e-MANTSHI

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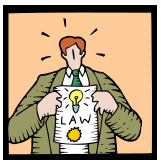
Welcome to the hundredth and thirty fourth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. Act 7 of 2017, the Courts of Law Amendment Act, 2017 has been published in Government Gazette no 41017 dated 2 August 2017. The purpose of the Act is to amend the Magistrates' Courts Act, 1944, so as to insert definitions; to regulate the rescission of judgments where the judgment debt has been paid; to further regulate jurisdiction by consent of parties; to regulate the factors a court must take into consideration to make a just and equitable order; to further regulate the payment of debts in installments or otherwise; to further regulate consent to judgments and orders for the payment of judgment debts in installments; to further regulate offers by judgment debtors after judgment; to further regulate the issuing of emoluments attachment orders; to further regulate debt collection proceedings pursuant to judgments granted by a court for a regional division; to further regulate the suspension of execution of a debt; to further regulate the abandonment of judgments; and to provide for certain offences and penalties relating to judgments, emoluments attachment orders and installment orders; to amend the Superior Courts Act, 2013, so as to provide for the rescission of judgments by consent and the rescission of judgments where the judgment debt has been paid; and to provide for matters

connected therewith. The Act will come into operation on a date to be fixed by the President by proclamation in the government gazette. The Act can be accessed here http://www.justice.gov.za/legislation/acts/2017-007.pdf

2. Act 8 of 2017, the Judicial Matters Amendment Act, 2017 has been published in Government Gazette no 41018 dated 2 August 2017. Amongst the Acts that are amended is the Magistrates' Courts Act, 1944, the Criminal Procedure Act ,1977and the Magistrates Act, 1993 which is of specific relevance for Magistrates. One of the most interesting amendments is section 24 of the Magistrates Act, 1993.

24. Section 13 of the Magistrates Act, 1993, is hereby amended—
(a) by the substitution for subsection (1) of the following subsection:
''(1) A magistrate shall, subject to the provisions of subsection (1A), vacate his or her office on attaining the age of 65 years: Provided that if he or she attains the said age after the first day of any month, he or she shall be deemed to attain that age on the first day of the next ensuing month.''; and
(b) by the insertion after subsection (1) of the following subsection:
''(1A) *(a)* A magistrate holding office as such may, before attaining the age of 65 years, in written notice to the Commission, indicate his or her intention to continue to serve in such office for such further period specified in the written notice: Provided that a magistrate must vacate his or her office on attaining the age of 70 years: Provided further that if he or she attains the said age after the first day of any month, he or she shall be deemed to attain that age on the first day of the next ensuing month.
(b) A magistrate who intends to continue to serve in such office as contemplated in paragraph *(a)* must timeously give notice thereof in writing to the Commission before he or she attains the age of 65 years.''.

The Act is already in operation except sections 19, 20, 21, 24, 35 and 38 which will come into operation on a date fixed by the President by proclamation in the *Gazette*. The Act can be accessed here:
http://www.justice.gov.za/legislation/acts/2017-008.pdf

Recent Court Cases

1. **S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe [2017] ZAWCHC 82 (16 August 2017)**

The statutory insistence on the expeditious forwarding of records for review in terms of s 303 of Act 51 of 1977 is to promote the speedy and efficient administration of justice, which should not be compromised by administrative incompetency.

(This is an edited version of the full judgment. The full judgment may be obtained here http://www.saflii.org/za/cases/ZAWCHC/2017/82.pdf)

Sher AJ (Henney J concurring):

[1] We have before us 7 matters which were sent to this Court for so-called 'automatic' review from the Caledon, Montagu, Vredendal, and Ceres magistrates' courts in terms of ss 302 and 303 of the Criminal Procedure Act 51 of 1977("*the CPA*"), which provide that the record of the proceedings in which a reviewable sentence has been imposed by a magistrate shall be forwarded to the registrar of the High Court within 7 days, in order that such proceedings may be reviewed by a judge in chambers. In all these matters the records were sent for review well outside the requisite period. The breach is particularly egregious in the case of the 2 matters from Caledon and the matter from Montagu.

[2] In *S v Jacobs,*[1] where the accused was convicted of house-breaking and theft of an electric grass cutter and was sentenced to 2 years' imprisonment in terms of the provisions of s 276(1)(i) of the CPA on 7 March 2014, the record was only received on review more than 3 years after the sentence was imposed and a year after it would have been served, that is, on the supposition that the accused served the full term. In the other matter from the Caledon court (*S v Swart*),[2] the record of proceedings was sent for review 2 years after the sentence was imposed. The accused was convicted of house-breaking with intent to steal and theft of a small amount of cash and a cell phone and was given a sentence of 2 years' imprisonment which was suspended for 4 years. As will be apparent, not only was the conviction unsound for the reasons we set out herein, but the terms of the suspended sentence were so widely framed that it could have been put into operation since then in the

[1] Caledon case no. C 1191/13.
[2] Case no. B 927/14.

event that the accused sustained a subsequent conviction for any offence involving dishonesty committed in the period of suspension, no matter how trivial.

[3] In the Montagu matter of *S v Damon*[3] the accused was convicted of theft of a music system for which he was sentenced to 2 years' imprisonment on 19 November 2015. On 17 June 2016, after he had served 7 months he was released on parole, but he was re-admitted for violating his parole conditions on 16 August 2016 and by now he too will long since have served the remainder of his sentence. The record in his matter was only sent to this Court in June 2017, a year and 8 months late.

[4] The delay in the submission of the record in respect of the 2 matters from the Vredendal court is in the order of 4 months from the date when the sentence was imposed. In one of these matters the accused, who was convicted of assault with intent to cause grievous bodily harm, was sentenced to 18 months' imprisonment which was suspended for 5 years on standard conditions.[4] In the other matter[5] the accused was sentenced to a fine of R2 000.00 or 18 months' imprisonment half of which was suspended for 5 years, after he was convicted of being in possession of certain prohibited dependence-producing substances.

[5] In the case of the 2 matters from the Ceres magistrate's court the delay between the date of sentence and receipt of the record by the Registrar is in the order of 2 months. In one of these matters[6] the accused received a suspended sentence of 6 months' imprisonment after he pleaded guilty to a charge of common assault and in the other matter[7] the accused was sentenced to a term of 6 months' imprisonment after he was convicted on a charge of theft.

[6] From these and other cases which have come before judges of this division recently on automatic review it is apparent that non-compliance with the provisions of ss 302 and 303 and lengthy delay in the submission of the records of reviewable matters is fairly endemic throughout the outlying magisterial districts of the Western Cape and this judgment constitutes an attempt, on our part, to put forward certain remedial measures in order to correct this situation. In the circumstances, given the nature of the recommendations we make at the end of this judgment and the terms of the Order which we impose, we direct that a copy of this judgment should be sent to the Director-General of the Department of Justice, the Regional Heads of the Department of Justice and the Office of the Chief Justice for the Western Cape, the Director of Public Prosecutions for the Western Cape, the Magistrates' Commission, the Regional Court President (Western Cape) and the Chief Magistrates and judicial administrative/'cluster' heads for the various courts referred to as well as the Head of Court of each of the magistrates' courts concerned.

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[3] Case no. 526/14.
[4] *S v Jas* Vredendal 14/17.
[5] *S v Klaasen* Vredendal 682/16.
[6] *S v Swanepoel* Ceres 1907/16.
[7] *S v Xhantibe* Ceres 310/17.

The legislative provisions

[7] S 302(1)(a) of the CPA provides that proceedings in which a sentence has been imposed by a judicial officer who has not held the rank of magistrate[8] for a period of more than 7 years and which exceeds 3 months' imprisonment (or R6 000.00) or in the case of magistrates who have held the rank for longer exceeds a term of imprisonment of 6 months (or R12 000.00), are automatically reviewable by this Court. In addition, s 85 of the Child Justice Act[9] provides that[10] any matter in which a child[11] has been sentenced to any form of imprisonment[12] (or any sentence of compulsory residence in a child and youth care centre) is also subject to automatic review, irrespective of the length of the sentence or the period the judicial officer concerned has held the substantive rank of magistrate or regional magistrate,[13] or whether the child appeared before a district or regional court.[14] Automatic review is not available to an adult accused who was legally represented at the time[15] or who has noted an appeal.[16]

[8] Although s 302(1)(a) is couched in terms of a review of the sentence which was imposed, and although review powers are ordinarily confined to considering whether there was any irregularity in the proceedings, because s 303 requires certification that the proceedings are in accordance with justice, the reviewing judge is required to evaluate whether the entire proceedings ie those pertaining both to the sentence as well as the merits of the conviction, are not only formally in order and regular, but also whether they are fair, and in doing so it has long been accepted that the reviewing judge exercises a function akin to that ordinarily exercised by an appellate court. As such, the process of automatic review is aimed at ensuring both the validity as well as the fairness of the underlying conviction and sentence[17] and the powers of the reviewing judge are extremely wide [18] and include not only the power to alter or reduce the sentence imposed[19] but also the power to quash the conviction[20] or to set aside or "*correct"* the proceedings,[21] or to make any other order which may promote the ends of justice.[22]

[9] Automatic review was not derived from Roman-Dutch or English sources and is a unique creation of our law. In the oft cited decision of *Letsin*,[23] it was described

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[8] The definition of *"magistrate"* in s 1 of Act 51 of 1977 only refers to a so-called district court magistrate and not an additional or regional magistrate.
[9] Act 75 of 2008.
[10] Unless an appeal has been noted (s 85(2)).
[11] Whether legally represented or not (s 85(2)(c)).
[12] This will include a suspended sentence of imprisonment *vide S v LM* 2013 (1) SACR 188 (WCC) at paras [50]-[51].
[13] S 85(1)(b).
[14] S 85(1)(d).
[15] S 302(3)(a) of the CPA.
[16] S 302(1)(b)(i) – (iii) of the CPA.
[17] *S v Mokubung; S v Lesibo* 1983 (2) SA 710 (O) 714H.
[18] As set out in s 304.
[19] S 304(c)(ii).
[20] S 303(c)(i).
[21] S 304(c)(iii).
[22] S 304(c)(vi).
[23] 1963(1) SA 60 (O) at 61A-B.

as an institution of vital importance to the administration of justice in this country as the great majority of accused who come before the magistrates' courts are legally unrepresented and criminal proceedings in these courts are not considered to be properly concluded until the reviewing judge has certified that they were in accordance with justice.[24] It was also said that it was part of the *"higher calling"* of the magistrates' courts to see to it that any process in terms of which a person is deprived of his personal liberty by means of a sentence of incarceration receives the *imprimatur* of a reviewing judge as speedily as possible.[25]

[10] In *Manyonyo*[26] it was held that the reason for the statutory insistence on the expeditious forwarding of records for review in terms of s 303 is to promote the speedy and efficient administration of justice,[27] which should not be compromised by administrative incompetency, and in *Joors*[28] this Court[29] described automatic review[30] as a measure intended to lend substance to the constitutional right which an accused has to review by a higher court[31] and the constitutional right of every detained person to challenge the lawfulness of their detention.[32]

The effect of delay

[11] Even before the introduction of the Bill of Rights it was an accepted principle of common law that a gross irregularity during the course of a criminal trial could result in a conviction or sentence being set aside, if it caused a failure of justice. In *S v Moodie*[33] it was accepted that a failure of justice could occur where there was an irregularity which was so gross a departure from established rules of procedure that it could be said that the accused had not been properly tried[34] and, in like vein in *S v Mushimba and Ors*[35], it was accepted that if an irregularity resulted in an accused not receiving a fair trial, the conviction or sentence, as the case might be, could be set aside.[36]

[12] In regard to the effect that gross delay may have on the integrity and validity of criminal proceedings, we have sought guidance from reported cases that have dealt with this issue in both pre- and post-conviction proceedings.

[13] In regard to pre-conviction delay, the cases must be considered in the context of s 342A of the CPA which was introduced as an attempt on the part of the legislature to provide certain remedies where there has been excessive delay in respect of bringing an accused to trial. Amongst these remedies is that of a stay of

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[24] *Id* 61F.
[25] *Id* 61G.
[26] *S v Manyonyo* 1997 (1) SACR 298 (E).
[27] *Id* at 300f.
[28] *S v Joors* 2004 (1) SACR 494 (C).
[29] Per Binns-Ward AJ *et* Thring J.
[30] At 497d.
[31] In terms of s 35(3)(o) of the Constitution.
[32] In terms of s 35(2)(d) of the Constitution.
[33] 1961 (4) SA 752 (A).
[34] At 758F-G; 759C-D.
[35] 1977 (2) SA 829 (A).
[36] See also *S v Lubbe* 1981 (2) SA 854 (C) 860F-G.

proceedings and the most important cases dealing with pre-conviction delay are those that concern applications in this regard. In summary, the outcome of these cases[37] is that a permanent stay will only be granted in exceptional circumstances or where there is significant prejudice to an accused were the matter to proceed. Thus, it could fairly be said, the tendency in regard to pre-conviction delay is not to upset the applecart save in exceptional circumstances, and the courts will generally be disposed towards leniency.

[14] In *Sanderson*,[38] the Constitutional Court identified the principle factors which need to be taken into account by a court in deciding whether or not to grant a permanent stay of prosecution on the grounds of undue delay.

[15] It reiterated what was said in 1963 in *Letsin*[39] viz that the vast majority of accused in South Africa are unrepresented and thus to deny them a stay because they have not asserted their right to a speedy trial would be to *"strike a pen"* through the rights of the most vulnerable members of society.[40] At the same time, the Court also pointed out that it would be equally unrealistic not to recognise that the administration of the criminal justice system in this country was under severe stress. These remarks are still apposite some 9 years later.

[16] The Court was of the view that the greater the prejudice to an accused because of delay (be it in the form of continued incarceration, restrictive bail conditions or trial prejudice), the shorter should be the pre-conviction period within which the accused was to be tried.[41] Consequently, cases involving incarceration or serious *"occupational disruption or social stigma"* should be prioritised and expedited.[42] However, the Court held that delay in itself was not necessarily determinative and in each case the nature and cause thereof and the role of the parties responsible therefore needed to be taken into account.

[17] So, for example, where an accused was to blame for a number of postponements or delays in trial proceedings, he or she should not be allowed to rely thereon in order to vindicate his constitutional right to a speedy trial.[43] The Court also recognised that there was a distinction between a simple and a complex matter which required more time to prepare, such as cases where scientific or other analyses or the obtaining of technical, medical or other expert reports was awaited.[44] The Court also expressed the view that systemic delays caused by limitations in resources were probably more excusable than individual instances involving a dereliction of duty. But, at the same time, it recognised that there had to be some proportionality between the sentence which could ultimately be imposed and the prejudice to an accused caused by delay. So, in matters where the period of pre-trial

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[37] *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 524 (SCA); *Wild and Ano v Hoffert & Ors* 1998 (3) SA 695 (CC).
[38] *Sanderson v Attorney-General Eastern Cape* 1998 (1) SACR 227 (CC).
[39] Note 23.
[40] Note 32, para [26].
[41] *Id* para [31].
[42] *Id.*
[43] At para [33].
[44] Para [34].

incarceration caused by delay exceeded the maximum possible period of incarceration which might be imposed on sentence, the delay would be considered to be unreasonable.[45] And the Court also warned that notwithstanding resource limitations *"there must come a time when systemic causes can no longer be regarded as exculpatory"*[46] as the Bill of Rights was not a set of aspirational principles of State policy, and the State should make whatever arrangements were necessary to avoid a violation of an accused's constitutional rights. The Court further cautioned that delay should not be allowed to debase the presumption of innocence and thereby in itself become a form of extra-curial punishment.[47]

[18] In *Bothma*[48] the Constitutional Court added a further factor (to those set out in *Sanderson)*, which needed to be weighed in the scale ie. the nature of the offence concerned. It held that:

"The less grave the breach of the law the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial".[49]

[19] It pointed out that the factors referred to in *Sanderson* should not be dealt with as though they constituted a definitive checklist and in each case the court was required to carry out a balancing exercise depending on the facts before it.[50] In *Bothma* the issue was whether a 37-year delay in bringing an accused to trial on a charge of rape and sexual abuse merited a permanent stay of the prosecution. The Court pointed out that local and international jurisprudence recognized that the trauma and shame suffered by youthful victims of sexual offences often resulted in criminal complaints only being lodged many years afterwards, and public policy therefore required that delays in regard to prosecuting such offences should be treated differently. It drew attention to the fact that although the CPA provided that the right to institute a criminal prosecution ordinarily lapsed after the expiry of a period of 20 years, such a prescriptive bar did not apply in the case of serious offences such as rape, murder, genocide, and trafficking for sexual purposes. This was a consideration which was also taken into account by the Supreme Court of Appeal in *Zanner*,[51] where the Court held that the societal demand to bring an accused to trial in the case of a serious offence such as murder was *"that much greater"* and the Court should accordingly be that much slower in granting a permanent stay[52] as the right to a fair trial required fairness not only to the accused, but also to the public, as represented by the State.[53]

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[45] *Id*.
[46] Para [35].
[47] Para [36].
[48] *Bothma v Els* 2010 (1) SACR 184 (CC).
[49] Para [77].
[50] *Id*.
[51] *Zanner v Director of Public Prosecutions Johannesburg* 2006 (2) SACR 45 (SCA).
[52] At para [21].
[53] *Id.*

[20] That then, as far as the treatment of pre-conviction delay is concerned. As far as post-conviction delay is concerned, and appellate delay in particular, the approach of the Courts has been equally wary. In *Pennington*[54] the Constitutional Court referred to the decision of the Supreme Court of Canada in *R v Potvin*,[55] where it was held that a delay in the appeal process did not infringe the constitutional right to be tried within a reasonable time. But the decision in *Potvin* must be seen in the context of the particular wording of the relevant Canadian Charter right[56] which provided that any person *"charged"* with an offence had the right to be tried within a reasonable time. The majority of the Supreme Court held that the reference to being 'charged' did not allow for this right to be extended beyond conviction, to appeals. The Court adopted the approach that the remedy for appellate delay was not the reversal of a conviction as this would be disproportionate to the interest that had been harmed by the infringement, but gross delay might possibly give rise to a right of action for damages, or some other form of relief.

[21] There are two *caveats* that must be noted in respect of the decision in *Potvin*. Firstly, the Supreme Court of Canada subsequently held in *R v MacDougall*[57] that the phrase *"charged with an offence"* should not be restricted to a particular phase of criminal proceedings and required an expansive interpretation which covered both pre- and post-conviction proceedings. In *MacDougall* the delay had occurred in sentencing proceedings and the Supreme Court took account not only of the length thereof and the causes for it, but also the prejudice suffered by the accused, and it also considered whether by his conduct he might have waived any of his rights. It held that an accused who entered a plea of guilty did not waive his right to be sentenced within a reasonable period of time thereafter.

[22] In the second place, the corresponding right in our Bill of Rights is phrased differently. It is a right to have a criminal trial begin and conclude without unreasonable delay[58] and although our general right to a fair trial[59] includes as a subspecies the right of appeal to or review by a higher court,[60] this right is not expressly phrased in the context of time, reasonable or otherwise.

[23] In *Pennington* the Constitutional Court remarked that, although undue delay in the prosecution of a criminal appeal was undesirable, to say that guilty persons were to be excused from serving sentences imposed on them because of delays associated with an unsuccessful appeal would not be consistent with fairness or justice.[61] But these remarks were *obiter* and the Court expressly left open the

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[54] *S v Pennington and Ors* 1997 (4) SA 1076 (CC).

[55] *R v Potvin* (1993) 16 CRR (2d) 260.

[56] S 11(b) of the Charter of Human Rights.

[57] [1998] 3 SCR 45; [1998] 56 CRR (2d) 189.

[58] S 35(3)(d).

[59] In terms of s 35(3).

[60] S 35(3)(o).

[61] Para [43].

question of whether undue delay might constitute an infringement of the constitutional right to a fair trial.[62]

[24] In *Sochop*[63] this Court raised the question of whether an accused's constitutional right to have their trial begin and conclude without unreasonable delay extended to appeal proceedings and, if so, whether unnecessary delay could in and of itself result in an acquittal. Blignaut J referred to a number of judgments in international jurisdictions where the issue had been raised but not decided conclusively, one way or the other. In *Sochop* there had been a 5-year delay between the noting of an appeal and the hearing of it, which was largely attributable to problems in the provision of Legal Aid. The Court pointed out that delays of this kind prejudiced not only an appellant, but brought the whole criminal justice system into disrepute and the Court found it especially disturbing that there were insufficient control mechanisms in place in the provision of Legal Aid to ensure that lengthy delays could be avoided.[64] But, as the conviction was found to be unsound in any event, the appeal was upheld on this ground and as far as the delay was concerned the Court simply directed that the judgment be brought to the attention of the Director of Public Prosecutions and the Legal Aid Board.

[25] The way in which appellate courts have dealt with the issue of delay may be contrasted with how it has been dealt with by courts before whom matters have come on automatic review. Already in 1963 in *Letsin* the Court sought to place an obligation on presiding magistrates to see to it that criminal trials were properly concluded by ensuring that the record of proceedings were placed before the High Court for review as speedily as possible.[65] In *Letsin* the delay was minimal: the record was sent on review 9 days after sentence instead of 7 and when reasons for the delay were requested from the magistrate these were supplied a month later.

[26] In *Raphatle*[66] a 2-month delay in submitting the record was described as a matter of *"great concern"*.[67] But the conviction was set aside on the grounds of another irregularity, to wit that the presiding officer had failed to inform the accused of his right to cross-examine.

[27] In *Manyonyo*[68] the remedy which the Court adopted for a (5 month) delay in submitting the record was to direct that the magistrate should provide a full explanation to the Court, and since then this has come to be expected practice[69] in the case of lengthy delay but, sadly, it is a practice which is often not adhered to. The Court pointed out that the reason for the statutory insistence on the expeditious transmission of records on review was to promote the speedy and efficient administration of justice, and to ensure that an accused was not detained unnecessarily in matters where the reviewing Court might set aside a conviction or

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[62] Para [41].
[63] 2008 (1) SACR 553 (C).
[64] At para [30].
[65] Note 23 at 61G.
[66] 1995 (2) SACR 452 (T).
[67] *Id* at 453h.
[68] Note 26.
[69] Reaffirmed in *S v Mekula* 2012 (2) SACR 521 (ECG) at para [13].

sentence. It raised the question whether lengthy delay did not *per se* constitute a failure of justice which would preclude certification that the proceedings were in accordance with justice,[70] but ultimately it held the delay in *casu* was not a sufficient ground to set aside the conviction.[71]

[28] In 1998 this Court[72] reaffirmed in *S v Lewies*[73] that the whole purpose of automatic review was to ensure that an accused had a fair trial and one of the essential elements thereof was to obtain finality in the proceedings as soon as was feasible. Consequently, a delay of 3 months was held to have resulted in a serious miscarriage of justice for which the Court expressed the strongest disapproval.[74] But, once again the Court stopped short of setting aside the conviction on this ground and the review succeeded on the basis that the accused had been wrongly convicted, as his version had been reasonably possibly true.

[29] Six years later, in *Maluleke*[75] a delay of more than 3 months was described as 'certainly' constituting an infringement of the accused's rights to a fair trial, but the Court also stopped short of finding that it constituted sufficient grounds for setting aside the conviction.[76] With reference no doubt to the approach adopted by the Canadian courts (as referred to in *Pennington*) it pointed out that there were 3 possible ways one could deal with the issue of undue delay in automatic reviews. One approach was to only allow for a claim in damages, whilst another was to adopt the attitude that as the accused still had a right to appeal or institute his own review, delay should not in itself ever result in the proceedings being set aside. The third approach was to hold that where the delay was serious and no cogent and convincing reasons therefore had been provided, the proceedings could, in certain instances, be set aside. But the Court held that it was not necessary for it to make a determination in regard to which approach was to prevail, and as in the previous matters we have referred to it held that the matter was capable of being disposed of on other grounds.[77]

[30] In the same year, this Court took the view in *Joors*[78] that the extent to which the statutory provisions may have been ignored to the resultant prejudice of an accused might, in itself, constitute a factor material enough to exclude confirmation by the reviewing judge of the proceedings *a quo.* The Court held that the relevant provisions *"certainly bear closely enough on the concept of what is included in a fair trial to beg the question as to what the result should be of so material an infringement of the right"*.[79] However, ultimately it too was loath to express a definitive view, one way or the other, as to whether an egregious breach of the provisions in question

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[70] In terms of s 304(1).
[71] *Id* at 300g-h.
[72] Per Traverso DJP *et* Conradie J.
[73] 1998 (1) SACR 101 (C).
[74] At 104c.
[75] 2004 (2) SACR 577 (T).
[76] At para [12].
[77] *Id*.
[78] Note 28 at 498i-499a.
[79] *Id.*

could, of its own, result in a conviction being set aside. In this regard the Court referred[80] to the 'dubious' consequence of completely absolving a person of liability where there had been undue delay, but it too left the question open and was content with simply directing that a copy of the judgment be referred to the Director of the Legal Resources Centre for consideration as to what assistance should be given to the accused in order to achieve appropriate redress. But, in doing so, the Court expressed the view that there was no reason why judicial pro-activism should be limited when it came to the act of fostering respect for the rule of law and an individual's constitutional rights.[81]

[31] In 2013 in the matter of *S v VC*,[82] there had been a delay of 7 months from the time when the accused was sentenced to the date when the record was forwarded for review. The Court found that the delay had impacted on the fairness of the trial, but its findings in respect of the consequences thereof were contradictory. It held, in one and the self-same paragraph,[83] that the failure to comply with the provisions of ss 302 and 303 constituted a failure of justice as a young offender had been deprived of recourse to the review process and had already served 10 months of the sentence which was imposed on him by the time the matter came under review, but it also found that the delay did not constitute an irregularity, and ultimately it interfered with the sentence on the basis that it was unduly harsh.

An evaluation: some guiding principles

[32] The Constitutional Court held in *Zuma*[84] that the right to a fair trial embraced a concept of substantive fairness which was not to be equated with what might have passed muster in our criminal courts prior to the advent of the Constitution. An accused's right of review and appeal is a subsidiary part of this overall right to a fair trial.

[33] Although the cases pertaining to pre-conviction delay are useful and the principles set out therein offer some guidance, in our view there are a number of important distinctions between pre-conviction and post-conviction proceedings which must be borne in mind.

[34] The principle consideration pre-conviction is that offenders should be brought to justice, and with a view to realising this objective courts have leaned in favour of tolerating delay provided no other irregularity is discernible in the proceedings. This approach has as much to do with the aim and purpose of bringing offenders to book as it has with the realities of the constraints upon the criminal justice system in regard to limited resources, congested court rolls and over-burdened courts. However, it occurs to us that post-conviction there is a somewhat inverse relationship with delay inasmuch as the aim of the proceedings is to obtain the court's confirmation of the integrity of the conviction and the fairness of the sentence which

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[80] With reference to the commentary by Chaskalson *et al* in *Constitutional Law of South Africa.*
[81] *Id* at 499f-500a.
[82] 2013 (2) SACR 146 (KZP).
[83] Para [5] at 149b.
[84] 1995 (2) SA 642 (CC) at para [16].

was imposed as soon as possible and generally, at the post-conviction stage of criminal proceedings which originated from the magistrates' courts, there is much less congestion in the criminal justice system and a lack of resources will not ordinarily constitute a factor of substance. As such, there is much less room for delay to be tolerated post-conviction than pre- and the objective should surely be to process appeals and reviews as expeditiously as possible.

[35] In the second place, whereas the enquiry into pre-conviction delay is generally more complex, and involves a number of elements and factors which are to be put into the scale such as the conduct of the prosecution, possible motives for laying false charges, the loss or dissipation of evidence through the death of witnesses and the disintegration of evidentiary material, the enquiry in respect of post-conviction appeal or review delay is generally a much simpler one and the causes are usually much easier to ascertain.

[36] Thirdly, whilst it is so that in the context of delay the seriousness of an offence is highly relevant pre-conviction ie the more serious the offence the greater the need for fairness to the public and the complainant by ensuring that a matter proceeds to trial and therefore the greater the tolerance for delay.[85] In post-conviction proceedings the converse may often be applicable ie the more trivial an offence for which a person has been sentenced to a term of incarceration or a sizeable fine, the more urgent and compelling the need to have a speedy review or appeal. The contrast between the vantage points from which the courts approach pre- and post-conviction proceedings, is aptly illustrated by the remarks of Sachs J in *S v Coetzee and Ors:* [86]

"The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book".

[37] In our view, in order to maintain the integrity of the criminal justice system and public confidence therein it is important that the system of automatic review which is supposed to provide for a free, far-ranging and expeditious review by the High Court of proceedings in the lower courts, should be an effective process, otherwise, quite frankly, there is no point to it. Even though the provision of Legal Aid has been expanded dramatically in the urban metropoles, it has still not effectively been extended to outlying areas where poverty and crime are often at their worst. We have frequently noted, when considering records in automatic reviews and criminal appeals which emanate from magistrates' courts which are located in outlying and under-resourced areas, that whilst many accused indicate on the occasion of their first appearance that they would like to avail themselves of legal aid assistance, when it does not materialise and they face the prospect of further extended delay whilst in custody awaiting trial, they often subsequently elect to conduct their own defence in order to expedite the proceedings. The system of automatic review

[85] *Bothma* n 42 para [77].
[86] 1997 (3) SA 527 (CC) at para [220].

therefore still fulfils an extremely important function in the administration of justice, at a time when great poverty and rampant crime combined with a lack of legal aid resources often coincide and are common features of our daily experience in the criminal justice system. And it serves as an important check on criminal proceedings involving children.

[38] In addition, in our view it would be unfair and fallacious to adopt the attitude that if a conviction is sound, any post-conviction delay in the automatic review process is inconsequential and should always be condoned. That would mean that only the innocent are entitled to an expeditious review. Apart from the arch cynicism inherent in such a proposition and the fact that it goes against the fundamental grain that all are entitled to be treated equally before the law, it also suffers from a failure to appreciate that it is only if one has an expeditious system of review that we can identify those unrepresented persons who have been wrongly convicted or sentenced, and thereby prevent them from serving sentences that they should not.

[39] Thus, if we are to be consistent and true in our application, where an irregularity pertaining to delay in an automatic review matter is egregious and has resulted in prejudice to an accused, and such irregularity has not been brought about through any act or fault of the accused, it should be treated in no lesser fashion than it would ordinarily be treated in the context of the general principles applicable to a criminal trial ie that if there is a failure of justice, this could, depending on the circumstances, result in a vitiation of the proceedings as a whole. Without the lower courts being at risk in this regard there will be no incentive for them to ensure that the peremptory requirements of the statutory review provisions are complied with and that there is due and proper adherence to the time periods and the procedures prescribed. The very fact that from 1963 to date the law reports are littered with cases in which judges have regularly lambasted magistrates for failing to comply with the provisions in question (either by sending through records well outside the time limits provided or by failing to ensure that the records are complete), illustrates that the system is not working and that it is high time that effective measures be put in place to rectify this.

[40] In our view, if an accused's constitutional right of review is effectively stymied and rendered nugatory because of egregious delay, for example where, by the time the matter is reviewed he has already served the sentence that was imposed upon him, his constitutional right to a fair trial has been infringed and this may constitute a failure of justice and a ground for the Court not only to decline to certify that the proceedings are in accordance with justice, but also to set aside or correct the proceedings[87] or to make any other order in connection with the proceedings as will, to the Court, seem likely to promote the ends of justice.[88] Judicial pro-activism requires that this Court move beyond being a passive bystander lamenting lengthy and unnecessary delays in the automatic review process without doing something practical in order to attempt to remedy systemic deficiencies and indeed, in the

[87] in terms of s 304(c)(iii).
[88] In terms of s 304(c)(vi).

interests of justice the Court has a duty not only to the accused in the matter before it but also to other unrepresented accused who may have been sentenced at a particular magistrate's court where there is a clear problem, to ensure that effective measures are taken to resolve such deficiencies.[89]

[41] Why the legislature saw fit to stipulate in s 303 that proceedings subject to review must be sent to the High Court within 7 days from the date when the sentence is imposed, is not clear when, as a matter of practicality, particularly where evidence is led, it will almost always be impossible for a magistrate to comply with this time period. The reviewing judge must be alive to this in-built difficulty which almost in itself sets the system up to fail and it should not be understood that this judgment in any way seeks to lay down a general principle or rule of law that mere non-compliance with the peremptory period will in itself constitute an irregularity, or that if it constitutes an irregularity it will be of such a nature as to necessarily and inevitably vitiate the entire proceedings. Each matter will have to be decided on its own facts.

Towards some remedial measures

[42] Already 7 years ago on 15 February 2010 the Chief Magistrates' (Heads of Court) Forum noted[90] that it had been brought to their attention by judges of the High Court and via judicial quality assurance reports that problems were being experienced with review and appeal matters not being processed timeously and that *"serious prejudice"* was being caused thereby to the administration of justice. In the interests of accountability and with a view to ensuring that such matters were attended to timeously and effectively the Forum accordingly resolved that all magistrates were to keep personal review and appeal registers which were to be checked, monthly, by the magistrate of the district or the responsible senior magistrate concerned. A specimen template datasheet was attached to the resolution which set out the information which magistrates were required to record in respect of reviewable sentences. This information includes particulars as to the relevant dates when the sentence was imposed and when the record was sent for typing and transcribing, as well as the date when the matter was despatched to the High Court. The datasheet also makes provision for a record of the dates when any query was raised by the reviewing judge and when the matter was returned to the High Court and finally, it makes provision for insertion of the date when the matter is returned from the High Court, and the outcome of the review.

[43] This resolution has been adopted by the magistracy as a performance standard. Laudable as its contents may be, it appears that as each magistrate is required to keep their own personal register of automatic reviews, control and supervision of these matters still lies largely in the hands of the individual magistrate and it does not appear that the Heads of Court exercise effective oversight over these registers. Administratively, the registers resort primarily under the control of the

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[89] In *Wild* n 31 at paras [11]-[12] the Con Court held that where there is an infringement of the right to a 'speedy trial' the court has a duty to devise and implement an appropriate remedy or combination of remedies, depending on the circumstances.

[90] In Circular 14/2010 which was circulated to all magistrates on 8 March 2010.

clerk of the relevant court who accounts, insofar as office statistics and records are concerned, to the Office and Court Managers, who in turn account to the Regional Head of the Department of Justice. As we understand it, although the clerk is also required to report monthly to the Head of Office, outstanding reviews are not included in the monthly reporting by the Head of Office to the respective Chief Magistrates and the judicial (or so-called "cluster") heads for the administrative regions nor is a record of outstanding reviews included in the reporting which is rendered by these Heads of Court and the Regional Court President to the Judge-President of this Division.[91]

[44] As a result, because control over automatic reviews is still largely a matter for the individual presiding magistrates concerned and is not regulated as part of a systemic uniform practice applicable throughout the Western Cape magistracy the mechanisms in place to ensure that automatic review records are prepared and sent to the High Court as soon as possible are fragmented and inadequate.

(i) *The introduction of an outstanding automatic reviews list*

[45] It has occurred to us that one of the possible mechanisms which might be instituted as a remedial measure in this regard is the introduction of an outstanding automatic review list, modelled along the lines of the reserved judgment list which certain divisions of the High Court now keep,[92] in which the particulars of all outstanding judgments with reference to the case number and names of the parties and the judicial officer concerned is recorded. Inasmuch as this list is circulated not only internally amongst judges, but also amongst members of the profession and the Office of the Chief Justice it has a salutary effect in pressuring judges to ensure that their judgments are handed down within the period prescribed, save in exceptional circumstances. It occurs to us that, were such a list to be kept in respect of outstanding automatic reviews from each magistrates' court within the Western Cape, and collated regionally, it would immediately be apparent to the Chief Magistrates and the Regional Head of the Department of Justice when difficulties are being experienced at a particular court, and the necessary resources could immediately be diverted thereto in order to address the problem.

[46] In our view what we are proposing will not constitute an additional burden on over-worked magistrates. In *Nyumbeka*[93] this Court previously held that even though the preparation of records for automatic review is primarily a function of the administrative component ie the clerk of each magistrate's court, it is ultimately the function of the magistrate concerned to see to it that a proper and complete record of the proceedings and sentence that has been rendered in a particular matter that the magistrate has presided in, is sent to the High Court.[94] As was pointed out in *Letsin*

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[91] In terms of cl 4 of the Norms and Standards for the Performance of Judicial Functions (the "*Norms and Standards*"), issued by the Chief Justice by way of GN 147 on 28 February 2014.

[92] In terms of cl 5.2.6 of the Norms and Standards, which provides that save in exceptional circumstances every effort shall be made to hand down a judgment that has been reserved no later than 3 months after the date of the last hearing.

[93] 2012 (2) SACR 367 (WCC).

[94] *Id* para [22].

a criminal matter which commences in the magistrate's court is not completed until any outstanding review in respect thereof has been concluded in the High Court and, in our view, in the same way as it is the magistrate's duty to hand down a judgment timeously in respect of both the conviction as well as in respect of the sentence, in terms of *Nyumbeka* it is also accepted that post-sentence the magistrate's duties include ensuring that the record is properly prepared and timeously dispatched to the High Court. As such, (as was pointed out in *Letsin* and *Nyumbeka*) magistrates have duties and functions which go beyond merely adjudicating the matters before them. In terms of the Constitution and the law they have a duty to ensure that judgments of their Court and matters relating thereto are given effect to and they should not sit idly by and take it for granted that the administrative component of their courts will implement and give effect to their directives.[95] The introduction of an outstanding automatic review list might serve to spur magistrates on to take more responsibility for their duties in this regard and where there are deficiencies may also serve to ensure proper oversight and assistance with the provision of the necessary resources from the relevant Office and Court Managers, Heads of Court, Chief Magistrates and administrative region/cluster heads, as well as the Director-General and the Regional Head of the Department of Justice.

[47] The Heads of the Magistrates' Courts within this division, including the Regional Court President and the heads of the administrative regions are required to account to the Judge-President for the management of their courts[96] and the Judge-President is responsible[97] (subject to the over-arching authority and control of the Chief Justice as Head of the Judiciary) for the co-ordination of the judicial functions of all such courts. Those functions include the management of procedures to be followed in respect of case flow management[98] and the finalisation of any matter before a judicial officer including any outstanding judgment, decision or order.[99] Case flow management is directed at enhancing service delivery and access to justice through the speedy finalization of matters and is co-ordinated via the Provincial Efficiency Enhancement Committee, which is led by the Judge-President.[100] In the circumstances, whether the introduction of an outstanding automatic review list is feasible and whether it will be an appropriate measure which will serve to assist in ensuring that automatic reviews are processed and finalised efficiently, effectively and expeditiously[101] is a matter that should be taken up by the relevant stake-holders and Heads of Court with the Judge-President and the Provincial Efficiency Enhancement Committee, in conjunction with the Regional Head of the Office of the Chief Justice.

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[95] *Id* para [20].
[96] Note 91.
[97] In terms of S 8(4)(c) of the Superior Courts Act 10 of 2013 and cl 4 of the Norms and Standards.
[98] Cl 4 (v)(a) of the Norms and Standards.
[99] Cl 4 (v)(b).
[100] Cl 5.2.4 (ii).
[101] Which are amongst the principal objectives set out in the Norms and Standards (*vide* cl 2).

From The Legal Journals

Bekink, M

“Minister of Police v M 2017 38 IJL 402 (LC): Hearsay evidence and the testimony of child witnesses.”

2017 De Jure 186

Abstract

Children are often the victims of acts of physical or sexual violence, or bear witness to criminal acts. Consequently, these children may be called upon to testify to these acts of violence in a court of law. While the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) addresses procedural issues relating to a child witness, for example that the child does not have to be in the same room as the accused when testifying (see s 170A of the Criminal Procedure Act), the evidential rules applicable to the evaluation of the child’s testimony remain the same, irrespective of the age of the witness. A child who is unable to give evidence due to the child, for example, not meeting the competency test, will not be able to rely on someone to tell his or her story to the court, as hearsay is not allowed. A report made to a mother, guardian, social worker or police officer identifying the perpetrator and depicting the event may, hence, be inadmissible as evidence, as this will amount to hearsay, unless the court finds it to be in the interest of justice to admit it. (Zeffert & Paizes Essential Evidence (2010) 139).

The purpose of this discussion is to investigate the application of the hearsay-rule to children’s evidence not given in testimony during court procedures. A recent decision in a Labour Court dispute, Minister of Police v M (2017 38 IJL 402 (LC) (Minister of Police v M)), shed valuable light on the applicability of the hearsay rule to a child’s evidence. Though this case was decided in the Labour court, the discussion will not per se focus on the decision to admit the hearsay evidence, but on the way in which the hearsay evidence was evaluated, as well as the court’s finding with regard to the application of the hearsay rule to child witnesses.

Du Toit, A

"Minister of Justice and Constitutional Development and Another v Masingili and Others"

Constitutional Court Review 2016 273

Abstract

The Court first found that a conviction for robbery with aggravating circumstances in the absence of proof of intent did not infringe upon s 12(1) (a) which protects the right of an individual not to be deprived of his freedom arbitrarily or without just cause. That section has been held to require a rational connection between the deprivation of freedom and the purpose of such a deprivation. The Court referred to its earlier decisions in S v Thebus and Another and S v Coetzee and concluded that the enhanced penal jurisdiction created by s 1(1)(b) was not arbitrary. It was not manifestly inappropriate and constituted a rational tool in achieving the constitutionally permissible end of combating violent crime. Furthermore, the culpability established for robbery fulfilled the requirement of just cause and the requirement of culpability was therefore not abandoned.

With regard to the presumption of innocence, the Court rejected the argument that a conviction for robbery with aggravating circumstances in the absence of proof of intent with regard to the aggravating circumstances violated s 35(3)(h) of the Constitution. It would not constitute a conviction where one of the elements of the crime, culpability, has not been proven; thereby resulting in a conviction where reasonable doubt still exists. The Court contended essentially that intent with regard to aggravated circumstances is not an element of the offence of robbery with aggravated circumstances.

Much of the Court's decision rested on its evaluation of the nature of the offence of robbery with aggravating circumstances and, specifically, the proposition that robbery with aggravating circumstances is not an offence distinct from the common law offence of robbery but is merely a form of robbery. The aggravating circumstances component does not in itself create an offence or impose liability. Its significance is that: (1) it is relevant for sentencing as it attracts a minimum sentence in terms of the Minimum Sentencing Act ranging between 15 to 25 years unless substantial and compelling circumstances justify a lesser sentence; (2) the right to prosecute robbery with aggravating circumstances does not prescribe; and (3) it is more difficult for a person charged with robbery with aggravated circumstances to be granted bail than it is for a person charged with robbery.

In this note, this central line of argument is discussed and then the Court's specific findings as to accomplice liability are addressed.

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

Contributions from the Law School

Admissibility of Confession

In the case of Mudau v S (1148/2016) [2017] ZASCA 34 (29 March 2017), the appellants appealed against their conviction and sentencing in the Limpopo High Court on charges of murder, attempted murder and robbery committed with aggravating circumstances. The appellants were originally charged with a third accused whose conviction and sentence was subsequently set aside by the supreme court of appeal in 2009 (at para [2]).

Two witnesses testified for the state, but neither could identify the three accused (at paras [3], [4]). The state based its case on confessions from two of the accused and a signed statement by the third accused. The defence objected to the admissibility of the confessions on the basis that they did not comply with section 217 of the Criminal Procedure Act 51 of 1977 because the accused were threatened, assaulted and forced to make the statements and that the statements were thus not made freely and voluntarily. Importantly, the preamble forms of the confessions were not completed in full (at para [4]). A trial within a trial was held to determine the admissibility of the two confessions and the signed statement. On conclusion of the trial within a trial it was determined that the accuseds' evidence that they had been assaulted be rejected, and the confessions and the signed statement were ruled admissible. It was common cause in the appeal court that the appellants were convicted in the court a quo solely on the basis of their confessions (at para [5]).

The gist of the appeal on the merits of the first appellant was that his statement did not amount to a confession because he did not implicate himself in the crimes and in fact exonerated himself from any guilt. He argued further that he had been impermissibly convicted on the basis of the second appellant's confession (at para [6]). The essence of the second appellant's appeal on the merits was that his confession should not have been admitted because it was not freely and voluntarily made because he had been told that making a confession would 'allow the matter to proceed quickly (at para [7]).'

There was also an appeal against sentence which this note is not concerned with (at para [8]).

The supreme court of appeal briefly stated the law on confessions, correctly stating that a confession was where the accused has admitted all the essential elements of the offence, but incorrectly stating that a statement would not be regarded as a

confession where it was made with exculpatory intent (at para [10]). The correct position is that it is necessary to make an objective assessment of whether all the essential elements of the crime have been admitted to in order to determine whether a statement amounts to a confession (S v Yende 1987 (3) SA 367 (A) at p 374; See also S v Motloba 1992 (2) SACR 634 (BA) at 638).

The supreme court of appeal also referred to section 219 of the Criminal Procedure Act which states that '[n]o confession made by any person shall be admissible as evidence against another person and correctly stated that a confession made by one accused should be excluded when determining the guilt or otherwise of his or her co-accused (per S v Molimi 2008 (2) SACR 76 (CC) at para 30) (at para [11]).

The supreme court of appeal emphasised that while the admissibility of confessions is determined in large part by the provisions of section 217 of the Criminal Procedure Act, section 35 (5) of the Constitution, which excludes evidence obtained in violation of the bill of rights in certain circumstances, also bears relevance. The supreme court of appeal specifically referred to situations where the accused was not informed about the right against self-incrimination and the right to remain silent and the right to consult with a lawyer as examples of situations where section 35 (5) might be invoked (at para [12]).

The supreme court of appeal referred to the presumption in section 217 to the effect that a confession made to and reduced to writing before a magistrate is, upon mere production, admissible in evidence provided the requirements of section 217 are satisfied. Accordingly, the supreme court of appeal held, any magistrate to whom a confession is made must ensure that the confession conforms to the prescripts of the constitution (at para [14]). The supreme court of appeal then referred to the case of S v Mpetha 1982 (2) SA 406 (C), which held that before the presumption comes into operation it must appear from the document itself that the confession complies with the requirements of law. To this end '[i]t is well known that over a period of many years departmental instruments and the decisions of courts have built up a series of guidelines designed to ensure that confessions are in fact made freely and voluntarily without the exercise of undue influence…' (at p 408 E, quoted in casu at para [14]). What the court was referring to is the preamble of the boilerplate forms which are used to record confessions before magistrates and which set out questions to be asked by the magistrate of the accused, and provides place for his/her answers to be recorded so that it can be ascertained from the confession document itself that the confession was made freely and voluntarily and without undue influence. It is unfortunate that the supreme court of appeal did not note that the presumption to section 217 was declared unconstitutional in the seminal case of S v Zuma 1995 (1) SACR 568 (CC). However, this is not material and both the court in Mpetha's case (supra) and the supreme court of appeal in casu's observations about the importance of the preamble to the confession being properly completed remain good.

The supreme court of appeal noted that the recording of the confessions of both appellants were 'replete with omissions, incoherent and contradictory recording of answers by the appellants to questions, and serious non-adherence to some of the fundamental principles governing confessions …' (at para [15]).

In respect of the first appellant, the supreme court of appeal found that the appellant had told the magistrate that he did not want to make a statement, and that the magistrate should not have proceeded to record it in these circumstances. The fact that it was, and that the trial court then found the confession to be admissible was incorrect and resulted in a serious miscarriage of justice and rendered the trial unfair. Also, the fact that the appellant was told that the recording of the confession would allow the matter to 'proceed quickly' amounted to undue influence over him which rendered it inadmissible in terms of section 217 of the CPA (at para [19]). The 'confession' of the first appellant also ought to have been excluded because it was not a confession since he did not implicate himself in the commission of the offence but rather exculpated himself by saying that he was coerced by his co-accused to act in the manner he did. The supreme court of appeal held that '[a]s not all of the elements of the offence were admitted, the first appellant's statement did not amount to a confession and ought to have been excluded (at para [20]).' With respect, I agree that the statement did not amount to a confession since not all of the elements of the crime were admitted, but this is not a ground for exclusion.

In respect of the second appellant, the magistrate had not recorded whether the appellant was in his sound and sober senses. In addition, as to how the second appellant had come to make the confession, the magistrate simply recorded that he had been told to report to the magistrate by the investigating officer. This, the supreme court of appeal held, ought to have been a red flag prompting the magistrate to probe the question of undue influence more carefully than he did (at para [22]).

The supreme court of appeal also noted other serious irregularities and misdirections by the trial court. For example, the magistrate erroneously ruled at the start of the trial within a trial that the appellants had to adduce evidence regarding the admissibility of the confessions first, thus ignoring the fact that the onus was on the state to prove admissibility (at para [23]). In addition, the supreme court of appeal found that certain of the magistrate's comments, to the effect that the second appellant had made a very bad impression, were inappropriate because they were made before the second appellant had been cross examined. They would have created a perception of bias in the mind of any reasonable person because the comments suggested that the magistrate had already made up his mind not to accept the second appellant's evidence even before cross examination (at para [25]) and this would have led to the perception that he was not open minded, impartial and fair during the second appellant's trial within a trial (at para [27]). The final misdirection noted by the supreme court of appeal was when the magistrate 'decided in his reasoning to apply the confessions and admissions by all three accused against one another in clear violation of section 219 of the Criminal Procedure Act (at para [28]). The supreme court of appeal explained that the trial court erred 'by not delineating and treating each confession separately against its specific maker, and instead treated all of them in blanket fashion against all the accused (ibid).'

In conclusion, the supreme court of appeal found that the recording of the appellants' confessions and the conduct of their trial, especially the trial within a trial, were

characterised by ‘serious misdirections, gross procedural irregularities and material non-observance of the statutory requirements contained in sections 217 and 219 of the Criminal Procedure Act and other principles governing confessions (at para [29]). Furthermore there was a serious violation of the appellants’ constitutional right to a fair trial (ibid). The supreme court of appeal accordingly found that the state had not discharged the onus upon it to prove that the confessions were admissible and that they should have been excluded. It followed that there was no admissible evidence on which to hang the conviction and accordingly the appeal was successful and both appellants’ convictions were set aside (ibid).

Nicci Whitearnel
School of Law,
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

MEDIA STATEMENT BY THE SOUTH AFRICAN LAW REFORM COMMISSION: ISSUE PAPER 32 ON THE RIGHT TO KNOW ONE’S OWN BIOLOGICAL ORIGINS

In 2016, the SALRC commenced an investigation into the The Right to Know One’s Own Biological Origins (Project 140). The object of the investigation is to perform research to ascertain whether a child should have legal right to know his or her biological origins.

The project leader responsible for this investigation is Judge Thina Siwendu. The SALRC researcher assigned to this investigation is Miss Veruksha Bhana. On 20 May 2017, the SALRC considered and approved the publication of Issue Paper 32 which will serve as the basis for the SALRC’s deliberations on this investigation. The SALRC hereby releases Issue Paper 32 for general information and comment.

The Project 140 investigation is important in an age of cutting-edge and ever advancing science in the field of assisted reproduction. Assisted reproduction is used to treat infertility and entails the use of fertility medications and medical techniques to

bring about the conception and birth of a child. Children are conceived using donor gametes in techniques such as in vitro fertilization, mitochondrial replacement therapy and genetic surrogacy.

Assisted reproduction in South Africa is regulated by the National Health Act 61 of 2003 and the Regulations Relating to Artificial Fertilization of Persons, 2012 as well as the Children's Act 38 of 2005 and the regulations thereto. The legal position in South Africa is that gamete donors and surrogate mothers must be anonymous and it is an offence to reveal the identity of a gamete donor or surrogate mother. Further, gamete donation and surrogate motherhood should be altruistic and not for commercial purposes.

South Africa is State Party to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, however; clauses in the Conventions are open to interpretation in deciding whether or not a child has a legal right to know his or her biological origins.

When heterosexual infertile persons and homosexual couples have children, obvious questions arise as to how these children were conceived and their biological origins. Innovations in genetic testing also means that the chances of donor-conceived children discovering that they are not biologically related to one or both of their parents are higher than before and this raises the question as to whether donor anonymity should remain the legal position as is the case in South Africa currently.

Mitochondrial replacement therapy is sometimes called three-parent IVF. It is a form of in vitro fertilization in which the future baby's mitochondrial DNA comes from a donor. This technique is used in cases when mothers carry genes for mitochondrial diseases. Therefore, mitochondrial DNA from a healthy donor egg is used to attempt to prevent the transmission of mitochondrial disease from one generation to the next. Mitochondrial replacement therapy involves the introduction of foreign mitochondrial DNA into the germ line that will be inherited by all children in downstream generations. Ethical concerns relate to the alteration of germ line genetics and the dilemma of children inheriting DNA material from three instead of two parents. Mitochondrial transfer has also been closely associated with reproductive cloning which is regulated differently worldwide. Children born from these techniques might experience an identity crisis. The use of donors also raises the question of what information should be available about them to the children born from their eggs and vice versa. In light of Chapter 8 of the National Health Act 61 of 2003, questions are asked as to whether the legislative framework in South Africa allows for the use of mitochondrial replacement therapy in South Africa.

Practical considerations come into play in deciding whether or not to disclose information to a child regarding his or her conception. It is clear that one cannot simply emphasize a child's right to know but there must also be consideration of broader social issues such as the relationship with the wider family, the community, financial issues and the ability of the donor-conceived child to deal with information regarding his or her biological origins.

In the case of AB and Surrogacy Advocacy Group v the Minister of Social Development (CCT155/15) [2016] ZACC 43; 2017 (3) BCLR 267 (CC), AB who is

both conception and pregnancy infertile, challenged the constitutionality of S294 of the Children's Act 38 of 2005.

Section 294 requires that a child contemplated in terms of a valid surrogate motherhood agreement must be genetically related to both the commissioning parents or, if this is impossible as a result of medical or biological or other valid reasons, related to at least one of the commissioning parents. Where the commissioning parent is a single person, the child must be genetically related to the commissioning single parent. On 29 November 2016, the Constitutional Court held that a genetic link is required between the intended parent and the child. The Constitutional Court adopted a more impartial approach in deciding the matter. Rather than focusing only on the rights of the intended parent, the Court considered the best interests of the intended child.

In light of the judgment of the Constitutional Court one could argue that a more balanced approach is necessary when weighing the rights of a person or couple who wish to have a child via assisted reproduction and that of the intended child. The Court held that clarity regarding the origin of a child is important to the self-identity and self-respect of the child. Given this Constitutional Court decision, it is clear that South Africa needs to reconsider anonymous gamete donation in surrogacy and in other types of assisted reproduction.

The question of the right to know one's own biological origins is also applicable as regards adoption, registration of birth, disputed paternity and child abandonment and all of these topics are dealt with in Issue Paper 32.

Birth registration is necessary to concretize a child's rights to a name and nationality. A birth certificate is a vital record that documents the birth of a child and is the means by which the State recognizes the existence and status of a child. A birth certificate provides a child with an identity of their own and allows a child to access key social services such as education, health care and social grants. Issues related to registration of birth and disputed paternity affects all children and not just donor-conceived children.

Section 10 of the Births and Deaths Registration Act 51 of 1992 deals with how a child is to be registered when the parents are not married each other. Where the parents are not married, the mother must register the child under her surname or, the child may be registered under the surname of the biological father provided that the father acknowledges paternity and both the father and the mother consent to the registration of the child under the father's surname in the presence of a Home Affairs official. Questions of equality can be raised in that an unmarried mother must register the birth of her child under her surname whereas the unmarried father must first acknowledge paternity and he has the option of whether or not his details appear on the birth certificate.

Questions are asked as to whether Courts should still use legal presumptions to determine paternity in the case of disputed paternity or whether a scientific approach should be adopted given the certainty that scientific tests provide.

Regarding abandoned children, questions are asked as to whether baby hatches should be established and whether safe haven laws (as in the United States of

America) and confidential birth laws (as in Germany) should be enacted in South Africa.

Issue paper 32 also deals with the ethics and regulation of inter-country medically assisted reproduction. Over the past decade, there has been a steady growth in a new global market of cross-border medical travel for repro-genetic purposes (medical tourism). Many practices of inter-country medically assisted reproduction involve 'third-party' individuals acting as surrogate mothers and gamete providers in reproductive collaborations for the benefit of other individuals and couples who wish to have children. Arrangements between intended parents and third-party reproductive collaborators create a special kind of agreement that needs regulation so as to protect the interests of all the involved persons: the intended parents, the third-party collaborators and the children. In inter-country settings, under conditions of geographical distance, cultural differences and economic disparity, the for-profit motivation of medical entrepreneurs and intermediary agents exacerbates the potential commodification and abuse of women and children.

Human relationships are complex and, while the law does regulate various areas of life, the general consensus is that the law should not intrude too deeply into family relationships. However, where the State plays an active role either by way of public funding, research (legal or scientific), provision of health care services, legal regulation of service providers and the administration of registration of birth and nationality, one could confidently argue that the State is obliged to be proactive in order to protect the interests of children who, by their disposition, are dependent on the State to protect their interests.

This investigation cuts across law (the right to reproductive health care, the right to privacy in respect of one's health or family life, the right to know one's biological origins and the right to economic activity), sociology and science. In each chapter of Issue Paper 32 questions are asked regarding the content of the chapter in order to assess whether a child should have a legal right to know his or her biological origins and how such a right could be enforced and whether the law in this regard should be amended in light of prevailing and anticipated circumstances and contemporary mores and thinking.

The Issue paper can be accessed here: http://www.justice.gov.za/salrc/ipapers/ip32-prj140-BioOrigins-2017.pdf

A Last Thought

"[45] It is important that courts should consider all issues or matters before them and decide them properly and give reasons for their conclusions. When they do not do that, they infringe the fair trial rights of accused persons or appellants."

Per Zondo J in Barlow v S (CCT233/15) [2017] ZACC 27 (3 August 2017)