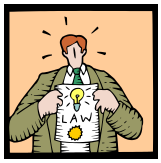
# e-MANTSHI

A KZNJETCOM Newsletter

**April 2024: Issue 206**

Welcome to the two hundredth and sixth 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. Act No. 15 of 2023: the Judicial Matters Amendment, Act 2023 was promulgated on 3 April 2024.It also came into operation on the same day. The notice was published in Government Gazette no 50430 dated 3 April 2024. Some of the most important amendments which it brought about is to the following legislation: Section 51 and 93ter of Act 32 of 1944; Addition of sections 57B, 57C and 57D in Act 51 of 1977; section 342A of Act 51 of 1977; Amendment of section 10 of Act 4 of 2000; and the repeal of law in section 34:
(1) The common law relating to the crime of defamation is hereby repealed.
(2) Subsection (1) does not affect civil liability in terms of the common law based on defamation.
The Act can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202404/judicialmattersamendmentact152023.pdf

## Recent Court Cases

### 1. Centre for Child Law and Others v South African Council for Educators and Others (1289/2022) [2024] ZASCA 45 (9 April 2024)

**Section 28(2) of the Constitution incorporated a procedural component affording a child the right to be heard. It follows that if legislation and policies impact on the rights of children, those must refer back to what is contained in the Constitution, related legislation and applicable international law. How the child will participate in the proceedings will depend on the circumstances of the specific case and must be approached in a manner that will best serve the interests of the child.**

The judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2024/45.html

### 2. Director of Public Prosecutions, Eastern Cape, Makhanda v Coko (248/2022) [2024] ZASCA 59 (24 April 2024)

**Logic dictates that even in circumstances where consent has been given to a specific sexual act, it may also be withdrawn during the sexual act to which the consent relates. This then means that if B changes her mind and withdraws her consent and communicates her change of mind to A, there would be no consent to speak of beyond the withdrawal of the consent previously granted. Thus, subsequent to the withdrawal of consent previously granted, any continued engagement in an act of penetrative sexual act in relation to which consent has subsequently been withdrawn would constitute a contravention of s 3.**

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2024/59.html

## From The Legal Journals

**Bekink, M**

The best interests of the child and the right of interested third parties to parental responsibilities and rights: RC v HSC 2023 4 SA 231 (GJ)

**2024 De Jure Law Journal 1**

**Abstract**

*The South African post-constitutional era gave rise to the reframing of what was previously referred to as parental authority to parental responsibilities and rights. Throughout these developments, the best interests of the child remained a constant consideration, resulting in a move away from a parent-centred approach to a child-centred approach. In line with this child-centred approach, modern South African law recognises that children have the right to family or parental care. Recognition is also given to the subsequent fundamental principle that parents and the family perform a central role in a child's care and protection. However, analogous to global trends South African family structures have transformed and are no longer typically nuclear, but are characterised by a diversity of parental, family and community-based forms of caregiving. Children accordingly find themselves being cared for by persons who are not their biological parents. In this regard the position of the "interested third party" or so-called "co-holder of parental responsibilities and rights" is gaining increasing relevance. Although the role of interested third parties is recognised in domestic law, in the Children's Act, some uncertainty about the right of these parties to obtain parental responsibilities and rights over a child prevails. One such aspect is the right of a former life-partner to obtain parental responsibilities and rights over a non-biological child upon the dissolution of a life-partner relationship. A recent High Court case, RC v SC 2022 4 SA 308 (GJ) and its appeal namely, RC v HSC 2023 4 SA 231 (GJ) to a full bench of the High Court provides valuable insight into this regard and specifically on the approach taken by the courts about an application for parental rights and responsibilities to a non-biological child by an interested third party in terms of the Children's Act.*

**Van Coller, A**

Judicial problemsolving: An evaluation of Grobler v Phillips and Others [2022] ZACC 32

**Law, Democracy & Development/ Vol 28 (2024) 76**

**Abstract**
*The South African Constitutional Court was recently tasked with considering whether the "just and equitable" requirement of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act had been complied with when an eviction order was granted in the Somerset West Magistrates' Court. The Magistrates' Court found that the occupier unlawfully occupied the land and determined that the eviction was just and equitable in the circumstances. However, the High Court and the Supreme Court of Appeal held that the order of the Magistrates' Court could not be confirmed. With certain conditions attached, the Constitutional Court held that the eviction was just and equitable. These judgments are noteworthy as they highlight the inconsistencies in the reasoning of the various courts that considered the same facts. The conclusion is that judicial reasoning which creates tension between the rights of private landowners and unlawful occupiers is not constructive. Ideally, evictions should be resolved by enforcing a potentially homeless person's right to access adequate housing by holding the state to account for its constitutional obligations.*

**Singh, C**

A "SIGN" of the times: a brief consideration of the validity of e-signatures in agreements and affidavits in South African Law.

**OBITER 2024 38**

**Abstract**
*The evolution of technology has changed business practices all over the world. Owing to technological and e-commerce developments, businesses can now transact with each other instantaneously across borders. The digitalisation of commerce and other traditional working methods has created a new "digital age" in human history. Digitalisation has taken over many economic activities and industries and is slowly finding its way into the legal system. Several businesses are now concluding commercial transactions and contracts electronically. Electronic signatures have consequently become essential tools for concluding legal agreements and conducting other daily business and legal practices. These new innovations have brought into question the legal validly of these transactions, and in particular the legitimacy and security of electronically signed documents.*

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

## Contributions from the Law School

### The Adjustment of Fines Act: Part I

### Background and introduction

Magistrates' courts are creatures of statute (cf *S v Ndlovu* 2017 (2) SACR 305 (CC) at para [19]; *S v Tshoga* 2017 (1) SACR 420 (SCA) at para [53]; *S v James* 2019 (1) SACR 95 (ECB) at para [12]; *S v Matitwane* 2018 (1) SACR 209 (NWM) at para [12]). Their powers are clearly demarcated by the law which, generally speaking, consist of statutory law. These powers include the power to impose sentence on a convicted offender. In case of common-law offences, the limits of these powers are prescribed in the Magistrates' Courts Act 32 of 1944. When it comes to statutory offences, the penalty clauses that apply to them places additional limitations on these powers. All of this is trite.

A simple example of a penalty clause connected to a statutory offence is provided by s 170(2) of the Criminal Procedure Act 51 of 1977: accordingly, following a conviction of contravening s 170(1), a court may sentence the offender 'to a fine not exceeding R300 or imprisonment for a period not exceeding three months". Today, it is immediately obvious that a maximum fine amount of R300 far too low. However, there is a remedy, in the form of the Adjustment of Fines Act 101 of 1991.

By 1990, most penalty clauses were similar to s 170(2) of the Criminal Procedure Act. One could provide one further example: "a fine not exceeding R1 000 or to imprisonment for a period not exceeding two years, or to both such fine and such imprisonment…" (s 39(2)*(d)* of the (former) Arms and Ammunition Act 75 of 1969; see the analysis in *S v Mali and Others* 1981 (2) SA 478 (E)). However, at this time inflation rates in South Africa were higher than today. The effect of inflation on the value of money was explained as follows in Terblanche *The guide to sentencing in South Africa* (1999) 49: "Especially during the 1980's inflation devalued money to an almost unbelievable extent. What used to be R1 000 in 1970, was worth as much as R2 775 in 1980 and more than R10 000 in 1990. … This devaluation caused considerable problems with the maximum fines mentioned in penalty clauses, which had to be adjusted regularly to keep up with the falling value of money". The same problem affected the general jurisdiction in the Magistrates' Courts Act 32 of 1944. In 1987, the maximum fine that could be imposed in a district court was R2 000, and in a regional court R20 000 (s 92 of the Magistrates' Courts Act; cf Hiemstra *Suid-Afrikaanse Strafproses* (1987) 253). These limits soon became inadequate; a problem that could only be resolved through the cumbersome process of amendment acts passed by Parliament.

The rapid devaluation of money prompted the legislature to find another way of dealing with the challenge of outdated penalty clauses. First, in 1987, the amounts mentioned in the Magistrates' Courts Act were removed. Instead, s 92 was amended to give the Minister of Justice the power to set these amounts in a government notice (s 9 of the Magistrates' Courts Amendment Act 25 of 1987, with effect from 1 Jan 1988). The amounts originally set by the Minister have been increased a few times and the current amounts are the following: R120 000 when "the court is not the court of a regional division", and R600 000 when the court is a regional court (GN 217, *GG* 37477 of 27 March 2014, with effect from 1 June 2014). Before 1 June 2014, the amounts were R60 000 (district court) and R300 000 (regional court) (GN R1411, *GG* 19435 of 30 October 1998). It is important to keep in mind that these increased amounts do not apply retroactively. As explained in *S v Liang* 2016 JDR 0989 (WCC) at [54]: "The increase in monetary penal jurisdiction does not operate retrospectively (see *Veldman v DPP, Witwatersrand Local Division* 2006 (2) SACR (CC) at paras [26], [28] and [34])." In other words, for offences committed from 30 October 1998 to 31 May 2014, the maximum fine that a district court may impose is R60 000; for offences committed since 1 June 2014, it is R120 000.

The second measure employed by the legislature in dealing with the challenge of inflation, was the passing of the Adjustment of Fines Act 101 of 1991. Surprisingly, it took many years before any reported judgments even mentioned the Act. However, in *S v Viljoen* 1999 (1) SACR 128 (W), Cloete J observed that the maximum fines prescribed in penalty clauses did not keep up with inflation, which reduced the real value of those maximum fines; and the Act had been placed on the statute book because of the effect of inflation on the value of money (at 131*c*, with reference to Hiemstra *Suid-Afrikaanse Strafproses* 709).

The Adjustment of Fines Act affects virtually every criminal case involving a statutory offence. It still, at times, creates confusion. This contribution considers the provisions of the Act in detail, with reference to such legal sources as are available. This first part provides general information and considers the basic effect of the Act. The second part will expand on this first part, and will also consider exceptions, and references to the Act in other laws.

**The Adjustment of Fines Act: general information**

The essential function of the Act is contained in s 1(1), which reads as follows:

"**1 Calculation of maximum fine**

(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."

The Adjustment of Fines Act is not a model of clarity. I previously wrote that, "Reading through it, though, leaves one with the distinct impression of an abstract painting: the colour and shapes of the words may impress, but the true meaning is singularly obscure" (Terblanche *The Guide to Sentencing in South Africa* (1999) at 50; see also *S v Rooi* 2007 (1) SACR 668 (C) at 670*f*). In *S v Mkhize and Others* 2004 JDR 0549 (N) at para [14] the full court referred to "the gross ineptitude of the draftsmanship" in the Act. There are inconsistencies within the different provisions; the two texts, being the English (signed text) and Afrikaans texts, also contain some differences (cf *Mkhize and Others* (supra) at paras [5] and [13]).

Incidentally, the operation of the Adjustment of Fines Act was extended across the whole of South Africa through s 2 of the Justice Laws Rationalisation Act 18 of 1996, read with Schedule I, which expressly mentions the Adjustment of Fines Act (see *Mhlekwa v Head of the Western Tembuland Regional Authority and Another; Feni v Head of the Western Tembuland Regional Authority and Another* 2000 (2) SACR 596 (Tk) at 608-9, in connection with the Transkei). Notably, the Act does not apply in Namibia (C Liebenberg & N Nedeunyema "Exploring sentencing purposes, principles and practices in Namibia" (2020) *SACJ* 23 at 30–31).

**Interpreting s 1(1)**

In what follows, s 1(1) is dissected. In this process, the following approach is used:

1. Emphasis is placed on the fact that the provision requires a calculation of the maximum fine that a court may impose.
2. The "ratio", as laid down in the second half of s 1(1), is explained.
3. Against the background of 1 and 2 above, the basic provision is considered anew.

*Calculation*

It is worth noting the headings of s 1: "Calculation of maximum fine" (similarly, s 1(2) reads: "Calculation of fine in case of fraction of year"). However, in the sections themselves, forms of the word "calculation" only appears in s 1(2): it reads that "the amount of the maximum fine which may be imposed shall … be an amount *calculated* in accordance with the ratio referred to in subsection (1)*(a)*…". The question is whether there is any significance in the fact that s 1(1) does not contain a similar reference; why it does not include the wording that the maximum amount to which fines may be imposed must be *calculated* in accordance with the mentioned ratio? It is submitted that too much should not be read into this difference, regardless of what the reason for it might be, because the only functional interpretation of s 1(1) is that it demands a calculation to be made, as will become clear from the discussion that follows.

Most of the (small number of) judgments dealing with the Act expressly state, or accept, that the Act requires the court to calculate the maximum fine that may be imposed. For example, the full court in *S v Mkhize and Others* 2004 JDR 0549 (N) at para [14] noted that "the maximum fine requires *to be calculated* in what appears to be a fairly cumbersome method…" (see also *S v Rooi* 2007 (1) SACR 668 (C) at 670*f*; *S v Liang* 2016 JDR 0989 (WCC) at para [56]; *S v XM and Another* 2016 (1) SACR 500 (KZP) at para [8]; *S v Permall & another* 2018 (2) SACR 206 (WCC) at para [11]; see also SS

Terblanche *A guide to sentencing in South Africa* (2016) 37). This is also the language used in some other statutes that contain references to the Adjustment of Fines Act (cf s 41 of the Architectural Profession Act 44 of 2000; s 58(2) of the Spatial Planning and Land Use Management Act 16 of 2013). Alternatively, some judgments use the word "determine" (cf *S v Siduna and Others* 2023 JDR 4206 (NWM) at para [22]; *S v Tseko* 2024 (1) SACR 208 (NWM) at para [13]) which, in the current context, clearly is a synonym for "calculate".

*The "ratio"*

It is useful to now consider the "ratio" mentioned in the final part of s 1(1)(a). It is worth repeating the wording here: "…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."

Mention has been made of the provisions of s 92 of the Magistrates' Courts Act 32 of 1944, in the "Background and introduction" above. It is now necessary to consider the references to this section in the Adjustment of Fines Act.

First, it is worth noting that the heading of s 92 reads, "Limits of jurisdiction in the matter of punishments": it places the emphasis on jurisdiction. This is what s 92(1)(a) provides for (italics added):

"Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence- *(a)* by imprisonment, may impose a sentence of imprisonment for a period not *exceeding three years*, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division;…".

Both the Magistrates' Courts Act and the Adjustment of Fines Act use the words, "where the court is not a court of a regional division". Clearly, then, the only "period of imprisonment as determined in section 92(1)*(a)*" to which the Adjustment of Fines Act could refer in s 1(1)(a), is that of three years' imprisonment.

Section 92(1)(b) of Magistrates' Courts Act reads as follows:

"Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence - … by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the *Gazette* for the respective courts referred to in paragraph *(a)*".

As in the case of imprisonment, the only "amount of the fine" to which the Adjustment of Fines Act could refer is the amount determined by the Minister for courts other than regional court. As indicated in the "Background and introduction" above, this amount currently stands at R120 000.

By replacing the period of imprisonment and amount of the fine as identified above into s 1(1)(a) of the Adjustment of Fines Act, it means that the quoted part of s 1(1)(a) can now be read as being, "…the ratio between the amount of [R120 000]…, and [3 years'] imprisonment…". The same ratio can be expressed as R40 000 per one year's imprisonment (see, e g, *S v Shongwe* 2015 JDR 2446 (GP) at para [7]; *S v Siduna and others* 2023 JDR 4206 (NWM) at para [21]; *S v Tseko* 2024 (1) SACR 208 (NWM) at

para [17]). Obviously, this ratio is subject to change: should any of the relevant provisions be amended in future, whether by the Minister or Parliament, the numbers currently determining the ratio could change as well. This has happened in the past as well. And because any increased amounts do not apply retrospectively, for example, for offences committed before 1 June 2014, the ratio would have been R20 000 per one year's imprisonment.

Incidentally, the maximum sentences that a regional court may impose, in terms of s 92 of the Act, being a R600 000 fine and 15 years' imprisonment, work out to the same ratio of R40 000 per one year's imprisonment. Strictly speaking, therefore, at present the words "where the court is not the court of a regional division" are unnecessary. However, it is conceivable that the Minister might, in future, prescribe fine amounts that would result in different ratios for district and regional courts, in which case these words would become important.

This consideration of the ratio would be incomplete without reference to the judgment in *S v Permall & another* 2018 (2) SACR 206 (WCC). In this case the review judge considered s 1(1)(a) of the Adjustment of Fines Act and observed that "one has to determine the ratio" between the amount, as noted above, and the period of imprisonment, "which is three years' imprisonment, or 36 months" (at para [10]). The court then proceeded to divide R120 000 by 36 (the number of months): the answer of 3333,33 is then described as "the ratio between the fine and the period of imprisonment" (ibid). This is the only case, as far as I know, which converted the three-year maximum period of imprisonment, as stated in the Magistrates' Courts Act, into months for purposes of determining the ratio. The result was the mathematically considerably more difficult to work with (and far less elegant) ratio of "3333,33". It must also be said that the court incorrectly described the *number* of 3333,33 as "the ratio", whereas it should have said the ratio is "R3333,33 per one month's imprisonment".

It is submitted that there is nothing to be gained by using a month as period of imprisonment for purposes of determining the ratio, especially not since all the statutes that are referred to expresses the period of imprisonment in terms of years.

*Considering s 1(1)(a) anew*

Now that it has been established that the ratio mentioned in the last part of s 1(1)(a) is currently R40 000 per one year's imprisonment, the basic provision can be read as follows: "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,… the amount of the maximum fine which may be imposed shall…, be an amount … in … the ratio" of R40 000 per one year's imprisonment.

The remaining parts of s 1(1)(a), which have not yet been considered, are the following: "If any law provides…". Generally, "any law" is considered to include regulations and other subordinate legislation (cf s 2 of the Interpretation Act 33 of 1957). Therefore, for example, if a Minister is empowered to include offences and penalties in regulations, the penalty clauses in regulations should also be affected by s 1(1)(a). This position is confirmed by s 3, which reads that, 'This Act shall *mutatis mutandis* apply to a provision in any law authorizing the promulgation of another law, which provision confers the

power to prescribe a penalty contemplated in section 1 in respect of any contravention of the law so authorized.' In a few instances, legislation expressly allows regulations to include references to the Act when prescribing the maximum fines that may be imposed. For example, s 15(2) of the Civil Union Act 17 of 2006 allow contraventions of the regulations to be visited by '*(a)* a fine not exceeding the amount that, in terms of the Adjustment of Fines Act , 1991 (Act 101 of 1991), may be imposed as an alternative to imprisonment for a period of six months; or *(b)* in lieu of payment of a fine referred to in paragraph *(a)*, imprisonment for a period not exceeding six months'. And s 58 of the South African National Roads Agency Limited and National Roads Act 7 of 1998 reads, 'However, the maximum period of a term of imprisonment so prescribed may not exceed six months, whilst any fine imposable in conjunction therewith or as an alternative thereto will be calculable in accordance with section 1(1)*(a)* of the Adjustment of Fines Act…'. In view of the generally accepted meaning of 'any law', these express provisions should not be interpreted as setting a standard that should be complied with before any subordinate legislation is considered subject to the Act.

"…that any person on conviction of an offence may be sentenced…". This is a typical reference to a statutory penalty clause, in compliance with the legality principle that a "law" must not only expressly declare an action or omission to be an offence, but should also state that it is punishable (see, generally, *Director of Public Prosecutions, Western Cape v Prins* 2012 (2) SACR 183 (SCA); D Van Zyl Smit "Sentencing and punishment" in S Woolman et al *Constitutional law of South Africa* 2 ed (2003) 49–4). Generally, "any person" should include natural persons and corporate bodies.
"…may be sentenced to pay a fine the maximum amount of which is not prescribed…". There are two elements to these words: first, the penalty clause must allow for a fine. Penalty clauses that make no mention of a fine would not be covered by the Act. Secondly, any prescription to a "maximum amount" of the fine must be absent. In other words, s 1(1)(a) regulates penalty clauses that refer to a fine but contains no reference to a maximum amount of such fine. It clearly refers to most penalty clauses passed by Parliament over the last three or so decades (see, e g, *S v Tseko* 2024 (1) SACR 208 (NWM) at para [13]).
"…or, in the alternative, to undergo a prescribed maximum period of imprisonment…". The meaning of these words is quite clear, namely that the penalty clause should not only mention the possibility of a fine but must also include "a prescribed maximum period of imprisonment". Again, there are two elements to these words. First, it means that a penalty clause that only mentions a fine, and not imprisonment, is not affected by the Act. Although rare, there are such penalty clauses (cf s 41(2)-(5) of the Architectural Profession Act 44 of 2000; Terblanche op cit 39). The second element is that the maximum period of imprisonment that can be imposed for the offence, should be mentioned ("prescribed") in the penalty clause. Once again, this interpretation fits most penalty clauses passed by Parliament over the last three or so decades (see also below, "Alternative imprisonment").
It should be noted that s 1(1)(a) was only ever intended to apply to future penalty clauses, in other words, penalty clauses passed *after* the Act came into operation (*S v*

*Mkhize and Others* 2004 JDR 0549 (N) at para [5]; *S v Liang* 2016 JDR 0989 (WCC) at [54]).

**"Alternative imprisonment"**

Another element that is relevant to the current discussion is so-called "alternative imprisonment". This is imprisonment imposed *not* as the primary sentence, but as a measure to enforce payment of the fine, which *is* the primary sentence. The power to impose such alternative imprisonment is derived from s 287(1) of the Criminal Procedure Act, which provides that, "Whenever a court convicts a person of any offence punishable by a fine …, it may, in imposing a fine upon such person, impose, as a punishment alternative to such fine, a sentence of imprisonment of any period within the limits of its jurisdiction…". Because of the phrase "in imposing a fine upon such person", alternative imprisonment is "inextricable connected to the fine" and it "cannot be imposed on its own" (cf *S v Jeffries* 2011 (2) SACR 580 (FB) at 585*j*; *S v Moyi* 1994 (2) SACR 408 (T) at 409*d*-e; Terblanche op cit 305-306). Alternative imprisonment is not, therefore, the same as the sentence of imprisonment that is mentioned in s 276(1)*(b)* of the Criminal Procedure Act, which can be imposed on its own.

Most of the case law about alternative imprisonment focus on the fact that a magistrates' court may *not* impose ordinary imprisonment plus alternative imprisonment to an extent which would, when added together, exceed the maximum term of imprisonment which its jurisdiction allows (see *R v Allen* 1945 CPD 42 at 46; *R v Jomane* 1948 (1) SA 793 (E) at 795; *R v Ntshangase* 1957 (4) SA 154 (C); *R v Dhlamini* 1958 (2) SA 306 (N); *S v Moyage* 1958 (3) SA 400 (A) at 415G-H; *S v Ferreira* 1973 (3) SA 261 (N) at 262C; *S v Louw* 1984 (1) SA 549 (NC) at 551A).

As magistrates no doubt know, it is standard practise, when imposing a fine, to add a term of alternative imprisonment (Terblanche (op cit) 306). Justice appears to dictate that the decisions about both the amount of the fine, and the alternative imprisonment imposed to enforce it, should be taken following careful exercise of the relevant discretion, and according to firm principle (cf *S v Juta* 1988 (4) SA 926 (Tk) at 928E). This issue has only really been attended to in one reported judgment, namely *S v Tsatsinyana* 1986 (2) SA 504 (T) (see also *S v Smith* 1990 (2) SACR 363 (C) at 366*c*; *S v Ntakatsane* 1990 (2) SACR 382 (NC) at 385*c*-*e*).

For current purposes, the important question is what the role is that alternative imprisonment plays when interpreting the Adjustment of Fines Act. The answer, it is submitted, is that alternative imprisonment plays no role in the interpretation of the Adjustment of Fines Act. To show why this is the case, it is necessary to, once again, quote the conditions for the application of the Act from s 1(1)(a) (italics added): "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*…". While s 287(1) of the Criminal Procedure Act permits the court to impose imprisonment "as a punishment alternative to such fine", and while it limits this alternative imprisonment to the court's penal jurisdiction, it contains no mention of any "prescribed maximum period of

imprisonment". Therefore, an important precondition for the application of the Adjustment of Fines Act is not met in case of the imprisonment provided for in s 287(1) of the Criminal Procedure Act.

**Misunderstandings**

A few judgments have taken the Act as a guide to the relationship that should exist between a fine and any alternative imprisonment imposed to enforce payment of the fine. It is likely that its confusing and inconsistent wording has contributed to these judgments.

There is little assistance to the interpretation of the Act in its long title. Such long title 'can always be utilised as an aid to its interpretation' (*S v Mkhize and Others* 2004 JDR 0549 (N) at para [8]). In this case it reads as follows:

'To provide that the maximum fine as an alternative to which a period of imprisonment may be imposed in respect of offences in terms of certain laws, shall be in the same ratio with regard to the period of imprisonment as the ratio of the fine as against imprisonment where the court is not a court of a regional division, as contemplated in section 92 (1) of the Magistrates' Courts Act, 1944; and to provide for matters connected therewith.'

If anything, this further confuses issues. The mind simply boggles at 'the maximum fine as an alternative to which a period of imprisonment may be imposed…': the only situation in which 'a period of imprisonment' may 'be imposed' 'as an alternative to' a fine, is the alternative imprisonment discussed above (s 287(1) of the Criminal Procedure Act). However, as indicated above, none of the provisions of the Adjustment of Fines Act themselves are capable of an interpretation that could include such alternative imprisonment.

In *S v Permall and Another* 2018 (2) SACR 206 (WCC) at para [11] Thulare AJ held as follows: "In my view, [the relevant statutory provisions provide] … a statutory rule which should guide magistrates, … not only to calculate the maximum fine or the term of imprisonment, as the case may be, but also in the computation of the fine or term of imprisonment in the sentences that the courts impose. … Considering provisions of both [the Adjustment of Fines Act] and the [Magistrates' Courts Act] referred to, the ratio between the amount of the fine and the term of imprisonment, in the magistrates' courts, is 3333,33, save as specially provided in any other law." In this case the magistrate sentenced the offender to a fine of R15 000 or 30 months' imprisonment, for driving with too much alcohol in his blood (a contravention of s 65(2) of the National Road Traffic Act 93 of 1996). Working back from the fine of R15 000, the court calculated that the maximum period of *alternative imprisonment* that could be imposed was 4,5 months (at para [12]). Imposing more, the review court held, was "founded on a drastic and unexplained departure from principles and rules" (ibid). However, in *S v Cronje* 2020 (1) SACR 74 (WCC) at para [8] the review court, per Boqwana J and Thulare AJ, effectively reversed the decision in *Permall*: "It is important to state upfront that, to the extent that *Permall* conveyed that a formula ought to be applied every time a judicial officer decides to impose a fine, that interpretation is not correct, as it is not consonant with the cardinal principle established, that the sentence must be

individualised and must fit the particular accused, the nature of the crime and the interests of society."

Similar arguments have earlier been raised by certain magistrates. In *S v Rooi* 2007 (1) SACR 668 (C) at 671*a*-*b*, the court confirmed that, 'The maximum fine is not itself a benchmark, as the magistrate appears to have reasoned. Any fine imposed must bear a relation to the convicted person's means and must fall, all things being equal, within the parameters established by sentences imposed in similar matters where guidelines have evolved.' In other words, the Adjustment of Fines Act has not affected the general principles that have developed over decades regarding the imposition of fines.

In *S v Shongwe* 2015 JDR 2446 (GP) the pertinent facts are the following. The accused had been convicted of contravening s 49(1)(a) of the Immigration Act 13 of 2002, for entering South Africa without a passport. They were convicted on their plea of guilty, under s 112(1)(a) of the Criminal Procedure Act. This procedure is available when "the presiding officer is of the opinion that the offence does not warrant punishment of imprisonment or any other form of detention without the option of a fine", nor a fine in excess of R5 000 (at para [5]). The magistrate sentenced each of the accused to a fine of R2 000 or, alternatively, six months' imprisonment. The review court requested the DPP for input, especially regarding the "correlation or proportionality between the fine and the alternative period of imprisonment" (ibid). The DPP argued that no legislation required such a proportion. The court (per Bekker AJ), correctly in my view, noted that there is considerable authority that "the amount of the fine has to bear some sort of relationship to the [alternative] imprisonment" (at paras [8], [9]). In addition, "to promote fairness and to ensure that justice was in fact done in less serious matters", it was the review judge's experience that magistrates generally did not impose more than three months' alternative imprisonment for a R5 000 fine, when it was imposed in terms of s 112(1)(a) (at para [12]). In the end, the review court replaced the imposed sentences for a fine of R2 000 or three months' imprisonment (at para [14]). However, in the course of the judgment, reference was made to the Adjustment of Fines Act, in terms which can only be described as confusing. In response to the DPP's claim that no legislation required a proportion between fine and alternative imprisonment, the court observed that the DPP was losing sight of the Adjustment of Fines Act, which "is clearly applicable in the current matters" (at para [6]). Applying the ratio, the court noted that the prescribed ratio was R40 000 per one year's imprisonment, and that this equated to a proportion, for six months' imprisonment, of R20 000. Therefore, the court concluded, alternative imprisonment of six months for a fine of R2 000, "seems to be disproportionate … [and] … too severe" (at para [7]). However, considering that the court eventually imposed three months' alternative imprisonment, which is much closer to the original sentence than to the ratio in the Adjustment of Fines Act, one must conclude that the excursion into the Adjustment of Fines Act was obiter (at best).

**Conclusion**

In conclusion, this contribution shows that s 1(1)(a) is purely a jurisdictional provision. It requires all courts to calculate the maximum amount of fines that may be imposed,

for contraventions of statutory provisions (for statutory offences, in other words). This calculation is currently to be performed with reference to the maximum period prescribed in the penalty clause, by using a ratio of R40 000 per one year's imprisonment. There is no room in s 1(1)(a) for interpreting it as containing any guideline for the amount of the fine that *should be imposed* in any given case.
Part II will show that penalty clauses, which still contain a maximum prescribed fine amount, must normally be reinterpreted in accordance with the Adjustment of Fines Act, by disregarding the amount in the penalty clause and calculating the actual maximum amount with reference to the ratio of R40 000 per one year's prescribed imprisonment. Part II will also consider exceptions to these processes, as well as any remaining matters arising from the Act.

**Prof Stephan Terblanche**
**Honorary Professor: School of Law, UKZN**

## Matters of Interest to Magistrates

The judgment below is by magistrate Mr S S Mthethwa of Mtunzini court and deals with an Inquest where the body of the deceased was never recovered. This is not something which Magistrates normally deal with and that is why the judgment is included. The findings by the Magistrate were confirmed on review by the High Court.

**IN THE MAGISTRATE'S COURT FOR THE UMLALAZI SUB-DISTRICT OF KING CETSHWAYO HELD AT MTUNZINI**

**INQUEST NO: 02/2022**

**THE INQUEST OF: SIMANGALISO QUINTON SEKOATI**

**JUDGMENT**

Introduction

[1] The birth of a child brings hope to their families. Some hope and pray that their children will grow up to be responsible man, women and leaders of tomorrow. Others hope that their children are the answer to their unfortunate circumstances and that their children would work and take them out of poverty. No parent wants to bury his or her child. The expectation is that the child would bury the parent. As much as it is painful to bury your child, but at least you get closure and you are able to point at your child's grave. On the other hand, just imagine the agony of a parent whose Seventeen (17) year old boy disappeared in the ocean/sea. Fast forward nine years later, the parent still does not know whether she will see her son coming back home or she would wake up from her horrible dream.

[2] This is an inquest to the disappearance of one Simangaliso Quinton Sekoati, and African male aged seventeen years old at the time. This inquest was conducted in terms of Section 16(1) of the Inquest Act 58 of 1959 since the body of Simangaliso was never recovered. The matter came before me as an informal inquest. Upon familiarizing myself with the provisions of Sections 16(1) and 18(1) and (2) of the Act, I realized we were going to hold a formal enquiry.

[3] The next of kin was subpoenaed in terms of section 7 of the Act. Ms. Mthembu advised that she could not afford an Attorney. I then wrote to legal aid to assist the family, but legal aid declined my request. I also wrote to probono.org, but they never replied. I then extended the request to local attorneys to do the matter pro-bono. Mr. Ndlovu accepted my request. Two other local attorneys had indicated their willingness to assist, but Mr. Ndlovu had already accepted. I am grateful to Mr. Ndlovu and the other colleagues who were willing to assist the family and this court to close this chapter. I am also grateful to the NPA for allocating Mr. Ngobese to represent the State in this matter.

[4] Before proceeding any further, I would like to state that this kind of an inquest is very rare and there is not much precedents on same. So one was really entering the uncharted waters.

Background/Facts

[5] Four witnesses testified in this matter, namely, Ms. Nobuhle Mthembu, Mr. Nkosinathi Philani Mthembu, Constable Thandeka Notsikelelo Makhoba and Captain Mbhekiseni Wiseman Shandu. Their evidence can be summarized briefly as follows.

[6] In the year 2014, Simangaliso Sekoati was residing with his mother, Nobuhle Mthembu. He had left his homestead, to visit his grandfather at Mangethe area, two or

three days before his disappearance. That was the last time Ms. Mthembu saw her son. On the 30th December 2014, Nkosinathi, Simangaliso and others had planned to go to the beach. Simangaliso decided to leave others behind and proceeded to the beach and others would follow him. He took some empty containers with him.

[7] Nkosinathi stayed home and waited for others to come back from the shop. When they came back, they all proceeded to the beach, hoping to find Simangaliso. When they got to the beach, they found the empty containers and a T-shirt belonging to Simangaliso. Simangaliso was nowhere to be found. Nkosinathi and others were informed by two Indian anglers (fisher-man) that the person they were looking for had went into the water for a swim. They saw him going deeper into the sea. They tried assisting him, but he was quite far.

[8] Nkosinathi and others took Simangaliso's T-shirt and containers and went to report what they discovered. The elders contacted the SAPS. Constable Makhoba was one of the Police Officers who came to the scene. Her testimony was that when they received a call about a drowning, they proceeded to the Mthembu homestead. They spoke to a thirteen year old who narrated what had happened. They then proceeded to the beach and the two Indian anglers were still there. According to Constable Makhoba, the two anglers also confirmed to her that the person they were looking for had drowned or was taken away by the sea.

[9] Constable Makhoba, further, testified that search and rescue teams were contacted. A search was conducted along the seashore. The divers went into the sea. The search lasted for hours and there was no recovery. She stated that she could not obtain the names and statements from the two anglers as she was prioritizing the search and recovery of the boy. The evidence of Captain Shandu was more of a formal evidence and it related to his role when he received the docket in November 2021.

[10] Ms. Mthembu also testified of the hardships and agony she has been through over the past nine years trying to get assistance. She testified that after the drowning, they waited for a period of two years before making enquiries with the SAPS. In 2016, she went to the Mandeni Police Station, but discovered that a docket was never opened in relation to the drowning of her son. There was only an entry in the SAPS occurrence book. A docket was then opened, but she was thereafter told to wait for another five years.

[11] She waited for the said five years and went to the Police Station on the sixth year. However, the official that assisted her was no longer there. The docket was allocated to the Unit Commander after she had complained to the Station Commander. She had to tell her story afresh. She also stated that she has not been able to claim from Simangaliso's trust fund and other policies because she does not have a death certificate. She also advised that she cannot get closure without a death certificate.

She stated, further, that she is convinced that her son will never come back and that he drowned on that day.

[12] This is one of the rarest kind of inquest. It is so because a body was never recovered and as stated above, there is not much precedent on this kind of inquest. I will consider what the Inquest Act 58 of 1959 says in instances where a body was never recovered or when a body is alleged to have been destroyed. I will start with the preamble of the Act.

[13] The preamble of the Inquest Act 58 of 1959 states that it is to "provide for the holding of inquests in cases of deaths or alleged deaths apparently occurring from other than natural causes and for matters incidental thereto…"

[14] Section 16 provides:
*(1) If in the case of an inquest where the body of the concerned is alleged to have been destroyed or where no body has been found or recovered, the evidence provides beyond a reasonable doubt that a death has occurred, the judicial officer holding such inquest shall record a finding accordingly, and there upon the provisions of subsection (2) shall apply.*
*(2) The judicial officer holding an inquest shall record a finding upon the inquest-*

- *a) as to the identity of the deceased person;*
- *b) as to the cause or likely cause of death;*
- *c) as to the date of death;*
- *d) as to whether the death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any other person.*

[15] It is clear, therefore, that the Act empowers a presiding officer to conduct or hold an inquest even when a body was never required. The Act, further, empowers one to make findings as one would do in normal inquest, that is, where a body was recovered. It is also clear that such findings may only be made if there is evidence that shows beyond a reasonable doubt that death has occurred.

[16] In the normal inquests, where a body was found, one would record their findings in terms of section 16(2) and refer the record to the DPP or close the inquest depending on the findings. In cases where a body was never recovered, one is required in terms of Section 18 of the Act to refer the matter for review after recording their findings. I will come back to this issue and the rational thereof.

[17] Section 18 states that

*(1) Whenever a regional magistrate or magistrate has in the case of an inquest referred to in subsection (1) of section 16 recorded a finding in regard to the matters mentioned in that subsection and in paragraphs (a) and (c) of subsection (2) of that section, such regional magistrate or magistrate shall submit the record of such inquest, together with any comment which he may*

*wish to make, to any provincial or local division of the Supreme Court of South Africa having jurisdiction in the area wherein the inquest was held, for review by the court or a judge thereof.*

*(2) Such findings, if confirmed on such review, or, if corrected on review, as so corrected, shall have the same effect as if it were an order granted by such court or such judge that the death of the deceased person concerned should be presumed in accordance with such finding.*

[18] It is clear, therefore, that section 16(1) must be read in conjunction with section 18(1) and (2). Section 16 empowers the magistrate to conduct and inquest and record findings even though a body was not recovered. After the magistrate records his findings, the record must be transcribed and referred to the High Court in terms of section 18 of the Act. The reviewing judge will look into the matter and if satisfied will confirm the findings. Once confirmed, by the Judge, such finding become the equivalent of a presumption of death. The reason such matters are taken on review for confirmation is, inter alia, that magistrates do not have powers to order a presumption of death. Such powers are only vested in the Superior Courts.

[19] The rational for Section 18 referral is to seek confirmation from the Reviewing Judge or the High Court of the findings of the magistrate or regional magistrate. This is solely because magistrates do not have powers to pronounce on the status of a human being. Magistrates do not have powers to declare someone dead. However, if the findings made by the magistrate are confirmed by the High Court, such a confirmation becomes a declaration of death. This means that there will be no need for the family to approach the High Court for the actual presumption of death order.

[20] Since the body was not recovered, one deals with circumstantial evidence. This means that one is called upon to reason by inference. In R v Blom 1939 AD 188 (A), the court stated the following:
*“In reasoning by inference, there are two cardinal rules which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved fact. If it is not, the inference cannot be drawn. (2) The proved facts must be such that they exclude every reasonable inference from them, save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.”*

[21] The following is common cause

a. Simangaliso Quinton Sekoati is the son of Ms. Nobuhle Mthembu.
b. Simangaliso was born on the 27th August 1997.
c. He left his mother to visit his grandfather late December 2014.
d. On the 30th December 2014, Simangaliso and his cousins had planned to go to the beach.
e. Simangaliso proceeded to the beach on his own.

f. When his cousins arrived at the beach, they only found his T-shirt and empty containers he had carried from his grandfather's place.
g. Two anglers informed his cousins and the SAPS that they saw him entering the water and drowned. Also that they could not save him.
h. It is also common cause that search and rescue teams were contact, but they could not recover the body of Simangaliso.
i. That a period of nine years has lapsed since Simangaliso disappeared.

[22] I have carefully considered the evidence before me. The evidence shows that Simangaliso drowned on that day. It is concerning and worrisome that the statements of the anglers, who reported that the young man had drowned, were not obtained. Such witnesses would have greatly assisted this court in reaching its decision. It still puzzles me that statements of such crucial witnesses were not obtained. The police officers who were the first at the scene could have ensured that they record the details of such witnesses. I understand that, at that time, the main objective was to try and rescue the young man. However, in life we always prepare for the worse. Nevertheless, I do not believe that such failure by SAPS has an impact on my findings.

[23] The evidence before me shows that Simangaliso is the one that was seen drowning by the anglers. His cousins found his T-shirt and the containers he had with him when he left his homestead. The evidence might be circumstantial, but everything points to the fact that Simangaliso drowned and did not make it out of that sea alive. It is possible that his body was discharged far away from his homestead and it was recovered as an unknown person's body. This is not strange in inquests matters. I have also dealt with a few where decomposed bodies and/or human remains were recovered, but their families were unknown.

[24] Having heard and considered the evidence presented, I make the following findings in terms of section 16(2) of the Act:

1. Identity of the deceased person: SIMANGALISO QUINTON SEKOATI with identity number 970827 6346 086.
2. Cause of death or likely cause of death: DROWNING.
3. Date of death: 30 December 2014.
4. Whether the death was brought about by any act or omission prima facie involving or amounting to an offence on the part of any person: NO

[25] The record of these proceedings will be forwarded to the High Court for review in terms of section 18(1) of the Act. Should the reviewing Judge confirm my findings, Simangaliso will be presumed to have died on the 30th December 2014 or a date to be determined by the reviewing Judge. The family will be given feedback once the matter comes back from review.

Handed down on this 12th day of JULY 2023.

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**MR. S.S MTHETHWA**
**MAGISTRATE, MTUNZINI**

**A Last Thought**

[50] As a general rule, a Judge should not interfere with the terms of a settlement agreement. A Judge is, however, entitled to raise concerns in certain circumstances. The concerns contemplated by *Eke* are concerns arising from the terms of the settlement agreement itself. A settlement agreement may offend public policy if there is a significant difference between the amount in the settlement agreement and the amount that could reasonably be expected to be agreed on between the parties in similar cases, or decided by a court had the matter gone to trial, so as to give rise to a reasonable suspicion that the amount may have been inflated or that there may be corruption involved. In the case of settlement agreements relating to damages, unlawfulness would not usually appear *ex facie* the agreement, and so the scope for raising concerns on that ground would be limited. However, since the settlement agreement purports to be a settlement of an existing *lis*, a court is entitled to look at the pleadings. A Judge may, for example, find the terms of a settlement agreement incompetent in law such as to raise an exceptional circumstance sufficient for a Judge to alert the parties to her concerns. Furthermore, if, for example, a settlement agreement includes heads of damages which are not the subject of a claim in the particulars of claim, this could be questioned. The same would be true if the settlement involves the payment of an amount exceeding the pleaded claim because then it would not seem to be a settlement. Nonetheless, even in these circumstances, courts do not have free reign and must exercise restraint to ensure that there is no undue imposition on contractual freedom. Where a Judge raises concerns, the grounds thereof should be clear and may not be based on information retrieved from inadmissible evidence. Two possibilities then arise.

[51] First, the Judge may refuse to make the settlement agreement, an order of court. Second, the Judge may notify the parties of her concerns. It must be emphasised that the Judge is not entitled to demand the parties to address these concerns. Once the Judge has informed parties of her concerns, the parties may elect not to address the concerns and indicate to the Judge that they regard the matter as settled between them. In such a case, the Judge will note on the court file that the matter has been settled between the parties and that the settlement agreement will not be an order of court. If the parties elect to address the issues raised and the Judge is satisfied, the settlement agreement will be made an order of court. If the Judge is not satisfied, she will refuse to do so. However, the fact that the Judge refused to make the settlement agreement an order of court does not mean that the settlement agreement is invalid. Whether the settlement agreement is valid depends on its terms and the law.

[52] In all these possibilities, the Judge may advise the parties on how they may address the concerns raised. The parties are at liberty to take the advice and amend the settlement agreement accordingly or reject the Judge's advice. Similarly, the matter may proceed to a hearing or trial depending on how the parties elect to deal with the concerns raised. In essence, therefore, a Judge is entitled to raise concerns – what the parties do afterwards is not determined by the Judge but by the parties. If a Judge has concerns arising from the pleadings before it, these have to be raised with the legal representative so that the parties may decide whether they wish to persuade the Judge in which case they may address the concerns or elect not to do so. Judges are neither obliged nor entitled to assess the propriety of a settlement agreement with reference to inadmissible evidential material.

**Per Mhlantla J in *Mafisa v Road Accident Fund and Another* [2024] ZACC 4**