that the National Prosecuting Authority Act prohibits such interference.

While the act does allow the president to establish an inquiry into the fitness of the NDPP to hold office, launching any other inquiry would amount to improper interference with the carrying out or performance of its powers, duties and functions. Section 32(1)(b), read with section 41(1), makes it clear that this would constitute a criminal offence.

Second, as Professor Jamil Mujuzi pointed out in an article titled "*The history and nature of the right to institute a private prosecution in South Africa",* at present the Criminal Procedure Act "does not require that a private prosecutor should have a prima facie case against the accused before he may institute a private prosecution, and the high court has not questioned this position".

In fact, in *Solomon v Magistrate, Pretoria* 1950 (3) SA 603 (T), the court suggested that the legislature "must have contemplated that private prosecutors might in many cases have weak grounds for prosecution". This means that an individual may be subjected to a private prosecution even if there is little or no evidence to show that the accused committed a crime.

Third, the Criminal Procedure Act does not prescribe the form of summons for a private prosecution. However, as the high court noted in *Nundalal* (in theory at least), the clerk who issues a summons "must be satisfied that the private prosecutor complies with the requirement in s 7(1)(a) [of the Act] in that he has some substantial and peculiar interest in the trial and the personal injury he suffered arising from the commission of the offence which he seeks to prosecute".

This requirement does provide some protection against abuse, but as the court noted in *Nundalal,* clerks have a "low-level discretion" when issuing a summons, which

means that a summons may well be issued even when these requirements of section 7(1)(a) are clearly not met.

Last, it is at best unclear whether the accused person has a right to make representations before a private prosecution is instituted against them.

A person facing a frivolous or vexatious private prosecution has two options to limit the harm caused by such a prosecution.

First, when the accused is asked to plead, he or she could challenge the prosecutor's title to prosecute on the grounds that a valid a *nolle prosequi* certificate was not issued, or that the private prosecutor did not have some substantial and peculiar interest in the trial and had not suffered a personal injury because of the alleged crime.

Second, he or she could approach the court for an interdict to stop the unlawful prosecution – as Ramaphosa did. The second option may not be available to individuals with limited funds to pay for legal representation.

But as I pointed out earlier, these options may only partially undo the harm caused by a frivolous or vexatious private prosecution.

One way to address this problem would be to require the private prosecutor to obtain permission from the high court before a summons could be issued. As Mujuzi points out, this used to be the position in South Africa before the legislature intervened, as a private prosecution could only be instituted once the high court had established that the private prosecutor had a prima facie case against the accused.

I would add additional requirements, namely that the court must not issue permission if, in its view, the prosecution is frivolous, vexatious, or brought with an ulterior purpose.

Sadly, even if the law is amended as suggested, unscrupulous private parties and their unscrupulous lawyers may still try to abuse the system by approaching the court for permission to pursue a private prosecution against a political opponent or financial rival, despite the fact that they know that there is no prospect that such permission would be granted.

(The above post was posted on the *Constitutionally Speaking Blog* of Prof Pierre De Vos on 19 January 2023.)

A Last Thought

[11] The importance and necessity of the record of the proceedings in a trial court being available on appeal was also succinctly dealt with by the Supreme Court of Appeal in the decision of *S v Chabedi* 2005 (1) SACR 415 (SCA) paras 5-6, where Brand JA held the following:

'On appeal, the record of the proceedings in the trial court is of cardinal importance. After all, that record forms the whole basis of the rehearing by the Court of appeal. If the record is inadequate for a proper consideration of the appeal, it will, as a rule, lead to the conviction and sentence being set aside. However. the requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect recordal of everything that was said at the trial. As has been pointed out in previous cases, records of proceedings are often still kept by hand, in which event a verbatim record is impossible...

The question whether defects in a record are so serious that a proper consideration of the appeal is not possible, cannot be answered in the abstract. It depends, *inter a/ia,* on the nature of the defects in the particular record and on the nature of the issues to be decided on appeal.'

[12] In *S v Schoombee and Another* 2017 (2) SACR 1 (CC), the Constitutional Court had to consider whether the right of an accused person to participate in a reconstruction process was part and parcel of his rights to a fair appeal. In this matter, the appellants had not participated in the reconstruction process and the reconstruction was based solely on the trial judge's notes. At paragraph 19, the Constitutional Court once again emphasised that it was:

'...long established in our criminal jurisprudence that an accused's right to a fair trial encompasses the right to appeal. An adequate record of trial court proceedings is a key component of this right. When a record "is inadequate for a proper consideration of an appeal, it will, as a rule, lead to the conviction and sentence being set aside"'.

At paragraph 20, the court held:

'If a trial record goes missing, the presiding court may seek to reconstruct the record. The reconstruction itself is "part and parcel of the fair trial process".'

Further, at paragraph 21, the court held:

'The obligation to conduct a reconstruction does not fall entirely on the court. The convicted accused shares the duty. When a trial record is inadequate, "both the State and the appellant have a duty to try and reconstruct the record". While the trial court is required to furnish a copy of the record, the appellant or his/her legal representative "carries the final responsibility to ensure that the appeal record is in order". At the same time, a reviewing court is obliged to ensure that an accused is guaranteed the right to a fair trial, including an adequate record on appeal, particularly where an irregularity is apparent.' (Footnotes omitted.)

Per Henriques J in Shangase v S (AR400/2019) [2023] ZAKZPHC 8 (27 January 2023)