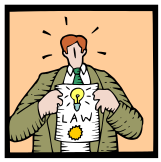
e-MANTSHI

A KZNJETCOM Newsletter

November 2025: Issue 224

Welcome to the two hundredth and twenty fourth 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. Government Notice No. R. 6752 of Government Gazette No. 53572 dated 24 October 2025 is hereby corrected by the substitution for item 14 in Notice No. R. 6752 of the following item: "Amendment of rule 55 of the Rules"

The correction notice can be accessed here:
https://www.gov.za/documents/notices/rules-board-courts-law-act-rules-conduct-proceedings-magistrate%E2%80%99s-courts-south-7

2. The Minister of Transport has withdrawn the Regulations published on 31 October 2025 under the 1998 Administrative Adjudication of Road Traffic Offences (AARTO) Act 46 of 1998. The notice to this effect was published in Government Gazette no.53743 dated 28 November 2025.

The notice to this effect can be accessed here:

https://www.gov.za/documents/notices/administrative-adjudication-road-traffic-offences-amendment-act-commencement-1

3. The Older Persons Amendment Act, Act 1 of 2025 was published in Government Gazette no 53641 dated 6 November 2025.The purpose of the amendments are to,insert new definitions;to insert new provisions relating to the monitoring and evaluation of all services to olderpersons and for the removal of olderpersons to a temporary safecare without a court order; to tighten up the existing implementation and compliance measures; to effect some textual amendments for greater clarity;and to provide formatters connected therewith. , and takes effect on a date to be fixed by the President by Proclamation in the Gazette.

The amendment Act can be accessed here:
https://www.gov.za/documents/acts/older-persons-amendment-act-1-2025-english-sesotho-06-nov-2025

Recent Court Cases

1. S v Mutsinze and Others (Review) (19/2025; 20/2025; 21/2025; 23/2025; 24/2025; 27/2025) [2025] ZAKZDHC 69 (24 October 2025)

The magistrate committed a reviewable irregularity because s112(1)(a)(i) of the Criminal Procedure Act limits the sentencing jurisdiction of a court to the imposition of 'any competent sentence, other than imprisonment or any other form of detention without the option of a fine' (emphasis added). The reason for the sentencing limitation lies in the fact that a court does not question an accused person who tenders a plea under s112(1)(a) to ensure that they properly admit all the elements of the offence, but convicts the accused simply on their plea. The sentence limitation is thus an important safeguard.

This Judgment can be accessed here:
https://www.saflii.org/za/cases/ZAKZDHC/2025/69.html

2. S v A.S.M (Review) (R06/25025; LC173/2025; 01/2025) [2025] ZAMPMBHC 111 (17 November 2025)

It appears the Magistrate did not read the psychiatric report handed over to him by the Public Prosecutor, although it formed part of the record placed before him. If he did, he would have realised that the Form he was asked to sign by the Public Prosecutor differed from the one requested in the psychiatric report. It also appears that he did not exercise the discretion expected of him as a judicial officer, as everything submitted to him by the Public Prosecutor was the State's application. He was still required to exercise his judicial discretion bestowed on him by section 77(6)(a)(ii) of the Criminal Procedure Act.

This judgment can be accessed here:
https://www.saflii.org/za/cases/ZAMPMBHC/2025/111.html

From The Legal Journals

Le Roux-Bouwer, J

The admissibility of evidence arising during a disciplinary hearing at a criminal trial: *Liebenberg v The State* [2023] ZACC 33

Journal for Juridical Science 2025:50(2):154-168

Abstract
On 10 October 2023, the Constitutional Court passed judgement on the interesting question relating to the admissibility of evidence at a criminal trial. An employee testified during her disciplinary hearing called by her employer. The issue to be decided was whether evidence stemming from her testimony was subsequently admissible at her criminal hearing. The pressing question to be decided by the court was whether the admissibility of her testimony would impact her section 35 constitutional rights. In this contribution, we present a detailed analysis of the Liebenberg decision.

This article can be accessed here:
https://journals.ufs.ac.za/index.php/jjs/article/view/8171/5559

Scott, J

Private defence or necessity? The quaint case of the absconding taxi driver: *Monareng v Majories Trading Enterprise CC 2025 (3) SA 574 (GP)*

2025 TSAR 887

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

Contributions from the Law School

What role could compassion play in the functioning of the law?

Surely, if compassion is about care for others, it ought to be part of the fabric of law interwoven into society? Some would have grave doubts. The law is founded on rational deliberation, involving predictability, safeguarding against arbitrary decisions, and the supremacy of law over subjective whim. These are all significant concerns in the application of the law. If compassion is about feeling and emotion, would this not bring a measure of unpredictability and uncertainty into the law? Aren't feelings irredeemably at odds with reason? There are a few strong arguments why the law should not to be used to enforce compassion.

First, the law's enforcement mechanisms are typically aimed at preventing harmful behaviour, rather than requiring good behaviour. We aren't typically required to live up to the highest standards, just the standards of the reasonable person. We aren't, as a rule, required to assist those in need.

Second, the law focuses primarily on issues that are susceptible to proof. Behaviour which is not susceptible to proof, as for example whether a nurse providing treatment to a patient is doing so compassionately, cannot be determined by a court.

And even if these two points could be satisfied, isn't the concept of compassion simply too vague to satisfy the requirements of the rule of law?

But this begs the question: should compassion *not* be considered in the law?
Compassion has been defined by Cuff et al as 'the feeling that arises in witnessing another's suffering and that motivates a subsequent desire to help' ('Empathy: A review of the concept' 2016 *Emotion Review* 144 145). Compassion therefore includes a call to action. If we accept this, we can distinguish compassion from pity. Pity involves feeling sorry for someone, but is more spectator-like than compassion, allowing the maintenance of a safe emotional distance. We can also distinguish compassion from empathy, which can be understood as the cognitive ability and process of understanding what another may be experiencing and the situation in which they are experiencing it, which need not involve experiencing emotion. On this understanding, empathy is clearly a desirable quality of a good judicial officer. Sympathy, by comparison, includes a level of evaluation of the experience of the other person, along with the cognitive evaluation involved in empathy.
Even if compassion may also be described as both cognitive and evaluative in nature, it also involves feeling. And it is precisely this emotion which underlies the suspicion relating to the use of compassion in the rule of law context. The standard view would be that empathy is to be encouraged, but emotional resonance with an individual, where one is connecting with that person's distress, is another matter entirely.

Why? Because being regarded as contrary to the law's rationality and impartiality, compassion therefore cannot properly resolve disputes between competing viewpoints, and is an unreliable indicator of who ought to prevail in a legal dispute. However, could compassion possibly help us to understand what is at stake for others, to see the rights of others from the inside, to take to heart the interests others have in their legal claims?
Herring takes a relational approach to compassion in the legal context (for a full discussion, see Herring *Caring and the Law* (2013)). He argues for what he calls compassionate relational care, that is, not merely a feeling (compassion) but a putting of compassion into practice (care). By making reference to compassion he indicates that it is not simply the task of care that is being promoted, but *that* act done in a compassionate way, in a drawing alongside and recognizing the fellow humanity of the individual. And the relational aspect acknowledges that such compassion and care should flow each way, with each party open to care for and to receive the care and compassion of the other.
Herring contends that the law must take compassionate relational care seriously. Much of law is based on the assumption that we are competent, detached, independent people who are entitled to have our self-determination and autonomy fiercely protected, and legal rights and rules operate to draw these boundaries around us to protect us from interference. However, in reality we are ignorant in important ways, vulnerable, interdependent individuals, whose strength and reality are not in our autonomy, but in our relationships with others. Therefore, Herring argues, we should adopt an ethics of care approach, which is based on a norm of interlocking mutually dependent

relationships, rather than an individualized vision of rights (Herring 'Compassion, ethics of care and legal rights' 2017 *International Journal of Law in Context* 158 162).

Herring supports the ethic of care approach by reasoning that compassionate caring relationships are essential to human well-being. In the absence of such caring relationships, the burden that would fall onto the state would be impossible to bear. Moreover, if care is important, then emotions must also be – because emotions are central to good care, and compassionate caring relationships, the law needs to be aware of emotional complexity (163).

How then are we to include care and compassion into the law?
We need to take account of the influence of the law outside the courtroom (164). Law is primarily aimed at those who don't come to court, and so the law should be involved in creating an environment in which compassionate caring relationships flourish, just as contract law plays a role in creating an environment in which contracts are respected.
Next, Herring contends, we need to rethink the notion of rights (164). Though the traditional approach requires the analysis of the rights of the individual in each case, people are relational, which means their interests are tied up with the interests of others. In caring and dependency relationships, the interests of those involved become intermingled.
The traditional legal method of setting out the claims of each party does not match how people understand their personal lives, and may be thought to be inconsistent with compassionate caring relationships (165). The individualist, autonomy-focused conception of people associated with rights doesn't align with the ethics-of-care perspective, but rights can still provide the tools for the framework to enable safe relationships to develop and flourish: thus the individual is both separate and situated within relationships of care, attachments and interdependency.

Therefore the starting point should be the necessity for care and promoting caring relationships (166). These generate responsibilities. Only then do rights come as tools to enable people to perform their responsibilities and enable relationships to be genuinely caring. This goes to the central values of the law, in that especially in cases which involve people in intimate caring relationships, the value of relational promotion is key. In particular, the introduction of a relational element into the rights-based approach is of crucial importance in difficult cases where the rights of individuals clash. Herring thus argues that we should rethink the notion of rights and their role, as responsibilities are more important than rights in an ethics of care perspective. Here the focus is on obligations rather than rights, in other words, how can the law enable people to fulfil their responsibilities? In this regard rights exist to enable people to carry out their responsibilities.

It hardly need be said that this approach clashes with the classic liberal perspective which holds that one is 'born free' and that any responsibilities are in some sense

voluntarily assumed. The starting point of the ethics of care approach however is that people are relational, and they are born into relationships that carry responsibilities with them (166-167).
This approach not only proposes a rethinking of rights, but also a rethinking of the operation of the notion of best interests (167). In determining what is in an individual's best interests – usually done individualistically – the court will typically pursue the best interests of Y, regardless of the impact on the interests of others. However, for example, courts can find ways of protecting the interests of carers and parents while adhering to the best interests of the child principle. It is argued that Y's interests are in fact best promoted when they are cared for in healthy relationships, which would require acting in the person's best interests while heeding the carer's interests and the integrity of the family as a whole.

In applying this compassionate relational care approach to the law, the importance of communicative law should be highlighted: abstract rules should be rejected, and instead it is necessary to start with the context and concrete reality of particular situations. There is a need for the judge to understand the position the individual before the court finds themselves in (167).

Compassion in the law is typically associated with sentencing, and with restorative justice, although as indicated there are a range of applications across the branches of the law, with the relational perspective potentially being of most assistance in informing its use in the private law context. In South Africa it has emerged into jurisprudence as one of the kaleidoscope of meanings associated with the concept of *ubuntu*. The dictum of Mokgoro J from *S v Makwanyane* 1995 (3) SA 391 (CC) para 308 has been cited on a number of occasions, not least in the jurisprudence of the Constitutional Court itself (such as *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) para 71):
'Generally, *ubuntu* translates as "humaneness". In its most fundamental sense it translates as personhood and "morality"…While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity…'

The relational perspective was recently highlighted in the context of the right to adequate housing in the separate concurring judgment of Bilchitz AJ in the Constitutional Court case of *Commando v City of Cape Town* 2025 (3) SA 1 (CC) para 174:
'It is important here to stress the social dimension of human beings. This dimension is emphasised by aphorisms such as 'a person is a person through other people' which gives expression to the African philosophy of *Ubuntu* and places emphasis on the fact that individuals are shaped through their relations with others. Developing a home-grown approach to socioeconomic rights, means that we must recognise, front and centre, the relationships between people, the community ties and networks within

which they are embedded. The deliberate dislocation of individuals and families from their communities thus constitutes a serious harm to their sense of self, wellbeing and thus dignity.'

These concerns echo Sachs J's words in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 37, that the Constitutional imperative (and that of PIE, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998) is to 'infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.'

In conclusion: what role can compassion play in the operation of the law? Compassion is not merely a cognitive exercise, but involves emotion, and more particularly compels action. Judicial officers can demonstrate compassion by being attuned to the possibility of the suffering or distress of those who come before them, thus recognising the common humanity and dignity of all, and by acting to try to alleviate such distress, within the bounds of their role. Both the words used in court and the manner in which they are used can transform the quality and effectiveness of court interactions with court users.

The compassion-based approach would incorporate in equality the recognition that all have a common susceptibility to misfortune and would restrict personal autonomy to the extent that it is necessary to take into account the relational context in which a right is exercised. As Herring argues, the core legal concepts of rights and best interests should be understood in a way that fosters compassionate caring relationships. This is consistent with the pronouncements of the Constitutional Court.

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CONDITIO SINE QUA NON: A FRESH PERSPECTIVE.

1. INTRODUCTION

I was confronted recently with a set of interesting facts, as stipulated hereunder. I seek to articulate the legal concerns which, in my view, may present real obstacles in proving a charge of culpable homicide beyond reasonable doubt. Moreover, I sincerely hope that prosecutors who read eMantshi may perhaps be influenced positively to ensure that any prosecutorial decision is firmly grounded in principle.

This contribution focuses exclusively on the issue whether, on the facts and in light of established criminal law principles, the omission by a police official to seize a firearm can or should be the basis of criminal liability for culpable homicide.

2. FACTUAL MATRIX

Ms A (the deceased) obtained an interim protection order against her former partner, Mr B in terms of the Domestic Violence Act 116 of 1998. The order expressly directed the SAPS to seize the firearm used to threaten her. The order was served by the accused, who enquired from Mr B about the firearm. She was told that the firearm had supposedly been handed to a gun shop. No steps were taken to verify this or to locate or seize it.

Thirty-three days later, Mr B fatally shot Ms A with what appeared to have been the same firearm - and then he committed suicide.

3. THE ISSUE.

The question to be answered is, firstly whether the omission by a police officer to seize a firearm can be regarded as negligence in a criminal sense; and, secondly whether the non-seizure of the firearm can causally be linked, in law and in fact, to the death of deceased; so as to justify a charge of culpable homicide.

4. LEGAL FRAMEWORK.

4.1 The well-known decisions of S v Russell 1967 (3) SA 739 (N) and S v Mokgethi 1990 (1) SA 32 (A) make it clear that an omission attracts criminal liability, only if:

4.1.1 there exists a legal duty to act;
4.1.2 the omission is unlawful;
4.1.3 factual causation is proved (*conditio sine qua non*);
4.1.4 legal causation is proved (adequate cause/fairness test);
4.1.5 the required fault element (negligence) is present.

4.2 In the matter under discussion, the legal duty upon the accused to have acted, is beyond dispute. The court ordered the seizure of Mr B's firearm (the one that was involved), in so many words. Section 8 of the Domestic Violence Act obliges the SAPS to give full effect to such an order. The SAPS has a constitutional duty under s 205(3) to protect the public. In addition, it was held in Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC) as quoted again in Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) that police officers bear highlighted responsibilities where risks of gender-based and domestic violence are established.

Thus, the failure to seize the firearm certainly constitutes unlawfulness.

4.3 In S v Williams and Others 1998 (2) SACR 191 (SCA) it was held that: "The mere failure to discharge a legal duty connoted neither negligence nor intent." This principle is central to this discourse. Even when a legal duty exists and more so, when it is breached, criminal negligence is not presumed. The State must still prove that a reasonable officer would have foreseen the death and taken steps to prevent it. In assessing culpable homicide, one therefore cannot assume that the omission equals negligence or that negligence equals causation.

5. CAUSATION.

The factual causation enquiry necessitates the question as to what would have happened if the accused did not omit seizing the firearm. The burning question to be answered is: If the accused in fact seized the firearm as ordered, would the fatal result nevertheless have ensued? If the answer is no, then the omission is a factual cause of the result. If the answer is yes, then the omission is *not* a factual cause.

"Conditio sine qua non" literally means "a condition without which not", and the expression refers to an episode without which the prohibited result would not have occurred. Applied to the present matter, the accused's failure to seize the firearm satisfies the *conditio sine qua non* test in the narrow factual sense. Had s/he seized the firearm it would not have been possible for Mr B to kill the deceased <u>with that particular weapon</u>. In this limited regard, the omission can be said to constitute a factual cause of the death. See Snyman, Criminal Law, 7th Edition at 69

Now, it may well be argued that, if one surmises that Ms A could still have been killed by Mr B, <u>without using the same firearm</u>, it may amount to engaging in inappropriate

speculation. Hence, I have to clarify that the law requires a degree of hypothetical enquiry when determining causation.

The *conditio sine qua non* test necessarily involves “thinking the act or omission away” and asking what would probably have happened otherwise. This exercise is, by its very nature, speculative to an extent; the decision-maker must consider potential alternative outcomes and assess their likelihood. In this sense, speculation is not only permissible but unavoidable, because causation in law requires one to evaluate hypothetical scenarios in order to determine whether the omission materially contributed to the final result. In this regard the SCA framed it as follows in Van Duivenboden (supra) para 24 - 25: “In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an (sic) hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; *aliter,* (differently) if it would not have ensued.' [25] There are conceptual hurdles to be crossed when reasoning along those lines for, once the conduct that actually occurred is mentally eliminated and replaced by hypothetical conduct, questions will immediately arise as to the extent to which consequential events would have been influenced by the changed circumstances. Inherent in that form of reasoning is thus considerable scope for speculation, which can only broaden as the distance between the wrongful conduct and its alleged effect increases. No doubt a stage will be reached at which the distance between cause and effect is so great that the connection will become altogether too tenuous…”

Thus, as emphasised by Nugent JA in Van Duivenboden (supra) - the further one projects a hypothetical chain of events into the future, the more speculative the inquiry becomes. And this is exactly the difficulty here!

5.2 So, what about legal causation (adequate cause)? The core question is whether it was probable, in the ordinary course of human experience, that, if the firearm had been seized, Mr B would not have killed the deceased? The evidence does not permit such a conclusion.

In *casu*, the following factors posed real obstacles. I simply mention the accompanying facts, so as to give impetus to my conclusion. Firstly, there was a time lapse of 33 days after the omission by the accused to seize the gun. As the SCA warns, the longer the temporal distance, the more attenuated the causal chain becomes. Secondly, Mr B faced prior protection orders, applied for by other women. This strongly suggests a pattern of obsessive and violent behaviour. Such a person may have been determined to kill, regardless of the means available.

5.3 In order for the state to succeed with prosecution under these circumstances, they must exclude the reasonable possibility that, had his firearm been confiscated, he could have killed her by other means. I am of the considered view that, given the above, I cannot comprehend how the state could confidently argue that the failure to seize the firearm was an adequate cause of the death of Ms A.

6. ONUS OF PROOF AND INFERENCES.

Where direct evidence of causation is absent, the State must rely on inference. "The proved facts should 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". R v Blom 1939 AD 188 at 203.

The inference that is sought to be drawn must be the only reasonable one. Consequently, having in mind the "beyond reasonable doubt" standard, the following competing inferences may not be disregarded and are unavoidable:-

Firstly, that Mr B would have killed the deceased anyway; regardless of the firearm;
Secondly, if two reasonable inferences exist, the one favouring the accused must prevail;

7. FAIRNESS AND CONSEQUENCES

At the end of the day the state, in similar fashion as a court, cannot simply take an armchair attitude in blindly going ahead with prosecutions. A culpable homicide charge against this police officer (a captain) will have enormous consequences - reputationally, professionally, and financially - even if he/she is ultimately acquitted. Resultantly, they should ensure that they don't decide to prosecute, merely because a prosecution is possible on paper, but not necessarily justified by evidence capable of sustaining a conviction. Such demeanour is not indicative of insensitivity to the family of the deceased who will understandably argue that the death of their relative is due to the inadequacy of the police. A real lawyer's responsibility goes far beyond these parameters. It is their duty to apply the law, both with compassion and fairness; and in this instance they can only do so if they once again research the legality of prosecutions. In the instance of this accused they should concentrate on a charge of common law contempt of court, rather than the more serious accusation of culpable homicide.

Louis Radyn
Retired Senior Magistrate
Assessor of the High Court/KZN

A Last Thought

From *The Cure at Troy*

Human beings suffer,
They torture one another,
They get hurt and get hard.
No poem or play or song
Can fully right a wrong
Inflicted and endured
…
History says, don't hope
On this side of the grave.
But then, once in a lifetime
The longed-for tidal wave
Of justice can rise up,
And hope and history rhyme.
So hope for a great sea-change
On the far side of revenge.
Believe that further shore
Is reachable from here.
Believe in miracle
And cures and healing wells.
Call miracle self-healing:
The utter, self-revealing
Double-take of feeling.
If there's fire on the mountain
Or lightning and storm
And a god speaks from the sky
That means someone is hearing
The outcry and the birth-cry
of new life at its term.

Seamus Heaney