e-MANTSHI

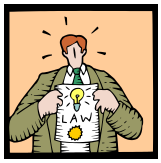
A KZNJETCOM Newsletter

June 2024: Issue 208

Welcome to the two hundredth and eighth 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 *Cannabis for Private Purposes Act* 7 of 2024 has been promulgated on 3 June 2024 in Government Gazette no 50744. The Act intends to:

- respect the right to privacy of an adult person to use or possess cannabis;
- regulate the use or possession of cannabis by an adult person;
- provide for an alternative manner by which to address the issue of the prohibited use, possession of, or dealing in, cannabis by children, with due regard to the best interest of the child;
- prohibit the dealing in cannabis;
- provide for the expungement of criminal records of persons convicted of possession or use of cannabis or dealing in cannabis on the basis of a presumption;
- amend provisions of certain laws; and
- provide for matters connected therewith.

The Act will come into operation on a date to be proclaimed by the President by proclamation in the Gazette.

The Act can be accessed here:
https://www.gov.za/documents/acts/cannabis-private-purposes-act-7-2024-english-sepedi-03-jun-2024

2. The Minister of Social Development has amended the General Regulations Regarding Children, 2024 in terms of section 306 of the Children's Act 38 of 2005. The amended Regulations were published in Government Gazette no 50870 of 26 June 2024. The Regulations come into effect from 1 July 2024.

The Regulations can be accessed here:
https://www.gov.za/documents/notices/children%E2%80%99s-act-regulations-amendment-26-jun-2024

Recent Court Cases

1. S v Chivabo (HC 14/2024) [2024] ZANWHC 156 (27 June 2024)

A court is a court of record, whether proceedings are noted longhand or digitally recorded. It is accordingly imperative that the record must reflect as accurately as possible what transpired. In the absence of a digital recording, the Magistrate was required to keep accurate notes on the charge sheet of every aspect of the proceedings before him.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZANWHC/2024/156.html

2. Minister of Police v Sabisa and Another (725/2023) [2024] ZASCA 105 (28 June 2024)

Section 50(1)*(c)* of the Criminal Procedure Act requires an arrested person to be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest. Subsection *(d)*(i) states that if the period of 48 hours expires outside ordinary court hours, the person may be brought before a lower court not later than the end of the first court day. In terms s 50(1)*(d)*(ii), if the 48-hour period expires at the time when the arrested person cannot be brought before a lower court, because of physical illness or condition, the court to which he or she would have been brought, but for the illness, may on application by the prosecutor:
'authorise that the arrested person be detained at a place specified by the court and for such period as the court may deem necessary so that he or she may recuperate and be brought before the court.' The application envisaged in this section must set out the circumstances relating to the illness or condition which the arrested person suffers from and be accompanied by a certificate of a medical practitioner. Court orders for further detention at the said place may be similarly sought.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZASCA/2024/105.html

3. S v Afrikaner (36/24) [2024] ZAWCHC 174 (19 June 2024)

A person who is convicted of an offence should not be required to suffer '*ex post* reformulations' (sic) or explanations which the presiding officer considers, on reflection, to best express the reasons for finding as he/she did. The Constitutional Court held that, whereas revisions in respect of 'infelicities of style, grammar, spelling and word choice' in judgments that are handed down *ex tempore* in criminal matters, may be permitted afterwards, the reasons given by the court in its judgment may not be altered or embellished to give further expression to what the court meant to convey.

The judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2024/174.html

From The Legal Journals

Boleu, K

Examining the value of criminologists' skills in the context of sentencing objectives: Perspectives from presiding officers in Bloemfontein, Free State Province

2023 SACJ 363

Abstract
The role of criminologists in South Africa and many other countries has been evolving and expanding over the years. Criminologists are increasingly involved in various phases of the judicial process, including the pre-trial, trial, and post-trial stages. As a scientific discipline, criminology involves understanding the root causes of crime, its impact on society, and how to prevent and respond to criminal behaviour. However, it stands to reason that in making an informed and balanced contribution to a case in a court of law, the criminologist must familiarise themself with all aspects relevant to the case. The current study focused on the perception of presiding officers about criminologists as expert witnesses in their courts during sentencing. This study explored whether presiding officers valued criminologists knowing, understanding and applying sentencing objectives in writing their reports. A qualitative inquiry was conducted to explore whether it is important for a criminologist to understand sentencing objectives in order to provide an overall and thorough report to the court. Semi-structured interviews were conducted with presiding officers from the regional and high courts in Bloemfontein. The findings suggest that presiding officers prefer to appoint a criminologist who understands and has broad experience of all sentencing objectives in South Africa to assist them in deciding on appropriate sentences.

Tredoux, C G , Fitzgerald, R J Allan, A and Nortje, A

Identification parades in South Africa — Time for a change?

2024 SALJ 84

Abstract
Identification parades are essential when obtaining evidence of identity from eyewitnesses. Eyewitnesses are shown a line of people containing the suspect(s) and innocent fillers, and witnesses are asked to point out the perpetrator(s) of the crime, noting that the perpetrator(s) might not be present. Corporeal ('live') parades are required in South Africa unless there is a good reason not to use them, in which case

the police may use photograph parades. We review the rules for conducting parades in South Africa and compare these to those in several other countries, many of which no longer use corporeal parades. We consider evidence from empirical studies that have tested the 'live superiority' hypothesis and conclude that there is no clear evidence in its favour, notwithstanding that there are benefits to augmenting static views of faces with additional cues to identity. We then consider the logistical and financial cost of conducting live parades, which we find to be considerable. We conclude that it may well be time to reconsider the use of live identification parades in South Africa but caution that this should coincide with a review of the law regulating the use of alternative methods to ensure that accused persons receive fair trials.

Watney, M

Appeal will not remedy a guilty plea presented for the wrong reasons :*S v Joubert* (HC-MD-CRI-APP-CAL-2020/20) 2020 NAHCMD 396 (4 September 2020) and *S v Joubert* (SA 53/2021) 2023 NASC (7 December 2023)

2024 TSAR 367

Swart, M

“A veritable cesspool of lawlessness”: Upholding impartiality and decorum in South African judgments

2024 TSAR 386

Marumoagae, C & Tsehla, B

Automatic review of magistrates' courts judgments: A noble invention at the risk of impotence?

2023 Stell LR 406

Abstract
The Criminal Procedure Act 51 of 1977 provides for the automatic review of certain cases decided in the magistrates' courts. This is a mechanism aimed at ensuring that justice is properly administered by subjecting decisions of some magistrates, mainly determined on the basis of their experience and the length of the sentence imposed, to review by judges of the High Court. This system, however, has been systematically hamstrung, primarily due to the inordinate delays that take place between the imposition of the sentence and the delivery of the review judgment. In some cases, by

the time the review judgment is delivered, the accused has already completed the sentence.
The discussion in this article focuses on the automatic review process. It starts by contextualising the automatic review system; then deals with its practical application through the lens of a few selected cases; and — in conclusion — makes some recommendations aimed at strengthening the system. The recommendations are interrelated. The main one is that the period of a week for the record to be submitted for review is unrealistic — as is evident from the cases discussed — and should therefore be increased. Conscious that this may delay the process to the disadvantage of the accused, it is also recommended that those accused whose cases are subjected to the automatic review process should be granted bail as a default position. The last recommendation may seem cosmetic, but it is important. Communication between the magistrates' courts and the High Court seems to be at the centre of the problem and, for this reason, the use of technology is recommended.

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

Contributions from the Law School

Rest in peace, criminal defamation

The South African crime of defamation died on 3 April 2024. This was the date of commencement of the Judicial Matters Amendment Act 15 of 2023, which provides as follows in s 34:
'*Repeal of law*
(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 rationale underlying the legislative elimination of defamation from the ambit of criminal liability in South African law may be found in the Memorandum on the Objects of the Judicial Matters Amendment Bill, 2023. At 2.34, after explaining that the repeal

does not affect common law claims based on defamation grounded in delictual liability, it is noted that this repeal occurs in the light of the advocacy for the abolition of laws criminalising defamation (or 'libel') by the 'United Nations, as well as foreign authorities', based on the '"chilling effect" of such offences, especially on journalists'. The Memorandum continues further to explain the repeal by stating that '[t]here are well established civil remedies based on delict, in addition to the offence of *crimen iniuria*'.

I have previously considered whether the crime of defamation is defensible in a modern constitutional democracy (see 2013 *Obiter* 125; this matter was also previously discussed in this journal in *e-Mantshi* 100 (July 2014) 7-12). The concerns associated with such laws are indeed their potential use by the powerful to undermine and threaten the work of media, and thus the right to freedom of expression. However, even though some countries have repealed their defamation laws, the crime still exists in a large majority of states in all regions of the world (for a detailed analysis of the existence of such laws, see http://legaldb.freemedia.at/international-standards/ , last accessed 29 June 2024).

The ongoing existence of the crime in these jurisdictions can be justified in the light of various criticisms that have been raised in this regard (for a more detailed discussion, see 2013 *Obiter* 125). Some of the arguments made previously bear reiteration. The sparing use of the offence by prosecution authorities does not entail that the offence should be scrapped. It has even been suggested by the Privy Council that infrequent prosecution is indicative that the law is functioning effectively (*Worme v Commissioner of Police of Grenada* [2004] UKPC 8 at par [42]). Moreover, even selective prosecution of the crime by authorities does not undermine the need for the existence of the crime. While the existence of the crime has been criticized for unduly limiting the right to freedom of expression, it cannot be denied that it protects a very significant personal right to reputation, which in itself is founded on the right to dignity. This is a compelling rationale for the crime, as the Supreme Court of Canada has stated in *R v Lucas* (1998) 157 DLR (4th) 423 at par [73]:

'Defamatory libel can forever cause long-lasting or permanent injuries to the victim. The victim may forever be demeaned and diminished in the eyes of the community…The harm that acts of criminal libel can cause is so grievous and the object of the section to protect the reputation of individuals is so meritorious that the criminal offence is of such importance that the offence should be maintained.'

This statement of the court further underscores the reality that the harm caused by defamation may exceed the recompense of monetary damages via a delictual action. Moreover, civil defamation actions are very expensive, and are practically only available to those with sufficient resources. And what if the offending party cannot afford to pay such damages? Could it not be said that by eliminating the crime of defamation, the legislature has effectively limited access to justice for a poor person who has been defamed? The case of *S v Hoho* 2009 (1) SACR 276 (SCA), which reaffirmed the validity of the common-law crime of defamation, noted that the need for a criminal sanction, as opposed to a civil remedy, was illustrated by the facts of the

case, where the complainants' lack of knowledge of the source of the defamatory leaflets that had been distributed, required that they enlisted the help of the police and prosecuting authorities to enable them to ascertain that the appellant was responsible (par 35). The legislature is clearly of the mind that since a civil law remedy can be applied to defamation, justice will prevail. However, it may again be asked, is the repeal of the defamation crime in the interests of justice?

The words of the Memorandum indicate that where it is indeed necessary to impose criminal liability, where there is an unlawful abuse of the right to freedom of expression, that *crimen iniuria* could take up the slack in the absence of criminal defamation. The legislature has recently sought to proscribe certain expressive conduct, inter alia hate speech (see s 4 of the Prevention and Combating of Hate Crimes and Hate Speech Act 16 of 2023, which has yet to commence) and offences in the context of cybercrime (Cybercrimes Act 19 of 2020). However, the particular harm protected by the defamation crime is reputational harm, which does not necessarily fall within the ambit of these statutes. Unfortunately, the same can be said of *crimen iniuria*.
Milton describes the 'trinity of interests of human personality' protected by South African law as dignity (*dignitas*), physical integrity of the human being (*corpus*) and the reputation of the person (*fama*), which are in turn respectively protected by the criminal law by the crimes of *crimen iniuria*, assault, and criminal defamation (*South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 492. In the absence of the crime of criminal defamation, could it be said that the crime of *crimen iniuria* would of necessity provide a ready and effective replacement ground for liability? Given that the crimes, by definition, protect *different* interests, this is by no means clear. Taking into account all the issues referred to above, it seems unclear that the repeal of the defamation crime is indeed a welcome development. The crime has hardly been over-used in the past in South African criminal law, and provides a very important means of protection for the right to dignity. As was stated in the Canadian case of *R v Lucas* (supra) at par 94, such protection in the criminal law is 'the attribute which is most highly sought after, prized and cherished by most individuals' and that the 'enjoyment of a good reputation in the community is to be valued beyond riches'. As indicated, the civil law delictual remedy is not an adequate substitute in itself, and the protection extended by *crimen iniuria* does not equate to the protection provided by the defamation crime.

What of the stated concerns relating to the use of a criminal sanction to ward off the media, thus infringing on the right to freedom of expression? Media freedom is an absolutely crucial element of a democracy. But if this concern is to be foregrounded, why not adapt the defamation crime accordingly, rather than throwing the baby out with the bathwater, and in so doing negating the criminal protection of the right to dignity of the individual, in the context of publication of defamatory matter injurious to the reputation of the individual? Would a statutorily defined defamation offence, which limited the crime where the complainant was a public figure, not assuage some of the concerns about the media being targeted by the powerful? As it is, any conviction for

the erstwhile crime of defamation would still need to be established beyond reasonable doubt, and the impugned publication of defamatory matter would have to be unlawful and intentional, and not rescued by the special defences of truth and public benefit, fair comment and privilege (see Milton 526-528). Are such safeguards to the unjustified limitation of the right to freedom of expression insufficient?

Shannon Hoctor
Stellenbosch University

Matters of Interest to Magistrates

OUR COURTS ARE IN TROUBLE – WILL THE NEW CHIEF JUSTICE BE ABLE TO FIX THEM?

The late Ms. Altecia Kortje visited the Bellville Magistrate's Court around midday on 8 June 2020 to apply for a protection order. Her name was placed on the list of complainants in the Protection Order Section of the Bellville Magistrate's Court. She was attended to by a clerk at the section, who gave her an application form and explained to her the Protection Order application process.

Ms. Kortje left the Bellville Magistrates' Court about an hour after her arrival without completing and submitting the application form for further help. Her explanation to Ms. Dolf, who had been accompanying her to court on the day, was that she did not expect that it would be a long process to obtain the Protection Order, and there was too much to write.

Ms. Kortje was allegedly murdered by her former partner on 12 June 2020. She never did get that protection order.

In the subsequent report by the Public Protector on systemic administrative deficiencies in the processing of GBV cases in the South African justice system, the Public Protector reports a range of serious issues around the processing of GBV cases in virtually all courts that were surveyed. Many of these were also reported by magistrates in the research done by the DGRU.

There is poor maintenance of existing infrastructure, which is evidenced by cracked walls, leaking roofs, unhygienic ablution facilities, exposed electrical wiring, broken ceilings, doors and windows. There are incomplete building projects at some Magistrate's Courts such as at Mamelodi, which has been incomplete for over a period of 10 years, Pretoria, which burned down in 2010 and has not yet been repaired, and Ga-Rankuwa, where the project to repair and renovate was registered with the DPWI more than 10 years ago but never commenced. Even some of the recently renovated courts such as Palm Ridge and Umbumbulu have structural defects in the form of cracked walls and roof leaks.

The majority of the courts do not have proper filing systems and spaces. The report details inadequate office equipment such as malfunctioning telephone lines, switchboard and air conditioners, persistent network problems, broken photocopiers, and shared computers. Certain courts, like those in Mamelodi, Ga-Rankuwa, and Vereeniging, lack waiting places, forcing people to utilise parking lots or open spaces, exposing them to the elements. In certain courts, such Tseki and Tsheseng in the Free State, there is a lack of electricity and water. Most courts lack enough filing cabinets and workspaces. Files kept in police cells at Ga-Rankuwa or strewn on the floors of Mamelodi, Pretoria, Palm Ridge, Vereeniging, Johannesburg, and Bellville Courts serve as evidence of this.

In the background, there are clerks issuing documents, finding files, and trying to keep the Integrated Case Management System (ICMS) up to date. Some courts lack an operational ICMS and cases have to be manually entered. Due to network issues, the ICMS is frequently unavailable or operates very slowly, as seen, for instance, at the Magistrates Courts in Umlazi, Umbumbulu, Mamelodi, Mzumbe, and Ndwendwe.

The process of applying for and receiving temporary protection orders, which are necessary to support victims of domestic abuse, lacks regular deadlines. Certain courts handle protection order cases every day, while other courts reserve one day of the week to handle protection order applications. This is against the Domestic Violence Act's section 5(1), which mandates that the court consider applications as soon as is reasonably possible. It also prejudices the victims and applicants by potentially exposing them to additional violence or death if protection order applications are not promptly handled.
So, who is responsible? The intractable difficulty in dealing with these particular problems in the justice system is that there are all of these many role players. If you go into a court room, it is tempting to assume that the magistrate has all the power, and

therefore is in charge of everything. They do, of course, have significant power as a judicial officer, but in their courtroom you may also see a Legal Aid South Africa lawyer, a prosecutor from the NPA, and a court orderly. These people are actually all part of different organisations and report to different employers.

Then there is the court manager, who is responsible for the court functioning, like trying to get the CCTV system working for the cases involving minors, while also trying to find a space for those piles of court records that the system generates. Out in front are security, and of course, they are the first port of call. Add to the mix that its actually Public Works who repair court buildings, as they are government buildings, and you can see the problem. In higher courts, the Office of the Chief Justice manages the courts, but must still engage with the Department of Justice and Public Works.

Practically speaking, there are strong signs that the Department of Justice, the Office of Chief Justice, and the Department of Public Works, as the governing triumvirate, are not doing a good job of supporting the courts. South African judges surveyed for the DGRU's 2022 State of the Judiciary report listed a variety of difficulties they faced. The most common was a lack of digital and online resources, which was followed by the poor condition of court building infrastructure and—perhaps most notably—complaints about OCJ staff's lack of responsiveness and communication with the courts. The OCJ was characterised as "another tier of administration which frustrates rather than assists" by one respondent.

These concerns were further borne out when Justice Mandisa Maya was interviewed by the JSC in 2022 for her current position of Deputy Chief Justice. Justice Maya spoke from a position of experience as a judicial leader, having served as Deputy President and then President of the Supreme Court of Appeal, and been a candidate for the position of Chief Justice earlier in 2022. In her interview, Justice Maya spoke candidly about the administrative and infrastructural challenges facing the courts. She highlighted failures by the OCJ to 'do its part' to deal with longstanding issues affecting the SCA registrar's office, as well as unreliable internet access and the lack of a working telephone system. She repeated these same concerns in her interview by the JSC in 2024 and indicated that she believes that these problems require an overhaul of judicial governance.

Her argument is that judicial officers should play a much bigger role in maintaining the courts. She proposes institutional independence for judges. The relationship between personal/individual independence and institutional independence is such that, though judicial officers may be free to operate independently and to deliver judgments in accordance with the law, their ability to do so may be constrained by the resources they have. Therefore, it is argued, the extent to which the judiciary has control over its resources and is able to determine policy and strategic priorities, and allocate funds to pursue these, is crucial. It has been argued that the effective judicial resolution of disputes requires the institutional independence of the courts.

That would probably involve strengthening the Office of the Chief Justice (OCJ), which despite its name, is actually the equivalent of a government department for the judiciary, and not the Chief Justice's personal office. The Constitution makes no reference of the OCJ. One may have anticipated that the OCJ's existence would be formally established, as the Constitutional Seventeenth Amendment Act of 2012 also came after the OCJ's founding. The Office of the Chief Justice (OCJ) was established as a national department on 23 August 2010. A striking feature of the OCJ's establishment is that it was created via proclamation – there was and still is no dedicated legislation establishing and demarcating its role. As a result, the life of the OCJ is less certain and less stable than it might be.

The mission, authority, composition, and purview of the OCJ are not set forth in any fundamental laws. This kind of thing should have been included in the Superior Courts Act, which was passed a few years after the OCJ was established. The administration of the judicial functions of all the courts, including governance issues, over which the Chief Justice exercises responsibility, is one of the Act's goals.

For the system to work, all these parts need to be working seamlessly. We have a new Parliament and a new Chief Justice coming. They have many issues to fix, but the role of the courts, and the rule of law are central to any functioning state. The Public Protector has made findings and requires the Department of Justice, the police, and the Department of Social Development to embark on remedial action. One of those orders is to submit to the Public Protector a detailed project plan for the construction, renovation, or procurement of all courts identified in the audit with clear dates, turnaround times, targets and deliverables indicating how buildings and ICT will be upgraded, and the procurement plan for the furniture and office equipment. The project plan should include the short and medium to long-term interventions for the various courts.

When a young woman like Ms. Kortje comes to the court, she needs to be seen and assisted quickly and in the right way. This will only happen if the parts of the system work together seamlessly.

(The above post was posted on the *Judges Matter* blog on 25 June 2024)

A Last Thought

"Sexual harassment is an extremely sensitive topic, particularly in the workplace. It is a complete abuse of power and does severe physical, mental, and career damage to the victim. Studies by the International Bar Association and judiciary prove that it is pervasive in the legal profession. Studies by the Institute for African Women in Law and judiciary expert Dr Tabeth Masengu prove that it is a structural limitation to the career advancement of women within the judiciary.

In this case, as is common in similar cases, there are huge power imbalances between the complainant, a judges' secretary, and the alleged perpetrator, a judge president. By treating this case differently from other judicial misconduct cases in the last 10 years, the male-dominated JSC reinforces these power imbalances.

It is now extremely urgent that the judiciary adopts a comprehensive Anti-Sexual Harassment Policy to guide what the JSC should do in sexual harassment cases. The policy would help victims not feel that their complaints are trivialised and would protect them from reprisals.

An anti-sexual harassment policy would foster in our courts an environment that is intolerant of all forms sexual harassment, tackles abuse of power, and eliminates the power imbalances. It would help create a welcoming and inclusive environment and affirm the dignity of all court users. It would maintain our courts as places of safety. Zondo promised such a policy at his chief justice interview in February 2022. Two years later it is still not done.

Sexual harassment is the one of the big taboo topics in the legal profession and the judiciary. The constitution demands the transformation of the judiciary to make it broadly representative of South Africa's population. The constitution also affirms everyone's inherent dignity and requires that everyone receive equal protection and benefit of the law. Transformation will remain elusive if sexual harassment, one of the structural barriers to the advancement of women in the judiciary, is not tackled head-on. We need judicial leaders to act to eliminate sexual harassment as an abuse of power and protect the dignity of everyone in our courts."

From the *Judges Matter* blog dated 20 June 2024