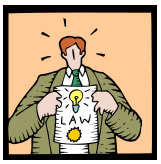
e-MANTSHI

A KZNJETCOM Newsletter

July 2016: Issue 122

Welcome to the hundredth and twenty 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 now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. In terms of the section 23 of the Judicial matters amendment Act,2015 (Act 24 of 2015) the President has fixed 1 August 2016 as the date on which sections 5,12,13,17,and 18 will come into operation. The notice to this effect has been published in Government Gazette no 40176 dated 29 July 2016. None of the sections put into operation will have any direct effect on the magistrate courts.

2. The Department of Justice and Constitutional Development invites interested parties to submit written comments on a proposed draft Criminal Procedure Amendment Bill. The comments on the draft Bill must be submitted not later than **15 August 2016**, marked for the attention of Mr H du Preez, and —

   (a) If they are forwarded by post, be addressed to —
   The Director-General: Justice and Constitutional Development
   Private Bag X 81
   Pretoria
   0001

(b) If they are delivered by hand, be delivered at —
Salu Building, Room 2333
315 Thabo Sehume Street
Pretoria
(c) If they are submitted by email, be emailed to HduPreez@justice.gov.za
(d) If they are faxed, be faxed to 086 649 6582

BACKGROUND NOTE

The following background information is hereby furnished in order to assist interested parties to comment on the draft Amendment Bill.

2.1 On 26 June 2015, the Constitutional Court in the *De Vos* case declared section 77(6)*(a)*(i) of the Criminal Procedure Act, 51 of 1977 ("the CPA"), to be inconsistent with the Constitution and invalid to the extent that it provides for—
(a) compulsory imprisonment of an adult accused person; and
(b) compulsory hospitalisation or imprisonment of children.

2.2 The draft Amendment Bill aims to amend section 77(6)*(a)*(i) so as to provide the court with a discretion to order that accused concerned be detained in a—
(aa) psychiatric hospital; or
(bb) single cell or correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to him- or herself or to members of the public or to any property belonging to him or her or any other person; pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;
(cc) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002; or
(dd) be released subject to such conditions as the court considers appropriate.

2.3 The proposed amendment of section 77(6)*(a)*(ii) aims to provide the court with a discretion, where the court finds that the accused has committed an offence other than, among others, one involving serious violence or that he or she has not committed any offence, to order that the person concerned -
(aa) be admitted to and detained in an institution stated in the order as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;
(bb) be released subject to such conditions as the court considers appropriate; or
(cc) be released unconditionally, where the court has found that the accused has not committed any offence and deems it appropriate to do so.

2.4 The case of *S v Pedro* largely dealt with the correct interpretation of section 79(1)(b) insofar as it relates to the composition of the psychiatric panels. Section 79(1) of the CPA deals with the constitution of the panels for purposes of the

sections 77 and 78 reports to be prepared for the court. Section 79(1)*(b)* provides that where the accused is charged with, among others, murder or culpable homicide or another charge involving serious violence, the panel concerned must consist of

(a) medical superintendent of a psychiatric hospital designated by the court, or by a psychiatrist appointed by the medical superintendent at the request of the court;

(b) a psychiatrist appointed by the court and who is not in the full-time service of the State unless the court directs otherwise, upon application of the prosecutor, in accordance with directives that have been issued by the National Director of Public Prosecutions;

(c) a psychiatrist appointed for the accused by the court; and

(d) a clinical psychologist where the court so directs.

2.5 The court gave a clear and unambiguous interpretation of how section 79(1)*(b)* should be read in order to ensure that the psychiatric panels are properly constituted. The decision was made to include the proposed amendments in the draft Amendment Bill in an attempt to promote legal certainty throughout the country.

Recent Court Cases

1. **S v SEEMELA 2016 (2) SACR 125 (SCA)**

Presiding officers should baulk at relying on uncorroborated hearsay evidence to convict an accused unless there were compelling justifications for doing so.

The appellant was convicted in the High Court on two counts of murder and sentenced to life imprisonment on each count. Both offences were alleged to have been committed on the same day in 1998, but the trial commenced 12 years later, in 2010. In the interim, several crucial state witnesses had died. The deceased in the second count (deceased No 2) was a woman with whom the appellant had had a relationship, and the deceased in the first count (deceased No 1) was a man with whom the second deceased had since embarked on a relationship. Both deceased were alleged to have been shot by the appellant in separate incidents on the same day, and both were admitted to hospital. Deceased No 2 died some 10 months after the shooting and deceased No 1 some 3 months after the shooting.

At the trial, during the course of the evidence of the investigating officer, the state applied for various statements to be admitted into evidence in terms of s 3(1)*(c)* of the Law of Evidence Amendment Act 45 of 1988 (the Act). These comprised statements made by both deceased, as well as statements by three other witnesses who identified the appellant as having fired the shot at deceased No 2. The police officer who took down one of those statements was not called by the state to testify.
A medico legal postmortem report, compiled by a state pathologist and admitted by the defence in terms of s 220 of the Criminal Procedure Act 51 of 1977, recorded the cause of deceased No 2's death as 'septicemia', disseminated intravascular coagulopathy'. The pathologist was not called as a witness, nor was a professor in forensic pathology who had prepared a report at the request of the Director of Public Prosecutions. When the state counsel intimated that the professor would be called, the trial judge made it plain that his testimony was not required and swept aside protestations by the appellant's counsel, who wanted to question him on a number of issues arising from his report. The report — which was admitted into evidence without further ado — was sharply critical of the state pathologist for not having conducted a proper postmortem examination and having contented himself with an external examination of the deceased's body. The professor stated that:
'Although the terminal mechanism of death was that of septicemia with disseminated intravascular coagulopathy, due to underlying infection (pressure sores and/or renal tract infection), there is little doubt that the primary medical cause of death (being the gunshot injury), should also be incorporated in the final formulation of the cause of death. Unfortunately, the autopsy report makes no specific mention of external injuries or scars, suggestive of prior gunshot injury. It is therefore essential, that due cognizance be taken of the clinical history pertaining to this patient — the latter having been reasonably well documented.'

Held, that judges should baulk at relying on uncorroborated hearsay evidence to convict unless there were compelling justifications for doing so. In the present case the trial judge did not manifest sufficient awareness of the perils of relying solely on the evidence of deceased No 1 to found a conviction on count 1, and accordingly the conviction and sentence on that count fell to be set aside. (Paragraph [14] at 133*j* – 134*b*.)

Held, further, that if the state relied on the provisions of s 3(1)*(c)* for the admission of an otherwise hearsay statement into evidence but did not call as a witness the person who took the statement, the statement could not be admitted into evidence. (Paragraph [16] at 134*g* – 135*e*.)

Held, further, that it was inexplicable why the trial judge thought that it was not necessary for the professor to testify, and that he ought, in the circumstances, to have entertained grave doubt as to whether the wounding of deceased No 2 was the juridical cause of her death. Although the gunshot wound was an indispensable precondition to her death, the conviction of murder had to be changed to one of

attempted murder. The sentence was correspondingly reduced to one of 12 years' imprisonment. J (Paragraphs [22] – [24] at 138*b* – 140*d*.)

2. S v PATEL 2016 (2) SACR 141 (GJ)

In an extradition case a magistrate is not required to find that there is sufficient evidence to 'guarantee' the prosecution, but merely that there is sufficient evidence available to 'warrant', in the sense of 'justifying', the prosecution.

The definitions of 'extraditable offence' in s 1 of the Extradition Act 67 of 1962 I and subpart 2.1 of the extradition treaty between South Africa and the United States of America express the principle of double criminality. Their wording is similar and both are equally, prima facie, 'silent' in respect of the temporal aspect. Properly construed, art 2.1 of the treaty, which has to be interpreted consistent with the definition of 'extraditable offence' in the Act, does not refer to conduct which would have constituted an offence in this country at the time of its commission in the foreign state, but refers to conduct which will constitute an offence in this country at least at the time of the extradition request, if not at the time when the extradition enquiry is being conducted by the magistrate. The wording of the definition of 'extraditable offence' in s 1 of the Act is clearly non-retrospective. It refers to conduct that must be an offence now in this country and not at a time of its commission in the foreign state. It is inappropriate to give the word 'punishable', as it appears in the definition in the Act and art 2.1 of the treaty, any meaning that would suggest that the offence alleged ought to have been such in this country at the time of the commission in the foreign state. (Paragraphs [43], [50] and [52] at 153*g*, 155*b* – *c* and C 155*f* – 156*b*.)
Section 10(2) of the Extradition Act provides that:
'For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State [of the person in respect of whom an extradition request has been made] the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.'

Held Such a certificate is not invalid because it uses the word 'justify' instead of 'warrant'. Properly construed within its context, the word 'warrant' could reasonably be interpreted to mean 'justify' or 'justifies'. Furthermore, the foreign state is not obliged in terms of the Act to furnish a certificate as contemplated in s 10(2). It is merely a mechanism to facilitate proof. There is nothing else in the Act which requires the foreign state to guarantee the prosecution of the requested person. In those circumstances a contention that the foreign state must 'guarantee' the prosecution in the certificate rings hollow. In the absence of a certificate the magistrate must, nevertheless, satisfy himself or herself that there is sufficient evidence to 'warrant' a prosecution in the foreign state. Clearly the magistrate is not required to find that there is sufficient evidence to 'guarantee' the prosecution, but

+merely that there is sufficient evidence available to 'warrant', in the sense of 'justifying', the prosecution. (Paragraphs [71] – [72] at 159*f* – *h*.)

3. S v NDWAMBI 2016 (2) SACR 195 (SCA)

In a fraud case where the issue of prejudice is involved, there is a long-standing principle that the law looks at the matter from the point of view of the deceiver, and not the deceived.

The appellant, a police official, was convicted in a regional magistrates' court of committing fraud in that he had been complicit in a transaction in which his co-accused had sold a very good imitation of a rhino horn to a police trap. He was sentenced to six years' imprisonment. Having appealed unsuccessfully to the High Court against his conviction and sentence, he argued in the present appeal that the proven facts had not established all the elements of the crime of fraud, in that there was no evidence that he had intended to deceive, nor of prejudice. It was contended that, as the state's evidence was to the effect that the police had no intention to pay for the rhinoceros horn, there could be no prejudice. The trial court had rejected his evidence that he had no knowledge of the contents of the bag containing the fake horn that his co-accused had carried to the vehicle involved in the police trap. It also rejected his assertion that he had thought that his co-accused had been going to meet a client in connection with her works of art. The present court agreed with the trial court's assessment of the evidence, its adverse credibility findings relating to both the appellant and his co-accused, and ultimate rejection of their evidence. It also agreed that there was not the slightest doubt that the state evidence was honest and accurate.

Held (per Meyer AJA; Navsa ADP, Leach JA and Schoeman AJA concurring), that in the circumstances of the case any suggestion that the appellant and his co-accused had not known that the object was a fake lacked a factual foundation and would therefore amount to impermissible speculation. It lay exclusively within their power to show what the true facts were but they had failed to give an acceptable explanation. The prima facie inference that the false representation was made knowingly thus became conclusive. (Paragraph [17] at 201*h* – 202*a*.)

Held, further, as to the issue of prejudice, that the contention by the appellant ignored the long-standing principle that the law looked at the matter from the point of view of the deceiver, and not the deceived, and that it was immaterial whether the person to be deceived was actually deceived or whether the prejudice was only potential. In any event, objectively, some risk of harm — which did not have to be financial, proprietary or even to the person to whom the representation had been addressed — might have been caused, given the contribution of such transactions to the illegal trade in rhinoceros horn in South Africa. (Paragraphs [18] – [22] at 202*b* – 203*d*.)

Held, as to sentence, that, when the reprehensible nature of the conduct was assessed, together with the intention to deceive and the fact that the accused was a policeman who was supposed to be on official duty at the time, the sentence of six years' imprisonment was appropriate. The appeal was dismissed. (Paragraph [23] at 203*e* – *f*.)

Held (per Willis JA, dissenting), that it was not proved beyond a reasonable doubt that the appellant was an accomplice to the crime of fraud, even though he clearly was an accomplice to some kind of crime. To come to the conclusion that he was guilty of fraud, one had to draw inferences that could not be justified — the replica was of such a superlatively good quality that it was only the day after the arrest, when it was confirmed by the forensic laboratories, that the scandal of the imitation was revealed. In the circumstances it could not be concluded beyond a reasonable doubt that the appellant knew either that he was an accomplice to a false representation being made or that he knew that the horn was fake. Neither was it proved that the appellant foresaw that a false representation might be made in regard to the sale of a rhino horn that was a fake, or even that he foresaw the possibility that a fake rhino horn might be sold. (Paragraphs [28], [32] and [45] at 205*d* – *g*, 206*e* – 207*a* and 211*b* – *c*.)

From The Legal Journals

De Villiers, W P

“Does remand in custody by a court following an unlawful arrest render the subsequent detention lawful? *Minister of Safety and Security v Tyokwana*
2015 1 SACR 597 (SCA)”

THRHR 2016 (79) 2 302

De Jong, M

"University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services (South African Human Rights commission as amicus curiae*)* – implications for the issuing of emoluments attachment orders in maintenance matters?"

THRHR 2016(79) 2 261

Knoetze, I & Crouse, L

"DNA processing contemplated in the Criminal Law (Forensic Procedures) Amendment Act 37 of 2013 and the Constitutional Right to Privacy"

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

Contributions from the Law School

Illegally/unconstitutionally obtained evidence: Facebook hacking

In the case of *Harvey v Niland* 2016 (2) SA 436 (ECG), the applicant brought an urgent application to interdict the respondent from breaching the fiduciary duties imposed on him in respect of a jointly owned close corporation, by s 42 of the Close Corporation Act 69 of 1984.

A crucial piece of evidence submitted by the applicant was a print out of the respondent's Facebook communications which he had gained access to by hacking into his Facebook account, thereby acting unlawfully and contrary to the provisions of the Electronic Communications and Transactions Act 25 of 2002 (ECTA). 'Hacking' into a person's Facebook account entails gaining access to that account without

permission. In this case a third party gave the applicant the password for the respondent's Facebook account without his knowledge or permission which the applicant then used to obtain the relevant evidence. This amounted to criminal conduct in terms of s 86 (1) of the ECTA which provides that 'a person who intentionally accesses or intercepts any data without authority or permission to do so, is guilty of an offence. It was also an infringement of the respondent's constitutional right to privacy.

This discussion will only deal with the part of the judgement relevant to unlawfully/unconstitutionally obtained evidence.

The courts have always, at common law, had a discretion to exclude unlawfully obtained evidence. The mere fact that a statute creates a criminal offence does not however mean that evidence obtained as a result of the commission of that offence is automatically inadmissible. That will depend on myriad factors, including the purpose and wording of the legislation. In the case of *Waste Products Utilisation (Pty) Ltd v Wilkes* (2003 (2) SA 515 (W) at 549 J) the court held that it retained a discretion to admit evidence that had been obtained in consequence of the commission of an offence or the infringement of a constitutional right. (Note: In criminal cases, the admission of unconstitutionally obtained evidence is regulated by section 35(5) of the Constitution of RSA Act, 1996).

In casu, the court found that since s 86 (1) of the ECTA was silent on the admissibility of unlawfully intercepted data, there was no automatic exclusion of that evidence. It held that the admissibility of that evidence would depend on the exercise of the discretion by the court.

The court then turned to consider what principles should guide the exercise of such a discretion. First, it addressed the question of whether the same considerations applied to unlawfully obtained evidence in the civil and criminal context, relying on the dicta of Brand J in the case of *Fedics Group (Pty) Ltd v Matus; Fedics Group (Pty) Ltd v Murphy* (1998 (2) SA 617 (C)). Brand J pointed out that in a criminal case, the accused bears no obligation to provide information to the state, nor does it have to disclose its defence or provide the state with any document which might be relevant to the case; whereas in a civil case, the parties are under an obligation to disclose their cases to each other and to discover documents which may be detrimental to their own case, or which may serve to strengthen the case of the other side. He explained that this led him to conclude that the court would have to consider firstly why the litigant could not obtain the evidence by following proper procedures (perhaps including the Anton Piller procedure) and then secondly what the nature of the evidence was. In this regard Brand J said the court would consider whether it was the type of evidence which could never be legally obtained and/or entered into evidence without the adversary's co-operation (like privileged communications, for example) or whether it was evidence which the litigant could have obtained through

proper means. Brand J concluded that the court would be more likely to exercise its discretion to admit the latter type of evidence.

In casu, the court agreed that all relevant information should be taken into account in exercising the discretion. It listed the following considerations specifically as being relevant in the case before it:

'…the extent to which, and the manner in which, one party's right to privacy … has been infringed, the nature and content of the evidence concerned, whether the party seeking to rely on the unlawfully obtained evidence attempted to obtain it by lawful means and the idea that …the constitution does not permit unrestrained reliance on the philosophy that the end justifies the means (at para [47]).'

In considering the breach of the respondent's constitutional right to privacy, the court noted that the right to privacy is not absolute and that the scope and extent of the right to privacy shrinks as one moves from the inner sanctum of the home into communal activities like work and social interaction. The court observed that the respondent's Facebook communications encompassed both business and private communications. The court accepted that in theory there were various lawful procedural avenues that the applicant could have pursued to try and obtain proof of the infringement of his fiduciary rights, but it acknowledged that they would likely not have been effective or practical.

The court, in deciding to admit the Facebook evidence, reasoned that:

'right-thinking members of society would have believed that … [the respondent's] conduct, particularly [given his denials and undertakings not to behave in the way he did] ought to be exposed and that he ought not to be allowed to hide behind his expectation of privacy: it has only been invoked, it seems … because he had something to hide (at para [52]).'

Nicci Whitear Nel

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Matters of Interest to Magistrates

Women judges: Are they doing justice to the cause?

The recent furore in the media caused by the Facebook posts of High Court Judge Mabel Jansen has highlighted the important role of women judges when confronted with issues that affect women. Several organisations such as the Black Lawyers Association, Advocates for Transformation and the South African Women Lawyers Association issued press releases condemning the judge for her perceived racism and bias. Judge Jansen was placed on special leave and a complaint against her was lodged with the Judicial Services Commission (JSC) (see news 'High Court judge granted special leave for Facebook comments' 2016 (June) *DR* 16).

The perception of bias in adjudication is a cardinal sin. Judges are expected to be impartial. It is one of the essential qualities of a judge. A problem arises when judges are perceived to be biased, as the public outcry in this instance vividly illustrates. The objective of this article is not to discuss whether Judge Jansen is biased or racist. Instead it seeks to shine the spotlight on women judges and their approach to adjudication when deciding issues that particularly affect women such as gender-based violence, femicide and rape.

Are women judges different?

This question is important considering the endless call for more women on the Bench. So why do we need more women judges? Do they really make any difference? If so, what difference? Are they different from male judges?

Gender is the central theme in all these questions. It rests on the assumption that men and women approach adjudication differently. These gender based claims are contested and steeped in controversy. They are based mostly on the views expressed by American psychologist Carol Gilligan in her book, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press 1982). These arguments assume that women follow a different reasoning process and that women approach adjudication in a different manner.

This notion that men and women approach adjudication in a different manner has been discredited by recent studies. Sally Kenney, a prominent feminist political scientist in the field of comparative law makes a compelling case for more female representation on the Bench in her book *Gender & Justice: Why Women in the Judiciary Really Matter* (UK: Routledge 2013).

She argues that the impact of gender on judging does not have to be based on the elusive 'difference.' It can be approached from another angle, which does not simply ask the question whether women judges decide cases differently from men. This approach is too narrow and simplistic because of its focus on essential sex differences. Instead, she constructs a powerful argument that sex as a variable (sex as a biological category), can be instructive only if it is coupled with gender as a social process. She emphasises the fact that gender is not a category but a social process that actively differentiates by sex and devalues women and the feminine.

In her research she found that the individual experiences of judges, which include the experience of gender-based exclusions, may cause them to interpret facts differently from judges without those experiences. This implies that when it comes to adjudication, a myriad of other identity characteristics and factors such as class, religion, ethnicity, life experience and affinities (such as one's political party or judicial philosophy) and approach to constitutional interpretation may have a greater influence on adjudication than sex. Her forceful argument is that the gender of the judge is important – not because men and women are inherently different as people but at least sufficiently differently positioned, and as a result there are cases where their perspectives and interests might diverge. This positioning should make a difference when considering gender-based issues.

Gender and adjudication

This positioning can be instructive when considering disadvantage based on gender as suggested by legal academic, Professor Katharine Bartlett in 'Feminist Legal Methods' (1990) 103 (4) *Harvard Law Review* 829. Prof Bartlett proposes a strategy for feminists to move beyond traditional judicial methods in the process of legal reasoning. Her justification for this approach is that traditional legal methods and existing legal rules often do not take into account the perspectives of women and other excluded groups. She developed a methodology of legal analysis that highlights the critical importance of an awareness of bias for feminists in the methods they apply when 'doing law.'

Asking the 'woman question'

Prof Bartlett argues that when feminists 'do law' – they do what other lawyers do: They use the full range of methods of legal reasoning to arrive at a conclusion. In addition to these, they use other methods in an attempt to reveal features of legal issues, which more traditional methods tend to overlook or suppress. One of the methods, which she describes as asking the 'woman question' is designed to expose how the substance of law, silently and without justification, submerge the perspectives of women and other excluded groups. The 'woman question', or rather set of questions, is designed to identify the gender implications of rules and practices, which may otherwise appear to be neutral or objective. These are loaded questions which insist that rules must be applied in a way that does not continue to

disadvantage women. The justification for asking the ‘woman question’ is to expose features in law that are not only non-neutral but distinctly male. Asking the ‘woman question’ means examining how the law fails to take into account the experiences and values that seem more typical of women, than of men, and how existing legal standards and concepts may disadvantage women. It exposes the hidden discrimination and bias in substantive rules. Without asking the ‘woman question’, differences associated with women are taken for granted, and unexamined, they may serve as justification for laws that disadvantage women. It reveals how the position of women reflects the organisation of society rather than the inherent characteristics of women. Difference can be located in relationships, social institutions and child rearing patterns, not in women themselves. Social structures may embody norms that implicitly render women different and thereby subordinate.

When an adjudicator takes this approach, it requires an active search for gender bias, reaching a decision that is defensible in the light of that bias. It demands special attention to interests and concerns that may, and historically have been overlooked. The substance of asking the ‘woman question’ lies in what it seeks to uncover; disadvantage based on gender. Beyond gender it is also useful as a model of inquiry into the consequences of overlapping forms of oppression for other excluded groups.

Prof Bartlett also developed Feminist Practical Reasoning. The idea behind this approach is to expand the traditional notions of legal relevance, and to make legal decision making more sensitive to the features of a case not already reflected in legal doctrine. It demands more than some reasonable basis for a decision. The decision maker must give actual reasons for a decision. Where there are choices to be made the agent who makes them must admit to those choices and defend them.

More importantly, this approach supports the idea advanced in this article that one cannot, and should not, eliminate political and moral factors from legal decision-making. To the contrary, these factors should be brought to the surface and acknowledged. In this process of engagement with those factors, decision makers are forced to think self-consciously about them, and to justify their decisions in the light of facts of the case.

It is critical to expose and open up the debate concerning underlying political and moral considerations. So-called neutral forms of decision-making mask, and do not eliminate political and moral considerations from decision-making. They tend to drive the bias of the decision-maker underground and these biases do not serve women’s interests well. Contextualised methods of reasoning allows for greater understanding and exposition of injustice because it considers not only the legally relevant but also the actual experiences of women and other marginalised groups.

According to Karl E Klare in ‘Legal Culture and Transformative Constitutionalism’ (1998) 146 *SAJHR* at 163, is now uncontroversial that the political and moral values of judges play a routine, normal, stubbornly persistent, yet unacknowledged role in

adjudication. In the evaluation of a legal decision it is perfectly acceptable, perhaps even compelling, to examine the underlying moral and political convictions of the judge.

Conclusion

The critical insight drawn is that a judge's personal or political values and sensibilities cannot be excluded from the interpretive process or adjudication. Judges should acknowledge the importance of values and experiences on judicial interpretation. This approach is congruent with transformative adjudication without necessarily negating the supreme judicial virtues of neutrality and impartiality. Justice Pius Langa in '*Transformative Constitutionalism*' (www.msu.ac.za, accessed 29-6-2016) confirms this view:

'At the same time, transformative adjudication requires judges to acknowledge the effect of what has been referred to elsewhere as the "personal, intellectual, moral or intellectual preconceptions" on their decision-making. We all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under Apartheid legal culture was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions. This is vital if respect for court decisions is to flow from the honesty and cogency of the reasons given for them rather than the authority with which they are given.'

In a country such as ours – where violence against women and children has reached pandemic proportions – women judges can and must make a difference. Women judges must acknowledge their unique position and powerful role in exposing injustice and disadvantage based on gender. Women judges must be the progressive voices, who in embracing a transformative approach to interpretation and adjudication can make the world a safer place for all.

Diana Mabasa *LLM (Wits)* is an attorney at Diana Mabasa Inc in Johannesburg.

(This article was first published in *De Rebus* in 2016 (Aug) *DR* 20.)

A Last Thought

"When it comes to matters, which have a scientific aspect, legal practitioners are prone to rely either on their own understanding of science, or defer to the inevitable expert, if the client can afford the cost of the latter. The unfortunate consequence of legal practitioners failing to understand science fully is that they can be only too easily persuaded to accept an expert's point of view, or if the practitioner is acting alone, is personally unable to intertwine law and science for the benefit of their client. What legal practitioners need to know is that science is an area filled with pitfalls and uncertainty, and that it is a path over which many self-proclaimed experts themselves are subject to stumble over misconceptions and errors."

Dr David Klatzow *BSc (Hons) PhD (Wits)* is a forensic scientist and Peter Otzen *BSocSc LLB (UCT)* is an attorney at Guthrie Colananni Attorneys in Cape Town.
(This extract is from an article "A scientist and a lawyer walk into a courtroom …" by the two authors in the August edition of *De Rebus*)