e-MANTSHI

A KZNJETCOM Newsletter

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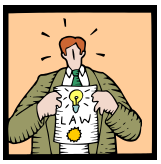
Welcome to the hundredth and twenty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search 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 section 2A of the Public Holidays Act, 1994 (Act No. 36 of 1994),the president has declared the *Twenty Seventh day of December 2016* as a public holiday throughout the Republic. The notice to this effect has been published in Government Gazette no 40346 dated 14 October 2016.

2. In Government Gazette no 40367 dated 24 October 2016 there was an invitation published for comments on a draft Prevention and Combating of Hate Crimes and Hate Speech Bill. The Bill aims to-
* give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance in accordance with international law obligations;
* provide for the offence of hate crimes and the offence of hate speech and the prosecution of persons who commit those crimes;
* provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences;
* provide for the prevention of hate crimes and hate speech;
* provide for the reporting on the implementation, application and administration of

This Act;
* amend certain Acts of Parliament consequentially; and
* provide for matters connected therewith.

Any person wishing to comment on the Bill is invited to submit written comments to the Department of Justice and Constitutional Development on or before 1 December 2016.
Comments should be marked for the attention of T Ross:
(a) if they are forwarded by post, be addressed to -
The Department of Justice and Constitutional Development
Private Bag X81
PRETORIA
0001;
(b) if delivered by hand, be delivered at -
The Department of Justice and Constitutional Development
Salu Building
316 Thabo Sehume Street (Corner of Thabo Sehume and Francis Baard Streets)
PRETORIA;
(c) if they are delivered by E-mail, they can be sent to: hatecrimes@justice.gov.za ; or
(d) if it is faxed, they can be faxed to 012 406 4632**.**

The Bill can be accessed here: http://www.justice.gov.za/legislation/bills/2016-HateCrimes-HateSpeechBill.pdf

Recent Court Cases

1. **Mokhosi v S (A40/2016) [2016] ZAFSHC 170**

It is always the prerogative of the prosecutor and not a trial magistrate to decide whether to accept or to reject an accused person's plea and to decide on what factual matrix to accept that plea.

Rampai, J

[1] This was an appeal against the custodial term of 8 years imposed on the appellant. He was aggrieved. He came to us on appeal with the leave of this court granted on petition. The appeal was opposed.

[2] An incident took place at Sasolburg on 26 July 2014. The police investigation led to the arrest of two men, namely: Mr Ditaba Jeremiah Mokhosi, who was arrested on 29 July 2014, three days after the incident and Mr Tlole Ben Lehoko, who was arrested on 30 July 2014, four days after the incident.

[3] The two suspects were subsequently charged. The first charge was one of kidnapping. It was alleged that they unlawfully and intentionally deprived Mr Thabiso Piet Mpondo of his freedom of movement at 5110 Chris Hani Sasolburg on 26 July 2016 by placing him in the boot of a motor vehicle and that they took him from there to the Vaal River. The second charge was that they unlawfully and intentionally attempted to kill the said person by throwing him into the said river.

[4] The accused suspects were tried in the Sasolburg Regional Court. Ms Ngewu presided over the proceedings. Mr Nhlahesi appeared for the state and Mr Charlie for the defence. The appellant was accused 1. His co-accused, Mr Lehoko, was not before us in these appeal proceedings. Even though an impression was created that he was the second appellant, he did not file a petition for leave to appeal. Therefore, I shall refrain from deciding his fate.

[5] On 31 July 2014 the appellant was convicted on his plea in terms of section 112 Criminal Procedure Act 51/1977 in respect of both charges. The regional magistrate took the two charges as one for the purpose of sentence. The appellant was then sentenced to 8 years imprisonment.

[6] The appellant was aggrieved by the sentence imposed on him. On 25 August 2014 he applied for leave to appeal. The regional magistrate refused him leave to appeal on 29 August 2014. He subsequently approached this court by way of a petition. He succeeded. Accordingly, he came to us with the leave of this court granted by Mocumie J *et* Mia AJ on 4 June 2015.

[7] The principal grounds of the appellant's appeal were:
7.1 that the regional magistrate erred by sentencing the appellant on the basis of facts that were contrary to the facts as set out by the appellant in his written statement in terms of section 112(2) Act No. 51/1977;
7.2 that the regional magistrate erred by imposing on the appellant a sentence which was disproportionate to the crimes he committed and thus disturbingly inappropriate.
[8] As regards the first ground, Mr Monareng argued that the regional magistrate incorrectly sentenced the appellant on the strength of the complainant's version

instead of the appellant's version, which version the state had accepted. Mr Steyn disagreed. In view of this, I deem it necessary to give a summary of each version in order to determine whether the regional magistrate committed the alleged misdirection.

[9] The appellant's version was that the complainant, Mr Thabo Piet Mpondo, his friend, owed him money; that he no longer wanted to repay the loan; that he and his co-accused drove to Sasolburg to enquire from him why the complainant was avoiding him instead of setting the debt; that they found the complainant; they put him in their motor vehicle against his will; that they took him to the Vaal River for questioning; that there he became aggressive and that as a result of his aggression, they pushed him into the river where they left him behind. He admitted that his actions of 26 July 2014 were wrongful; unlawful and intentional. Consequently he pleaded guilty to kidnapping and attempted murder.

[10] On 31 July 2014 the regional magistrate convicted the appellant on his plea. The plea was set out in a formally written "statement in terms of section 112 Criminal Procedure Act 51/1977." The statement was handed up and marked "exi a". I shall revert to the verdict.

[11] After the verdict, Mr Charlie, counsel for the defence, addressed the court in mitigation of sentence. When he was done, Mr Nhlahesi, the public prosecutor, likewise addressed the court in aggravation of sentence. When he was done, the regional magistrate remanded the case to 5 August 2014 for the evidence of the complainant and the imposition of the sentence.

[12] On 5 August 2014 the trial resumed. Mr Mpondo, the court witness, took the stand. He testified that he was a police informer. He and the appellant met through a common friend but they were not friends. He, the appellant and his erstwhile co-accused conspired to rob whites at Denneysville. In the furtherance of the conspiracy a vehicle and firearms were secured. On the day in question the three conspirators set out from Vereeniging to Denneysville to execute the armed mission. However, the mission flopped because they were arrested on the way. Two firearms were found in the vehicle and seized by the police.

[13] The three conspirators were charged for possession of unlicensed firearms. All were released on R500.00 bail each. Somehow the complainant's co-conspirators got wind of his secret undercover police operations. The appellant sent him an sms and told him that they had received information that he betrayed them to the police. Three more sms from the appellant followed. The appellant threatened him. He warned him that they would teach him a lesson. He showed the sms to his secret police handler and a police captain.

[14] He feared for his life. Because he got no joy from the police, he fled from Sasolburg to Heilbron. From Heilbron to Deneysville and from Deneysville back to

Sasolburg. The appellant and his co-perpetrators were constantly hot on his heels which was why he was always on the run. They did not give up.

[15] Eventually his luck ran out. On 26 July 2014 he was in hiding at his uncle's place of residence commonly known as 5110 Chris Hani at Zamdela at Sasolburg. He was sleeping in the shack on the premises that night. His cousin, who was sleeping in the main house, shouted to alert him that "Dithabaneng" wanted to see him. He woke up and opened the door. Instead of Dithabaneng he came face to face with an unknown woman. Before he could ascertain who she was, the appellant unexpectedly emerged behind the woman with a firearm pointed at him and punched him. He warned him to keep quiet. The appellant, aided and abetted by accused 2, took him out of the house to their car, put him into the boot and drove off to Deneysville.

[16] They stopped on the outskirts of Themba Kubheka, a local township. There another perpetrator, the driver of a white Corsa sedan arrived. The three perpetrators assaulted him. They decided his fate there and then. He had to be killed not by shooting but rather by drowning. They stripped him completely naked, tied together his legs and then his arms behind his back. They fastened his limbs with cable strippings or ties. The female perpetrator remained behind with the unidentified latecomer when the two kidnappers drove away with him in the boot once again.

[17] They stopped the car, opened the boot and carried him out of the boot. They put him down on the pedestrian sidewalk on the bridge. The appellant said to him:
"Bye-bye Sparks".
They then pushed him, naked as he was, from the top of the bridge down into the Vaal River. By then he had already partially untied the cable ties around his arms but they were obviously unaware. The scene of the incident was on Ascort Road on the bridge between Deneysville and Vereeniging. He managed to swim out. He was spotted by a passing motorist who rushed to Sharpeville Police Station where the incident was reported.

[18] It is obvious that the complainant's version was completely different from the appellant's version in many factually material respects. Now the question is whether the sentence imposed upon the appellant was substantially influenced by the facts as alleged by the complainant as the appellant contended it was? To that question I turn now.

[19] In the first place I proceed to consider the comments of the trial magistrate during the sentencing phase of the proceedings.
"The reason why I called the Court witnesses (sic) was to establish how big is the amount that would warrant you, I mean killing a person in the way that you sought to do and from the evidence that was led the only money that was spoke (sic) of was R2500.00 for sheep and that amount is quite minimal."

It is somewhat unclear to me as to why the trial magistrate did not call upon the appellant through his legal representative, Mr Charlie, to specify, in his written statement the exact amount of money that had induced him to kill the complainant. It must be borne in mind that the appellant and not the complainant had made the allegation concerning the motive to kill.

[20] In his direct evidence neither the trial magistrate nor the prosecutor asked the complainant any question about the amount of money the appellant alleged he owed him. The omission to ask him any question concerning the alleged debt, watered down the reason given for calling him. It seemed to me that he was called because the court believed there was more to the incident than the appellant revealed in his statement, “exi a”. Details of and question about the alleged debt were first put to the complainant by the appellant’s counsel. In his indirect evidence he denied the appellant’s allegation that he was indebted to him in the sum of R2500.00 for sheep purchased but never delivered. In brief he dismissed the substantial portion of the appellant’s account of the incident as untrue.

[21] The trial magistrate went further to say:
“Yes, he has testified that you were planning a robbery in Deneysville of some whites in (sic) the day of your arrest for possession of firearms.”
There were no such factual averments made by the appellant in his statement.

[22] The trial magistrate further remarked as follows:
· “I mean for you now to go about committing crime is out of greed and not out of need. I mean you hunted this complainant, you traced him until you tracked him down, he was in hiding.”
· “You managed to trick him, find him and accomplish your mandate of throwing him into the Vaal River.”
· “You mean you have ensured or you tried to ensure that he does not escaped by tying both his hands and feet.”
· “I mean to expose somebody, to strip him and leave him naked, throw him into the river, tied, it is a serious offence.”
None of those factual averments appeared anywhere in the appellants’ statement. All of them, without any exception were extracted from the complainants’ elaborate version.

[23] During the course of delivering judgment in connection with the appellant’s application for leave to appeal, the trial magistrate remarked that the appellant was so determined to kill the complainant that he hunted him in three different towns before he eventually tracked him down. The trial magistrate commented that the appellant used a certain woman, a stranger who lured the complainant out of his secret haven under a false pretext that she was someone he knew. All those facts obviously stemmed from the complainant’s testimony and not the appellant’s statement.

[24] Given the aforesaid analysis of the trial proceedings and the judicial comments in particular, there can be doubt that the court *a quo* was largely influenced by the testimony of the complainant. The trial magistrate disbelieved the appellant's account of the incident but believed the complainant's. The trial magistrate remarked that the appellant showed no respect for the life of the complainant and that, whether or not he was an informer, there was no justification to kill him. Correct though that view was, it could not redeem the trial magistrate from the shackles of her internalized belief that the version of the appellant was untrue. Accordingly there was substance in the argument that the court *a quo* repudiated the factual matrix as set out in the appellant's written plea of guilty in terms of section 112 and punished him on the strength of the extrinsic factual considerations.

[25] In those circumstances, I would not ordinarily hesitate, on that ground alone, to come to the conclusion that the court *a quo* materially erred. S v Van der Merwe & Others 2011 (2) SACR 509 (FB). But there is something more in the instant appeal. It is significant in this instant case to revert to what transpired at the trial shortly before the verdict was pronounced. Of course, that concerned the substantive rather than the punitive dimension of the proceedings. The appellant's legal representative first read the appellant's statement, "exi a", into the record and handed it up. Immediately after doing so he proceeded to read the second statement, "exi b", made by accused. He then took his seat.

[26] What subsequently followed and mechanically captured reads:
"COURT: Will the accused confirm that the statement was compiled in their presence and their cooperation [?], and that the signature at the end of the statement is their own signature.
INTERPRETER: Both confirm, Your Worship.
COURT: You are fully aware of the contents of the statement?
INTERPRETER: Correct, Your Worship.
COURT: This statement, is this document the 29th that this document was signed?
ADV CHARLIE: Indeed, Your Worship.
COURT: The statement will be admitted as Exhibit A and B, for accused 1 and 2 respectively.
JUDGMENT
COURT: The accused will (sic) be found guilty on the basis if (sic) their pleas to both counts
PROSECUTOR: Your Worship, the State is not in possession of the SAP69, may the matter be finalised."

[27] It was quite clear *ex facie* the above extract that the public prosecutor did not participate after the appellants' plea but before the court pronounced the verdict. He was not invited to say whether the plea accorded with the facts at his disposal or not. That was the first omission. It is not necessary now to guess as to what his response

to the obligatory invitation would have been. What has to be necessarily pointed out is that the facts as set out by the appellant were poles apart from the facts as set out by the complainant in his evidence. The latter set of facts were probably embodied in his witness statement. The prosecutor, and indeed the defense counsel, had those facts at their disposal.

[28] After the verdict, the prosecutor stood up, informed the court that he was not in possession of the appellant's criminal record and urged the court to summarily sentence the appellant without it. He did not then and there draw the trial magistrate's attention to the procedural misstep that I have outlined in the preceeding paragraph. That was the second omission.

[29] The first omission was a material procedural irregularity. The substantive merits of the state case were substantially compromised. It is always the prerogative of the prosecutor and not a trial magistrate to decide whether to accept or to reject an accused person's plea. It is also his prerogative to decide on what factual matrix to accept an accused person's plea. Such a prosecutorial decision determines whether or not a lis is reached between the two adversaries. If a prosecutor rejects a plea, a trial magistrate is obliged to note a plea of not guilty. Since a lis has not been reached, a prosecutor is then called upon to lead evidence against an accused.

[30] On the facts, it is clear and obvious that this critical stage was never reached. The appellant believed otherwise – hence he was aggrieved when he was subsequently sentenced on the basis of the factual matrix not contained in his statement. I have demonstrated that his belief was erroneous.

[31] The second omission, though not as material as the first, was nonetheless also significant. The way the prosecutor reacted immediately after the verdict, was ambivalent. On the one he created the unfortunate perception that the prosecutor tacitly accepted the appellant's plea. On the other he tacitly downgraded the appellant's factual matrix by explicitly promoting the factual matrix of the complainant's version. Instead of probating and reprobating as he did, the prosecutor was obliged to immediately point out to the regional magistrate, ideally in chambers, that the court erred in prematurely pronouncing the verdict without first giving him the opportunity of exercising his prerogative by either accepting or rejecting the appellant's plea.

[32] The deplorable temptation to accept a plea based on distorted facts must be resisted by prosecutors because distortion of true facts will almost invariably have an adverse impact on the ultimate measure of punishment. Ensuring that an offender's plea is grounded on true factual foundation is a prosecutor's exclusive responsibility. That duty must be carried out without any fear, favour or prejudice in order to preserve the integrity of the criminal justice systems. It is also incumbent upon a trial magistrate to ensure that s(he) does not overstep the mark between prosecutorial

decisions and judicial decisions. At times that fundamental and defining line of demarcation may be very thin.

[33] The first omission constituted an irregularity of such a magnitude that it vitiated not only the sentencing component of the proceedings (S v Pillay 1977 (4) SA 531 (A) at 535 F-G) but the entire trial proceedings. Both parties were substantially prejudiced by the material irregularity. Since it resulted in a mistrial, neither the conviction nor the sentence should be allowed to stand. In my view, the appeal was not so much about the unlawfulness of the sentence but rather the lawfulness of the verdict. Consequently, I am inclined to nullify the trial proceedings as a whole. The interest of justice dictate that the case be remitted to the regional court for the fresh retrial of the accused persons before a different regional magistrate.

[34] Accordingly I make the following order:
34.1 The conviction and the sentence are set aside.
34.2 The case is remitted to the regional court for a fresh trial of the accused person by a different regional magistrate.

2. Longano v S (AR76/2015) [2016] ZAKZPHC 93

Impartiality of the court serves to protect the integrity of our judicial system and should never be compromised. A judicial officer should always give reasons for rulings made during a trial.

Steyn J

Introduction

[1] The appellant was charged before K Pillay J, in the KwaZulu-Natal Local Division, Durban High Court, with one count of murder in that he killed his partner of eight years on Sunday the 1st August 2010 at the flat shared by them as a couple. He was convicted by the court *a quo* and sentenced to fifteen (15) years' imprisonment. The appellant appeals against the conviction and sentence with leave granted by the court *a quo.*

[2] In order to properly understand the issues that arise in this appeal it is necessary to briefly set out the background facts and chronology of the events before the court *a quo.* The appellant relied, in main, on the defence of non-pathological criminal incapacity. On appeal the grounds of appeal were not only focussed on the misdirection by the trial Judge in dealing with the facts and the law but also on the following irregularities that occurred during the trial. Mr Scheltema SC on behalf of the appellant submitted that the following irregularities were so gross that it vitiated

the findings of the court *a quo*:

(a) The trial Judge's refusal of the application to recuse herself on 5 September 2012;
(b) The court calling the witness, Willows, in terms of s 186 of the Criminal Procedure Act 51 of 1977 ("the Act") without inviting submissions from the parties to address the court on the regularity of the procedure; and
(c) The trial court's ruling to allow the prosecutrix to cross-examine the witness Willows.

An additional ground was raised by Mr Scheltema namely that the trial Judge had ruled that reasons for her refusal to recuse herself would be delivered, however the court in its judgment did not furnish any reasons for the decision not to disqualify herself.

Background

[3] This appeal was initially set down for hearing on 31 March 2016 but was not heard due to an incomplete record. The transcript of the proceedings of 5 September 2012[1] reveal no ruling or any reasons for dismissing the recusal application. The appellant subsequently filed a supplementary volume to Volume 11, which shows that the trial Judge issued the following ruling:

'PILLAY J This is an application for the recusal of the Court from these proceedings on the basis that an expert, whose report was handed to the Court with full knowledge about the parties and which report was used to cross-examine the defence expert witnesses, was not called as a witness by the State.

The defence contends that the contents of the report are prejudicial to the accused. Therefore, the accused has a reasonable apprehension of bias in the sense that the Court would be subliminally at least prejudiced by the contents of the report.

Both parties made extensive submissions for and against my recusal. I had earnest consideration and come to the conclusion that this application is without substantial merit and is accordingly REFUSED.

The reasons for that refusal will be furnished during the course of my judgment when this case is finalised. I have seen the report which has now been handed in by the defence and forms an exhibit in these proceedings. I am of the view that it is essential for the just decision of this case to call this witness. In doing so, I invoke the power bestowed on this Court in terms of section 186 of the Criminal Procedure Act.'[2]

[4] The complete record was placed before the Full Court when the appeal was heard on 23 May 2016.

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[1] See Vol II at 1019.
[2] See Supplementary Vol II at 1018L to 1018M.

[5] Ms Moosa, on behalf of the respondent, submitted that the fact that the court had sight of the report prepared by the expert Willows who was not called by the State to testify is not in itself prejudicial to the appellant's case and should not be regarded as a gross irregularity that vitiated the proceedings in its entirety. Ms Moosa, albeit reluctantly, conceded in argument that the witness Willows' evidence was not necessary for the just administration of the case. The respondent placed reliance on s 322(1) of the Act which requires of this court in the instance of any irregularity to be satisfied that a failure of justice has resulted from such irregularity before setting aside any conviction.[3]

[6] For purposes of this judgment I intend dealing with the irregularities first, since a positive finding may be determinative of the outcome of the appeal. If the appeal fails on the procedural grounds i.e. the irregularities, then the merits of the conviction and the sentence imposed will be considered.[4]

Ad irregularities

[7] Before dealing with the irregularities as they presented themselves in the case it is necessary to consider the consequences of any irregularities. It is trite that 'no conviction or sentence shall be set aside and altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from said irregularity or defect'.[5] In *S v Langa*[6] different classes of irregularities were listed and distinguished the one from the other. For the sake of completeness I shall repeat the different categories since they remain relevant to this case:

'In *S v Moodie*, the *locus classicus* on procedural irregularities, Holmes JA stated:

"(1) The general rule in regard to procedural irregularities is that the court will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.

(2) In an exceptional case, where the irregularity consists of such a gross departure from established rules of procedure that the accused has not been

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[3] Section 322(1) of the Act provides as follows:

'(1) In the case of an appeal against a conviction or of any question of law reserved, the court of appeal may –

(a) allow the appeal if it thinks that the judgment of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; or

(b) give such judgment as ought to have been given at the trial or impose such punishment as ought to have been imposed at the trial; or

(c) make such other order as justice may require:

Provided that, notwithstanding that the court of appeal is of opinion that any point raised might be decided in favour of the accused, no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record or proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or defect.'

[4] Cf *S v Moodie* 1961 (4) SA 752 (A) at 760G-H.

[5] See s 322 (1)(c) of the Act.

[6] 2010 (2) SACR 289 (KZP).

properly tried, this is *per se* a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitably have convicted if there has been no irregularity.

(3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity."

In defining the concept of "failure of justice" the court stated as follows:

"As to the meaning of "failure of justice", the Afrikaans text has to be considered because the 1944 and 1955 Acts were signed in Afrikaans. The former uses the word "regskending" and the latter contains the expression "geregtigheid nie geskied het nie". All these linguistic variants harmonise in meaning when one bears in mind what was said by De Wet JA, in *Rex v Rose* 1937 AD 467 at 476-7:

"Now the term justice is not limited in meaning to the notion of retribution for the wrongdoer: it also connotes that the wrongdoer should be fairly tried in accordance with the principles of law."

In interpreting the proviso and seeking a test to apply, this court has decided in a series of cases that it will be satisfied that there has in fact been a failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity …."

Further at 756E:

"This is a sound general test which works well in most cases of irregularity. But it is not an exclusive test, and the Courts have more than once recognised that in an exceptional case an irregularity can be of such a nature as *per se* to amount to a failure of justice, and to be so held, without the necessity of applying the foregoing test."'[7]

(Footnotes omitted.)

The classification of irregularities has developed to include an irregularity that results in an unfair trial. In my view it is best to refer to it as a constitutional irregularity or illegality. In *S v Jaipal*[8] Van der Westhuizen J stated it as follows:

'Therefore a failure of justice must indeed have resulted from the irregularity for the conviction and sentence to be set aside. In construing when an irregularity had led to a failure of justice, regard must be had to the constitutional right of an accused person to a fair trial. If an irregularity has resulted in an unfair trial, that will constitute a failure of justice as contemplated by the section and any conviction will

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[7] See *S v Langa* at 295c-296b. Also see *S v Naidoo* 1962 (4) SA 348 (A) at 354D-F:

> 'But irregularities vary in nature and degree. Broadly speaking they fall into two categories. There are irregularities (fortunately rare) which are of so gross a nature as *per se* to vitiate the trial. In such a case the Court of Appeal sets aside the conviction without reference to the merits. There remains thus neither a conviction nor an acquittal on the merits and the accused can be re-tried in terms of sec. 370 (c) of the Criminal Code. That was the position in *Moodie's* case, in which the irregularity of the deputy sheriff remaining closeted with the jury throughout their two hour deliberation was regarded as so gross as to vitiate the whole trial.
>
> On the other hand there are irregularities of a lesser nature (and happily even these are not frequent) in which the Court of Appeal is able to separate the bad from the good, and to consider the merits of the case, including any findings as to the credibility of witnesses.'

[8] 2005 (4) SA 581 (CC).

have to be set aside. Whether a new trial may be commenced against the accused will also require a constitutional assessment of whether that would be a breach of the right to a fair trial or not. The meaning of the concept of a failure of justice in s 322(1) must therefore now be understood to raise the question of whether the irregularity has led to an unfair trial.'[9]

The test for reasonable apprehension of bias

[8] The recusal application before the court *a quo* was based on the fact that the presiding Judge should have disqualified herself from hearing the matter since she was in possession of evidentiary material, the Willows Report, in circumstances that established a reasonable apprehension of bias and that her impartiality was compromised by being in possession of evidential material that would not form part of the evidence before court.

[9] The Constitutional Court has defined the test of apprehension of bias in *President of the Republic of South Africa and Others v South African Rugby Football Union & others*:[10]

'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour.…'[11]

The SARFU test was considered and developed in *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Ltd*[12] to the point where the Supreme Court of Appeal in *S v Shackell*[13] classified the test as one of 'double reasonableness'. Brand AJA, as he then was, held:

'Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal, but the apprehension must also be reasonable.'[14]

In *S v Dube & others*[15] the court held that where the disqualification is based on a reasonable apprehension, like in the present matter, the court has to make a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain the apprehension. Importantly it was held that a judicial officer should not only conduct a trial with an open, impartial and fair mind but

[9] *Ibid* at 596F-597B.
[10] 1999 (4) SA 147 (CC).
[11] *Ibid* at 177B-E.
[12] 2000 (3) SA 705 (CC).
[13] 2001 (4) SA 1 (SCA).
[14] *Ibid* para 20.
[15] 2009 (2) SACR 99 (SCA).

that such conduct must be manifest to all those who are concerned in the trial and its outcome, especially the accused.[16] It is necessary to evaluate the proceedings before the court *a quo* in order to decide whether the appellant had a reasonable apprehension to believe that the presiding Judge would no longer be impartial. I shall now turn to the proceedings.

[10] During the course of the trial a number of experts were called by the defence. The defence witnesses were confronted with parts of the Willows report. Mr Willows is a psychologist who was requested on behalf of the State to draft a report.[17] The prosecutrix stated to the court during her cross-examination of the defence witness, Ms L Roux:

'MS MOOSA I know what my learned friend is going to say and I am basing this on what Mr Clive Willows who will testify on behalf of the State will say.
MR SCHELTEMA So I can conclude, because I've got my client's interests at heart here, that this statement is not based on literature, but based on a report of another psychologist?
PILLAY J Ja.'[18]

(My emphasis.)

There was therefore no doubt that the State placed reliance on the report of Willows in its cross-examination and that the State would call this witness in support of its contentions.

[11] The record shows further that the prosecutrix promised that she would make the report of the witness Willows available to the court upon conclusion of her cross-examination of the defence's expert. It was however never placed on record how the report was handed to the learned trial Judge nor was the report handed in during the proceedings in court. Counsel for the defence in his application for the recusal of the presiding Judge placed the following on record:

'We were not involved in that process so I can't comment, but it seems from the record that by the next morning the Friday morning, the 20th, M'Lady and her assessors were already in possession of this report. Whether it was handed to M'Lady in chambers or through her registrar I don't know, but it doesn't really matter.

Judge : I don't know how it came to me, to be honest.'[19]

It is necessary to consider what was said by the prosecutrix when she opposed the recusal application regarding the report since it clarifies how the report came into the possession of the presiding Judge:

'MS MOOSA M'Lady, it was – throughout the proceedings it was in fact the intention of the State to call Mr Willows as a witness. At the time that Professor Schlebusch and Dr Roux testified it remained the intention of the State to call Mr

[16] *Ibid* para 7.
[17] See *infra* para 13 for details of the report.
[18] See Vol 8 at 798 lines 17 to 22.
[19] See Vol 10 at 952 lines 9 to 19.

Willows as a witness. He was in fact in attendance at court on 20 April 2012 which was the last day on which this matter was heard prior to yesterday, and that was confirmed by my learned friend. On the morning of 20 April 2012 a copy of his report was handed to Your Ladyship's registrar, and that was at the request of the Court, and that had been placed on record the day before by the Court. Whether that reached the Assessors or not I am unable to say, my last contact was with the registrar.'[20]

(My emphasis.)

[12] During the recusal application the learned Judge indicated that the report was handed to her by her registrar but placed it on record that it was never handed to the assessors. Mr Scheltema submitted that the report ought to have been handed in as an exhibit and since it was not before the court as an exhibit, the defence elected to hand it in so as to demonstrate the prejudicial effect of the report on the accused's case. In determining the reasonableness of the accused's apprehension it is imperative to consider the content of the report.

[13] The report of Willows[21] constitutes 10 pages and it is not necessary to repeat it in detail. The introduction and conclusion of the Willows report will suffice for purposes of this judgment:

'1. **Introduction**

The State has charged Nick Longano (the accused) with the murder of Vinoba Naidoo (the deceased). Mr Longano has raised the defence of Non Pathological Incapacity. The Prosecutor for the State requested a professional opinion from the Psychologist regarding the psychological characteristics of this particular mental and behavioural phenomenon.

…

…

11. **Application of Theory to Facts.**

In such matters as this before the court, it is important to evaluate the narrative of the accused and other witnesses, in the light of established facts.

A conclusion of a state of temporary non pathological capacity would depend on the factual response to a number of crucial questions, the answers to which this psychologist does not know at the time of writing.

11.1 The accused has been separated for 21 days, why would he experience the "rejection" as so overwhelming on the day of the incident?

11.2 Was the alleged attack by the deceased of such violence as to pose a real physical threat or danger to the accused.

11.3 If the couple were involved in a conflictual argument, at which point was the threat perceived to be of such inordinate strength as to cause a change in consciousness?

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[20] See Vol 10 at 988 lines 16 to 25.

[21] See exhibit "Y" of the record for the entire report.

11.4 With the identified frailties of his personality, is the accused not a person who is prone to having limited emotional control when responding to criticism or perceived threat?
11.5 Was such behavioural expression a recurring problem within the relationship, or in his response to other emotional demands? And if so, did such behaviour contribute to the decision of the deceased to terminate the relationship?
11.6 Was the description of the automotive behaviour suggestive of poor judgment and minimal control and was it haphazard in nature? Did it imply sustained concerted effort or was it random?
11.7 Was the accused able to recall certain features of the incident in the short term, immediately after the incident, even if these cannot be currently recalled?
11.8 The possible influence of his medication on his behaviour is not a field in which I have experience or knowledge. Questions as to the possible influence of such medication should be directed toward those specialised in the field. It is presumed that some of the medication was recommended in order to help him feel "calmer", and it would be important to understand whether or not such medication may induce the opposite effect.' [22]
(My emphasis.)

[14] On 10 April 2012 the witness Willows was identified as an expert witness who would testify on behalf of the State. The defence witnesses Roux and Schlebush were confronted in cross-examination with some of the opinions expressed in the Willows report. The defence highlighted this fact to the court:
'May I furthermore place on record that before we led the evidence of the two experts who testified on behalf of the accused, a report was made available by the prosecution of a clinical psychologist, one Clive Willows. This report was dated 2 April 2012 and faxed to the instructing attorney in this matter on 10 April 2012 and we were given to understand that this person would be the professional to be relied upon by the prosecution in dealing with the psychological aspects relevant in this matter. M'Lady, I can therefore place on record that thus far we had led the evidence of the two experts in the face of the information supplied to us in the form of the report of Clive Willows and we dealt with the evidence also in the light of that report. This morning there was a development in that we were given a report emanating from Mr Clive Willows which contained an addendum to the first report, although essentially it is still the same report, but in an addendum Mr Willows deals with certain pertinent questions which appear to be relevant, in his view, in the application of theory to the facts. Now we have not really considered those questions. Some of them we could have in part, but there was no proper evaluation of those questions one by one when we dealt with our experts.'[23]

[15] The defence in its application made it clear that the conduct of the learned

[22] See pages 1590 and 1598-1599.
[23] See Vol 8 at 815 line 16 to 816 line 8.

Judge was not criticised but rather the conduct of the State.[24] What is evident from the record is that on the day that the report found its way to the presiding Judge, the State still intended calling Willows as a witness. The State has made it abundantly clear to the defence that whatever report is compiled on behalf of the State contains information important to the State's case. That much was stated by Ms Moosa on 20 April 2012, when she said:

'I do not undertake to give him any information beyond that and I say that because that report ought to – if the State intends calling this witness, that report will contain the information which the State intends to elicit from that witness. It should therefore, from that report, be evident what issues are in dispute and what aren't or where that professional differs from the evidence that has already been led by the defence experts. I don't see the need to provide the defence with an affidavit in which I set out the various areas of dispute.'[25]

(My emphasis.)

[16] The recusal application was triggered by the State's decision not to call Willows to testify. On 3 September 2012 the prosecutrix placed on record that the State intended calling Dr Dunn and not Mr Willows. At this stage of the proceedings the presiding Judge had been in possession of Mr Willows' report for a period of four months. The defence was of the view that the Willows report was prejudicial to the case of the accused and that it was not neutral, this fact was acknowledged by the presiding Judge. The defence submitted that the report raised pertinent questions in relation to the conduct of the appellant which appeared to be aimed at influencing the court.

[17] The presiding Judge was also acutely aware that there could be a perception that she could have discussed the report with her assessors. The following interchange between the court and counsel bears testimony to this fact:

'MR SCHELTEMA About what is a reasonable perception. Now maybe the other thing is a person in the shoes of the accused may very well have a perception that the contents of this report was discussed, because there may be a perception that there was no reason as to why not to discuss it.

PILLAY J The perception has to be reasonable, Mr Scheltema.

MR SCHELTEMA It's based on the perception that the prosecutor informed … [intervention]

PILLAY J Otherwise we'll have a situation where any perception will have to lead to a recusal. Perception has to be reasonable.

MR SCHELTEMA Reasonable.

PILLAY J And you say it's a value judgment or a value question.

MR SCHELTEMA M'Lady, the accused may have a perception based on what the prosecutor said, namely that she will hand … [intervention]

[24] See Vol 10 at 938 lines 20 to 24.
[25] See Vol 8 at 819 lines 2 to 10.

PILLAY J Yes.

MR SCHELTEMA … this report to the Court. To the Court. And he may have a perception that there is simply no reason as to why not to discuss this report at least in the light of the evidence given, because the evidence needs to be discussed. The cross-examination of Roux needs to be discussed.

PILLAY J I accept that.'[26]

(My emphasis.)

[18] That Willows was not a neutral witness is apparent from an evaluation of his report and the conclusions reached by him in the report. The trial court relied on the evidence of Willows when it made certain adverse findings against the defence witnesses Roux and Schlebusch. The court held:

'Willows conceded that determining the level of consciousness involves a very intricate and complex process. However, Willows was concerned that Roux and Schlebusch's conclusions on the accused's level of functioning was done without important collateral information. In fact he stated that Roux's description of the accused's personality did not give him a consistent picture. He gave examples where in relation to interpersonal functioning she states that the accused presents as shy and withdrawn. Then in another instance she says he conforms socially. Willows pointed out various other aspects which tend to contradict her findings.'[27]

Later in the judgment the court measures the conduct of another defence witness Dr Howlett against the conduct proposed by Mr Willows.[28]

[19] The conduct complained of is not that there was actual bias on the side of the presiding Judge or that such bias was established. The issue is whether the appellant reasonably believed at the time of the recusal application that the Judge would no longer bring an impartial mind to the matter after having considered the content of a report that was aimed at supporting the State's case against him. The appellant is furthermore entitled to be informed of the Judge's reasoning and her consideration of the law and its application to the facts when the recusal application was decided. The failure to provide such reasons for the specific order is irregular given the earlier ruling of the court that it would be provided. Had the Judge given reasons for her dismissal of the application then the appellant would have been informed of the court's conclusion and the reasons why it reached the conclusion it did, given the said circumstances.

[20] In my view the integrity of the trial court was compromised when the State submitted evidentiary material to the Judge which should not have been given to her if the witness was not going to testify. It cannot be disregarded that the presiding Judge was aware of information favouring the State's case. The Willows report was

[26] Vol 10 at 971 lines 1 to 19.
[27] See Vol 18 at 1727 lines 20 to 25 to 1728 lines 1 to 3.
[28] See record Vol 18 at 1741 lines 1 to 5.

not a neutral piece of evidence. Even if it had been neutral, it was improper to hand a document to the presiding Judge without calling the witness. Once the information was given to the Judge there had to be an apprehension that the court would not be able to disabuse its mind from the report. In an adversarial process the perception was created that the State had an advantage since it shared a document with the Judge that is favourable to its case.

[21] *R v Matsego & others*[29] the court dealt with the fairness of the trial in circumstances where information was divulged to the assessor. Centlivres CJ held:

'In my opinion the learned Judge should not after reading the affidavit of the assessor concerned, have proceeded with the trial …. It is essential in the interests of the proper administration of justice that an assessor should retire from the case as soon as it is proved that he has been given information detrimental to the accused which has not been proved in evidence, for nothing should be done which creates even a suspicion that there has not been a fair trial.'[30]

In my view once the court's impartiality was compromised, how unfortunate it might have been, it is the end of the enquiry as to the apprehension of bias. Impartiality serves to protect the integrity of our judicial system and should never be compromised. What complicates this matter is that the trial Judge believed that the witness Willows' testimony was essential to the case. The calling of this witness caused a procedural conundrum.

[22] I shall now turn to the court's conduct in invoking s 186 of the Act during the trial.

The calling by the trial court of the witness Willows

[23] The court on 5 September 2012 exercised its discretion to call the witness Willows in terms of s 186 of the Act.

Section 186 of the Act provides as follows:

'**Court may subpoena witness**

The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceedings, and the court shall so subpoena a witness or so cause a witness to be subpoenaed <u>if the evidence of such witness appears to the court essential to the just decision of the case</u>.'

(My emphasis.)

[24] The trial Judge's calling of the witness Willows must therefore be assessed against the backdrop that the report of this witness was in her possession for a lengthy period and that the report formed part of the evidential material that the State intended to place before the court. The court *a quo* gave the following reason for

[29] 1956 (3) SA 411 (A) at 417H-418A. The court placed reliance on *R v Mabaso* 1952 (3) SA 521 (A) at 525F-G.

[30] *Ibid* at 418A-B.

invoking section 186 of the Act:

'I have seen the report which has now been handed in by the defence and forms an exhibit in these proceedings. I am of the view that it is essential for the just decision of this case to call this witness. In doing so I invoke the power bestowed on this Court in terms of section 186 of the Criminal Procedure Act.'[31]

The court also relied on the dictum of *R v Hepworth*[32] which effectively dealt with a judicial officer's duty to administer justice. The decision however to call Mr Willows was exercised immediately after the court dismissed the recusal application that was based on the fact that the Judge had sight and knowledge of a report that should not have been in her possession if the State was not calling the specific witness. It has been argued before us that the trial Judge simply had no other reason for calling Willows other than to avoid the dilemma of having to recuse herself. The trial Judge did not give reasons as to why the evidence of Willows was essential or necessary. Whether he was essential has to be decided on the cold record.

[25] In *S v Gabaatlholwe & another*[33] the court interpreted what 'essential to the just decision of the case' means and held:

'… the Court, upon an assessment of the evidence before it, considers that unless it hears a particular witness it is bound to conclude that justice will not be done in the end result. That does not mean that a conviction or acquittal (as the case may be) will not follow but rather that such conviction or acquittal as will follow will have been arrived at without reliance on available evidence that would probably (not possibly) affect the result and there is no explanation before the court which justifies the failure to call that witness. If the statement of the proposed witness is not unequivocal or is non-specific in relation to relevant issues it is difficult to justify the witness as essential rather than of potential value.'[34]

[26] The assessment of whether evidence is essential is primarily left to the presiding Judge and courts of appeal will only interfere with the Judge's exercise of discretion on very limited grounds.[35] Importantly a court of appeal would give consideration to the reasons of exercising a discretion and whether those reasons are substantial. In *R v Joannou*[36] the court relied on *Evans v Bartlam*[37] and Lord Wright's approval of English authorities that a discretion 'must be exercised according to common sense and according to justice and if there is a miscarriage in the exercise of it, it will be reversed'. The principle in my view would be that a court of appeal would be entitled to interfere with a discretion wrongly exercised, if it

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[31] See record at 1018 M lines 8 to 12.
[32] 1928 AD 265.
[33] 2003 (1) SACR 313 (SCA).
[34] *Ibid* para 6.
[35] *Ibid* para 8. Also see *R v Zackey* 1945 AD 505 at 510; *S v Seheri en Andere* 1964 (1) SA 29 (A) at 33 and *S v B and Another* 1980 (2) SA 946 (A) at 953A-F.
[36] 1957 (4) SA 385 (FSC) at 386E.
[37] 1937 AC 473.

resulted in a miscarriage of justice.

[27] In *S v Gerbers*[38] the court issued a word of caution to presiding officers exercising judicial discretion and it is necessary to repeat it especially since the trial court placed reliance on Hepworth's case:

'There is obviously potential tension between the need to fulfil the role of a judicial officer as described in Hepworth's case *supra* and the need to avoid conduct of the kind which led to the characterising of the judicial officer's behaviour in cases such as *S v Rall* 1982 (1) SA 828 (A) as irregular and resulting in a failure of justice. Nonetheless, it remains incumbent upon all judicial officers to constantly bear in mind that their *bona fide* efforts to do justice may be misconstrued by one or other of the parties as undue partisanship and that difficult as it may sometimes be to find the right balance between undue judicial passivism and undue judicial intervention, they must ever strive to do so.'[39]

[28] In my view it is not necessary to address the ground that the State was permitted to cross-examine Willows in detail since it is without merit. Once the witness was called by the court, he was regarded as the court's witness and both parties, State and defence, had a right to cross-examine him. I believe the criticisms levelled against the court's decision to permit such cross-examination must be rejected. Section 166(2) of the Act regulates the procedure that both parties may cross-examine a witness that is called by the court. It gives recognition to the broader concept of a fair trial and in my view there is nothing on record that supports the appellant's contention that the court did not exercise its discretion judicially. Both parties were equally granted leave to cross-examine.

[29] Lastly, reasons for a decision are vitally important to any litigant. Without reasons a litigant is deprived of the knowledge of how conclusions were reached. Undoubtedly in this matter where the accused had a reasonable apprehension that the presiding Judge was likely influenced by a report that she had in her possession, the reasons became vitally important to him. This court is in the invidious position to evaluate the conduct of the presiding Judge without giving consideration to the reasons that swayed her to the finding of not disqualifying herself. Moreover the court exercised its decision to call Willows, shortly after the recusal application was launched without substantiating the importance of Willows' testimony. Given the defence of non-pathological incapacity and Willows' reservation of giving an opinion on the possible influence of the medication used by the appellant, it is impossible to determine why the court considered him as an important witness. The respondent conceded that Willows' evidence was not necessary.

[30] The irregularities of the presiding Judge not to recuse herself, to call a witness

[38] 1997 (2) SACR 601 (SCA).
[39] *Ibid* at 607b-c.

not essential for the just decision of the case, and to not give reasons for any of the rulings, cumulatively in my view constitute gross irregularities that resulted in a failure in justice. It vitiated the proceedings to the extent that the conviction and sentence need to be set aside without reference to the merits of the case.

[31] Accordingly the appeal succeeds and the conviction and sentence are set aside. It remains the prerogative of the prosecuting authority to decide whether or not the accused will be recharged.

From The Legal Journals

Omar, J

“South Africa's rape shield: Does section 227 of the Criminal Procedure Act affect an accused's fair trial rights?”

2016 SACJ 1

Abstract

Rape shield laws are a critical aspect of the protection of rape complainants during the criminal justice process. The rationale of rape shield laws is to protect complainants from having their sexual reputation or behaviour used to reduce their credibility, particularly as the inferences drawn are based on historical prejudices against women, and do not actually assist with the fact-finding role of the court. This article will argue that Section 227 of the Criminal Procedure Act 51 of 1977 aims to finding the correct balance between the protection of the complainant's rights to privacy and dignity, while upholding an accused's right to a fair trial, including the right to adduce and challenge evidence. However, the sparse case law related to section 227 raises questions about its successful implementation by courts.

Khumalo, K

“The meaning of 'force', 'violence' and 'threats of violence' for purposes of the crime of public violence”

2016 SACJ 44

Abstract

A number of eminent criminal law scholars agree that the crime of public violence is only committed when there is violence or a threat of violence; the mere use of force is insufficient. In establishing the meaning of the concepts of force, violence and threats of violence, regard must be had to the jurisprudence of the crime of assault as it sets out clearly how these concepts can be interpreted for purposes of all crimes of violence, such as, inter alia, robbery and public violence. Under assault jurisprudence, the violence required to constitute an assault exists where there is a direct or indirect unlawful application of force (in whatever degree) against the body of another. A threat of violence exists where the victim apprehends the immediate application of force against his/her body. Therefore, it is clear that for the crime of assault, force is a feature of violence and that there is no distinction between these concepts. Furthermore, any degree of force (be it slight or extreme) is sufficient to constitute violence for purposes of the crime of assault.

Viljoen, T & Tshehla, B

“A steep climb for an accused person: An examination of the courts’ approach to application for further evidence”

(2016) *SAJHR.*

Abstract

The law makes provision for further evidence to be adduced even after the completion of the trial. However, the courts only allow such further evidence in exceptional circumstances and have repeatedly stated that such power should be exercised sparingly. This entrenched approach, based on an approach established in S v de Jager, starts with a pre-disposition against the adducing of further evidence. The constitutional imperatives of a fair trial, which in turn also guide a court of appeal in determining its own processes, should be interpreted to give content to substance over processes. It is the need to give effect to these constitutional imperatives that belies the core argument of this article that the de Jager test be modified so that the

inquiry starts from a premise that enquires whether the evidence will affect the outcome of the case with the other two requirements serving a subordinate role.

Botha, J and Govindjee, A

'The regulation of racially derogatory speech in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000'

(2016) *SAJHR*.

Abstract

A significant number of hate speech cases in South Africa involve the use of racially derogatory epithets in the form of inter-personal racial slurs. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), as a transformative human rights and anti-discriminatory statute, is ideally suited to regulate the use of such speech and to provide a means grounded in law to overcome the harm caused thereby both to its victims and to the broader societal good, which includes the constitutional ideal of an equal and pluralistic society embracing tolerance. Section 7(a) of PEPUDA, however, is an inappropriate tool for the regulation of racially derogatory epithets, which are more suitably addressed through the medium of the narrowed down hate speech regulator proposed for section 10(1) of PEPUDA.

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

Contributions from the Law School

Sexual harassment in the workplace.

Sexual harassment is extremely prevalent in South African workplaces. Some sources estimate that 70-80% of all working women have experienced sexual harassment at some or other time. It is usually women who are the victims, and older

men in supervisory positions who are the perpetrators, and this is not surprising since sexual harassment is a form of sex/gender discrimination and it naturally mirrors the power differentials which exist more broadly in society generally. Victims of sexual harassment have various options open to them to pursue their rights, including proceeding in terms of delict under the common law.

In a very recently decided case, *PE v Ikwezi Municipality and XV Jack* case no 828/2011the plaintiff was awarded damages in excess of R 4 million, to be paid by her employer (the Ikwezi Municipality) because they had failed to protect her adequately from sexual harassment and it's consequences. They were therefore found to be vicariously liable for the sexual harassment of their employee. The employee who had perpetrated the sexual harassment was the plaintiff's supervisor, Jack. The harassment culminated in an incident where the supervisor tried to force his tongue into the plaintiff's mouth, against her clenched teeth. She was left with his saliva all over her mouth area and was utterly 'revolted' and severely traumatised by the incident. She reported the incident to the municipality, her employer, who instituted disciplinary action against him. However, they failed to take sufficiently adequate steps to prevent him from coming into contact with her during the ordinary course of their work. The perpetrator chose not to defend himself at the disciplinary enquiry, and he pleaded guilty to the criminal charge of sexual assault which the victim laid against him. The outcome of the disciplinary enquiry was that he received a punitive two-week suspension without pay. In the criminal court, he was sentenced to a suspended period of imprisonment. The victim was badly traumatised by her experience and eventually had to resign as she could not bear coming into contact with the perpetrator. She would tremble, and cry; and experienced insomnia, nightmares and panic attacks. She was diagnosed as suffering from post-traumatic stress disorder. The municipality told her that there was nothing they could do to help her after the perpetrator had returned to work after he had served his two-week suspension period. The court held that it had not protected her sufficiently and held them liable to her for over R 4 million.

In another recently decided case, *Campbell Scientific Africa (Pty) Ltd v Simmers and others (*2016) 37 ILJ 116 (LAC)the court had to decide whether sexually charged remarks made to a consultant of the employer, a 23 year old female, by a 43 year old male employee was sexual harassment. The perpetrator said it was just a sexual invitation made by one adult to another and that it was meant to be taken lightly – whereas she testified that the comments had made her anxious and fearful, particularly since they were in a remote location in Botswana and staying in the same hotel. The comments, including asking her whether she wanted a lover that night, were made after an after-hours dinner. The court said that it was nevertheless regarded as the workplace since they would not have been having dinner there together had it not been for their work obligations. The consultant made a complaint of sexual harassment to the employer (even though she was not an employee of the employer). The employer instituted disciplinary action against the perpetrator and the court found that his resultant dismissal was fair. This case shows us that employees can be dismissed for the sexual harassment of a non-employee, at an after-hours

function; and that the line between sexual banter, invitations and attention; and sexual harassment is a very fine one.

How then does one distinguish between benign sexual interaction between consenting adults and sexual harassment?

The first thing to note is that not all sexual comments or innuendo are automatically sexual harassment. The law does not prohibit sexual or romantic interaction in the workplace as a blanket rule. The conduct must be unwelcome and it must cross a line into the realm of the inappropriate.

Where there is a power differential between the parties – which could be marked by gender, age, socio-economic status or position in the workplace – it is more likely that sexually charged comments and behaviour will be regarded as sexual harassment rather than acceptable adult interaction. Also, the threshold of what is regarded as appropriate will be different in the workplace than it is in, say, a pub. What may be regarded as merely ribald banter in a pub setting, may cross the line into sexual harassment in the workplace setting.

Further, one has to consider whether the conduct was welcome or unwelcome. Unwelcome sexual attention which is sufficiently serious is sexual harassment. Even where a subordinate employee is momentarily flattered by the attention – but then later becomes uncomfortable with it – repeated instances of the sexual attention would then become sexual harassment. Likewise if the perpetrator ought to have known that the conduct would be unwelcome and is inappropriate in the workplace setting, even if the victim was too shy to voice her discomfort.

Even a single instance of inappropriate and unwelcome sexual attention may be an instance of sexual harassment. The conduct does not have to be repeated.

There are two codes of good practice on the handling of sexual harassment in the workplace which provide useful guidance in this regard. The first code was promulgated in 1998 (Govt notice 1367), the second in 2005 (GG No. 27865) and must be read together.

In the 2005 code it is stated that the test for sexual harassment is that it must be unwelcome conduct of a sexual nature which violates the rights of an employee and which constitutes a barrier to equity in the workplace. Regard must be had to the nature and extent of the conduct and the impact it had on the complainant.

The code expressly recognises that failing to respond to the perpetrator or simply walking away from him will indicate that the conduct is unwelcome. As regards the nature and extent of the conduct the code recognises physical, verbal and non-verbal types of sexual harassment. Physical harassment ranges from inappropriately brushing past someone in a suggestive manner in a corridor to a strip search in the presence of someone of the opposite sex. Verbal sexual harassment includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person’s body made in their presence or directed towards them, inappropriate enquiries about a person’s sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text. Non-verbal conduct includes unwelcome gestures,

indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.
As regards the impact of the conduct on the complainant – to be sexual harassment it must impact upon the dignity of the complainant taking into account the circumstances of the employee and the relative positions of the complainant and the perpetrator in the workplace.

Nicci Whitear-Nel
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Matters of Interest to Magistrates

"Pseudocide"

Platteland perspective

Carmel Rickard

Australians – of course – have a name for it:
"pseudocide". In South Africa it is becoming so common we don't bother with a special name.

A couple of years ago the Free State didn't even make the list of provinces where insurance fraud was a problem. But, with the case of Hansley Desire Gebert, we are quickly catching up. Actually we can't claim Gebert; not really. After all, he is originally from Mauritius and still holds citizenship of that country. And he wasn't actually even living in the Free State at the time of the crime. He was a kind of semi-permanent resident of Lesotho. It was just that he was arrested by the South African Police crossing into South Africa at the Maseru/Ladybrand gate after a warrant had been issued for his arrest. (For readers in other provinces: Ladybrand is part of the Free State.) Still, we are short of records in the Free State, so we'll take what we can get. His arrest took place in October 2013, nearly a year after his "death" in November 2012. Following an official death report, a R5-million claim was submitted to Old Mutual, supported by all the normal documents, duly signed by, among others, his wife Mpho Gebert – though he later said the real Mrs Gebert had nothing to do with his abortive scam. Old Mutual was busy processing the death claim – in favour

of the “widow” – when the company discovered he was alive and well. The attempted fraud was duly reported to the police, and the border-gate arrest followed. Gebert was later charged with fraud and stood trial in the regional court, Bloemfontein. According to the charge sheet he and his wife pretended to Old Mutual that he had died, gave them information, including sworn affidavits to verify his alleged death, claimed that the death claim on the life insurance police was legitimate and generally did whatever they could to induce Old Mutual to process and pay out the policy. When the trial began in January 2014, Gebert pleaded guilty and made a statement explaining what had happened. In due course he was convicted, based on his plea. All concerned seemed to agree that there were good reasons not to sentence him to the minimum 15 years but when the magistrate imposed an effective eight years, Gebert appealed. Now the high court, having heard the appeal, has delivered its decision. And it was a sobering lesson for jakkals and me. The two judges who heard the appeal said the many grounds originally relied on by the accused narrowed down to just a handful. One by one they trawled through these challenges to the sentence imposed, each time declaring the magistrate had been quite right with her findings and they couldn’t fault her. By the time the judgement reached the last of the grounds I assumed the court would once again approve the magistrate’s work, dismiss the appeal and move on to a more bloody matter. Not so fast. That last ground made all the difference. The judges found the magistrate *“exceedingly stressed the seriousness and magnitude of the crime committed by (Gebert)”,* at the expense of his personal circumstances. So what personal information had the magistrate taken into account when she considered the mitigating factors in Gebert’s case?

He was 40-years old; a family man with two dependent minor children. Both were in private schools and he was responsible for their education. He paid school fees of R40 000 a year for each child. *“His spouse was a housewife. He also looked after his sick mother-in-law. He was the sole breadwinner for the family. He was a businessman. He had 30 persons in his employ. He pleaded guilty to the charge of fraud. The insurer suffered no actual financial loss. He was a first offender.”* On the other side of the scorecard, she took into account the aggravating features: Gebert was found guilty of fraud which is a serious and prevalent crime. *“The amount involved was very high”.* Although the insurer did not suffer actual loss of R5m, *“the potential prejudice was nonetheless very high”.* The crime was meticulously thought out and well planned. Public interest required that society be protected from fraudsters. Law abiding citizens expected those who commit serious crimes such as fraud to be retributively punished. According to the judges, the magistrate made a number of misdirections that shocked them. She reckoned that, for the purpose of sentence, it was irrelevant that the prejudice suffered by the insurers was potential rather than actual and, *“during the course of passing sentence … on a few occasions, repeatedly stressed the gravity of the crime of fraud and repeatedly stressed that (Gebert) had to be retributively punished.” “As a result of (these) misdirections she ultimately imposed a sentence which was disturbingly shocking,”* said the two judges. *“Although the regional magistrate was entitled to take notice that white-collar crime was increasingly becoming rife in our society, the gravity of the*

offence so dominated and clouded her mind that she failed to adequately individualise (Gebert)'s person. He was a first offender. He pleaded guilty. He expressed remorse for his actions. There was no actual loss suffered by the insurer. Instead the insurer even continued to collect the premiums for a period of six months subsequent to the lodging of the fake claim. Because the policy was cancelled (Gebert) lost the total sum of R64 000 in form of premiums and gained virtually nothing." Having satisfied themselves that he was given an inappropriate sentence and having *"considered all the peculiar circumstances of this particular case",* the judges settled on four years as more like what they would have given him themselves. All in all, a worthwhile appeal for Gebert. But it's interesting to check the statistics. Turns out that insurance fraud is indeed a serious problem to the industry – and therefore to the rest of us. In 2009 just over 3 500 cases of attempt insurance fraud were foiled. If paid out, these claims would have amounted to R74.2m. In 2014, investigators prevented 7 360 fraudulent claims from being honoured – that meant more than R400m not paid out to scammers. And, according to official industry statistics, most attempted fraud occurred in relation to death and funeral policies.

The above article appeared in the Without Prejudice journal of August 2016

A Last Thought

The Department of Justice and Constitutional Development (DOJ&CD) has particularly noted the concerns raised in the media regarding the scope of the Prevention and Combating of Hate Crimes and Hate Speech Bill. It was reported that comedians are concerned that once passed into law, the Bill will curtail their freedom of expression as guaranteed in the Constitution.

It should be noted that the Department does not have any intention to process a Bill that is not consistent with the Constitution of the Republic of South Africa. All pieces of legislation are tested against the Constitution. Indeed section 16(1) guarantees the right to freedom of expression and inevitably protects a wide range of expressive conduct, including verbal, written, pictorial and physical expression. It therefore includes speech and activities such as displaying posters, painting and sculpting, dancing, the publication of photographs, symbolic acts such as flag burning, the wearing of clothing, and physical gestures – in principle, every act by which a person attempts to express some emotion, opinion, idea, belief or grievance.

However, Section 16(2) of the Constitution contains a built-in proviso (also referred to as an “internal limitation”) regarding the definitional scope of the right to freedom of expression. It states that the right to freedom of expression does not extend to, propaganda for war, incitement of imminent violence; or advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

This limitation was also thoroughly expressed by the Constitutional Court’s pronouncement in a matter between the State versus Mamabolo, 2001 that freedom of expression is not to be afforded any primacy over any other constitutional rights, including dignity. According to the court, freedom of expression -“... is not a pre-eminent freedom ranking above all others. It is not even an unqualified right. ... [section 16(1)] is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection. Moreover, the Constitution, in its opening statement and repeatedly thereafter, proclaims three conjoined, reciprocal and covalent values to be foundational to the Republic: human dignity, equality and freedom. With us the right to freedom of expression cannot be said automatically to trump the right to human dignity. The right to dignity is at least as worthy of protection as the right to freedom of expression. How these two rights are to be balanced, in principle and in any particular set of circumstances, is not a question that can or should be addressed here. What is clear though and must be stated is that freedom of expression does not enjoy superior status in our law.”

Response to the concerns raised regarding the Prevention and Combating of Hate Crimes and Hate Speech Bill by the Department of Justice and Constitutional Development on 1 November 2016.