e-MANTSHI

A KZNJETCOM Newsletter

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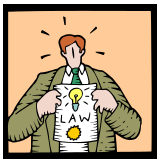
Welcome to the hundredth and forty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."

Any feedback in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Minister of Social Development has invited interested Persons and Organisations, inclusive of Government Departments, to apply for accreditation of diversion programmes and diversion service providers in terms of section 56(2)(c)(ii) of the Child Justice Act 75 of 2008 (Act No. 75 of 2008). The proclamation in this regard has been published in Government Gazette no 41561 dated 6 April 2018.

2. In terms of section 1(2) (*b*) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), the Minister of Justice and Correctional Services, has decreased the mora rate of interest to 10 percent *per annum* as from 1 May 2018. The notice to this effect was published in Government Gazette no 41581 dated 20 April 2018. The notice can be accessed here:

http://www.justice.gov.za/legislation/notices/2018/20180420-gg-41581-gon435-RateOfInterst.pdf

Recent Court Cases

1. NS and Others v Presiding Officer of the Children's Court (2184/18) [2018] ZAGPJHC 59 (6 February 2018)

In terms of section 44 of the Children's Act 38 of 2005 a court has jurisdiction in a matter if the child concerned is ordinarily resident within its jurisdiction – this would include a child who is a foreign national residing within its jurisdiction – it is irrelevant for purposes of establishing the jurisdiction of the children's court whether the child is legally or illegally in the country.

Kathree – Setiloane, J

[1] This is an urgent application to review and set aside the decision of the Presiding Officer of the Children's Court: Johannesburg (per F Ismail) declining to entertain an adoption application on the basis that the Children's Court has no jurisdiction to do so, because the minor child is a Zimbabwean national.

[2] The first and second applicants are married to each other. The first applicant wishes to adopt the third applicant, who is the biological son of the second applicant. The third applicant's sister was born on 20 March 1997. She is 20 years old. The third applicant was born on 8 March 2000. He is 17 years old. The applicants reside as a family at […] V. Street, Albertsville, Randburg.

[3] In 1999, the third applicant's biological father abandoned the second applicant who was several months pregnant with the third applicant. Since their birth, the children have had no contact with their biological father who has since passed on.

[4] In 2001 the second applicant and her father came to South Africa to seek a better life. Uncertain as to what South Africa might hold for her children, she left them in the care of her mother in Zimbabwe. She, nevertheless, made frequent trips to Zimbabwe to visit the children.

[5] In 2005, the first and second applicants met through mutual friends. They fell in love and later that year the first applicant asked the second applicant to live with him at his home. Their relationship was a strong and blissful one. They discussed marriage and bringing the children to South Africa to live with them.

[6] In January 2008, the second applicant brought the children to South Africa to live with them. The children were enrolled at Greenside Primary School where they completed their primary education.

[7] The first applicant began to develop a very close bond with both children and their relationship organically morphed, over time, from the second applicant's partner to the children's parent.

[8] In 2009, the first applicant proposed marriage to the second applicant and they married on 11 July 2009. In early 2012, they began discussing the possibility of the first applicant adopting the two children. Since the first applicant fulfilled the role of a father to both children, he felt that by adopting them they would be reassured of his commitment to them. The first and second applicants discussed adoption with the children and they consented. The first and second applicants subsequently put the adoption process into motion.

[9] On approaching a social worker later that year, she advised them that the adoption would cost them in the region of R10 000,00. But between paying school fees, living expenses and miscellaneous expenses, the first and second applicants simply could not afford it. On the advice of the social worker they ultimately made a down payment in 2015 and began saving up for the balance. Unfortunately, by this stage, the second applicant's daughter had already turned 18 and was no longer eligible to be adopted by the first applicant.

[10] Despite this setback, the first applicant decided to proceed with the third applicant's adoption. Having no biological children of his own, the first applicant felt it necessary to formalise his relationship with the third applicant, who had over the years become incredibly close to him; looked to him as a father and called him "Dad".

[11] The third applicant is a Zimbabwean national and is in South Africa on a visitor's visa. His visa, however, expired in 4 March 2017. The first and second applicants are afraid that the day may come when the third applicant is refused a visitor's visa and deported to Zimbabwe where he has no family and no home as his grandparents have also relocated permanently to South Africa.

[12] In order to avoid the trauma of a separation, the first and second applicants started the adoption process. They obtained the necessary approvals from the relevant government departments in South Africa. They also obtained the official

documentation from the Zimbabwean Consulate. They submitted themselves to police clearance checks, and medical tests. They then made application, on 11 February 2017, to the Children's Court for the third applicant's adoption. The adoption is recommended by the Department of Social Development and Dr Marie Kruger, a social worker, in terms of section 239 (1)(d) and 240 of the Children's Act 38 of 2005, respectively.

[13] The application for his adoption was enrolled for hearing in the Children's Court for 17 October 2017. On that day, the Presiding Officer removed the matter from the roll on the basis that the Children's Court had no jurisdiction to hear the adoption application because the:

'MINOR CHILD IS A ZIMBABWEAN CITIZEN. CURRENTLY HE IS ON A VISITOR'S VISA IN THE COUNTRY. THEREFORE COURT HAS NO JURISDICTION TO HEAR THIS MATTER OF A FOREIGN CHILD – VISA OF CHILD SEEMS TO HAVE FURTHER EXPIRED ON 04/03/2017…'

[14] On 22 November 2017, the Centre for Child Law, which represented the applicants in this application sought reasons from the Presiding Officer for her decision. She furnished reasons on 8 January 2017. They read as follows:

'1. …

2. The minor child in question is a Zimbabwean citizen. According to the passport copy and the birth certificate provided, the minor child was born on 8 March 2000.

3. The foreign minor child entered the country on the 11th of February 2017 on a port of entry visa which was valid until 4th March 2017. Such visa expired on the 4th March 2017 and the minor child's status is that of illegal since the 5th March 2017.

4. In terms of the Immigration Act 13 of 2002 (as amended) the following definitions appear as follows:
"foreigner" – An individual who is not a citizen; and
"*illegal foreigner" – Foreigner in the Republic in contravention of the Act.*

5. Furthermore, in terms of Section 44 of the Children's Act 38 of 2005 (as amended) it states:
"*The Children's Court that has jurisdiction in a particular matter is*
(a) *The court of the area in which the child involved in the matter was ordinarily resident."*
The child in question according to the papers filed cannot be ordinarily resident in the Republic of South Africa as his visa expired.
...

6. Should the applicant be treated as an inter-country adoption then the following in terms of Section 264 of the Children's Act 38 of 2005 (as amended) will apply:

Section 264 – **ADOPTION OF CHILD FROM CONVENTION COUNTRY BY PERSON IN THE REPUBLIC**

(1) *A person habitually resident in the Republic who wishes to adopt a child habitually resident in a convention country must apply to the Central Authority:*

(2) *If the Central Authority is satisfied that the Applicant is fit and proper to adopt, it shall prepare a report on that person in accordance with the requirements of the Hague Convention and Inter- Country Adoption and any prescribed requirements and transmit the report to the central authority of the convention country concerned.*

(3) If an adoptable child is available for adoption, the central authority of the convention country concerned shall prepare a report on the child in accordance with the requirements of the Hague Convention on Inter-Country Adoption and transmit it to the Central Authority.

(4) *If the Central Authority and the central authority of the convention country concerned both agree to the adoption, the central authority in that country will refer the application for adoption for the necessary consent in that country.*

In light of the above, particular cognisance must be given to Section 264(4) in respect of the applicant before court.

7. Chapter 2, Subsection 6(2)(a) relating to General Principles of the Children's Act specifically states that:

"*All proceedings, actions or decisions in a matter concerning a child must-*

(a) *Respect, protect, promote and fulfil the child's rights set out in the Bill of Rights, the best interest of the child standard set out in Section 7 and the rights and principles set out in this Act,* ***subject to any lawful limitations (emphasis)***.

8. …

9. The Court is therefore of the view that it has no jurisdiction and/or locus standi to hear the matter and the matter was thus removed from the roll.'

[15] As correctly contended on behalf of the applicants, the decision of the Presiding Officer is materially flawed and constitutes a grave misdirection as the Children's Act does not exclude foreign nationals (whether legally of illegally in the country) from its ambit. Nor does it exclude them from the jurisdiction of the Children's Court.

[16] Section 44 of the Children's Act entitled "Geographic area of jurisdiction of the Children's Court" provides:

'(1) The children's court that has jurisdiction in a particular matter is –

(a) The court of the area in which the child involved in the matter is ordinarily resident; or

(b) If more than one child is involved in the matter, the court of the area in which any of those children is ordinarily resident.

(2) Where it is unclear which court has jurisdiction in a particular matter, the children's court before which the child is brought has jurisdiction in the matter.'

[17] The Children's Court would have jurisdiction in a matter if the child concerned is "ordinarily resident" within its jurisdiction. The provisions of section 44 of the Children's Act relate solely to the territorial jurisdiction of the Children's Court. Section 44 of the Children's Act should not be construed to exclude the legal jurisdiction of the Children's Court to entertain a matter concerning a child who is a foreign national.

[18] The determination of whether a child is ordinarily resident in the area of the Children's Court is a factual question. The word "resides" has been interpreted by our courts in the context of establishing jurisdiction under the Children's Act of 1937 and 1960 respectively, to mean "the place where the child eats, drinks, or sleeps or where his family eats, sleeps and drinks".[1]

[19] The words "resides" or "resident" connotes something broader than "ordinarily resident",[2] which on a proper construction would mean "something more prolonged than a mere temporary stay"[3]. It need not, however, be permanent. In the context of tax law, our courts have interpreted "ordinarily resident" to be a person's "home or one of his homes",[4] and "the country to which he would naturally as a matter of course return from his wanderings".[5]

[20] Properly construed, the words "ordinarily resident" in section 44 of the Children's Act connotes, in more contemporary terms, the place or area where the child resides or his/her family resides. In the event of uncertainty in relation to where the child concerned is ordinarily residing, then section 44(2) Children's Act confers jurisdiction on the court before which the child is brought.

[21] There is no requirement in section 44 of the Children's Act that the child must be a South African citizen or a permanent resident. A child's immigration status is, therefore, irrelevant to the question of whether the Children's Court has jurisdiction in a particular matter.

[22] Lawrence Schäfer in his commentary on section 44 of the Children's Act writes:[6]

'A broad reading of the children's court's jurisdiction is necessary to give effect to South Africa's obligation as a State Party to the International Covenant on Civil and

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[1] *Philips v Commissioner of Child Welfare, Bellville* 1956 (2) SA 330(C) at 334. *Gold v Commissioner of Child Welfare, Durban, and Another* 1978 (2) NPD 305 A.
[2] *CIR v Kuttel* 1992 (3) SA 242 (A) at 247.
[3] *Philips* at 334G-H
[4] *Robinson v Commissioner of Taxes* 1917 TPD 542-548.
[5] *Cohen v CIR* 1946 AD 174 at 185H.
[6] *Child Law in South Africa: Domestic and International Perspectives* (2011) p 220.

> Political Rights (1966) and Convention on the Rights of the Child (1989). Article 2(1) of the Covenant requires a State Party to 'respect and to ensure to all individuals within its territory and subject to its jurisdiction' the rights protected by the Covenant. Article 2 of the 1989 Convention is almost identical: State Parties must 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction'. The latter article was interpreted by the Belgian Court of Appeals as requiring the extension of Belgium's child protection jurisdiction even to the 'troubled' child of a diplomat, notwithstanding the immunity that she otherwise enjoyed under the Vienna Convention on Diplomatic Relations (1961). Although controversial, this decision should be commended to South African courts on account of the priority – comparable to that enjoined in South African law by section 28(2) of the Bill of Rights – it gives to the protection of children's rights and best interests'

[23] Thus for purposes of establishing the jurisdiction of the Children's Court, it is irrelevant whether the child is legally or illegally in the country. Any contrary interpretation of the words "ordinarily resident" in section 44 of the Children's Act would mean that foreign children who are in the country illegally (regardless of their situation and vulnerability) would be excluded from the protection of the Children's Act. Such a construction of the words "ordinarily resident" would constitute a violation of their rights to access to court, and their rights to have their best interests considered of paramount importance.

[24] The third applicant is ordinarily resident in South Africa and within the jurisdiction of the Children's Court: Johannesburg - and has been so for an interrupted period of at least 10 years. He has not returned to Zimbabwe and nor could he, as his extended family have permanently relocated to South Africa. He has grown up a South African and has completed his primary and secondary education in South Africa. According to the first and second applicants, the only life that the third applicant has known is in South Africa. His friends and family reside here. He ordinarily resides in Johannesburg and has no intention of leaving.

[25] The Presiding Officer in the Children's Court seems to suggest that the adoption of the third applicant must be treated as an inter-country adoption under section 264 of the Children's Act. She is mistaken for the reasons set out below.

[26] Chapter 16 of the Children's Act deals with inter-country adoptions. There are four different contexts for inter-country adoptions. These are:

(a) The adoption of a child habitually resident in South Africa by adopters who are habitually resident in another Contracting State[7];
(b) The adoption of a child from a non-convention country by persons in the country[8];

[7] Section 261 of the Children's Act
[8] Section 265 of the Children's Act

(c) The adoption of a child from in the Republic by persons in non-convention country[9];
(d) The adoption of a child habitually resident in a foreign contracting State by habitual residents of South Africa[10].

[27] Section 264 of the Children's Act deals specifically with the adoption of a child from a Convention country by a person in the Republic. Section 264(1) provides that a person habitually resident in the Republic who wishes to adopt a child habitually resident in a Convention country must apply to the Central Authority of South Africa.[11]

[28] Section 264 of the Children's Act has no application to the adoption of the third applicant because he is not habitually resident in a Contracting State. The adoption of the third applicant is, accordingly, not an adoption form a Convention country by a person in the Republic but rather a local adoption to be concluded in terms of Chapter 15 of the Children's Act and not Chapter 16 as it is a local adoption and not an inter-country adoption, primarily because the third applicant is habitually or ordinarily resident in the Republic and so are the first and second applicants. His immigration status is immaterial to the application.

[29] Accordingly, I find that the Presiding Officer misdirected herself on a matter of law. Her decision accordingly falls to be set aside.

[30] I found this matter to be urgent because the third applicant will turn 18 on 8 March 2018. Had this Court not dealt with the applicants' review application as one of urgency, then the third applicant would have been denied the prospects of ever being adopted by the first applicant before his 18th birthday, and could therefore not have been afforded substantial redress in due course. The prevailing urgency in this application justifies an expedited hearing of the adoption application in the Children's Court.

[31] The Presiding Officer opposed the application on inter alia the basis that the third applicant is a foreign national who is in the country illegally, hence the Children's Court has no jurisdiction. As indicated, the immigration status of the third application is irrelevant to the question of whether the Children's Court has jurisdiction to consider his adoption application. Accordingly, the award of costs must follow the result.

[32] In the result, I make the following order:

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[9] Section 262 of the Children's Act
[10] Section 264 of the Children's Act
[11] In terms of section 257(1) of the Children's Act "Central Authority" in relation to South Africa means the Director-General.

1. The decision of the respondent to remove the adoption application from the roll is reviewed and set aside.
2. It is declared that the third applicant's immigration status is irrelevant for purposes of determining whether the Children's Court, Johannesburg, has jurisdiction in terms of section 44 of the Children's Act 38 of 2005.
3. It is declared that the third applicant is ordinarily resident within the jurisdiction of the Children's Court, Johannesburg.
4. It is declared that the first applicant's application to adopt the third applicant ("the adoption application") is a local adoption and must be determined in terms of chapter 15 of the Children's Act.
5. The Children's Court, for the district of Johannesburg, is directed to conclude the adoption application on or before 26 February 2018.
6. The applicants are granted leave to apply on the same papers, duly supplemented, for any order necessary to ensure that the adoption application is concluded timeously and without undue delay.
7. The respondent is ordered to pay the costs of this application.

From The Legal Journals

Bekink, M

"The Testimonial Competence of Children: A Need for Law Reform in South Africa"

***PER* / *PELJ* 2018(21)**

Abstract

Modern-day research studies conducted on the victimisation of children in South Africa show that South African children in particular experience and witness exceptionally high levels of crime and consequently represent a significant portion of the victims and witnesses that have to appear in court to testify about these crimes. In South Africa, as in many other countries, a child is, however, permitted to testify in a criminal court only once the presiding officer is satisfied that the child is competent to be a witness. The competency test, though, presents a critical initial challenge for child witnesses, as it focuses on their ability to answer questions about the concepts of truth and lies. These inquiries can be intimidating and confusing, especially to younger children, and may result in children who would otherwise have been capable of giving evidence being prevented from giving their testimony. Various legal and psychological fraternities have accordingly called for the abolition or amendment of the truth-lie competency requirement. Recent psychological research about the potential of a child to lie has once again raised fundamental questions about the competency inquiry, suggesting that an assessment of children's understanding of truth and lies has no bearing on whether the child will in fact provide truthful evidence in court. These empirical findings precipitated the amendment of competency rules by various countries such as the United Kingdom and Canada. The findings likewise raise serious questions and or doubt about the suitability of the South African competency requirements. The purpose of this paper is to review the current South African position with a view to proposing suggestions for meaningful legal reform.

Van Der Bijl, C

“Parental Criminal Responsibility for the Misconduct of Their Children: A consideration”

***PER* / *PELJ* 2018(21)**

Abstract

This contribution examines the criminal responsibility that is imposed upon parents for the delinquent acts of their children. As South African law has been swayed by the legal philosophy of Anglo-American jurisprudence, a comparative analysis is undertaken with the United States of America, where this imposition has been addressed legislatively in both civil tort law and criminal law. The reasoning underlying the implementation of such specific legislation in the United States is that the common law principles are rooted on the principles of individualisation, which does not specifically cater for parental liability. These parental responsibility laws have been challenged constitutionally over the years in the United States, as critics argue that such laws interfere with the rights of parents to raise their children and are also a form of cruel punishment. Additional criticism submitted is that parental responsibility laws impose strict liability on parents. Further misgivings have also been voiced that many parents face challenges such as those of being a single parent or of suffering poverty, both of which will be exacerbated if fines are imposed, or if such parents are imprisoned for their child's misconduct. It will be shown that in the United States these laws have managed to withstand such challenges over many decades in both the fields of the law of tort and that of criminal law. Although the common law of tort provides for the liability of parents for their child's misconduct, the child's conduct must be specifically attributable to the parent's action or inaction. Tort parental responsibility legislation focuses not only on providing monetary compensation by parents where their children are unable to do so, but also aims to pursuade parents to better supervise their children. At the opposite end of the spectrum, the focus of statutory criminalisation tends to remain on the criminal liability of parents for failing to protect others from the actions of their children resulting from a failure in supervision, as well as a prevention of juvenile delinquency. The South African law of delict is briefly contiguously considered in the context of parental responsibility laws. The concept of South African parental criminal responsibility law is then considered. It is proffered as a useful mechanism to regulate the misconduct of children currently falling outside the ambit of the criminal law.

Marais, M.E.

“A constitutional perspective on the *Sparrow* judgements”

Journal for Juridical Science, Volume 42 Number 2, Dec 2017, p. 25 - 64

Abstract

The cases of ANC v Penny Sparrow and State v Penny Sparrow, respectively in the Equality Court and the magistrate's court, concerned a Facebook entry posted by Penny Sparrow, a white estate agent. The Equality Court found that Sparrow's words constituted hate speech in terms of sec. 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ("the Equality Act"); in the magistrate's court, she was found guilty of crimen iniuria. This contribution considers whether the judgements in these matters comply with the constitutional approach in dealing with hurtful or harmful expression related to group characteristics, in particular race, broadly referred to as hate speech, which approach is crucial for the protection as well as the transformation of South African society. Both these aims are put at risk by an indiscriminate comprehension and application of the wide-ranging phrase "hate speech". This observation is corroborated by the fact that international agreements concluded in the aftermath of the atrocities of World War II set out on the quest for the narrowest restriction of free speech, reserving criminalisation for extreme forms of expression only. In line with this approach, the Constitution of the Republic of South Africa, 1996, clearly distinguishes between expression under its sec. 16(2), in particular sec. 16(2)(c), which warrants no protection, and expression that falls outside this ambit, which does enjoy constitutional protection, although subject to limitation. This distinction is particularly relevant in the application of sec. 10 of the Equality Act, which is primarily aimed at transformation instead of punishment. The article first argues that the Equality Court in the matter of ANC v Penny Sparrow disregarded the distinction above, and consequently failed to further the transformative aims of the Equality Act. It also failed to consider the cyber context within which the Sparrow comments were made. It is contended, in this regard, that the characteristics of internet communication increase the risks of extreme hate speech, on the one hand, and have the potential to generate sincere transformation through social pressure when it comes to expression that falls outside the ambit of sec. 16(2), on the other. In the same vein, the article argues that the common law offence of crimen iniuria, construed as to extend to a verbal attack, not against an individual, but against a group of which he/she is a member, is not in keeping with international law or the Constitution, and negates the purposively drafted provisions of the Equality Act.

Diedericks, L

"Disciplinary processes for South African magistrates: reflections on the Magistrates Act 90 of 1993 and the Labour Relations Act 66 of 1995."

Obiter, Volume 38 Number 3, Sep 2017, p. 655 – 663

Abstract

An employment relationship creates certain rights and protection for the respective parties concerned. For example, an employee has the right not to be unfairly dismissed or subjected to unfair labour practices in the execution of his or her duties (s 185 of the Labour Relations Act 66 of 1995 (hereinafter "the LRA")). On the other hand, an employer has the right to lay down rules in order to regulate the conduct required from its employees (Grogan Workplace Law (2014) 151). The Code of Good Practice recognises this right of the employer: Dismissal (published under schedule 8 of the LRA (hereinafter "the Code")), which requires all employers to adopt disciplinary rules that establish the standard of conduct required from employees (item 3 of the Code). If an employee fails to adhere to the required rules or standards, the employer has recourse in the form of discipline (Grogan Workplace Law 149; see also Van Niekerk, Christianson, McGregor, Smit and Van Eck Law@work (2014) 89). Disciplinary action is usually initiated in response to poor work performance or unwarranted behaviour by workers and is aimed at restraining employees from behaving in a manner that could hamper production and the functioning of the organisation (Nel, Werner, Haasbroek, Poisat, Sono and Schultz Human Resources Management (2008) 140; Van der Bank, Engelbrecht and Strümpher "Perceived Fairness of Disciplinary Procedures in the Public Service Sector: An Exploratory Study" 2008 6 SAJHRM 1 2). When an employer exercises the right to discipline, regard must be had to the employee's right to be treated fairly. It is therefore important that disciplinary procedures should maintain a proper balance between the rights of the respective parties in the disciplining process.

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

Contributions from the Law School

The rationale of kidnapping

Does the South African crime of kidnapping include what would be covered by the Common Law crime of false imprisonment? In other words, would a brief, unlawful

confinement, where for example the complainant is forced by the accused to travel out of his way, deviating from his intended route (see, for example, S v Dimuri 1999 (1) SACR 79 (ZHC)) amount to kidnapping? If not, should such conduct constitute kidnapping?

Kidnapping may be defined as 'unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control' (Milton South African Criminal Law and Procedure Vol II: Common-law Crimes 3ed (1996) 539). Thus, one of the basic values protected by the crime of kidnapping is freedom of movement. Should the crime protect a wider conception of liberty?

Whilst the Roman-Dutch sources do not provide definitive guidance in this regard, there is some support for a broader formulation of the protected value of liberty or freedom. Thus Van der Keessel states that 'this crime [plagium, the common law antecedent of kidnapping] can be committed…in all the ways in which a person is prevented from enjoying the freedom of his body' (Praelectiones ad Jus Criminale translated by Beinart and Van Warmelo (1969) 48.15.2 at 1635). Further, Van der Linden explains the crime as the deprivation of the 'liberty' of a person (Institutes of Holland translated by Juta 5ed (1906) 2.6.3). Influential case law reflected the same trend, not seeking to delimit the concept of 'liberty' (see for example R v Motati; R v Buchenroeder (1896) 13 SC 173 at 178; R v Lentit 1950 (1) SA 16 (C); R v Long 1970 (2) SA 153 (RAD)). The early South African authors also took this approach (see Lansdown, Hoal and Lansdown Gardiner and Lansdown South African Criminal Law and Procedure Vol II: Common-law Crimes 6ed (1957) 1588; De Wet & Swanepoel Strafreg 2ed (1960) 255).

However, since the definition cited above was proposed by Hunt, it has been followed (see, e.g., S v Blanche 1969 (2) SA 359 (W) 360D; S v F 1983 (1) SA 747 (O); S v Els 1986 1 PHH 73 (A); S v Mellors 1990 (1) SACR 347 (W) 350i). This definition has also been accepted by current textbook authors (Snyman Criminal Law 6ed (2014) 471; Kemp et al Criminal Law in South Africa 2ed (2016) 313). As a result, it was doubted in the case of Dimuri, where the accused forced the driver of a bus to depart some 20 kilometres from his intended route, whether this conduct amounted to kidnapping. It is however evident that the values protected by kidnapping may indeed extend beyond mere freedom of movement when the words of Corbett CJ (in S v Morgan 1993 (2) SACR 134 at 177g) are noted: '[k]idnapping is always a serious offence since it involves deprivation of liberty, particularly freedom of movement, freedom to be where one wants to be, freedom to do as one wishes…'.

A broader conception of the notion of liberty protected by kidnapping would indeed be in accordance with formulation of the right to freedom and security of the person contained in s 12 of the Constitution, which includes the right to bodily and psychological integrity (in s 12(2)). Currie and De Waal (The Bill of Rights Handbook 5ed (2005) 308) point out that this protection creates a 'sphere of individual inviolability', which extends to protection of 'bodily autonomy or self-determination against interference'.

Support for adopting a broader approach to the deprivation of liberty, as protected by kidnapping, may also be found in other jurisdictions. Kidnapping is viewed as an

aggravated form of false imprisonment in English law (Smith and Hogan Criminal Law 9ed (1999) 443). False imprisonment can be committed without physical detention by even a momentary restraint (including compelling a victim to go to a particular place (Glanville Williams Textbook of Criminal Law 2ed (1983) 217; see generally Law Commission Simplification of Criminal Law: Kidnapping and Related Offences No 355, 2014, 34-38). Similarly Canadian law recognizes the offence of kidnapping (committed by kidnapping a person with intent to cause the person to be confined or imprisoned against the person's will; to cause the person to be unlawfully sent or transported out of Canada against the person's will; or to hold the person for ransom or to service against the person's will – s 279(1) of the Canadian Criminal Code). The equivalent offence to false imprisonment, forcible confinement (s 279(2) of the Canadian Criminal Code), is committed by any person who, without lawful authority, confines, imprisons or forcibly seizes another person.

It can therefore be argued that the crime of kidnapping ought to punish all unlawful physical restrictions of the liberty of another. Failing to incorporate all such restrictions within the ambit of the crime would not only undermine the basis of the right to freedom and security of the person, but would leave a lacuna in the law, particularly as the crime of false imprisonment is neither recognised in the Roman and Roman-Dutch legal sources nor in South African law. MacDonald JA recognised this latter problem (in the case of Long) when he argued for the retention of the element of 'seizure' (which was defined at 158B as 'wrongful and unlawful confinement or detention') in order to avoid creating 'a gap in the provisions of our criminal law designed for the protection of personal liberty' (158B).

Hunt has argued that a broad conception of liberty is not appropriate:

'"liberty" is a rather unruly concept. In a wide sense Y is deprived of "liberty" when he is cheated out of his vote, shouted down at a public meeting, or induced by fraud or force to make a contract. It would be absurd in such cases to say that he had been "kidnapped". What is meant is that his freedom of bodily movement – his free access to other people – must be restrained or interfered with…' (Milton 545).

However, kidnapping is not prosecuted where the deprivation of liberty is merely incidental (as may be the case in an assault or rape), nor ought it to be prosecuted where the deprivation of liberty does not infringe the complainant's bodily or psychological integrity. Where the primary harm is either of a proprietary nature or emotional upset, other legal remedies should avail. The de minimis rule could be productively employed to eliminate from the ambit of kidnapping liability those instances which do not fit the ethos of the crime. However, it is submitted that in principle any physical infringement of the personal liberty of the individual, such that there is some confinement, causing the victim to suffer a violation of her bodily integrity as a result of being unable to exercise her freedom of choice, should lead to liability for kidnapping.

Furthermore, if it is accepted that the crime of kidnapping protects a broad concept of liberty, other debated issues would be resolved by the application of this rationale. For example, although it seems that the principle that the length of time is not elemental, but merely evidential, is now accepted (Milton 545-546; Snyman 473), this

would be strongly supported by the fact that any unlawful deprivation of the victim's freedom to go where she wishes would be kidnapping.
In summation, it is therefore submitted that the original rationale of the crime of kidnapping ought to be retained. This would not only allow criminal liability to be established whenever any form of confinement resulted in an unjust oppression or restraint, but it would be in accordance with the values enshrined in the Bill of Rights.

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Matters of Interest to Magistrates

What did the Conduct Tribunal find and is it likely to lead to judge Motata's impeachment?

Pierre De Vos

Judge NK Motata could become the first judge in South Africa's history to be impeached. But this will only happen if the Judicial Service Commission (JSC) accepts the findings of the Judicial Conduct Tribunal that judge Motata was guilty of gross misconduct and should be removed from office, and if two thirds of the members of the National Assembly (NA) then vote in support of his removal. Whether judge Motata will be removed from office (which will lead to him losing all his retirement benefits) will therefore depend on political (and not legal) considerations.
It is widely known that in the early hours of 17thJanuary 2007 judge NK Motata reversed his car through a pre-cast boundary wall of a house in Hurlingham, Johannesburg. Video recordings taken at the scene show that the judge was extremely intoxicated at the time. Further evidence – accepted by the lower court and the court on appeal – confirmed that he was intoxicated when he drove his car into the wall.
On the scene of the accident, the judge insulted the owner of the house in racial terms (calling the owner a "boer" and asserting his superiority over the owner – and all so called "boere' – in racial terms). He claimed later that he was provoked, but the

Conduct Tribunal held that this was not born out by the record. At the scene of the accident the judge also used the kind of colourful language one would expect from many dead-drunk South African men, saying (about the owner of the house):

Fuck him, fuck him, he must not insult me. I say fuck him. Anybody who insults me, I say fuck you.

Judge Motata was later convicted of drunken driving (a conviction confirmed on appeal). During his trial he continued to insist (and this was partly his defence) that he was not intoxicated at all at the time when he reversed through the wall.
A Judicial Conduct Tribunal (consisting of two sitting judges and one lay person) was appointed in terms of section 19 of the Judicial Service Commission Act to investigate two charges against the judge.
The first charge dealt with the racially charged insults made by judge Motata at the scene of the accident. The Conduct Tribunal had to decide whether these statements could be classified as racist language and if so, whether it constituted gross misconduct.
The second charge dealt with the manner in which judge Motata conducted his defence during the criminal trial and whether this was inconsistent with judicial ethics and thus also constituted gross misconduct.
The Conduct Tribunal is a fact-finding tribunal created by the Judicial Service Commission Act to deal with serious allegations against judges. In terms of section 177 of the Constitution a judge “may be removed from office only if the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct” and the “National Assembly calls for that judge to be removed, by a resolution adopted with a supporting vote of at least two thirds of its members”. The President *must* then remove the judge from office.
In terms of section 20 of the Judicial Service Commission Act, a finding by the Conduct Tribunal that a judge is guilty of gross misconduct is not binding on the JSC. Section 20(1) requires the Commission to consider the report of a Tribunal to decide whether it agrees with the finding of the Tribunal. Section 20(4) concludes:

If the Commission finds that the respondent is suffering from an incapacity, is grossly incompetent or is guilty of gross misconduct, the Commission must submit that finding, together with the reasons therefore and a copy of the report, including any relevant material, of the Tribunal, to the Speaker of the National Assembly.

If the JSC decides the judge is guilty, it must refer the matter to the NA who must then vote on impeachment. This means, the politicians from various parties in the NA can decide not to have a judge removed from office despite the fact that the judge is guilty of gross misconduct or is grossly incompetent. From a political perspective, this may be more difficult to do if the findings of the Conduct Tribunal rests on solid grounds. It is therefore important to analyse the findings as they relate to judge Motata.

The Conduct Tribunal found that the remarks made by judge Motata were “gratuitous, unjustified and divisive”. The Tribunal held that by making these racially charged remarks (including attempts to insult the owner of the house as a “boer” and asserting that he as a black person was superior over “boere”), the judge was attempting to use race to gain the sympathy of the black police officers at the scene of the accident.
The Tribunal invoked a dictionary definition of racism to measure judge Motata’s conduct against. The cited definition defines racism as:

a belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race.

The Tribunal held that the manner in which judge Motata deployed these racially charged remarks was racist and the statements thus constituted gross misconduct. Judges were custodians of the rights in the Constitution (including the right to dignity) and “racist conduct on the part of a judge therefore strikes at the heart of judicial integrity and impartiality”.
The use of dictionary definitions to decide the meaning of a legally relevant term is a rather old-fashioned and formalistic way of engaging in legal interpretation. I am therefore sceptical of the Tribunal’s decision to invoke a dictionary definition of racism. Moreover, the definition focuses on the subjective belief of an individual and not on the actual effects of that individual’s words or actions. This seems to be in conflict with the Constitutional Court jurisprudence which focuses on the *impact*of specific action within a particular social and economic context in which the ideology of white supremacy remains prevalent.
I am not sure it was necessary for the Tribunal to make this finding to come to the conclusion that judge Motata was guilty of gross misconduct (but perhaps it did so because this was the manner in which the question was posed to the Tribunal). It seems to me a finding of gross misconduct on the first charge could have been made without any definitive answer on whether the judge was guilty of racism.
This is because the Tribunal links its finding of gross misconduct to more general requirements for judicial conduct that would be breached if a judge deploys bigoted (but not necessarily racist) language or where his or her actions display gross forms of prejudice, stating in conclusion that:

impartiality, dignity and acting without favour or prejudice are key elements undermining our courts and judicial conduct. Conduct which militates against such attributes must amount to gross misconduct because such conduct would undermine these key values and attributes necessary to ensure Judicial Authority.

You do not need to label the judge as a racist to conclude that his racially charged statements displayed a shocking lack of impartiality, and that it undermined the dignity of his office and of those he attacked. It is a bit like a gay judge unleashing a drunken rant against “heterosexual breeders” and shouting: “Fuck all heterosexual

perverts!" This is not the kind of conduct that would instil confidence in the impartiality of the judge.

As a side note: this finding suggests that had judge Mabel Jansen not resigned (and had she thus attempted to hold on to her retirement benefits despite her racist statements on Facebook) she too would have been found to be guilty of gross misconduct as any black accused person could not possibly ever again have trusted her impartiality.

In any event, the Conduct Tribunal also found judge Motata should be removed from office for a second reason. It found he intentionally advanced a defence which he knew to be false. A judge (like any other accused) has every right to require the state to prove its criminal case against him or her and he is entitled to put up an appropriate defence. But unlike an ordinary accused a judge cannot publicly state a fact that he knows to be false, build a defence on such an untruth and then accuse truthful witnesses of manipulating evidence and of being racist.

The Tribunal rejected the argument advanced by judge Motata that he did not consider himself to be drunk. It held that while he might have considered himself not under the influence of alcohol at the time of the incident, by the time he was conducting his defence, it would not be possible for him to have believed this claim.

The Tribunal referred to overwhelming evidence placed before the court (and again considered on appeal) and concluded that judge Motata conducted a defence in his trial "which he knew lacked integrity". It then concluded that judge Motata was guilty of gross misconduct by knowingly advancing a defence which he knew was false:

The office of a judge is a very respectable office. So, must be those who hold it. A Judge's conduct, in and out of court, should not dishonour that high office. Impeccable moral and ethical standing is a crucial hallmark of such public office. The criminal trial of Judge Motata has placed this conduct squarely within the public domain.

Judge Motata is now retired from active service. A removal from office will not have any effect on his serving again as a judge. It will lead to a loss of all his retirement benefits as he would no longer be a judge entitled to retirement benefits. As noted in the introduction, in these circumstances, the politicians (on the JSC and – if it comes to that, the NA) will have to decide whether his removal is warranted to safeguard the integrity of the judiciary.

(The above post was posted on the blog *Constitutionally speaking* on 18 April 2018).

A Last Thought

"It is safe to say that judicial officers consider rehabilitation as part of an enlightened sentencing approach. However, the ambivalence of judicial officers is also noted. They appear to realise that rehabilitation through punishment is doubtful. This leaves the question: should rehabilitation be a sentencing consideration, in other words, a consideration that should guide the court in its quest to determine an appropriate sentence?

We have consistently expressed the view that it should not, unless there are clear indications of a need for rehabilitation in a specific case, and if the sentence is then specifically geared towards rehabilitation. This means no imprisonment, or another kind of sentence where rehabilitation is completely unpredictable. If anything, the empirical data in this contribution provide further support for these earlier views. It is also worth noting that the proposals of the South African Law Commission, in its *Report: Sentencing (A new sentencing framework)* (2000:41) do not include rehabilitation as a sentencing purpose, opting instead for "giving the offender the opportunity to lead a crime-free life in the future".

In particular, there is no excuse for judicial officers to continue expressing views on rehabilitation that are completely outdated. The court in *R v Karg* 1961 (1) SA 231 (A) might have been correct that "the retributive aspect has tended to yield ground to the aspects of prevention and correction," but twenty years later this statement could not be considered correct any longer. Today, 55 years later, everything has changed. The former kind of rehabilitation does not exist any longer. A quick reading of the Correctional Services Act or any modern source on sentencing or corrections will provide any judicial officer with up to date information.

But this does not mean that the correctional authorities should cease in their efforts to detain prisoners in conditions, with activities and training that might improve the likelihood that they will not reoffend. Offenders should not just be warehoused. Criminal sanctions should be used as an opportunity where offenders can make positive changes in their lives. People expect offenders to leave the institutions with pro-social attitudes. By identifying those personality traits that led to the commission of the offense, in the first place, offenders can be deterred from committing further crimes. In other words, this identification and accompanying deterrence is part of the process of long term rehabilitation. In South Africa the prospect of the rehabilitation programmes being offered remains speculative and in turn there is little or no guarantee that sentenced offenders will be rehabilitated. It does not help that prisoners involve themselves with rehabilitation programmes mainly to influence the decisions of the parole boards. Be that as it may, it will always be important for

Correctional Services to work towards the successful reintegration into society, of its inmates, once they are released. Regardless of its success rate, there will always be room for improvement – it is in the nature of the beast that is crime and its everlasting vicious circle of crime, arrest, conviction, punishment, release."

Per Phumudzo Muthaphuli and Stephan Terblanche in *A penological perspective on rehabilitation as a sentencing aim* in ***Acta Criminologica: Southern African Journal of Criminology 30(4)/2017***