e-MANTSHI

A KZNJETCOM Newsletter

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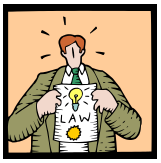
Welcome to the hundredth and forty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP.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



New Legislation

1. Guidelines for ascertaining consumers' gross incomes and discretionary incomes for the purposes of regulation 23a of the National Credit Regulations including the affordability assessment regulations have been published for public comment. The notice to this effect was published in Government Gazette no 41604 dated 4 May 2018.

1. Background

1.1 The affordability assessment regulations came into effect in 2015. The regulations were preceded by a review of the weaknesses in affordability assessments conducted by the National Credit Regulator ("NCR"). The review established the following principles -

(a) credit should be extended to consumers on the basis of income that has been verified or validated;

(b) credit providers should make reference to consumers' credit records held by credit bureaux to determine consumers' debt obligations;

(c) minimum living expenses should be introduced according to consumers' gross income categories;

(d) consistency of consumers' income should be established.

These principles form the basis of the affordability assessment rules in the regulations.

Recent Court Cases

1. Nel and Others v S (A508/2017) [2017] ZAGPJHC 296; 2018 (1) SACR 576 (GJ) (17 October 2017)

In an application for bail it is imperative that the presiding officer makes a timeous ruling on the applicable schedule or section of the Criminal Procedure Act 51 of 1977 which is applicable.

Petersen AJ:
[1] This is an appeal by the appellants' against the refusal of bail by the magistrate Tshwane North. The appellants' who appear in the district court as accused 1, 2 and 5 with two co-accused (accused 3 and 4) are charged with, attempted murder (count 1); pointing of a firearm (count 2) and assault with intent to do grievous bodily harm (count 3). Accused 3 abandoned his application for bail in the district court and accused 4 was released on bail in an earlier separate bail application.

[2] An appeal against the refusal of bail is governed by section 65(4) of the Criminal Procedure Act 51 of 1977("the Criminal Procedure Act") which provides that:
"The court or judge hearing the appeal shall not set aside the decision against which the appeal is brought, unless such court or judge is satisfied that the decision was wrong, in which event the court or judge shall give the decision which in its or his

opinion the lower court shall have given".

[3] The approach of a court hearing a bail appeal is trite. In *S v Barber* 1979 (4) SA 218 (D) at 220 E-H it was said:
"It is well-known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application for bail. This Court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because it would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly ... "
The appellants' assail the decision of the district magistrate both in law and fact.

[4] At the commencement of the bail application on 10 August 2017, the State contended that the application resorted within the ambit of Schedule 5 of the Criminal Procedure Act and by implication that the provisions of section 60(11)(b) of the Criminal Procedure Act were applicable. The appellants' legal representatives raised an objection to this contention and addressed the court at length with reference to authorities. The magistrate called on the State, in response, to reply to the objection. When an offence referred to in Schedule 5 is placed in issue, a prosecutor, is required either to produce written confirmation in terms of section 60(11A) of the Criminal Procedure Act, or prove to the court in some other way, ordinarily by way of an affidavit by the investigating officer, that it is such an offence. The State failed to produce either a certificate or evidence proving the schedule. Instead the State submitted from the Bar that the injuries sustained by the complainant, which resulted in bleeding from his ear and mouth, constituted a dangerous wound within the ambit of attempted murder involving the infliction of grievous bodily harm in Schedule 5.

[5] The dispute on the bail schedule required of the magistrate to give a ruling, a duty she was acutely aware of, when she noted that she was not in a position to do so before applying her mind to the matter. The focus briefly turned to the provisions of section 60(11B) of the Criminal Procedure Act which itself could have had an impact on the schedule of the bail application. The appellants' disclosed no previous convictions or pending cases on which they were released on bail. The State when asked to indicate if the application for bail was opposed or not confirmed that bail was opposed.

[6] A sequence of unfortunate events followed. The magistrate, perturbed by the absence of authorities being made available to her in print, declined an offer by one of the legal representatives to have same printed at his office which was in close proximity to the courthouse. At this stage the magistrate mooted the postponement of the application to secure the authorities herself so as to apply her mind to the issue of

the applicable schedule. The legal representatives were engaged at length on this aspect. A counter proposal was raised that the application proceeds, with the court ruling on the schedule and the bail proceedings as a whole, at the end of the matter. The magistrate raised concerns about the proposal, correctly so, in my view, for reasons which I deal later in this judgment. With the focus squarely on the postponement of the matter submissions turned to the accused right to liberty and constitutional imperatives related thereto at great length. In giving reasons why the matter should be postponed, the magistrate raised the possibility of the opposition to the schedule being withdrawn, as an alternative to a postponement. She qualified this proposal by stating that the appellants' were not forced to do so. After a lunch adjournment and obtaining instructions from the appellants', the legal representatives still held their view that the offence of attempted murder was not a schedule 5 offence, but "abandoned" the point on instruction of the appellants' The magistrate accordingly ruled that the application proceed on the basis of schedule 5.

[7] Counsel submits that this approach by the magistrate, which is described as having forced the legal representatives into a corner, constitutes a material irregularity. In the ordinary course of an application for bail, a timeous ruling should be made on the applicable schedule or section, whether placed in dispute or not. This determines how the bail application will be conducted and more importantly determines the issue of onus. The magistrate, who described herself as the driver of the vehicle had been heading in the right direction by indicating that she had to apply her mind to the issue of the schedule. However, the magistrate took a sudden detour by raising the possibility of a withdrawal of the opposition as an alternative to a postponement of the matter which the legal representatives of the appellants', albeit reluctantly, acquiesced in.

[8] The right of an applicant to apply for bail and the urgency thereof is important but equally important are the rights of the public and the complainant. The sentiments in the decision of *S v Jaipal* [2005] ZACC 1; 2005 (1) SACR 215 (CC) at para 29 are apposite:
"The right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State. It has to instill confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime." A court should never allow the interests of justice which has fairness at its core to be trumped by issues of convenience or expediency.

[9] The decision by the appellants' legal representatives to withdraw their opposition to the schedule as an alternative to a postponement of the application was not in the interest of the administration of justice or the appellants'. Similarly, the magistrate's proposal of a withdrawal of the objection, despite the protestations in her judgment that the appellants' had not been forced to do so was not in the interests of justice.

[10] It remains a salutary practice to give a timeous ruling on the applicable schedule, particularly in the case of schedule 5 and 6 offences. The procedure at a bail application should be carefully adhered to in a step by step process dictated by the bail chapter and related schedules in the Criminal Procedure Act. In *Nwabunwanne v S* 2017 (2) SACR 124 (NCK), Erasmus AJ agreed with a suggestion by Binns-Ward AJ in *S v Josephs* 2001 (1) SACR 659 (C) at *661f-h* "that, given the drastic consequences for an accused if section 60(11) of the CPA applies, it is desirable that the procedural provisions of s 60(11A) of the CPA should be closely adhered to and that proof of the nature of the charges should occur with some formality, either at the commencement of proceedings or as soon thereafter as possible". I agree.

[11] I am accordingly satisfied that the proposal by the magistrate leading to the acquiescence therein by the legal representatives of the appellants constitutes a material misdirection. This does not imply, however, that the appellants' are summarily entitled to be released on bail. In *R v Hepworth* 1928 AD 265 on 277, it was said that:
"A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done."

[12] In *Nwabunwanne,* Erasmus AJ having found that the magistrate had materially misdirected herself held at paragraph 19:
"This matter before me is not one where I, on the facts before me, should order whether or not the appellant should be released. It cannot merely be accepted that the appellant or the respondent would have approached the bail application on the same basis, had there been clarity whether section 60(11)(b) of the CPA applied or not. On this basis alone the appeal should succeed and the matter remitted to the Court a *quo."*

[13] The circumstances of the present appeal are distinguishable from those in *Nwabunwanne.* This court has the benefit of the evidence and submissions relevant to the attempted murder charge, both prior to the issue of the ruling and at the conclusion of the evidence. This court is therefore in a position to determine the issues in this appeal and to give the decision which the lower court should have given. There is further no indication that the bail application would have been conducted otherwise, when one considers the misplaced ruling of the magistrate that the charge of attempted murder constituted a schedule 5 offence, when opposition to the schedule was withdrawn.

[14] This matter demonstrates that the disputed facts of the State's case provide no clear or easy answers on whether the charge should be attempted murder or assault

with intent to grievous bodily harm. I do not have the benefit of how the magistrate would have approached this question and that is a question now best left for the trial court. At the very least the evidence is that the complainant on the attempted murder charge was viciously attacked to a point where he bled from his mouth and ear causing a burst eardrum following a blow to the head with a firearm, being hit with fists and kicked repeatedly. The intention of the accused on the State's version in inflicting grievous bodily harm is irrelevant. In *R v Jacob* 1961 (1) SA 475 (A) at 478A the following was said pertaining to the infliction of grievous bodily harm, in the context of the offence of robbery with aggravating circumstances:
'The question whether grievous bodily harm has been inflicted depends entirely upon the nature, position and extent of the actual wounds or injuries, and the intention of the accused is irrelevant in answering that question.'

[15] This view has been confirmed in the context of a charge of Rape involving the infliction of grievous bodily harm contemplated in Part 1(c) of Schedule 2 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 in *The Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* (959/15) [2017] ZASCA 85 (2 June 2017), where Molemela AJA said at para 15:
"In my view, the high court's reliance on cases where the accused was charged with the offence of assault with intent to do grievous bodily harm was clearly wrong. By importing the intention of the respondent into the enquiry, the high court disregarded the principles laid down in *Jacobs.* It committed an error of law as 'intent' is irrelevant in the determination of whether grievous bodily harm was inflicted on a complainant in the rape envisaged in Part *I(c)* of the CLAA. Rather, the question to be answered is whether, as a matter of fact, the victim of such a rape sustained grievous bodily harm...".

[16] For purposes of this appeal the remainder of the grounds of appeal and heads of argument clearly move from the premise that the appellants' had adduced evidence on a balance of probabilities in satisfying the onus brought about by section 60(11)(b) of the Criminal Procedure Act which provides:
"Notwithstanding any provision of this Act, where an accused is charged with an offence referred to -
(a) ….
(b) in Schedule 5, but not Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release".

[17] I propose to approach the appeal on the basis of these grounds of appeal. The magistrate in effect refused bail by finding a likelihood of the grounds set out in section 60(4)(a), (b), (c) and (e) read with the factors in sections 60(5), 6, 7 and 8A of the Criminal Procedure Act.

[18] Before proceeding to deal with the grounds of appeal, it is clear that the personal circumstances of the appellants' were not placed seriously in issue at the bail application and not disputed by the investigating officer. I therefore do not propose to repeat the personal circumstances in this judgment.

[19] Section 60(4)(a) provides that:
"The interests of justice do not permit the release from detention of an accused...
(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;
The magistrate in summarising the evidence of the investigating Officer, Constable Tladi and his commanding officer, Warrant Officer Naidoo, noted that the complainants as well as witnesses at the KFC at the Collanade Mall did not feel safe. This was based on video footage which had been taken of the complainant's motor vehicle indicating the registration number. This led to a fear that they might be intimated by the appellants who lived in the same vicinity as they did. The magistrate based on this evidence found that the respondent had successfully rebutted the evidence of the appellants' by showing that there was a reasonable likelihood that the appellants would intimidate witnesses if released on bail. The finding lost sight of the evidence of Constable Tladi and Warrant Officer Naidoo under cross examination that the fear expressed by the complainants and witnesses was premised on what *might* happen if the appellants' were released on bail. The appellants' in their affidavits indicated that they would not interfere with or intimidate state witnesses. What is required is a likelihood of the offending behavior manifesting itself and not a mere possibility. The gravity and seriousness of the offences cannot be overlooked, which was at face value was brutal, but that in itself cannot lead to a conclusion that witnesses would be intimidated. The imposition of suitable bail conditions was overlooked by the magistrate as a way of mitigating such a likelihood.
[20] Section 60(4)(b) provides that:
"The interests of justice do not permit the release from detention of an accused...
(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial".
The magistrate found that the first appellant had surrendered himself merely on the basis that accused 4 had been released on bail anticipating that he too would be released on bail. This led to a finding that the first appellant was a flight risk. There were no objective facts before the magistrate to draw this inference. The third appellant the magistrate found posed a flight risk based on the strength of the State's case and the likely sentence which would be imposed in the event of a conviction. The finding lost sight of Constable Tladi's evidence during cross examination that the third appellant would not flee. In *S v Acheson* 1991 (2) SA 805 (N), Mohamed J said:
"An accused person cannot be kept in detention pending his trial as a form of anticipatory punishment. The presumption of the law is that he is innocent until his guilt has been established in court. The court will therefore ordinarily grant bail to an accused unless this is likely to prejudice the ends of justice."

[21] Section 60(4)(c) provides that:
"The interests of justice do not permit the release from detention of an accused...
"(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; ..."
It is not in dispute that counsel (or the legal representative) for the first appellant had visited the Montana Hospital where the complainants received medical attention and was privy to information regarding their treatment. The magistrate premised on this found that counsel had contravened the provisions of section 60(4)(d) of the Criminal Procedure Act and made a blanket finding that all three appellants' would accordingly interfere in the State's case if released on bail. Whilst the behavior of counsel (or the legal representative) should be deprecated in the strongest terms, it could not be attributed to any of the appellants'. The submission that section 60(14) of the Criminal Procedure Act alludes to information which is contained in or forms part of the docket which an accused may not have access to for purposes of bail, does not avail counsel (or the legal representative) in what simply should not have happened. Save for the behavior of counsel (or the legal representative) there were no other objective facts showing that the appellants' would interfere in the investigation of the State's case.

[22] Section 60(8)(e) provides that:
"The interests of justice do not permit the release from detention of an accused...
(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security;"
and
(8A) In considering whether the ground in subsection (4) (e) has been established, the court may, where applicable, take into account the following factors, namely-
(a) whether the nature of the offence or the circumstances under which the offence was committed is likely to induce a sense of shock or outrage in the community where the offence was committed;
(b) whether the shock or outrage of the community might lead to public disorder if the accused is released;
(c) whether the safety of the accused might be jeopardized by his or her release;
(d) whether the sense of peace and security among members of the public will be undermined or jeopardized by the release of the accused.
(e) whether the release of the accused will undermine or jeopardize the public confidence in the criminal justice system.
The approach to this ground has been settled in *S v Dlamini* [1999] ZACC 8; 1999 (2) SACR 51 (CC) where Kriegler J held as follows at paragraph [57]:
"It is important to note that sub-section 4(e) expressly postulates that it is to come into play only "in exceptional circumstances". This is a clear pointer that this unusual category of factors is to be taken into account only in those rare cases where it is really justified. What is more, sub-section 4(e) also expressly stipulates that a finding of such circumstances has to be established on a preponderance of probabilities

("likelihood"). Lastly, once the existence of such circumstances has been established, paragraph (e) must still be weighed against the considerations enumerated in sub-section (9) before a decision to refuse bail can be taken. Having regard to these jurisdictional prerequisites, the field of application for subsections 4(e) and (8A) will be extremely limited. Judicial officers will therefore rely on this ground with great circumspection in the knowledge that the Constitution protects the liberty interest of all."

[23] The incident, notwithstanding submissions to the contrary, manifested racial connotations or undertones during the course of the incident, often described as so called "white on black" violence. The understandable public outcry in incidents of this nature is understandable. The call for bail to be refused is likewise understandable. However, the magistrate should not have lost sight of the very high watermark of section 60(4)(e) read with section 60(8A) and the salutary warning expressed in S *v Schietekat* 1999 (1) SACR 100 (CC) at paragraph 104 where the court said:
"... no more than expression, in statutory form, of what amounts to lynch law. It is true to say that it is the duty of courts of law to ensure the maintenance of law, order and justice and so prevent that greatest of all evils, a criminal justice system so weak and vacillating that people feel the need to avoid the courts and take the law into their own hands. Despite this courts have a greater obligation to society at large. They must jealously guard the rule of law. That is the lesson of this century..."

[24] No objective facts of the likelihood and not possibility of the eventualities envisaged section 60(8A) were presented to the court from which the magistrate drew her inferences. The magistrate appears clearly to have been influenced by the events which manifested itself in the social media, comments emanating from the Minister of Police on Twitter and protesters who had gathered opposing the release of the accused on bail. On what public outcry constitutes the magistrate indicated that she did not need a dictionary to tell her what public outcry was but had merely to have regard to section 60(8A). It is apparent that the magistrate paid lip service to the statutory provision.

[25] A submission was made that the court considers the fact that accused 4 had been released on bail and that there had been no public outcry. However, the court must be alive to the fact that even upon a reading of the record there is no indication as to what happened on the 04 August 2017 in the magistrate's court leading to the release of accused 4 on bail. Therefore it would be mere speculation on the part of the court to surmise that there would not have been a similar stance taken by the protesters who were at court on 10 August 2017. Notwithstanding this, the question still remains, whether or not on the high watermark, the State had shown or rebutted the evidence that there would be no public outcry.

[26] Upon a consideration of the totality of the factors set out in section 60(8A) it is clear that they are not to be read individually but jointly, the one following upon the

other. Whilst the court notes that there were protests for bail to be refused, that there has been an outcry on social media, the question remains, even though the magistrate had found the likelihood that the release of the appellants would disturb the public order or undermine public peace and security, whether a consideration of section 60(9) could have mitigated this aspect. The magistrate failed to consider the provisions of section 60(9), which on its own is a material misdirection when regard is had to the decision of *Dlamini.*

[27] On the factors the magistrate had considered, I am of the view that she had misdirected herself in respect of each of these grounds and that this court is at liberty to give the decision which the magistrate should have given in the first instance.

[28] In the result the following order is made:
1. The appeal against the refusal of bail is upheld;
2. The decision of the learned magistrate Rapulana in the court a *quo* is set aside.

2. Cooper v District Magistrate, Cape Town (WCC) (1699/2017) [2017] ZAWCHC 140; 2018 (1) SACR 369 (WCC) (24 November 2017)

A magistrate conducting a summary enquiry for the failure of an accused to attend court must inform the accused of the nature of the proceedings, the charge or his rights and cannot ignore the legal representative who is present.

Andrews AJ
Introduction
[1] This is a review application for the setting aside of the conviction and sentence of the Applicant under case number 24/1270/2016 in the Cape Town District Court., in terms whereof, Respondent convicted Appellant of contravening the provisions of Section 55 (1) of the Criminal Procedure Act[1], as amended and subsequently sentenced him to pay a fine of R3 000.00 (Three thousand rand) or three (3) months imprisonment. The matter was argued on 23 November 2017. The Respondent is not opposing the application and has filed a notice to abide.

Factual Background
[2] The salient features of the factual matrix as set out by Applicant in his supporting affidavit and gleaned from the court record, can in brief be summarised as follows. The Applicant was arraigned on a charge of contravening the provisions of Section 305 (1)(q), read with section 1 and section 305 (6) of the Children's Act[2]. His

[1] 51 of 1977.
[2] 38 of 2005.

first appearance was indicated on the summons as 28 July 2016. On 13 December 2016, the matter was postponed to 1 March 2017.

[3] Applicant avers that he had been experiencing chest pains since 28 February 2017 which necessitated that he attend at Tableview Medicross early on the morning of 1 March 2017 to consult with a doctor. Applicant further avers that he informed his attorney, Mr Arnold, that he would not be able to attend court because he was unwell and was advised to obtain a medical certificate from the doctor, which he duly did.

[4] The Applicant further avers that he contacted his legal representative later that morning to enquire about his matter and was informed by Mr Arnold that the trial had been postponed to 10 March 2017. According to Applicant, he was unaware that a warrant of arrest had been authorised in his absence. On 10 March 2017, Applicant attended at court together with his legal representative. According to Applicant, the Respondent, who ignored the presence of Applicant's legal representative, immediately called him into the witness box and conducted a warrant enquiry as to his absence form court on 1 March 2017. Applicant was subsequently found guilty and sentenced for failure to attend court, which fine was immediately paid by Applicant.

Grounds for Review

[5] Applicant contends that the proceedings were irregular and that his constitutional rights to a fair trial as enshrined in section 35 (3) of the Constitution of the Republic of South Africa[3] were infringed. Furthermore it is contended that the jurisdiction of section 55 (2) of the Criminal Procedure Act was exceeded. Applicant further avers that Respondent acted unreasonably in rejecting his explanation

Legal Principles

[6] It is trite that an accused person's rights are enshrined in the Constitution and in this regard, section 35 (3) of Act 108 of 1996 states that *'Every accused has a right to a fair trial, which includes the right - (a) to be informed of the charge with sufficient detail to answer it; (b) to have adequate time and facilities to prepare a defence*…*(h) to be presumed innocent, to remain silent, and not to testify during the proceedings; (i) to adduce and challenge evidence…'* In addition, everyone, including an accused person has the inherent right to dignity.[4]

[7] Section 170 of Act 51 of 1977, is applicable in circumstances when an accused fails to appear in court after a matter has been adjourned. The provisions of section 170 is as follows:

'170 Failure of accused to appear after adjournment or to remain in attendance

(1) An accused at criminal proceedings who is not in custody and

[3] Act 108 of 1996.

[4] Section 10 of At 108 of 1996 *'Everyone has inherent dignity and the right to have their dignity respected and protected'.*

who has not been released on bail, and who fails to appear at the place and on the date and at the time to which such proceedings may be adjourned or who fails to remain in attendance at such proceedings as so adjourned, shall be guilty of an offence and liable to the punishment prescribed under subsection (2).

(2) The court may, if satisfied that an accused referred to in subsection (1) has failed to appear at the place and on the date and at the time to which the proceedings in question were adjourned or has failed to remain in attendance at such proceedings as so adjourned, issue a warrant for his arrest and, when he is brought before the court, in a summary manner enquire into his failure so to appear or so to remain in attendance and, unless the accused satisfies the court that his failure was not due to fault on his part, convict him of the offence referred to in subsection (1) and sentence him to a dine not exceeding R300 or to imprisonment for a period not exceeding three months.'

[8] This section corresponds with section 55(3) and 72 (4) in cases where persons have been summoned or warned to appear in court and who subsequently fail to do so. It is trite that the court has the same powers in a section 170 (1) enquiry as conferred on it through these provisions save that in the section 170 (1) enquiry the provision is wide and without qualification.[5] *'Where the court holds a summary enquiry in terms of sub-s (2) into a failure to attend, considerations of justice and common sense demand that the court must inform the accused that there is an onus on him to tender a reasonable excuse – in the unlikely event, that is, that this reverse onus passes constitutional muster[6]…The accused must also be advised that he may call witnesses and give evidence himself[7][8]*

[9] At the summary enquiry, it is trite that the accused bears the onus of explaining his or her failure to attend court, which is to be conveyed to him through the Presiding Officer. The matter of *S v Chaplin*[9] is provides guidelines in respect of the enquiry. In this regard, Scott J stated as follows:

'What this section contemplates is that the mere failure to appear will justify a conviction in the absence of an explanation. In other words, what is presumed is that the failure to appear was wilful in the sense that it was due to the fault of the accused person. It follows that an accused person must be informed of the onus upon him, otherwise he might be justified in tendering no explanation, in the belief that his mere failure to appear did not in itself indicate that he was at fault and that the State had

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[5] Hiemstra's Criminal Procedure (LexisNexis) 22-67.
[6] *S v Ngubeni* [2009] 1 All SA 185 (T) at [15].
[7] *S v Bkenlele* 1983 (1) SA 515 (O) and *S v Du Plessis* 1970 (2) SA 562 (E) at 564-5.
[8] Du Toit et el *'Commentary on the Criminal Procedure Act'* (Juta) 22-105.
[9] 1995 (2) SACR 490 (C) at 494d-j.

failed to establish fault on his part. …Wilfulness will be presumed in the absence of an explanation by the respondent. In such circumstances, that is to say where wilfulness is to be presumed, justice and common sense require that that the presiding officer should inform the respondent that in the absence of an explanation he will be presumed to have acted wilfully.'[10]

[10] It is incumbent on the presiding officer to actively attempt to determine the truth and maintain a balance in fairness to the accused.[11]

[11] As previously stated, there is conformity between this enquiry and section 72 (4). In light hereof, the matter of *S v Singo*[12] has relevance. In this regard, Ngcobo J stated that, in answer to the question '*[d]oes the phrase "unless such person satisfies the court that his failure was not due to fault on his part" limit the right to be presumed innocent and the right to remain silent?'* stated that:
'[25] This court has on several occasions considered provisions in statutes that impose a legal burden, which has now become known as a reverse onus. A legal burden requires an accused to disprove on a balance of probabilities an essential element of an offence and not merely to raise reasonable doubt. It is by now axiomatic that a provision in a statute that imposes a legal burden upon the accused limits the right to be presumed innocent and to remain silent.
[26] A provision which imposes a legal burden on the accused constitutes a radical departure from our law, which requires the State to establish the guilt of the accused and not the accused to establish his or her innocence. That fundamental principle of our law is now firmly entrenched in section 35(3)(h) of the Constitution which provides that an accused person has the right to be presumed innocent. What makes the provision which imposes a legal burden constitutionally objectionable is that it permits an accused to be convicted in spite of the existence of a reasonable doubt….'

Discussion
[12] From the record of proceedings it is clear that the Applicant's legal representative attempted to explain the absence of the Applicant. The legal representative requested that the court hold over the warrant of arrest based on the explanation tendered for Applicant's absence from court. The court found, *'no sufficient reasons justifying hold over w/a (sic)'*[13] . What follows on the record is *'w/a held over'.* The word '*not'* appears to have been inserted between the words '*w/a and held'* and then deleted again. As it stands, the record reflects that the warrant of arrest was held over. When the amendment was effected has not been indicated as the amendment was neither initialled nor dated. If the warrant of arrest was held over, then it follow that there would have been no need for an enquiry to be held.

[10] See also *S v Baloyi* 2000 (1) SACR 81 (CC) at [29].
[11] *Ibid* at [31].
[12] 2002 (2) SACR 160 (CC).
[13] Record of proceeding page 36.

[13] Based on the further conduct of the matter, it is evident that the warrant of arrest had to have been authorised to justify the holding of an enquiry. I pause here to mention that the warrant of arrest was authorised in terms of section 55 of Act 51 of 1977. This is evidently incorrect as the Applicant was previously warned to be at court on 1 March 2017. Section 55 only finds application where a person appears in court on a summons. Consequently, a person after receiving a summons will thereafter appear in court in accordance with a warning under section 72.[14] It therefore flows that the warrant of arrest should have been authorised in terms of Section 170 of Act 51 of 1977.

[14] The Appellant avers that his legal representative failed to inform him that his failure to attend court resulted in a warrant of arrest having been authorised. The Applicant states in his affidavit that he presented at court on 10 March 2017. When his case was called, his legal representative placed it on record that he was present and was absent from court on the previously date because he had been ill. The attorney proceeded to hand up the medical certificate to Respondent who summarily called Applicant to the witness box where he was interrogated about his absence, the chest pains he had suffered and the manner in which he had travelled to hospital. According to the Applicant, Respondent appeared to take issue with the certificate of the doctor. Respondent also questioned Applicant about the medical tests which were run. As Applicant was not in a position to expound on the medical intricacies, he proposed to Respondent that the doctor be called to give evidence in this regard and according Applicant, Respondent ignored the suggestion. According to the Applicant, Respondent not being satisfied with his explanation remarked that if Applicant was well enough to drive to Medicross on the morning of 1 March 2017, then he could have come to court whereafter Applicant was found guilty and sentenced.[15]

[15] The record of proceedings provides a clear exposition the enquiry. What is evident is that Applicant conceded that there was no reason that he could not attend the hospital during the evening. Appellant also conceded that he could have phoned his attorney earlier. The record does not reflect the reasons given by Respondent for the verdict which followed.[16] In this regard, Applicant contends that this is indicative of the fact that the Respondent did not apply his mind.

[16] According to Applicant, he was not informed of the charge, the nature of the proceedings nor was he informed of his rights. In this regard, it is alleged that

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[14] Section 55 (2) of Act 51 of 1977. '*...Provided that where a warrant is issued for the arrest of an accused who has failed to appear in answer to the summons, the person executing the warrant – (a) may, where it appears to him that the accused received the summons in question and that the accused will appear in court in accordance with a warning under section 72..'*

[15] Paragraphs 15 and 16 of Applicant's founding affidavit.

[16] See typed record of enquiry on page 43.

Respondent did not make it clear to Applicant that he was being charged with a criminal offence, and the commensurate penalty provisions upon conviction. Respondent failed to afford Applicant a fair opportunity to prepare for the hearing, present a defence and or call witnesses and failed to explain and apply the correct onus at the enquiry.

[17] The Applicant refutes the accuracy of the information reflected *pro forma* form indicated that his rights to appeal and to legal representations were explained and that he elected to conduct his own defence. Applicant contends that this was never canvassed with him. In fact, it is argued that it made no sense for him to have elected to conduct his own enquiry as his legal representative who was being paid to represent him at court was present in court. In this regard, Applicant further contends that it would have been unwise of him to have done so. [17]

Conclusion

[18] Based on the exposition of events it is evident that a number of procedural irregularities were highlighted. In addition, a myriad of Applicant's constitutionally entrenched rights were infringed. Applicant's version in this regard is undisputed by Respondent. It is incumbent on the court to advise the accused of the burden of proof and ask the accused whether he wishes to testify and or call witnesses. Failure to do so constitutes a material error in law.

[19] It is common cause that Applicant presented the court with a medical certificate. If Respondent had any reservations as to the veracity or authenticity of the medical certificate presented in court, the author thereof could have been called as a witness to clarify any aspects for the benefit of the court to enable the court formulate an appropriate finding which would ultimately be in the interest of justice and in accordance with justice. An accused has the right to be treated with dignity and respect and the robust manner in which the inquiry was conducted suggests that Respondent was not alive to these basic and fundamental human rights firmly entrenched in South Africa's constitutional democracy.

[20] I am furthermore of the view that the manner in which the inquiry into the Appellant's failure to attend court was conducted amounted to a substantial injustice as it infringed on his constitutionally entrenched rights to a fair trial. His right to access to justice was curtailed when his legal representative was ignored and presence not acknowledged during the enquiry. It is of concern that Respondent, who his called upon in the exercise of his judicial function to administer the law without fear, favour or prejudice; had a complete disregard to the rights of the accused. In addition, the legal principles pertaining to the enquiry were misapplied to the prejudice of the Applicant. In this regard, I am in agreement with the Applicant that the summary hearing was irregular and that Respondent materially misdirected

[17] See page 2 of Applicant's supplementary affidavit – page 45 of record.

himself by applying the reverse onus. I furthermore find that Respondent incorrectly found the Applicant guilty of contravening the provisions of section 55 of Act 51 of 1977 instead of section 170(1) of Act 51 of 1977. In the circumstances, and having regard to all these glaring irregularities, I am of the view that the proceedings conducted on 10 March 2017 were not in accordance with justice and falls to be set aside.

[21] Turning to the sentencing component of the enquiry, Section 1 of the Adjustment of Fines Act 101 of 1991[18] has relevance and can be applied to Section 170 (2). In this regard, the maximum fine imposed can be adjusted upwards. I am of the view, in applying the Adjustment of Fines Act that the amount payable in respect of the fine imposed is not an incompetent sentence. However, seen in the totality of the evidence, a finding in this regard will be moot as the proceedings were already found to be irregular.

[22] In the result I would make the following order:

(a) The conviction and sentence imposed on the Applicant under case number 24/1270/2016 in the Cape Town District Court on 10 March is set aside.

[18] *'(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division....*
(2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) (a): Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1)(a).'

From The Legal Journals

Swales, L

"An Analysis of the Regulatory Environment Governing Hearsay Electronic Evidence in South Africa: Suggestions for Reform – Part One."

PER / PELJ **2018(21)**

Abstract

The purpose of this two-part article is to examine the regulatory environment governing hearsay electronic evidence in South Africa – with a view to providing clear, practical suggestions for regulatory reform in the context of the South African Law Reform Commission's most recent Discussion Paper on electronic evidence.

Technology has become an indispensable part of modern life. In particular, the Internet has facilitated new forms of business enterprise, and shifted basic communication norms. From a legal perspective, technology has presented several novel challenges for courts and legal practitioners to deal with – one of these key challenges relates to electronic evidence and in particular the application of the hearsay rules to the digital environment.

The South African Law Reform Commission has identified the application of the hearsay rule as one of the core concerns with regard to electronic evidence, and certain academic analysis has revealed inefficiency in the current legal position which may involve multiple sources of law. Moreover, the Law Society of South Africa has stated that there is some confusion amongst members of the profession in relation to hearsay as it applies to electronic evidence.

With the pervasive and burgeoning nature of technology, and with the Internet in mind, it is natural to assume that electronic evidence will be relevant in most forms of legal proceedings in future, and hearsay electronic evidence in particular will play an increasingly important role in years to come.

Consequently, part one of this article will consider the key definitional concept in relation to electronic evidence – data messages - and examine whether the definition should be revised. In addition, part one of this article will answer two further critical questions posed by the South African Law Reform Commission in relation to data messages and hearsay evidence, namely: should a data message constitute hearsay? And, how should one distinguish between documentary evidence and real evidence in the context of data messages?

Swales, L

"An Analysis of the Regulatory Environment Governing Hearsay Electronic Evidence in South Africa: Suggestions for Reform – Part Two"

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

Abstract

Part two of this article will review the statutory exceptions to the hearsay rules applicable to electronic evidence, including the controversial section 15(4) of the Electronic Communications and Transactions Act 25 of 2002. Further, part two will analyse the situation in selected foreign jurisdictions where hearsay electronic evidence has had more time to mature and develop (United Kingdom, Canada and United States) with a view to incorporating suggestions that South Africa can implement.

Finally, this article will conclude by providing suggestions for law reform in the context of the recommendations put forward by the South African Law Reform Commission, and will suggest that that there must be law reform in at least the following areas: the definition of data messages; the definition of the term document in the statutes applicable to the hearsay exceptions; a distinction between types of electronic evidence insofar as computer-generated evidence with human intervention, and without human intervention is concerned; and more cohesion and alignment with the statutory hearsay exceptions.

Oxtoby, C & Masengu, T

"Who Nominates Judges? Some Issues Underlying Judicial Appointments in South Africa."

2017 Stell LR 540

Abstract

The South African system of judicial appointments includes an important, but easily overlooked, feature whereby prospective judges must be nominated for appointment. This article examines the nomination procedure, to assess the impact of nominations on the appointment process.

The article deals with three central issues: whether the identity of the nominator impacts on a candidate's chances of appointment; the attention given by nominating organisations to the need for demographic transformation of the judiciary when

making nominations and what other factors influence a decision to nominate; and the gendered nature of nominations and judicial appointment in general.
It is argued that, in terms of numbers, the identity of a nominator does not appear to make a significant difference to a candidate's prospects of appointment. Contrary to what might have been expected, the "success rates" of judges and advocates who nominate candidates is collectively relatively low. However, it is argued that the identity of a nominator is nevertheless important in other respects, such as the perceived prestige of the nominator. Furthermore, candidates who are not involved in significant legal professional organisations may be disadvantaged.
The article further surveys the reasons for nominations given by leading nominators, as well as the process followed in making nominations, and assess these in light of transformative goals. The organisations surveyed appear closely attuned to these goals. The article concludes with a discussion of the challenges facing the quest for gender equality in the judiciary, such as perceptions of lack of competence and a lack of quality work that often bedevil women lawyers, which impact on the likelihood of female candidates being nominated for judicial appointment. The importance of acting as a judge, and the relative lack of opportunities provided for women to do so, is also discussed. A failure by some leading organisations to nominate female candidates regularly is also noted.

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

Contributions from the Law School

New Evidence: The case of the recanting witness

The power of the High Court, sitting as a court of appeal, to hear further evidence after the conviction of the accused derives from both the Criminal Procedure Act 51 of 1977 and the Superior Courts Act 10 of 2013 (which repealed the Supreme Court Act 59 of 1959 and came into effect on 23 August 2013).
Section 309B (5) and (6) of the CPA read as follows:

"(5)(a) An application for leave to appeal…may be accompanied by an application to adduce further evidence…relating to the prospective appeal.
(b) An application for further evidence must be supported by an affidavit stating that:-
(i) further evidence which would presumably be accepted as true is available;
(ii) if accepted, the evidence could reasonably lead to a different verdict or sentence; and
(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
(c) The court granting an application for further evidence must-
(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.
(6) Any evidence received under subsection (5) shall for the purposes of an appeal be deemed to be evidence taken or admitted at the trial in question."

Section 19 of the Superior Courts Act 10 of 2013 (effective from 23 August 2013) contains the same powers in virtually identical terms as those in s 22 of the Supreme Court Act.
Section 22 of the Supreme Court Act 59 of 1959 provides that:
"The appellate division or a provincial division, or a local division having appeal jurisdiction shall have power –

(a) On the hearing of an appeal to receive such further evidence, either orally or by deposition before a person appointed by such division or to remit the case to the court of first instance, or the court whose judgement is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as to the division concerned seems necessary."

They are broadly stated and are to the effect that the court can either hear the evidence on appeal or it can set aside the conviction and sentence imposed by the lower court and refer the matter back to the court a quo for the hearing of new evidence. There are policy reasons against the first approach (S v *De Jager* 1965 2 SA 612 A at 613 A – C, *R v Jantjies* 1958 2 SA 273 A at 279 D-E) and the usual course is for the court to remit the matter to the trial court to hear the new evidence. However, if there are good reasons for the appeal court to hear the evidence itself, it will – such as where the state accepts the new evidence as true (*S v Michele* 2010 1 SACR 131 (SCA) or where the evidence is incontrovertible (*S v Karolia* 2006 2 SACR 75 (SCA), *S v Jaftha* 2010 1 SACR 136 (SCA)). *R v Carr* 1949 2 SA 693 A).

Because the relevant provisions are so broadly framed, the courts have developed requirements which must be met before new evidence will be heard. The leading case in this regard is *S v De Jager* (supra at 613 D-C)), which sets out the requirements thus:
"(a)There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b)There should be a prima facie likelihood of the truth of the evidence.
(c)The evidence should be materially relevant to the outcome of the trial."
It is also a principle that the new evidence must have been in existence at the time of the judgement, but this is not a rigid rule (*S v Immelman* 1978 3 SA 726 A at 730 H, *S v Marx* 1989 1 SA 222 A at 226 C) and may be relaxed in exceptional or peculiar circumstances *(S v EB* 2010 2 SACR 524 (SCA), *S v Michele* (supra), *S v Karolia* (supra), *S v Jaftha* (supra)). In the case of *Mulula v The State* (074/14) [2014] ZASCA 103 (29 August 2014) the court held that whether this requirement is met will be dictated by what the interests of justice demand in a particular case (para 11).

What follows now is a discussion of some relevant case law dealing with the question of how to deal with an application to be allowed to introduce new evidence.
In *L […] v The State* (1049/2013) [2014] ZASCA 103 (23 August 2014) the appellant had been convicted of rape of a 13 year old girl and was sentenced to ten years imprisonment. Approximately two years later the complainant made a sworn statement to the police in which she confessed that she had falsely implicated the appellant. The police conducted an investigation into the matter (para 9), and the complainant confirmed her recantation to a different police officer more than once. The police officer warned the complainant that a consequence of her new evidence could be a charge of perjury, but she maintained that she had falsely implicated the appellant (para 10). An application was then launched in the High Court for leave to appeal against his conviction and sentence, and for the appellant to lead further evidence (para 10). Both applications were granted (para 11). The appellant sought an order setting aside his conviction and sentence and remittal of the matter to the trial court for the hearing of new evidence in the form of the complainant's recanting affidavit. The respondent supported the applicant's motion (para 12). A few days before the hearing of the appeal, the respondent filed supplementary heads of argument to the effect that the complainant and two potentially exculpatory witnesses had died (para 13). The appellant prayed that his conviction and sentence be set aside in the interests of justice, and was supported in his prayer by the respondent (para 14). The court was satisfied that the requirements for it to remit the matter to the trial court for the hearing of new evidence were met (para 14, 17). The court noted however that the difficulty for the appellant was that the evidence he sought to lead was no longer available (para 17). The court held that in these circumstances it was in the interests of justice to set aside the conviction and sentence without further ado, in accordance with the submissions of both counsel (para 17). It noted that it had grave doubts about the correctness of the conviction in the first place (para 17).
This case is unique because both counsel supported the setting aside of the conviction and sentence without the case being remitted to the trial court, and because the court doubted the correctness of the conviction in the first place. In the ordinary course however I submit that it would be preferable for the matter to be remitted to the trial court. It is not so that the evidence was unavailable. It was, albeit in the form of hearsay evidence. The trial court would have considered the admissibility of the evidence in accordance with s 3 of the Law of Evidence

Amendment Act, which requires that it must be in the interests of justice to admit it. Assuming the evidence was admitted, the trial court would then be in a position to evaluate the evidence in the context of the other evidence led at the trial.

In *Mulula v The State* (supra), the appellant had been convicted of the rape of a child and sentenced to fifteen years imprisonment. He had been represented by a legal aid attorney, and an appeal to the high court against conviction and sentence had failed. The appellant then secured different legal representation, and the matter was referred to the supreme court of appeal. There was no dispute that the complainant had been raped, rather the issue was whether the appellant had been correctly identified as the perpetrator (para 3). In the trial court there was evidence to the effect that the complainant had contracted a sexually transmitted disease, Herpes 2, which could only have been contracted as a result of the rape. A medical doctor gave expert evidence that once the Herpes 2 virus is in a person's blood; it remains there for life even if the person is asymptomatic. This aspect was not pursued in the trial court. The SCA expressed surprise that the prosecution did not pursue this avenue of investigation since a simple blood test may have exonerated the accused (para 7). It is equally surprising that the accused's defence counsel did not follow this up. In any event, the appellant's new legal representative recognised the significance of this evidence and the appellant underwent a blood test which revealed that the appellant tested negative for the Herpes 2 virus. The results of the test were submitted in affidavit form. Both the person who took the blood sample from the appellant, and the person who tested it could not be traced and were therefore unavailable to testify. The state opposed the appellant's motion. The SCA considered the criteria as laid down in the *De Jager* case (supra). On the issue of whether there was a reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial, the court identified that the real question was why the blood test had not been done at the time of the trial. The court noted that the appellant had no real explanation for this but that the prosecutor had been equally remiss (para 12). On the question of whether the evidence was prima facie true, the state argued that the chain of custody of the blood sample had not been proven, and that the affidavit containing the blood test result was not submitted in accordance with s 212 of the Criminal Procedure Act. On the question of whether the evidence was materially relevant to the outcome of the trial, the court interrogated the relevant standard (para 14). Ultimately, the court concluded that all the *De Jager* requirements were met and that the new evidence should be allowed.

In the case of *Sebofi v The State* (2013/A5043) [2014] ZAHCJ (13 October 2014) the appellant had been convicted on 2 counts of rape. He appealed against his conviction and sentence. At the outset of the judgement, the court noted that after reading the transcript of the proceedings in the court a quo it was left with a grave sense of disappointment about the way in which the allegation of rape was investigated, the way the case for the state was handled, and the manner in which the defence was conducted (para 5). The extent of the problems were such that the court was not

satisfied that it could confirm the verdict on the body of evidence that was presented to it (para 80). However, it remitted the matter to the court a quo for the hearing of new evidence in accordance with the interests of justice and its powers in terms of s 304 of the Criminal Procedure Act. This was done mero motu. The further evidence was expressly limited to two points.

In the case of *War v The State* (A94/2014) [2014] ZAHCP (23 October 2014) the appellant had been convicted on six counts of the sexual violation of his young biological daughter (para 1). He appealed against his conviction and before sentence was passed he brought an application to lead further evidence before the trial court in accordance with s 309B of the Criminal Procedure Act (paras 2, 3). The trial magistrate held that the application was premature because sentence had not yet been passed and that the appeal court should hear the application (para 33). The appeal court held that this was incorrect and that the trial court should have dealt with the application. However, the high court had the necessary jurisdiction to hear the application in terms of s 19 of the Superior Courts Act (para 34). The further evidence which the appellant sought to lead was an affidavit from the complainant's maternal aunt (Ms Palm) to the effect that the complainant had lied about the appellant molesting her (para 25), and an affidavit to the same effect by the complainant herself (para 26) The court noted that in the record of the proceedings in the trial court there was another statement which appeared to be written by the complainant in which she reinstated the allegation against her father, the appellant (para 29). The court appointed Adv A Skelton to represent the interests of the minor complainant (para 30). The court noted that the only *De Jager* requirement which was an issue was whether the evidence in the affidavits would presumably be accepted as true (para 36). The court considered the degree of cogency that was required to satisfy this condition (para 38).
In casu the court held that in view of the fact that the complainant had given different versions it could not be said that the evidence was 'presumably true' (para 42).
However, as this was a case involving a child, her best interests must be considered. Indeed, under s 28(2) of the Constitution, in every matter concerning children, their best interests are paramount. Counsel for the State submitted that it was not in the complainant's interests to have the matter reopened; firstly, because she was giving recanting testimony and there was a probability that she had been influenced to do so; secondly, that the trauma of a further court appearance would be too severe to allow of such a course.
The court noted that the recanted version was consistent with statements she made before the trial in the court below. The court observed that the medical evidence was not conclusive. The court acknowledged that it may well be true that the complainant had been influenced to recant in favour of the appellant. But the difficulty experienced by the court lay in deciding which, if any, of her versions, including her versions given before the trial even started, is true. The complainant did not present with any emotional signs of sexual abuse and the medical evidence in relation to physical

signs of abuse was equivocal. In all these circumstances, the court elected not to reject the evidence foreshadowed in the application as false.

As to the second point: the complainant actually wanted to return to the witness box and give further testimony. In addition, the court held, one must weigh up the stress of further testimony against a situation in which the complainant is denied the right to give further evidence and then has to live with a possible feeling on her part that she had wrongly condemned the appellant to prison for life.

The complainant was 14 years old and the court concluded that her own wishes should be given weight.

The court noted that what took this case out of the ordinary was that the complainant herself gave conflicting versions of what had happened to her even before the trial began. There was no reason why the court should prefer one version over another in considering the application. The version presented by the complainant in her affidavit put up with the application to lead further evidence might be true. The appellant was facing life in jail. The court concluded that it would be an affront to justice if the appellant were denied an opportunity to investigate in court the new evidence foreshadowed in the application. The application was accordingly granted.

In the case of *Nkomo v The State* (979/2013) [ZASCA] 186 (26 November 2014) the appellant had been convicted of the rape of an 11 year old girl in the court a quo and sentenced to 15 years imprisonment (para 1).The appellant applied for leave to appeal against conviction only. Before the appeal was heard, he lodged an application in terms of s 22 of the Supreme Court Act 59 of 1959 for the matter to be remitted to the regional court for the hearing of further evidence in the form of a letter in which the complainant recanted her testimony implicating him in the commission of the rape (para 1). The high court dismissed both applications, but granted leave for the matter to be referred to the supreme court of appeal (para 2).

The evidence on which the appellant was convicted was the testimony of the complainant, her sister, her father, her stepmother and the J88 medico-legal report prepared by a medical practitioner who had since died (para 3). The evidence included that after the charge of rape was laid a written agreement was entered into by the complainant's relatives (including her parents) and the appellant in terms of which he would pay them the amount of R8000.00 and they would not proceed with the rape case (para 11). This was never done.

The appellant was telephoned by a captain of the SAPS who told him that he had a letter from the complainant which was serious and which she wanted to give him (para 13). The appellant was reluctant to have contact with the complainant and told the captain to leave the letter in a public place from where he duly collected it (para 14). The letter was in the complainant's handwriting and recanted her testimony against him. He was told that the SAPS was considering a charge of perjury against the complainant, and he referred the letter to his attorney (para 14). None of this was disputed by the state, nor was there anything to suggest the evidence was false (para 15).

The letter was addressed to the appellant personally and in it the complainant said that the appellant did not rape her, that her stepmother conspired with a court

interpreter named Khambule to lay a false charge of rape against the appellant in order to extract money from him. She revealed further that she had been told to have sex with her boyfriend prior to the medico-legal examination so it could be seen that she had been penetrated, and to put on an act and cry while giving testimony to enhance her credibility. She apologised unconditionally to the appellant and his family.

In the end, the court concluded that having regard to the contents of the complainant's letter, the manner in which it was written, how it came into the possession of the appellant and the prima facie likelihood of the truth of its contents, it was of the view that there were exceptional circumstances which justify the re-opening of the case and the leading of this evidence.

In conclusion, it has been said that:

"It is not in the interests of the administration of justice that issues of fact, once judicially investigated and pronounced upon, should lightly be re-opened and amplified" (*De Jager* (supra) at 613 A-B*, S v Ndweni and others* 1999 (2) SACR 225 (SCA) at 227 E-G).

and

"Apart from the general interest in the finality of litigation, there is always the possibility, having regard to the frailty of human nature, that evidence may be shaped or even fabricated to meet the trial court's difficulties" (*Mulula* (supra) at para 10),

However, an analysis of the case law shows us that where the courts are satisfied that the *De Jager* requirements have been met, they will allow new evidence to be led.

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Matters of Interest to Magistrates

How open and transparent should the Judicial Service Commission be?

Prof Pierre De Vos

The Judicial Service Commission (JSC) plays an important role in the selection of judges. But what is the extent of the transparency required from the JSC when one of its decisions is challenged in a court of law? Should the party challenging the JSC decision be entitled to a transcript of the private deliberations of JSC? A recent judgment of the Constitutional Court held that a party challenging a JSC decision is normally entitled to such a transcript. Is this level of transparency a good idea or not?

Before I read the various judgments in the recent Constitutional Court matter of *Helen Suzman Foundation v Judicial Service Commission (CCT289/16) [2018] ZACC 8 (24 April 2018)* I was firmly of the opinion that the private deliberations of the JSC (where Commissioners discuss the merits of the judicial candidates before voting on who to select for appointment) should remain private and that an applicant wishing to have a decision of the JSC reviewed and set aside should not be entitled to such a transcript.

Luckily, most of us are able to change our minds when we are presented with new facts or good arguments. At the very least, good arguments will make us less certain of our original opinion. This, I think, is a good thing. Absolute certainty is often the product of too little thinking and a catastrophic lack of engagement with facts and arguments.

And I must concede that in this case the majority judgment of Madlanga J contains strong arguments, advancing a plausible case that a litigant should be entitled to a transcript of the deliberations of the JSC. The minority judgment of especially Jafta J is disappointing as it engages in the kind of formalistic legal reasoning that harks back to a pre-constitutional era, avoiding any meaningful engagement with the policy questions involved. (The other minority judgment of Kollapen AJ is far more convincing exactly because it deals with the constitutional policy questions head-on.)

The case is a preliminary skirmish in a legal battle about the selection of judges by the JSC. The JSC is in some ways an odd body. It comprises of the Chief Justice, the President of the Supreme Court of Appeal, the Minister of Justice, and – when the JSC is considering matters relating to a specific division of the High Court – the Judge President of that division and the Premier of the province concerned.

The remaining members are nominated, designated or elected by a variety of bodies and the President. They are: one Judge President designated by the Judges

President; two practising advocates nominated from within the advocates' profession; two practising attorneys nominated from within the attorneys' profession; one teacher of law designated by teachers of law at South African universities; six persons designated by the National Assembly from amongst its members; four permanent delegates to the National Council of Provinces with a supporting vote of at least six provinces; four persons designated by the President as head of the national executive, after consulting the leaders of all the parties in the National Assembly.

This JSC selects judges for appointment to the High Court and the Supreme Court of Appeal (SCA). The President *must* appoint these candidates selected by the JSC and has no power to reject any of the candidates selected by the JSC. The JSC also selects a shortlist of 4 candidates from which the President must select one for appointment to a vacancy on the Constitutional Court. The President appoints the Chief Justice and Deputy Chief Justice and President and Deputy President of the SCA after consulting the JSC, but unlike with other judges, the President is not bound by any recommendation of the JSC in this regard.

The composition of the JSC acknowledges the fact that judges in a constitutional state will inevitably make decisions that may have political consequences and that politicians should therefore be involved in the appointment of judges.

Those who argue that the judiciary is illegitimate because it is unelected are probably not aware that a majority of the members of the JSC who selects High Court, SCA and Constitutional Court judges are elected politicians or individuals appointed by the President. Those who argue that the appointment of judges is nothing more than a party-political sham, are probably not aware that judges and lawyers serve on the JSC to counter the dangers of appointments becoming a party-political matter entirely.

In the case under discussion the Helen Suzman Foundation decided to challenge a decision of the JSC to appoint some candidates as judges of the Cape High Court and not to appoint other candidates. They requested the record of proceedings on which the decision as based (in terms of section 53(1)(b) of the Uniform Rules of Court), and was provided with many documents but not with the transcript of the deliberations. Both the High Court and the SCA ruled that the JSC was not obliged to provide this transcript.

These courts agreed with the JSC that there were good reasons for the confidentiality of its deliberations, including the promotion of the rigour and candour of deliberations; the encouragement of future applications; and the protection of the dignity and privacy of applicants. It was argued that requiring disclosure may have the unintended consequence of discouraging the JSC from recording its deliberations in future.

The majority of judges of the Constitutional Court disagreed, relying on section 34 and 39(2) of the Constitution. It argued that rule 53 should be read to advance the applicants right of access to court under section 34 of the Constitution. This is so because section 39(2) of the Constitution instruct judges to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights.

The majority argued that rule 53 needed to be interpreted expansively to ensure that litigants have the relevant information before it and that there is equality of arms between the person challenging a decision and the decision-maker. The right of access to court would be denied to a party who were not provided with the relevant information held by another party to the dispute. For the majority, this need to ensure fairness to all parties was of pivotal concern. It thus argued that JSC deliberations were relevant to the decisions taken by the JSC to select some candidates for appointment and not others. According to Madlanga J:
They may well provide evidence of reviewable irregularities in the process, such as bias, ulterior purpose, bad faith, the consideration of irrelevant factors, a failure to consider relevant factors, and the like. Absent disclosure, these irregularities would remain hidden. Deliberations are the most immediate and accurate record of the process leading up to the decision.

Recall that the current Public Protector got into terrible trouble in the review of her Bankkorp Report because she did not disclose the complete record to the opponents and then attempted to mislead the court about it. In the light of this experience, the argument that a transcript of deliberations of the JSC might well assist the applicants in making its case is not as far-fetched as I had initially thought.
Another pivotal concern for the majority was the need for openness and transparency in order to safeguard the legitimacy of the JSC appointment's process and thus of the judiciary itself. The majority held that the foundational values of accountability, responsiveness and openness also applies to a body like the JSC.

These values are of singular importance in South Africa coming – as we do – from a past where governance and administration were shrouded in secrecy. If we are truly to emancipate ourselves from that past, all our democratic constitutional institutions must espouse, promote and respect these values. The blanket secrecy that the JSC is advocating is at odds with this imperative. And this is especially so, regard being had to the fact that the JSC's claim to secrecy does not bear scrutiny. The secrecy that the JSC is clamouring for might result in negative public perceptions not only about the JSC itself, but also about the very senior judiciary in respect of whose appointment it plays a vital role.

It is this same concern to ensure openness and transparency that led the majority to reject the argument that JSC Commissioners would be inhibited from speaking their minds if they knew that their deliberations could be made public. The argument advanced to support this conclusion is based on a full-throated endorsement of the value of transparency to protect judicial candidates against impermissible bias and – possibly – other forms of inappropriate conduct from members of the JSC.

I do not think it is expecting too much to adopt the stance that JSC members worth their salt ought to be in a position to stand publicly by views they have expressed in private deliberations. I would find it odd that JSC members would be such "timorous

fainthearts" that they would clam up at the prospect that views they express during deliberations could be divulged. I readily conceive of members being apprehensive at the prospect of disclosure if – during deliberations – they make inappropriate comments. Is that worthy of shielding? I think not. Debating with candour and robustness does not equate to the expression of impropriety. It escapes me why the prospect of disclosure of deliberations should necessarily take away candour and robustness from the debate.

The majority also rejected the argument that confidentiality would protect the privacy and dignity of the candidates themselves.

One assumes that, in asserting their points during deliberations, JSC members will not – as they shouldn't – make unfair or improper assertions that impugn the dignity or privacy of candidates. By unfair or improper assertions I mean assertions that have no basis on the material canvassed, questions asked or answers given during the interview. I have already concluded that the JSC cannot appropriately expect unfair or improper assertions made during deliberations to be shielded from disclosure.

Anyone who has watched JSC interviews would know that candidates being interviewed are sometimes put through the wringer and are often embarrassed and even humiliated by the questions lobbed at them by members of the JSC. As Madlanga J noted, it is this public embarrassment "that should fill candidates with dread". This gruelling public scrutiny was appropriate as it helped to ensure the legitimacy of the process.

[M]ost observers, who care to, will most likely draw their own conclusions on embarrassing issues at the stage of the public interview. If anything has the potential of being a dampener to future applications, it must be the prospect of the gruelling public scrutiny. That is not what the JSC's concerns relate to. How, if it were known by potential candidates that the ensuing arguments by JSC members at their deliberations are normally divulged, that could – to a sufficiently significant extent – be a dampener to future applications is difficult to comprehend.

Perhaps – and this I had not considered before – some members of the JSC might be anxious about having private deliberations revealed exactly because these deliberations might not show them in a good light. Maybe they wanted to protect themselves and not necessarily the candidates who they routinely embarrass during public hearings?

In any event, the majority also suggested that this general rule of transparency was not absolute. Some types of information *could* be excluded from the record. For example, privileged information (like communications between clients and their legal representatives) is routinely excluded from disclosure under rule 53. It further suggested that "public interest privilege" might well warrant the exclusion of *some* private information from the ambit of rule 53.

Jafta J did not provide adequate responses to these policy-based reasons for transparency, relying instead on technical legal arguments. Kollapen AJ did attempt to refute these arguments. The honourable justice appears to have a more generous view of public representatives and seem to be less worried about the *possibility* that members of the JSC could ever act in an inappropriate manner if their deliberations were kept secret. This view is summarised in the following passage:

Members of the JSC are often called upon to express opinions and vote in respect of candidates who, in many instances, will be known to them either as colleagues or acquaintances. In this regard, the judges, lawyers, academics and politicians who serve on the JSC are called upon to express views and cast votes in relation to these candidates with honesty and integrity. The secrecy of the ballot goes a long way to ensuring that they are able to do so without compromising friendships and relationships that exist and indeed to separate the personal from the professional. If the deliberations of the JSC become part of a disclosable record, then the voting preferences of its members become public with all the attendant consequences.

Whatever your view on this matter, the JSC will now have to provide the Helen Suzman Foundation with a record of the deliberations when the impugned appointments were made. However, this does *not* mean all deliberations will be made public as the ruling only applies to cases where a litigant seeks to review and set aside a decision of the JSC. This means that in almost all cases, we will never hear what the lawyers and politicians on the JSC say when they discuss candidates for judicial appointment.

(The above post was posted on the blog *Constitutionally Speaking* on 2 May 2018).

A Last Thought

[52] “The past may have institutionalised and legitimised racism but our Constitution constitutes a “radical and decisive break from that part of the past which is unacceptable”. Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by “strife, conflict, untold suffering and injustice”.

Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination. In both instances, such prejudices are evident in the workplace where power relations have the ability "to create a work environment where the right to dignity of employees is impaired".
[53] Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The late former President of the Republic of South Africa, Mr Nelson Mandela, said that "de racialising South African society is the new moral and political challenge that our young democracy should grapple with decisively". He went on to say that "we need to marshal our resources in a visible campaign to combat racism – in the workplace, in our schools, in residential areas and in all aspects of our public life". This Court has echoed such sentiments when it recognised that "South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations".

Per Theron J in *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13