e-MANTSHI

A KZNJETCOM Newsletter

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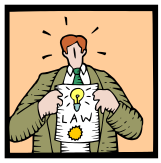
Welcome to the two hundredth and twenty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP.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

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

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



New Legislation

1. The Rules Board for Courts of Law has, under section 6 of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), with the approval of the Minister of Justice and Constitutional Development, amended the rules regulating the conduct of the proceedings of the magistrates' courts of South Africa. The notice to this effect was published in Government Gazette no 53149 dated 15 August 2025. Part I, II and III of Table A of Annexure 2 has been amended as well as Part I of Table B of Annexure 2, Part II of Table B of Annexure 2 and Part II of Table B of Annexure 2 and Part II of Table C of Annexure 2. The amendments come into operation on the 19th of September 2025.

The amendment can be accessed here:
https://www.gov.za/sites/default/files/gcis_document/202508/53149rg11865gon6505.pdf

Recent Court Cases

1. S v Lenting and Others (CC08/2018) [2025] ZAWCHC 341 (11 August 2025)

Evidence – *Hearsay* – Warning statement – Accused who passed away – Admissibility of extra-curial statements – Status as a co-accused at time of making statement – Did not qualify as an executive statement under common law exception – Did not advance a common purpose but instead recounted past events – Statement taken in violation of constitutional right to legal representation – Requested a lawyer before giving statement but was denied one – Application dismissed – Law of Evidence Amendment Act 45 of 1988, s 3(1)(c).

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2025/341.html

2. S v Meyering (Review) (2/25) [2025] ZAWCHC 333 (5 August 2025)

Criminal procedural law. Death of an Accused after pleading, during an adjournment and before conviction. Procedure to be applied to terminate charges and cancel extant arrest warrants. Principle that death terminates prosecution and criminal liability is personal, grounded in the common law. No direct statutory or caselaw in point. Review Courts approach to judicial review and remittal to referring Court in a special review.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAWCHC/2025/333.html

From The Legal Journals

Spies, A

Beyond punishment: Context and correctional supervision as a restorative sentence — An analysis of *S v Mphahlele*

2025 SALJ 439

Abstract
This note examines correctional supervision as a sentencing option for serious crimes by analysing the Mphahlele judgment, and explores whether correctional supervision incorporates (or should incorporate) elements of restorative justice. It critically assesses whether such an approach risks distorting traditional restorative justice principles and underscores the need to engage with justice as a transformative process — one that shifts the focus from individualised notions of crime and punishment to the structural inequalities that underpin criminal behaviour. Additionally, the note adopts a feminist perspective to interrogate the role of gender in sentencing, considering in particular whether identifying the accused as a mother and primary caregiver in Mphahlele reinforces harmful stereotypes.
Sentencing – restorative justice and transformative justice – correctional supervision – gendered stereotypes

Barratt, A

The voluntary assumption of an enforceable support duty — Comments on the ruling in *NM v BM*

2025 SALJ 260

Abstract
In the case of NM v BM *[2024] ZAWCHC 254, a stepfather had been providing generous financial support to his stepchildren while he was married to the children's mother. The court was not satisfied with the stepfather's abrupt discontinuation of financial support immediately upon splitting from the children's mother. The note*

explores whether an order requiring continued maintenance from a stepparent could be supported by the Supreme Court of Appeal ruling in Road Accident Fund v Mohohlo *2018 (2) SA 65 (SCA), which provided that an enforceable duty of financial support could be created through the voluntary assumption of such a duty in a familial setting.*
Maintenance obligations – stepchildren – blended families – voluntary assumption of support duties

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

Contributions from the Law School

***S v Mtshali*: Procedural Irregularities and Unacceptable Judicial Conduct**

Abstract
This case centers on Mr. Nhlakanipho Mtshali, who appeared before an additional magistrate in Newcastle, KwaZulu-Natal. Mr. Mtshali faced a charge of stealing two tins of shoe polish, valued at an alleged R170, from a Spar store in Madadeni. Crucially, Mr. Mtshali was unrepresented during his appearance. He pleaded guilty to the charge, and his plea was accepted in terms of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act), leading to his conviction. This article examines the High Court review judgment in S v Nhlakanipho Mtshali, a case arising from a petty theft conviction in the Newcastle Magistrate's Court. The review, conducted by the KwaZulu-Natal Division of the High Court, addressed multiple procedural irregularities, including an excessive alternative sentence and an unlawful firearm disqualification. Most notably, the judgment condemned the additional magistrate's aggressive and demeaning conduct toward the unrepresented accused, highlighting a breach of constitutional principles of dignity and judicial decorum. Through a detailed analysis of the statutory framework and judicial commentary, the article explores the implications of the case for sentencing practices, the treatment of vulnerable accused persons, and the accountability of judicial officers. The review underscores the critical role of judicial oversight in safeguarding fairness and integrity within South Africa's criminal justice system.

Keywords: Judicial review, judicial conduct, unrepresented accused, section 112(1)(a) Criminal Procedure Act, Firearms Control Act, dignity, South Africa.

1. Introduction

The case of *S v Mtshali*[1] came before the High Court on automatic review, presided over by Mossop J and E. Bezuidenhout J. Mr. Nhlakanipho Mtshali (the accused) was charged with stealing two tins of shoe polish, valued at approximately R170, from a Spar store in Madadeni. He appeared unrepresented before an additional magistrate in Newcastle, KwaZulu-Natal. Mr. Mtshali pleaded guilty to the charge, and his plea was accepted under section 112(1)(a) of the Criminal Procedure Act 51 of 1977 (the Act)[2], leading to his conviction.

The High Court first addressed the conviction itself. Mr. Mtshali had freely admitted to shoplifting, and his plea was tendered under section 112(1)(a) of the Act. The High Court found that, based on all available information, Mr. Mtshali intended to plead guilty and was indeed guilty of shoplifting, therefore his conviction was in order.[3]

However, the court emphasized a significant caution regarding the application of section 112(1)(a), particularly for unrepresented accused persons. Referencing the "sage words" of Olsen J in *S v Gumede and others*[4], the judgment reiterated that "There appears to be little scope for exercising a discretion in favour of proceeding under s 112(1)(a) when the accused is unrepresented". Justice Mossop suggested that this section should be "cautiously applied" in such circumstances to uphold the criminal justice system's goal of ensuring "only truly guilty people are convicted".[5]

Next, the High Court scrutinized the sentence imposed, specifically highlighting an "incongruence" between the R500 fine and the alternative six-month period of imprisonment. The High Court found the alternative sentence of imprisonment "too harsh" when compared to the fine. It underscored the importance of ensuring that the two sentences - the fine and its alternative imprisonment - are in proper balance, especially since fines are not always paid, leading to the alternative term of imprisonment being served. The court determined that given the application of section 112(1)(a), the appropriate alternative sentence should have been 30 days of incarceration, not six months. Consequently, the sentence was altered to reflect this change. The High Court acknowledged the possibility that Mr. Mtshali might already be

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[1] *S v Mtshali* 2025 (1) SACR 665 (KZP).

[2] S 112(1)(a) of the Act reads as follows:

> "Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea -
> (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and—
> (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or
> (ii) deal with the accused otherwise in accordance with law;"

[3] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 1.

[4] *S v Gumede and others* [2020 (1) SACR 644 (KZP).

[5] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 2.

incarcerated for not paying the initial fine, which prompted the judgment to be prepared "in some haste".[6]

2. High Court Review and Findings

Section 103(1) of the Firearms Control Act 60 of 2000[7] lists 15 specific offenses that trigger a court's determination on firearm unfitness. The High Court pointed out that theft is not one of these offenses. While "dishonesty" is mentioned in section 103(1)(g), it only applies "in the context of a term of imprisonment without the option of a fine". Since Mr. Mtshali's sentence was imposed with the option of a fine under section 112(1)(a) of the Act, section 103(1)(g) could not apply. The High Court found that no other subsection in the FCA entitled the magistrate to disqualify Mr. Mtshali from possessing a firearm. The judgment critically noted that "Spending even a second in thought would have led to the realisation that s 103(1)(g) could not apply". As a result, this declaration was set aside.

In light of these findings, the High Court issued the following order[8]:

(i) Mr. Mtshali's conviction was confirmed.

(ii) The initial sentence was set aside and replaced with a fine of R500 or, in default of payment, 30 days imprisonment.

(iii) Mr. Mtshali's disqualification from possessing a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000 was set aside.

(iv) If Mr. Mtshali had not paid the initial fine and had consequently been incarcerated for six months, the Registrar of the court was directed to

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[6] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 3.

[7] Section 103(1) of the Firearms Control Act reads as follows:

> "(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –
> (a) the unlawful possession of a firearm or ammunition;
> (b) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;
> (c) an offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;
> (d) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;
> (e) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;
> (f) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;
> (g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;
> (h) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
> (i) any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);
> (j) any offence involving the abuse of alcohol or drugs;
> (k) any offence involving dealing in drugs;
> (l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
> (m) any offence in terms of the Explosives Act, 1956 (Act 26 of 1956), in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
> (n) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping, or child stealing; or
> (o) any conspiracy, incitement or attempt to commit an offence referred to above."

[8] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 5.

immediately inform the Department of Correctional Services of the sentence variation.

(v) A copy of this judgment is to be sent by the Registrar of this court to the magistrate of the Newcastle Magistrate's Court for his consideration.

3. Unacceptable Judicial Conduct

Perhaps the most profoundly disturbing aspect of the review, and one that "cannot be cured by a reviewing court," was the "aggressive attitude manifested by the additional magistrate" during the proceedings. Despite the brevity of the hearing due to Mr. Mtshali's guilty plea, the High Court identified "several disturbing moments" of unacceptable behaviour.

The first incident occurred before Mr. Mtshali even pleaded. The magistrate sternly told Mr. Mtshali to "*stop what you are doing*" and warned him, "*You're not a makoti here,*"[9] a term referring to a bride or newly-wed woman who traditionally avoids eye contact and acts coyly. The magistrate then demanded, "*You look straight into me when I'm talking to you... who is the fool now? Is it me or you? It is me. So stop that.*".[10]

A "more unpalatable outburst" followed later, occurring during sentencing. The magistrate aggressively questioned Mr. Mtshali, "*Do you want to know how I knew that everything you were saying you were lying to me, because I am not a sangoma and I'm not a prophet?*". The magistrate then added, "*It is your poor acting. You act like you are, you are shy when you are looking down and speaking softly. I can tell that you are the worst of the worst*.".[11]

The High Court unequivocally stated that a judicial officer is expected to behave courteously to all people appearing before them. Citing *Khuboni v S*[12]*,* a case in which Justice Mossop himself sat, the judgment emphasized that "It is implicit in our constitutional dispensation that all persons have inherent human dignity. This includes those who come before a court, be they witnesses or accused persons. Such persons are to be treated with dignity by a judicial officer. All are human beings and are entitled to be treated politely and respectfully".[13]

The High Court condemned the magistrate's language, calling it "unjustified and intemperate," particularly as Mr. Mtshali was charged with mere shoplifting, not a "crime against humanity".[14] It is difficult to contemplate that Mr. Mtshali was "the worst of the worst" when the crime was shoplifting (to the value of R170), and he pleaded guilty. The judgment concluded that such conduct, where a magistrate demonstrates power by "gratuitously insulting accused persons who have no means of replying to, or refuting, the comments made from the bench," is "redolent of a form of judicial bullying".[15] The High Court firmly declared that "This form of conduct is unbecoming of

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[9] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 9.
[10] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 9.
[11] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 10.
[12] *Khuboni v S* 2022 (1) SACR 4700 (KZP).
[13] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 9.
[14] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 12.
[15] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 12.

a civilised legal system, should not be permitted to take root and must be stopped now".[16]

The case of *S v Mtshali* revealed several systemic issues within the justice system, particularly concerning judicial conduct, sentencing practices, and the treatment of unrepresented accused persons. Key systemic issues highlighted include:

(i) Unacceptable Judicial Conduct and Abuse of Power:

The additional magistrate displayed an "aggressive attitude" and acted in an "unacceptable manner". This included repeatedly interrupting and gratuitously insulting Mr. Mtshali, accusing him of lying, describing his "poor acting," and calling him "the worst of the worst". Such behaviour is considered "unjustified and intemperate" and "redolent of a form of judicial bullying". This reveals a systemic risk of judicial officers abusing their "considerable power" by "gratuitously insulting accused persons who have no means of replying to, or refuting, the comments made from the bench". It fundamentally undermines the principle that all persons appearing before a court are entitled to be treated with dignity, politeness, and respect, as is implicit in the constitutional dispensation. The court noted that this form of conduct "cannot be cured by a reviewing court," indicating a deeper systemic problem that mere legal correction cannot address.

(ii) Incorrect Application and Misunderstanding of Sentencing Laws:

Incongruence of Fine and Imprisonment: The imposed sentence of a R500 fine or six months imprisonment in default was deemed "too harsh" and out of balance with the fine, particularly given the application of s 112(1)(a) of the Criminal Procedure Act. The proper alternative period of incarceration should have been 30 days, not six months. This indicates a systemic issue with magistrates potentially failing to ensure proportionate alternative sentences.

(iii) Improper Disqualification from Firearm Possession:

The magistrate wrongly declared Mr. Mtshali unfit to possess a firearm under s 103(1) of the Firearms Control Act. Theft is not an offence listed in s 103(1), and while dishonesty is mentioned, it only applies when a sentence is "imprisonment without the option of a fine," which was not the case here due to the s 112(1)(a) plea. The judgment explicitly states that "spending even a second in thought would have led to the realisation that s 103(1)(g) could not apply" and "no order of disqualification could, or should, have been ordered". This points to a significant lack of due diligence or a misunderstanding of specific statutory provisions by the judicial officer.

(iii) Vulnerability of Unrepresented Accused:

Mr. Mtshali was unrepresented when he appeared before the additional magistrate. The court cautioned that section 112(1)(a) of the Act "should be cautiously applied where the accused person is unrepresented". This highlights a systemic vulnerability within the criminal justice system where individuals without legal counsel may face heightened risks of procedural missteps or adverse treatment, as seen with the magistrate's aggressive questioning and sentencing errors.

(iv) Competency and Training of Judicial Officers:

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[16] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 12.

The fact that the additional magistrate was only appointed on July 1, 2024, and the case was subject to review due to her relatively short tenure (less than seven years as a magistrate), suggests potential systemic issues related to the training, experience, or initial oversight of newly appointed judicial officers. The multiple errors in law application and the severe behavioural issues raise questions about the initial preparedness and ongoing development of judicial personnel.

(v) Need for Oversight and Accountability for Judicial Conduct:

While the review process successfully corrected the legal errors in the conviction and sentence, the judgment emphasized that the magistrate's "profoundly disturbing" aggressive attitude "cannot be cured by a reviewing court". The court directed that a copy of the judgment be sent to the magistrate of the Newcastle Magistrate's Court "for his consideration". This indicates a systemic need for mechanisms to address and deter judicial misconduct that goes beyond correcting legal errors, ensuring accountability for behaviour that undermines the integrity and civility of the court system.

4. Automatic Trigger for Review (Systemic Safeguard)

The case was automatically subject to review by the High Court because the additional magistrate who presided over Mr. Mtshali's case was appointed only on 1 July 2024, and had not held the substantive rank of magistrate for a period of seven years. This statutory provision (s 302(1)(a) of the Criminal Procedure Act)[17] ensures that cases handled by less experienced judicial officers are subject to scrutiny, acting as a built-in safeguard to catch errors and potential abuses of power early on.

The reviewing court found an "incongruence" between the R500 fine and the alternative six-month period of imprisonment.[18] It determined that this alternative sentence was "too harsh" and out of balance, especially since Mr. Mtshali had pleaded guilty in terms of section 112(1)(a) of the Criminal Procedure Act, which specifically deals with minor offences not meriting imprisonment without the option of a fine.

Judicial oversight corrected this error, reducing the alternative period of incarceration from six months to 30 days. This direct intervention safeguarded Mr. Mtshali's right to proportionate punishment and prevented him from serving an excessively long period of imprisonment in default of payment. The urgency with which the judgment was prepared (in case Mr. Mtshali was already incarcerated for the longer period) further underscores the protective role of the review.

This highlights the judicial oversight's role in recognizing systemic vulnerabilities. By drawing attention to the heightened risk of procedural missteps or adverse outcomes

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[17] Section 302(1) of the Act reads as follows:

> "Any sentence imposed by a magistrate's court - (i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children's Act, 2005 (Act 32 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;
> …
> shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction."

[18] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 4.

for unrepresented individuals, the review indirectly advocates for greater protection of their rights and ensuring that "only truly guilty people are convicted".[19]

In essence, the review mechanism, triggered by the magistrate's relative inexperience, acted as a crucial safety net. It not only corrected specific legal errors that would have unduly prejudiced Mr. Mtshali but also served as a platform to publicly address and condemn judicial conduct that undermines the dignity and fundamental rights of accused persons within the justice system.

The High Court's findings in *S v Mtshali* regarding the additional magistrate's conduct and the subsequent review process have significant implications for legal practice, particularly concerning the standards of judicial decorum, the treatment of accused persons, and the broader pursuit of fairness within the justice system.

5. Systemic Issues and Legal Implications

While legal errors could be "cured" by the review, the High Court also addressed the "profoundly disturbing" and "aggressive attitude" manifested by the additional magistrate. The magistrate repeatedly interrupted, insulted, and demeaned Mr. Mtshali, calling him a "*fool*,"[20] accusing him of "*lying*," having "*poor acting*," and being "*the worst of the worst*".[21]

The court strongly condemned the additional magistrate's "aggressive attitude", deeming it "unjustified and intemperate" and "redolent of a form of judicial bullying". This sends a clear message that while magistrates are "endowed with considerable power," this power should not be used to "gratuitously insult accused persons who have no means of replying to, or refuting, the comments made from the bench". For legal practitioners, this reinforces the ethical duty to stand against judicial misconduct and to protect their clients from such behaviour, even when challenging a judicial officer can be difficult. It also suggests that the legal community has a role in fostering an environment where such conduct "should not be permitted to take root and must be stopped now".[22]

The review strongly condemned this behaviour, emphasising that a judicial officer must behave courteously and that all persons before a court are entitled to be treated with "dignity, politeness and respect". It explicitly described the conduct as "unjustified and intemperate" and "redolent of a form of judicial bullying" that "should not be permitted to take root and must be stopped now". The review unequivocally states that judicial officers are "expected to behave courteously to all people appearing before him or her". It stresses that "all persons have inherent human dignity" and "are entitled to be treated politely and respectfully". This finding serves as a stark reminder to all judicial officers that their conduct must uphold the dignity of the court and every individual within it, irrespective of the charges faced. Legal practitioners, including prosecutors and defense attorneys, are reminded that such standards are fundamental and should be observed and, where appropriate, advocated for.

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[19] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 4.
[20] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 9.
[21] [21] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 10.
[22] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 12.

Though a reviewing court cannot "cure" such conduct directly, its role in highlighting and condemning it, and directing that a copy of the judgment be sent to the magistrate of the Newcastle Magistrate's Court "for his consideration," serves as a vital form of accountability and systemic oversight. This aims to deter future misconduct and reinforce the fundamental right to dignified treatment within the justice system.[23]

The review explicitly noted that Mr. Mtshali was unrepresented when he appeared before the additional magistrate. The court cautioned that section 112(1)(a) of the Act "should be cautiously applied where the accused person is unrepresented," citing previous judgments. The fact that Mr. Mtshali was unrepresented when subjected to the magistrate's conduct and sentencing errors highlights a critical vulnerability. The court's caution that section 112(1)(a) of the Criminal Procedure Act "should be cautiously applied where the accused person is unrepresented" places an onus on all legal practitioners, particularly prosecutors and judicial officers, to exercise extreme care and ensure fairness for those without legal counsel. This implies a need for thorough explanations of rights, pleas, and potential consequences, going beyond mere procedural compliance, to ensure that "only truly guilty people are convicted". Mr. Mtshali was unrepresented. The High Court's caution about applying section 112(1)(a) to unrepresented accused persons implicitly supports the need for legal services and fair process, a point also raised in the discussion about bail reform and legal representation for vulnerable accused.

6. Conclusion

The High Court's review in *S v Mtshali* serves as a compelling reminder of the judiciary's dual responsibility: to uphold the rule of law with procedural precision, and to embody the constitutional values of dignity, fairness, and respect. While the legal errors in sentencing and firearm disqualification were significant and rightly corrected, it is the court's unequivocal condemnation of the Magistrate's conduct that resonates most powerfully. The judgment affirms that judicial authority must never be exercised in a manner that humiliates or dehumanizes those who appear before the bench, regardless of the nature of the offence.

This case illustrates the systemic vulnerabilities faced by unrepresented accused persons and the critical role of judicial oversight in safeguarding their rights. It also underscores the importance of proportionality in sentencing and the need for judicial officers to apply statutory provisions with care and competence. The High Court's intervention not only rectified the injustices suffered by Mr. Mtshali but also set a clear precedent against judicial misconduct, reinforcing the imperative that the courtroom must remain a space of justice, not intimidation.

Ultimately, *S v Mtshali* is more than a review of a petty theft conviction - it is a reaffirmation of the constitutional promise that all individuals, regardless of status or circumstance, are entitled to be treated with dignity and fairness in the eyes of the law. In essence, the *Mtshali* case serves as a poignant illustration of the practical challenges in ensuring a just and dignified criminal justice system, even for relatively minor

[23] *S v Mtshali* 2025 (1) SACR 665 (KZP) para 8.

offences, when judicial discretion is poorly exercised and fundamental principles of human dignity are disregarded.

Suhayfa Bhamjee
School of Law, University of KwaZulu-Natal

Matters of Interest to Magistrates

The right to legal representation at the state's expense at the pre-trial stage for arrested and detained persons

The right to legal representation in criminal proceedings is universally acclaimed. In South Africa (SA), courts have, for over a century, recognised the right to consult a lawyer during a pre-trial procedure. The right to be informed about legal representation is closely connected with the presumption of innocence and the right to remain silent (*S v Zuma and Others* 1995 (2) SA 642 (CC) at para 33). South Africa, as a constitutional democracy, relies on the Constitution for the rights of people suspected of having committed an offence. Thus, the point of departure in all criminal matters is the Constitution and its subordinate laws. The Constitution gives every arrested, detained and accused person the right to have access to a legal representative. The Constitution further gives the right to have access to a legal representative at the State's expense, where substantial injustice would result should such a right be denied. The article explores the meaning of s 35(2)(*c*) of the Constitution and presupposes circumstances where such a right might apply during the pre-trial stages of criminal proceedings.

Constitutional right to legal representation

The right to consult a legal representative predates the Constitution (Constitution of the Republic of SA, 1996) and was described as a common-law right closely related to the right to access the courts (*Mandela v Minister of Prisons* 1983 (1) SA 938 (A) at 957D). However, the right to legal representation at the State's expense for the indigent was not recognised at common law (*S v Rudman and Another*; *S v Mthwana* 1992 (1) SA 343 (A)). The Constitution has extended the right to legal representation to the indigent, at the State's expense, where substantial injustice would result. However, a detained

person can only have access to legal representation at the State's expense when a substantial injustice would result. Section 35(2) of the Constitution entails rights of detained persons. Section 35(2)(*b*) entails that the detainee must be informed of the right to consult a legal representative. This section does not require more than asking for a detainee to be informed of the right. Section 35(2)(*b*) has, over the years, become less problematic as it has become standard procedure with many law enforcement officers to inform a suspect of such right. Section 35(2)(*c*) gives detainees the right to a legal practitioner at the State's expense if a substantial injustice would result should the detainee not afford to pay for a legal representative. This article's basis lies in the wording of s 35(2)(*c*) of the Constitution. The wording of s 35(2)(*c*) presupposes that the right is qualified and that only when substantial injustice would result should a legal practitioner be made available to the detainee.

The right to legal representation at the State's expense

The rights mentioned in s 35(2)(*c*) of the Constitution, at the State's expense, can be realised through Legal Aid SA's network of legal practitioners (*Ehrlich v CEO Legal Aid Board and Another* [2005] JOL 15757 (E) at para 2). Legal Aid SA is established under the Legal Aid South Africa Act 39 of 2014. The Legal Aid Act provides for the establishment of a Board that would regulate the organisation's functions. The organisation receives funding from the government and is allocated a budget annually. Courts have acknowledged that the demand for Legal Aid services is disproportionate to the budget received by the organisation, making its services' availability limited (see, for example, *Ehrlich* at para 11). The Constitution echoes the courts' reasoning on the limited accessibility of Legal Aid SA's legal representation. Due to limited resources, Legal Aid SA can only provide legal representation to qualifying detainees where substantial injustice would result. An aggrieved party not satisfied with Legal Aid SA's decision can approach the courts to review the decision. Legal Aid SA's limited resources, however, do not excuse the organisation from its constitutional obligation. There should be designated legal practitioners assigned to every police station, ready to assist arrested persons and detainees should they need their services. The constitutional obligation does not begin at the accused's first court appearance. The Constitution also protects the rights of suspects, arrestees and detainees. Legal Aid SA's refusal to assist an arrested or detained person does not extinguish the constitutional right of access to legal representation at the State's expense where substantial injustice will result (*S v Du Toit and Others (2)* 2005 (2) SACR 411 (T) at 417G-H).

Aspects to consider when deciding to provide legal assistance

The Constitution does not elaborate on the circumstances that would constitute substantial injustice. Nor do the provisions of s 35 hint at what the term may refer to. The Constitution further does not provide information on who determines whether a substantial injustice would result in the given circumstances. However, the term is not confined to s 35 of the Constitution. Section 4(1)(*f*) of the Legal Aid Act entails that the Legal Aid Board has the power to provide legal services where substantial injustice, as

envisaged by the Constitution, would result. Considering how courts have interpreted the constitutional provisions relating to legal representation at the State's expense, a few guidelines can be deduced from the courts' reasoning on the factors to be considered when determining whether substantial injustice would result.

There is no established practice guiding on who must decide on the issue and on the factors to be considered when making the determination. For the reason of a lack of apparent guidance, this article identifies factors that should be considered when establishing whether refusing access to a legal practitioner at the State's expense would result in substantial injustice. The article proposes several issues to consider. The first issue to consider is the nature of the offence. Criminal offences differ in magnitude, and the accompanying probable sanctions vary. The disparity in the various offences is also acknowledged throughout the Criminal Procedure Act 51 of 1977, where several schedules regulate the differentiation between alleged offences in the several stages of criminal proceedings. A serious offence may also call for a severe punishment during sentencing. Thus, a legal practitioner may be needed at the pre-trial stage to advise the accused person appropriately. The court in *S v Vermaas; S v Du Plessis* 1995 (7) BCLR 851 (CC) mentioned the ramifications of the case and their complexity or simplicity of the matter as one of the factors to be considered when determining whether substantial injustice would result. Even before the advent of the Constitution, courts have recognised the seriousness of the offence as a factor to consider when determining whether a person should have access to legal representation (*S v Radebe; S v Mbonani* 1988 (1) SA 191 (T) at 196G).

Legal representation may also be needed where the accused person is to make informal admissions in the various pre-trial stages. Where an accused is to make a pointing out or a confession in terms of s 218 of the Criminal Procedure Act, such a suspect should not only be promptly informed of the right to a legal representative at State's expense, but law enforcement officers must also facilitate the representative's availability. Informal admissions affect several constitutional rights (i.e. rights to remain silent and to be presumed innocent) of the person concerned, and the process involved must be followed with constitutional compliance. It is advisable that, even when the informal admission is done voluntarily and all other requirements have been met, a legal representative at the State's expense be made available to the suspect concerned. Absence of a legal representative can, in the circumstances, result in substantial injustice, especially to a suspect unfamiliar with the process. Making the legal representative available to consult with the detainee before an informal admission is made is beneficial for all the parties involved in a criminal trial. Should the admission's admissibility be challenged, for example, the State can present a better argument where the legal representative was made available to the subsequently accused person. Also, where the accused person sues the State and the law enforcement officers after alleging violation of his or her rights in the processes leading to his or her informal admission, the State can present an argument against such abuses in light of a legal practitioner having been present or consulted in the impugned process.

The other instance where substantial injustice would likely result is where law enforcement officers want to establish a detainee's bodily features and compare them with the available information collected during an investigation. Section 37 of the Criminal Procedure Act read with s 205 of the Constitution permits police officials to, among other things, take body prints, present a suspect an at identity parade, and take blood samples for purposes of an investigation. The court has held that ch 3 of the Criminal Procedure Act or a court order asking for compliance with the section does not violate the person's right against self-incrimination (see *Levack and Others v Regional Magistrate, Wynberg and Another* [2003] 1 All SA 22 (SCA)). At the State's expense, a legal practitioner should be made available to the detainee to ensure that the processes mentioned in ch 3 of the Criminal Procedure Act are adequately explained to the accused and to provide information regarding the consequences of such a process. The right to legal representation does not extend to every pre-trial investigation stage. A detainee, for example, does not have the right to legal representation when a photo parade is conducted. In all cases where the above scenarios arise, it must be recorded that legal representation at the State's expense was offered, and the suspect's response must also be recorded.

Conclusion

In the pre-trial stages, there are circumstances where it is more likely that substantial injustice would result if a suspect is not afforded legal representation. Such instances include where the matter is complex, and the suspect faces a severe sentence should he or she be convicted. However, the complexity of the matter alone does not always necessitate legal representation, especially where the suspect's cooperation or input is not required in the investigation. There are instances where legal representation at the State's expense should be made available to the suspect unless the suspect waives such right, even after the consequences of the process have been explained to the suspect. Such compelling circumstances necessitating legal representation at the State's expense include instances where the suspect will make informal admissions, such as pointing out and confessions. Law enforcement officers sometimes overlook the rights of arrested and detained persons and only come into the spotlight when the pre-trial process's constitutionality is challenged later in court. The Constitution requires that Legal Aid SA make legal representation available during pre-trial stages, and a plan is needed on how this constitutional mandate can be achieved.

Mahlubandile Ntontela L*LB (NMU) LLM (NMU) PGDip in Labour Law Practice (NMU) PGDip in Drafting and Interpretation of Contracts (UJ)* is a lecturer at Nelson Mandela University and a legal practitioner at the Nelson Mandela University Law Clinic.

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A Last Thought

Sexual Harassment Policy of the South African Judiciary – Explainer History and Context

Sexual harassment remains a deeply entrenched issue in the legal profession. While efforts by Chief Justice Maya began in 2023 to establish a formal sexual policy, a major turning point came earlier—in May 2019 – when the International Bar Association (IBA) released the "Us Too?" report, based on responses from nearly 7,000 legal professionals across 135 countries. The findings were stark: half of the women and a third of the men from the survey reported experiencing bullying, while one in three women and one in 14 men had faced sexual harassment.
The Democratic Governance and Rights Unit (DGRU) contributed significantly to understanding harassment within South Africa's judiciary. Their 2023 "Isidima" survey and its 2024 follow-up "Court Users Survey" revealed that nearly a quarter of magistrates had faced threats or physical harm related to their work, and 16% of female magistrates had either experienced sexual harassment or knew someone who had—often perpetrated by fellow magistrates.

The surveys also found that 13% of respondents had encountered sexual harassment in the past two years, with women twice as likely to report such incidents.

The surveys also found that 13% of respondents had encountered sexual harassment in the past two years, with women twice as likely to report such incidents. Among court users, 2% reported experiencing or knowing someone who experienced harassment, rising to 3% among female users. Alarmingly, many users were also aware of physical assaults occurring in court settings.

> *These findings highlight the urgent need for a comprehensive sexual harassment policy within the judiciary.*

These findings highlight the urgent need for a comprehensive sexual harassment policy within the judiciary. We commend Chief Justice Maya for her commitment to addressing gender-based violence and sexual harassment. Her leadership, alongside the contributions of the heads of Courts, has been instrumental in shaping this critical policy.

The Sexual Harassment Policy of the South African Judiciary Purpose and Scope of the Policy

The policy applies to judicial officers and covers all professional settings, including courtrooms, travel, online interactions, and social events. Its core principles include confidentiality, accountability, non-discrimination, fairness, and protection against retaliation. It also acknowledges that false reporting is rare, though bad-faith complaints may be disciplined.

Sexual harassment is defined as an "unwelcome verbal, non-verbal, or physical conduct of a sexual nature".

Sexual harassment is defined as an "*unwelcome verbal, non-verbal, or physical conduct of a sexual nature*". Furthermore, related behaviours such as intimidation and victimisation are also covered.

Legal Framework and Reporting

Sexual harassment violates the Code of Judicial Conduct and may also constitute a criminal offence under South African law. Judicial officers have a legal duty to report offences against vulnerable individuals. Victims or witnesses can choose from three reporting options:

- anonymous reports,
- informal resolutions such as mediation or an apology,
- or formal complaints that trigger disciplinary action at the JSC, Magistrates Commission or the Department of Justice.

The policy also provides for the establishment of the Gender Desk (GDOCJ), which serves as the central hub for receiving reports, offering support, and coordinating with oversight bodies like the JSC and the Magistrates Commission. The desk provides for mandatory education and training on sexual harassment and monitors systemic issues.

Disciplinary and Training Measures

Formal complaints are handled by the JSC or MC, with protective measures such as confidentiality and virtual testimony available. Investigations may involve experts, and tribunals are convened as needed. All judicial officers are required to undergo annual anti-harassment training, with SAJEI supporting these efforts. Heads of courts are responsible for ensuring awareness campaigns and training are implemented.

Implementation and Impact

All stakeholders must submit implementation plans within six months of the policy's launch. These plans should outline training, resource allocation, and designated liaisons. The implementation plan will be ongoing and will streamline harassment processes, provide emotional and legal support, and educate staff on professional conduct.

We hope that this will foster a safer, more respectful judicial working environment.

(The above post was posted on the Judges Matter website on 22 August 2025)