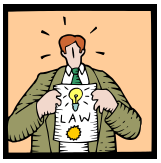
# e-MANTSHI

A KZNJETCOM Newsletter

**August 2018: Issue 145**

Welcome to the hundredth and forty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is 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 and contributions in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.




## New Legislation

1. The South African Law Reform Commission (SALRC) released its Issue Paper 34 on the review of aspects of matrimonial property law on 28 August 2018. The aim of the paper is to serve as a basis for the Commission's deliberations. Its main purpose is to establish the extent of the review necessary.
The Matrimonial Property Act 88 of 1984 was passed in order to address certain shortcomings in the matrimonial property law at the time. The Act has been in place for more than 30 years. Apart from certain ad hoc issues, which have been brought to the attention of the Commission, a number of social and legal changes since 1984 suggest that a review of the law with regard to matrimonial property is necessary to ensure that it meets current needs.
The SALRC invites comments on the issue paper, which will be considered in order to draft a discussion paper. The discussion paper will contain the SALRC's preliminary findings and will be published in order to test public opinion on the

preliminary findings (and draft legislation, if necessary), before a report with final recommendations is developed for submission to the Minister of Justice and Constitutional Development.

**The closing date for comments is 16 November 2018**. All comments and representations must be sent for the attention of Ms P Padayachee to the following address:

The Secretary
South African Law Reform Commission
Private Bag X668
Pretoria
0001
E-mail: PPadayachee@justice.gov.za

The paper can be accessed here:
http://www.justice.gov.za/salrc/ipapers/ip34_prj100E-MatrimonialProperty-2018.pdf

## Recent Court Cases

### 1. S v Simba; S v Perrang; S v Ajouhran (A2241/17; A850/17; A2800/17) [2018] ZAWCHC 99 (17 August 2018)

**Where an admission of guilt fine has been imposed in accordance with all legal requirements, the magistrate is still entitled to set aside the conviction and/or sentence, if he or she considers that they are not in accordance with justice.**

Engers AJ:

[1] These matters come before us by way of special review at the request of the control prosecutor, Strand magistrate's court. All of them involve the power of a judicial officer presiding at a magistrate's court to set aside a conviction and sentence in terms of section 57(7) of the Criminal Procedure Act, No. 51 of 1977.

[2] Case no. A2241/2017 involved a conviction under section 4(b) of the Drugs and Drug Trafficking Act, No. 140 of 1992. Cases A850/2017 and A2800/2017

involved convictions under the Marine Living Resources Act, No. 18 of 1998 ("MLRA")

[3] All the accused admitted guilt, which was accepted by the prosecutor in terms of section 57A.

(i) In case no. A2241/2017, the accused was found guilty of possessing 15 stops of dagga. The admission of guilt fine was R800.

(ii) In case no. A850/2017, the accused was found guilty under regulation 44(1)(a) to the MLRA of being in possession of 223 crayfish. The admission of guilt fine was R6000.

(iii) In case no. A2800/2017, the accused was found guilty under regulation 51(1) to the MLRA of being in possession of 454 undersized crayfish. The admission of guilt fine was R9000.

[4] In each case, the magistrate set aside the conviction and sentence, and directed that the accused be prosecuted in the ordinary course. The control prosecutor contends that the magistrate was not entitled to do this, and that the prosecutor was entitled to fix the admission of guilt fine in the relevant amounts.

[5] The relevant portion of section 57A reads:

> (1) If an accused who is alleged to have committed an offence has appeared in court…the public prosecutor may, before the accused has entered a plea and if he or she on reasonable grounds believes that a magistrate's court, on convicting such accused of that offence, will not impose a fine exceeding the amount determined by the Minister from time to time by notice in the *Gazette*, hand to the accused a written notice, or cause such notice to be delivered to the accused by a peace officer, containing an endorsement in terms of section 57 that the accused may admit his or her guilt in respect of the offence in question and that he or she may pay a stipulated fine in respect thereof without appearing in court again.
>
> …
>
> (4) The provisions of sections 55, 56 (2) and (4) and 57 (2) to (7), inclusive, shall apply *mutatis mutandis* to the relevant written notice handed or delivered to an accused under subsection (1) as if, in respect of section 57, such notice were the written notice contemplated in that section and as if the fine stipulated in such written notice were also the admission of guilt fine contemplated in that section.

[6] For present purposes, sections 55 and 56 are not relevant, and the relevant portions of section 57 are as follows:

> (4) No provision of this section shall be construed as preventing a public prosecutor attached to the court concerned from reducing an admission of guilt fine on good cause shown.
> (5) *(a)* An admission of guilt fine stipulated in respect of a summons or a written notice shall be in accordance with a determination which the magistrate of the district or area in question may from time to time make in respect of any offence …
> *(b)* An admission of guilt fine determined under paragraph *(a)* shall not exceed the maximum of the fine prescribed in respect of the offence in question or the amount determined by the Minister from time to time by notice in the *Gazette*, whichever is the lesser.
>
> (6) … the clerk of the magistrate's court which has jurisdiction… shall … enter the essential particulars … in the criminal record book for admissions of guilt, whereupon the accused concerned shall, subject to the provisions of subsection (7), be deemed to have been convicted and sentenced by the court in respect of the offence in question.
>
> (7) The judicial officer presiding at the court in question shall examine the documents and if it appears to him that a conviction or sentence under subsection (6) is not in accordance with justice or that any such sentence, except as provided in subsection (4), is not in accordance with a determination made by the magistrate under subsection (5) or, where the determination under that subsection has not been made by the magistrate, that the sentence is not adequate, such judicial officer may set aside the conviction and sentence and direct that the accused be prosecuted in the ordinary course, whereupon the accused may be summoned to answer such charge as the public prosecutor may deem fit to prefer: Provided that where the admission of guilt fine which has been paid exceeds the amount determined by the magistrate under subsection (5), the said judicial officer may, in lieu of setting aside the conviction and sentence in question, direct that the amount by which the said admission of guilt fine exceeds the said determination be refunded to the accused concerned.

[7] In terms of subsection 57(5) there are limitations on the amount of an admission of guilt fine. It cannot exceed the LESSER of:

(a) A determination made for that district for that offence (if such determination exists); and

(b) The amount determined by the Minister, which at present stands at R10 000.

[8] A determination for the magisterial district of Strand does exist. It provides for the following:-

(i) For a contravention of section (4)(b) of Act 140 of 1992, the fine is specified for up to 10 stops of dagga at R100 per stop. For 11 stops or more it states “No J534 – DOCKET TO PP”. Effectively this means that no admission of guilt can be accepted where 11 or more stops of dagga are involved.

(ii) For contravention of section regulation 44(1)(a) to Act 18 of 1998, the determination provides for a fine of R500 per lobster for a first offence, but says “No AOG for more than 5 lobster”.

(iii) For contravention of regulation 51(1) to the same Act, the determination is R500 per lobster for a first offence, but with no limitation for a first offender in respect of the number of lobsters concerned.

[9] In cases A2241/2017 and A850/2017, the number of articles found in the possession of the accused exceeded the maximum for which an admission of guilt could be paid in terms of the determination for that district. Notwithstanding this, the prosecutor proceeded by way of sections 57 and 57A.

[10] Section 57(5)(a) requires that the admission of guilt fine be “in accordance with” the said determination. Section 57(7) permits the magistrate to set aside the conviction and sentences if they are not in accordance with the determination. The admission of guilt fines in these cases were manifestly NOT in accordance with the determination, and it follows that the magistrate was entitled to set aside the conviction and sentence. The fact that the admission of guilt fine was not in accordance with the determination means that it was *ipso facto* not in accordance with justice, and the magistrate would be entitled to set the conviction and sentence on this basis as well.[1]

[11] In case no. A2800/2017, the contravention was of regulation 51(1) to the MLRA. The determination for the district does not include any maximum number of crayfish. The prosecutor was thus entitled to impose the admission of guilt fine of R9000.

[1] It should be noted that section 57(7) allows the magistrate to reduce a fine which exceeds the district determination, so as to accord with the determination. This would in my view not apply where the determination specifically prohibits the imposition or acceptance of an admission of guilt fine.

[12] However, the magistrate was equally entitled, in the exercise of the discretion given to her by way of section 57(7), to find that the conviction or sentence was not in accordance with justice. On so finding, she was entitled to set aside the conviction and sentence.

[13] It appears to be the contention of the control prosecutor that a prosecutor may determine an admission of guilt fine in excess of the maximum laid down in the determination for the district. This goes directly against the clear wording of section 57(5)(a). The proviso to section 57(7) allows the magistrate, in lieu of setting aside, to reduce the fine to accord with the maximum.

[14] To the extent that reliance is placed on section 57(4) which gives the prosecutor the right to "reduce" an admission of guilt fine, this is misconceived. The reduction can apply only to the maximum possible, which as stated above, is the LESSER of the determinations of the Minister and the district magistrate. In other words, where a determination exists for the district, the prosecutor may reduce the fine below that specified in the determination. In the cases under review, the prosecutor did not reduce the admission of guilt fine; he or she imposed a fine in excess of the maximum permitted by the district determination.

[15] In case A2241/2017, the offence fell outside the limit for which an admission of guilt could be accepted. The fine which was imposed and accepted did fall within the monetary limit prescribed in the determination for the district. The magistrate took the view that in the light of the seriousness of the offence, the fine imposed was not in accordance with justice, and set the conviction and sentence aside.

[16] Section 57 gives the presiding judicial officer an overriding discretion. Even where the admission of guilt fine has been imposed in accordance with all legal requirements, the magistrate is still entitled to set aside the conviction and/or sentence, if he or she considers that they are not in accordance with justice.[2] Any other interpretation would lead to the absurd result that the powers of a judicial officer under subsection 57(7) are subject to a prosecutor's overriding discretion under s 57(4).

[17] In the light of the above, I am of the view that the magistrate was correct in setting aside the convictions and sentences and directing that the accused be prosecuted in the ordinary course.

[2] The discretion must, of course, be properly exercised.

[18] I therefore propose that the following order be made:

1. The setting aside of the conviction and sentence in case numbers A2241/17, A850/2017 and A2800/2017 is confirmed.
2. The fines paid by the accused are to be refunded forthwith.
3. The accused are to be prosecuted in the ordinary course as provided for in section 57(7) of Act 51 of 1977.

**2. S v ZOTWA 2018 (2) SACR 151 (ECG)**

**A magistrate must bring the provisions s 35(3) and (4) of Act 93 of 1996 to the attention of an accused where he had been convicted of reckless driving.**

The appellant was convicted in a magistrates' court of reckless driving and was sentenced to a fine of R10 000 or 10 months' imprisonment, of which R3000 or three months' imprisonment was suspended for five years. The court also invoked the provisions of s 35(1)*(c)*(i) of the National Road Traffic Act 93 of 1996 (the Act) and suspended the appellant's driver's licence for six months.
After having dismissed the appeal against conviction, the present court mero motu raised the question whether the magistrate had adopted the correct procedure in suspending the appellant's licence. It appeared that, after evidence in mitigation and submissions were made, the magistrate had suspended the licence but not brought the provisions of s 35(3) and (4) of the Act to the attention of the appellant.

*Held* that the language used in s 35(4) was peremptory and, after convicting the appellant, the court's next step ought to have been to conduct the inquiry before sentence. It was clear that the inquiry was intended to allow the accused the opportunity to persuade the court, by whatever means at his disposal, that suspension of his licence would not be justified. In the circumstances the suspension of the appellant's driver's license was irregular and had to be set aside. (See [34] and [38].) The conviction and sentence were otherwise upheld.

**3**. **S v MAHLANGU 2018 (2) SACR 64 (GP)**

**Voice identification is acceptable evidence, subject to its credibility and reliability.**

The appellant was convicted in a regional magistrates' court of robbery with aggravating circumstances and was sentenced to 18 years' imprisonment. He appealed against his conviction and the sentence. The appellant was, according to the state, one of three robbers armed with guns who confronted the complainant in his home. After demanding money they ransacked his home and then drew money

from his bank account at the nearby ATM. During the course of the robbery the appellant asked the complainant if he recognised him, as he had previously worked for him. The complainant pretended that he did not, but in fact did remember him. After the appellant was arrested, he was identified by the complainant in an identification parade, through his voice.

*Held*, that s 37(1)*(c)* of the Criminal Procedure Act 51 of 1977 made provision J for an identification parade. The voice was part of the category of marks, characteristics or features of the body. Provided the parade was properly held, the evidence of voice was acceptable in our courts, but it had to be credible in the sense of reliability.
In the present case the recommended safeguards were rigorously observed and the procedure was not challenged. The most important safeguard was the fact that the complainant had known the appellant for a long time and was familiar with his voice. In the circumstances the room for mistake was substantially minimised and the appellant had been properly identified. (See [11] – [12].) The court upheld the conviction, but set aside the sentence and replaced it with one of 15 years' imprisonment.

**From The Legal Journals**

**Pearce, T**

“A fork in the road: Distinguishing between ‘public’ and ‘private’ roads”

***De Rebus* 2018 (Aug) *DR* 34.**

The article can be accessed here:
http://www.derebus.org.za/a-fork-in-the-road-distinguishing-between-public-and-private-roads/

**Parker,J and Zaal, F N**

"Person in charge" in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998: An assessment of some court interpretations"

**2018 (81) THRHR 288**

**Bekink, M**

"Locus standi" of victims concerning victim impact statements during sentencing proceedings – Wickham v Magistrate, Stellenbosch"

**2018 (81) THRHR 333**

**Gravett, W**

"Subconscious advocacy — part 1: nonverbal communication in the courtroom"

**Stellenbosch Law Review, Volume 29 Number 1, 2018, p. 3 - 24**

**Abstract**

*Social science has been used with increasing success in a wide variety of human endeavours. For example, marketing, human relations and the delivery of health services are among the widely expanding applications of the classic disciplines of psychology, sociology, anthropology and social psychology. More recently, trial lawyers have also shown increased interest in applying the research findings and theoretical insights of social science to litigation. After all, every law and legal institution is based upon assumptions about human nature and the manner in which human behaviour is determined. Although trial lawyers have been using subconscious nonverbal and verbal persuasion techniques for centuries, social science has recently provided empirical support for trial practice theories that heretofore have been based solely on folklore, intuition and experience. I aim to show that principles of human behaviour derived from social psychological laboratory and field research illuminate the behaviour of actors in the courtroom, equip trial lawyers to better represent theirclients, and even suggest ways in which the trial system could be improved. Some scholars claim that the increasing body of psychological literature on the effects of subconscious verbal and nonverbal persuasion, has enabled trial lawyers to improve their courtroom effectiveness to the point where they can*

*"covertly" control how fact-finders decide cases. It is true that social scientists have discovered a myriad of factors that affect judicial decision-making, but that have nothing to do with the merits of the case. However, by communicating this information to trial lawyers, the social scientists have actually decreased the likelihood that these extraneous influences will affect judicial decisions. They have identified existing barriers to rational decision-making, and have devised strategies to reduce their impact, and thereby improve the chances that fact-finders will render better, more informed, and more rational judgments.*

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

## Contributions from the Law School

### Depression in the workplace

### INTRODUCTION

Depression in the South African workplace is increasing at an astronomical rate in every sector of the labour market.[3] This trend is not unique to South Africa. Studies in the USA, UK, the EU and elsewhere reveal the same upward trajectory in the number of employees suffering from depression.[4]

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[3] Lesley Burns 'Incapacity matters- Depression in the Workplace' available at http://www-b-h.co.za/downloads/depression_article.pdf. See also Meryl du Plessis 'Mental Stress Claims in South African Workers' Compensation (2009) 30 ILJ 1476-1480

[4] Yuiko Fujimori, Takashi Muto, Keiko Suzuki 'Characteristics of an external employee assistance program in Japan (2004) 54 Occupational Medicine Journal 570. See also Gaston Harnois and Phyllis Gabriel 'Mental Health and Work Impact, Issues and Good Practice' Geneva World Health Organisation (2000) at 32 available at http://www.who.int/mental_health/media/ed/712.pdf; Phyllis Gabriel and Marjo-Riita Liimatainen 'Mental Health in the Workplace: Introduction' International Labour Office, Geneva October 2000 available at http://ilo.org/global/About_the_ILO_/media_and_public_information/press_release/lang--en/WCMS_007910/index.htm

Work related stress is the most commonly cited major contributing factor to depression,[5] which is regarded as the second most debilitating illness for employees, after heart disease.[6]

While there are no formal studies on this, anecdotal evidence (and common sense) suggests that magistrates and the legal representatives appearing before them have to deal with immensely stressful circumstances, and are therefore likely to be particularly vulnerable to post traumatic stress disorder, depression and even other mental illness. This is likely to be especially so for those who work in the criminal courts.

The case of *Ockert Jansen v Legal Aid South Africa* (case no c678/14 heard in the Cape Town Labour Court (where judgement was delivered on 16 May 2018) was a case dealing with a dismissal for alleged misconduct including insubordination and absenteeism which was found to be inextricably intertwined with his mental illness of depression. The employer dealt with the matter as an ordinary misconduct dismissal case and was found to have handled the matter incorrectly and in contravention of the Labour Relations Act and the Employment Equity Act.

**FACTS**

The applicant employee, who was employed as a paralegal at the Legal Aid Riversdale Satellite Office of Legal Aid South Africa, brought a case alleging automatically unfair dismissal in terms of the Labour Relations Act on the basis that the reason for his dismissal was that the respondent had unfairly discriminated against him on the ground of his mental illness. He also lodged an unfair discrimination claim in terms of the Employment Equity Act. It has been established that an employee may lodge separate claims, seeking separate remedies, in terms of the Labour Relations Act and the Employment Equity Act, on the same facts. In this case the applicant sought reinstatement with back-pay for his alleged automatically unfair dismissal and damages in terms of the Employment Equity Act discrimination claim.

The court ruled that the respondent had a duty to begin and the respondent then closed its case without leading evidence. This was a dubious strategy which did not serve the respondent well since it's version was never placed before the court and the applicant's evidence stood unchallenged.

The applicant testified that he had been an excellent worker who had received performance awards from his employer and who had been appointed as the vice-chairperson of the Small Claims Board. However, around about 2010 things started to change.

During the course of 2010 the applicant visited his doctor for a physical problem but also mentioned other symptoms which the doctor diagnosed as symptoms of major depression. He was referred to hospital and prescribed anti-depressants. The

[5] R Kaplan 'Guidelines to the management of disability claims on psychiatric grounds: issued by the South African Society of Psychiatry (1996) 86 South African Medical Journal 646

[6] Elif Kaban 'Gloom and Doom at work on the rise – survey. Reuters Internet Supplement 10 October 2000 available at http://www.iol.co.za/index.php?set_id=1&click_id=31&art_id=qw971155381875M534

relevant medical certificate detailing all this was furnished to the respondent employer.

The applicant requested to be put on respondent's wellness programme, which was done. This simply entailed that the applicant consulted with a social worker from FAMSA.

In 2011 the applicant consulted another doctor who confirmed the diagnosis of depression and also found that he was presenting with high anxiety levels. He submitted the necessary doctors' certificate to this employer.

In August 2012, the applicant confided in his employer and mentioned his personal and work problems that had resulted in him being treated for depression.

In September 2012 the applicant attended at the Divorce Court because he had separated from his wife. He found that his manager (and a Justice Centre executive) was appearing for his estranged wife. This blindsided the applicant who had not been forewarned that his manager would be appearing for his wife against him. His depression and anxiety levels were heightened by this occurrence and he felt betrayed by his employer.

At about this time, the respondent arranged for the applicant to consult a clinical psychologist who issued a report detailing the applicant's problems and recommending that the issues at work needed resolution as soon as possible. The report was given to the respondent. The applicant tried to meet with the respondent to make an attempt at resolving the workplace stressors but to no avail.

The applicant continued to address emails to the respondent advising of his condition and his continuing need to see a psychologist. He told the respondent that he believed management's behavior was causing and worsening his depression and anxiety. No response from the respondent was forthcoming.

By this stage the applicant's emotional and mental condition had deteriorated to such a degree that he would, as a coping mechanism, disengage from everything and lock himself up in his room for days.

Other work related problems arose, including grievances relating to overtime payment and maintenance order payment delays, which further aggravated the applicant's mental condition.

The applicant then absented himself from work for 17 days. He told his employer that it was because he could no longer cope as a result of his mental state. His employer's only response was to say that the 17 days would be treated as unpaid leave.

The applicant's condition deteriorated further resulting in him staying away from work from 11-18 October 2013. During this period the applicant consulted another doctor who diagnosed him with manic depression.

On 14 November 2013 the applicant's manager presented him with a notice to attend a disciplinary enquiry and a charge sheet. The charges against the applicant were unauthorized absence from duty for a total of 17 working days, and failing to inform his manager thereof in accordance with procedure, gross insolence and refusal to obey a lawful and reasonable instruction.

The applicant gave his manager a document explaining the symptoms of his depression and related conditions which the manager read and then simply asked the applicant to sign the notice of the disciplinary enquiry.
At this stage the applicant's condition had worsened to such an extent that he had effectively lost control of himself and was acting erratically and out of character.
The disciplinary enquiry was held on 20 and 21 November 2013 and the applicant was found guilty on all charges, and ultimately dismissed.
On 28 November 2013 the applicant advised the respondent that he had been absent for some of the days because he had been consulting with the respondent's resident clinical psychologist. On 4 December 2013 the psychologist forwarded a report concerning the applicant's psychological state to the employer. It was a detailed report and contained the following paragraph
"I would recommend that Mr Jansen be granted sick leave for a considerable amount of time … His resources for impulse control him seems (sic) limited therefore he needs timeout. This is of great importance. Please take Note."
The chair of the disciplinary enquiry rejected the applicants' defense saying there was no medical evidence corroborating that he was suffering from reactive depression. She also commented that she was chairing misconduct proceedings and that it was not an incapacity hearing. She refused to consider the psychologist's report saying it would be prejudicial to the respondent to re-open the case.
The applicant also submitted the report, and other medical certificates, to the Chief Legal Executive who concluded that
"Having regard to all evidence that was led before your disciplinary hearing in totality, there is no concrete evidence before me to conclude that your alleged ill health has the effect you presented. Accordingly this defence is dismissed."
The applicant also applied for sick leave as per the respondent's policy on temporary incapacity but it was refused, even though the applicant still had 18 days from his sick leave cycle to his credit.
The applicant again consulted with a medical practitioner who diagnosed him with major depression and booked him off work from 15 – 31 January 2014.

**JUDGEMENT**

The Court was satisfied that the applicant at all material times suffered from reactive depression which was triggered by stress in the workplace, particularly the incident when the applicant's manager represented his estranged wife at court.
The court held that the respondent was aware that the applicant was a person with a disability. For this reason the respondent was under a duty to reasonably accommodate him. The respondent failed to comply with its duty in this regard. Instead of dismissing the applicant for misconduct, the respondent had a duty to institute an incapacity enquiry (see also *Standard Bank of South Africa v CCMA* [2008] 4 BLLR 356 (LC)).
In considering whether the dismissal amounted to an automatically unfair dismissal, the court held that although the applicant's condition did not fall within the definition of disability in the Employment Equity Act, his depression was nevertheless a mental

health problem. The law protected him from being discriminated against on this ground. The court held, referring to *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland* (2009) 30 ILJ 2875 LAC (at para 24), that the conduct of the respondent in ignoring the applicant's mental health condition and deciding to dismiss him in the circumstances, when, viewed objectively against the applicant's depression, had the potential to impair the applicants fundamental human dignity fell within the grounds of s187(1) f of the Labour Relations Act, and thus rendered his dismissal an automatically unfair dismissal.

The court reasoned, referring to *SACWU v Afrox Ltd* (1999) 20 ILJ 1718 LAC (at para 32) and *Kroukam v South African Airlink (Pty) Ltd* [2005] 12 BLLR 1172 LAC (at para 27), that the applicant would not have been dismissed had the applicant not suffered from his medical condition. The misconduct he was charged with was inextricably linked to his mental condition. In other words, the court concluded, the most probable reason for the applicant's dismissal was his mental condition. Thus it was an automatically unfair dismissal.

The court then turned to the unfair discrimination claim and, flowing from its earlier reasoning, quickly concluded that the applicant had been unfairly discriminated against on the prohibited ground of his mental condition.

He was reinstated with full retrospective back-pay, to satisfy the unfair dismissal claim. In respect of the unfair discrimination claim, the court declined to order damages for patrimonial loss because of the order granted in the unfair dismissal case but ordered him 6 months compensation as a solatium for the distress suffered by the applicant on account of the discrimination, which, the court held would also act as a deterrent to other employers. The respondent was ordered to pay the applicant's costs on a party and party scale, including costs of counsel.

**Nicci Whitear**
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**University of KwaZulu-Natal, Pietermaritzburg**

## Matters of Interest to Magistrates

### Compensation orders in criminal proceedings

By John Ndlovu

The Criminal Procedure Act 51 of 1977 (the CPA), as amended, makes provision for the award of compensation to victims of crime, who have suffered damages because of the criminal conduct of an accused. The purpose of such a compensation order is to reimburse the complainant for the loss or damage they suffered without the need to institute separate civil proceedings against the accused for the recovery of such damages. In view of the aforegoing, the court will – where it finds it desirable to make a compensation order against an accused – avoid imposing an effective period of imprisonment. This approach is intended to afford the accused an opportunity to raise the money in order to pay the compensation. Furthermore, since a compensation order is intended to reimburse the complainant for the loss or damage suffered, the court will not make such an order if the accused does not have the wherewithal to satisfy it. Compensation orders are regulated by ss 297 and 300 of the Act, and this article will discuss and compare the provisions of these sections and will also show how the courts have, in practice, interpreted the provisions.

### Legislation and case law

Section 300 of the CPA makes provision for an award of compensation by the court during criminal proceedings. The said section provides that where a person is convicted of an offence, which has caused damage to or loss of property (including money, belonging to some other person) the court in question may, on the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss. It is clear from this section that the court can only make an award of compensation after the accused has been convicted of the offence in question. The use of the word ‘may’ means that the court has a discretion whether to make the award or not. However, the use of the word ‘forthwith’ does not imply that the court should not properly apply its mind in exercising its discretion in terms of this section.

Furthermore, the court cannot mero motu decide to make a compensation order in terms of this section as it is the complainant’s prerogative to apply for compensation after the accused has been convicted. Where the prosecutor applies for compensation in terms of this section, it should be clear that they are acting on the

instructions of the complainant. In S v King (ECG) (unreported case no CA8R: 393/2014, 11-12-2014) (Brooks AJ) the court set aside the sentence imposed by the magistrate on the accused, on the ground that it was evident from the record of proceedings that the compensation award made by the magistrate in terms of this section was made on the application of the prosecutor during his address on sentence. The prosecutor did not make it clear that in making the application he was acting on the instructions of the complainant. The court also decided that the accused must be afforded the opportunity to lead evidence or address the court on the application. In this case the accused was not given such an opportunity.

Section 300(3)(a) provides that an award made in terms of s 300 shall have the effect of a civil judgment of the magistrate's court. This means that the award is for all intents and purposes a judgment debt and is subject to all the principles and procedures applicable to judgment debts. Where, for instance, the accused fails to pay the compensation as ordered by the court, the complainant will be entitled to enforce compliance with the compensation order by means of a warrant of execution issued by the magistrate's court having jurisdiction in the matter. It is, therefore, not possible to commit the accused to prison in the event of his failure to pay the compensation in terms of s 300. Furthermore, it is also permissible to pay the compensation in terms of s 300 in monthly instalments since in civil judgments payment by instalments is normal and happens very often (S v Williams (FB) (unreported case no 241/2015, 4-2-2016) (Moloi J)).

Where a compensation order in terms of s 300 becomes an option for sentencing, the court must satisfy itself as to the accused's ability to pay the compensation. In Vaveki v S (WCC) (unreported case no A414/10, 3-12-2010) (Matthee J)) the court held that where a court has decided that it wishes to give a person the opportunity to avoid effective imprisonment by ordering a fine and/or a compensation order as an alternative or as a condition, it must endeavor to establish whether such a person is in fact in a position to pay such an amount at all and/or within the time frames stipulated. In this case the court found that the magistrate had failed to apply his mind as to whether the accused would be in a position to pay the compensation timeously or not so as to comply with the conditions of the sentence. The sentence imposed by the magistrate was accordingly set aside on appeal and replaced with a sentence which had no reference to time limits within which the accused was to pay the compensation. The judge also remarked in this case that an award for compensation under s 300 can form part of a plea and sentence agreement as provided for in terms of s 105A of the CPA (see also S v Williams (op cit)).

The complainant in whose favour the award has been made in terms of s 300 may, within 60 days after the date on which the award was made, renounce the award in writing. Where the complainant does not renounce the award as aforesaid, they will be precluded from instituting any further civil proceedings against the accused concerned in respect of the injury for which the award was made (see s 300(5)(a) and

(b)). A complainant who is not satisfied with the amount of compensation awarded by the court in terms of s 300 will be entitled to renounce the award within the time period referred to so that they may be able to institute separate civil proceedings against the accused for a claim greater than the compensation awarded by the court.

**A comparison of ss 297 and 300**

Section 297(1)(a)(i)(aa) provides that where the court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may – in its discretion – postpone the passing of sentence for a period not exceeding five years and release the person concerned on one or more conditions, which may include an award of compensation. An important distinction between the two sections is that a compensation order in terms of s 300 is made as part of the conditions of sentence, whereas a compensation order in terms of s 297 is a condition of suspension of sentence. Failure by the accused to pay the compensation in terms of s 300 will not result in his incarceration. However, where the accused fails to pay compensation in terms of s 297 they may be committed to prison. One of the differences is that s 297 does not give the complainant the right to apply for compensation. The court has a discretion whether to invoke the provisions of this section or not. Any award of compensation under s 297 does not have the effect of a civil judgment as is the case of an award made in terms of s 300. Where the amount of compensation awarded in terms of s 297 is less than the actual amount of damages suffered by the complainant, the complainant concerned will be entitled to institute separate civil proceedings against the accused for the recovery of the balance of such damages.

An award of compensation in terms of s 300 appears to be the better option than compensation under s 297. It is clear that the legislator enacted s 300 with the intention of ensuring that victims of crime are restored to the position in which they were prior to the commission of the crime. Section 300 is designed to advance the principles of restorative justice and focuses on repairing the harm occasioned by crime. The purpose of a compensation order should be restitution and not retribution. In the case of Vaveki the court stated at para 52 of the judgment: ‘The section 300 route also is better suited to addressing the main mischief a sentencing officer is seeking to address with a compensation order, namely that the victim be compensated. If a compensation order is made in terms of section 297 and made a condition of suspension of a prison sentence, as in the present matter, and the accused cannot meet the condition timeously, by going to prison the chances of the accused ever compensating the victim become less than if the accused was kept out of prison and remained free to try and raise the money to pay the compensation awarded. The facts of the present matter clearly illustrate this.’

**Conclusion**

It is clear from the discussion that compensation orders in criminal proceedings are desirable as a means of repairing the harm caused by the accused's criminal conduct. The award of a compensation order as a condition of the sentence will ensure that the accused is kept out of prison and this will in turn maximise the chances of the accused paying the compensation. Victims in criminal proceedings are often not conversant with the provisions of the CPA governing compensation orders. It is proposed that prosecutors and police officers charged with the investigation of crime should, where appropriate, draw the attention of the complainants to these provisions.

The award of compensation orders can serve as a deterrent to crime. The possibility of the accused being ordered to compensate the victim for the loss or damage suffered will ensure that the accused does not see any benefit from the commission of crime. Furthermore, the threat of being imprisoned in the event of non-compliance with a compensation order is an added factor that will encourage the accused to comply with the conditions of the sentence.

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**A Last Thought**

**When temperatures rise, so do crime rates: evidence from South Africa**

Over the past few decades there has been a growing worldwide interest in examining the relationship between weather and various types of crime. Most research in this area has however produced inconsistent and often paradoxical results. For example, some studies have found no seasonal fluctuations in crime. Others have however found an increase in crimes during either the colder winter months or warmer summer months.

Very little is known, however, about how the magnitude and spatial distribution of

criminal activity in South Africa is affected by climatic conditions. So we set out to determine whether there is an association between criminal activity and climate in the country's capital city, Tshwane.

We were specifically interested in whether the magnitude of crime changes depending on extreme weather conditions, notably temperature and rainfall. In other words: do extremely hot days or high-rainfall days experience higher or lower rates of violent, property or sexual crime?

We also wanted to know whether the spatial distribution of violent, property or sexual crime changes depending on the type of extreme weather event. Simply put, does crime occur in different places on extremely cold days than it does on really hot ones?

Our results indicate a strong association between temperature and criminal activity. That is, as the temperature goes up, so too, does crime. There's a less significant association between rainfall and crime. The spatial distributions of all types of crime are found to differ significantly depending on the type of weather extreme observed.

The results could help law enforcement agencies better understand how weather affects crime patterns in South Africa's urban areas and develop and implement appropriate crime prevention measures.

**Diving into data**

The notion that there's a relationship between criminal activity and climate is nothing new. Over a century ago Belgian sociologist and scholar Adolphe Quételet observed that crimes against people reach a maximum during the warmer summer months, while crimes against property reached a peak during winter.

He later developed the temperature-aggression theory, which provides a psychological explanation for the increase in crime during warmer months. It suggests that warmer temperatures will lead to an increase in an individual's frustration and discomfort levels and so increase the likelihood of aggression. This could in turn result in interpersonal crimes such as assault.

We used data and statistical analysis to find an association – if any – between extreme weather conditions and crime in the nation's capital, Tshwane. We obtained climate data for the city from the South African Weather Service for a 5-year period from September 2001 to the end of August 2006.

Next, we calculated daily average temperatures before extracting the ten hottest for each year of the five years. That gave us a dataset of 50 days. The process was repeated for low-temperature days, high-rainfall days, no-rainfall days and random-rainfall days.

Then came crime data for the same period. We obtained this from the South African Police Services' Crime and Information Analysis Centre. The data included the geographical location of each crime; the date and time of day that each crime was committed; and the specific type of crime committed. A total of 1,361,220 crimes were reported in the five-year period across 32 different categories. All crime was

then categorised into either violent, sexual or property crimes before we calculated a count of crime per type per day.
Next, we used a recently developed spatial point pattern test to determine whether the spatial distribution of crime on the three types of days – very hot, very cold and rainy – changes. That is, does the spatial patterning of crime in Tshwane change depending on certain rainfall and temperature conditions?

**What we found**

Our findings demonstrate that the amount of violent, sexual and property crime in the city of Tshwane is significantly affected by temperature and, to a lesser extent, rainfall.
The magnitude of violent, sexual and property crime was higher on hot days compared to cold or random temperature days. Violent crimes increased by 50% on hot days compared to very cold days. Sexual crimes increased by 41% and property crime by 12%. Violent and sexual crimes in Tshwane also decreased on high-rainfall days. Surprisingly, property crime was found to increase slightly on heavy rainfall days, though only by 2%.
Second, the spatial distribution of violent and property crime was found to differ on days by temperature and rainfall. There is a considerable change in the way that particularly violent and property crime is spatially distributed in Tshwane depending on the weather conditions. We also found that the distribution of sexual crime did not seem to differ significantly by temperature or rainfall.
More research is needed to confirm these findings and to determine if the results can be generalised to other urban areas in South Africa.

**Applications**

The results of this research have the potential to inform how law enforcement agencies and other relevant stakeholders tackle crime in South Africa.
Our findings can be used to identify communities that are more prone to crime under certain meteorological conditions and allow stakeholders to target these neighbourhoods and plan interventions. It also allows stakeholders to adequately develop and implement suitable intervention practices in similar at-risk neighbourhoods.
For the police and others responsible for specifically addressing long-term solutions to crime, crime pattern analysis can utilise the understanding of how weather events influence crime patterning and provide measures to take appropriate action.

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