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SAJEI
South African Judicial Education Institute

Enhancing Judicial Excellence

JUDICIAL EDUCATION NEWSLETTER

15TH EDITION

10 YEARS
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- Mr Bradley Swanepoel
- Ms Hangwelani Maringa

Editorial Enquiries
Telephone: +27 104932621
Email: mmokgetle@judiciary.org.za

Deisgn By:
Mr Thomas Maseko

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FROM THE DESK OF THE CEO

Dr Gomolemo Moshoeu
CEO of SAJEI

On behalf of SAJEI, I would like to welcome the new members of the Newsletter Editorial Committee, they are Mr Ian Cox (Regional Magistrate) and Ms Chetna Singh (District Magistrate). We are looking forward to their fruitful contributions.

In the 14th edition, I indicated that SAJEI is implementing the 2022/23 Annual Training schedule. To date, 87 courses have been conducted, thank you for your attendance. SAJEI is continuing to offer training in a hybrid format, that is, virtual training through ZOOM platform and in-person. SAJEI encourages you to participate in virtual sessions. Please make use of whatever device you have available, namely, mobile phones, laptops and tablets and stay informed. If you are stationed in a remote area but can connect with mobile phones, then virtual training is a way to go. Recently, more than 100 Magistrates attended virtual training on GBV amendments.

It is with pleasure to announce that Chief Magistrates attended the third Judicial Dialogue in October 2022. They are indeed visionary leaders when it comes to judicial training. Let us commend them for leading by example. Some of the topics covered in the dialogue were judicial accountability and judicial independence which was delivered by Judge President Selby Mbenenge. Social media and the judiciary was done by Judge President Cagney Musi. SAJEI appreciates the contributions of the Heads of Court.

In 2018, SAJEI launched a training programme named Human Rights week. The programme takes place annually during the first week of December. This year, it is taking place from the 30th November 2022 to 02 December 2022. Some of the topics that will be discussed are the impact of COVID-19 on the judiciary, trafficking in persons, unpacking judicial stereotypes in GBV cases, Judicial Wellness, and so on. We will be joined by Acting Deputy President Thoba Poyo-Dlwati, Judge Vuyo Nomcembu as well as Justice Effie Owuor, a renowned jurist from Kenya. We are looking forward to your participation. SAJEI has incorporated Judicial Wellness in most of its in-person training programmes, which includes debriefing and physical activity.

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MESSAGE FROM THE EDITOR-IN-CHIEF

Ms Jinx Bhoola
Editor-In-Chief

The President of the Republic of South Africa, President Cyril Ramaphosa has signed into law legislation aimed at addressing and strengthening efforts to put an end to gender-based violence. The stance taken in these amended legislations is focused on the victims rights and whereby various opportunities are created to combat this pandemic of gender-based violence (GBV).

The three pieces of legislation are welcomed. The purpose of the Criminal and Related Matters Amendment Act, 2021 (Act 12 of 2021) is to amend the Magistrates' Courts Act, 1944, to provide for the appointment of intermediaries. The Amendment Act provides for the giving of evidence through intermediaries in proceedings other than criminal proceedings. The intention behind this is that in gender-based violence, the victim is usually afraid to face her perpetrator. The use of the intermediary will prevent victims from testifying in open court where they are overwhelmed with fear and possible intimidation by their perpetrators.

What is important to note is that the intermediaries are now sworn in by the Heads of Court regarding their relevant qualifications and competency. A comprehensive application for a certificate of competency to appear as an intermediary is made to the Judicial Head, who will thereafter interrogate the applicants regarding their qualifications and comptence before providing them with certificates to act as intermediaries. They will be expected to take an oath which is designed specifically for intermediaries, which is cncluded in the Act.

The impact is that in GBV matters the victim can now testify and give evidence through the audiovisual link in proceedings other than criminal proceedings. This will mean that witnesses in the domestic violence, maintenance, harassment, older persons and civil matters in addition to criminal matters will have the luxury and benefit of the use of an intermediary in court proceedings, under certain conditions.

The Criminal Procedure Act, 1977, also regulates the granting, amendments and cancellation of bail. The bail amendments are also victim-centered. The legislator has adopted a firm stance on how to deal with bail applications involving gender-based violence. This is a clear indication of the balancing of the victim's rights with that of the perpetrator and encouraging Magistrates to provide value judgments which speaks to section 1 of the Constitution of the Republic of South Africa. We as the judiciary can play our part in minimizing the scourge by speaking through our judgments.

The time has come for quality judgments that addresses the valus in terms of our constitution. Judicial officers are encouraged to impose sentences that will deter the perpetrators. Let's apply our Judicial discretions and the rule of law without fear, favour or prejudice. Section 60(12) of the Act 12 of 2021 has been introduced to crub Domestic Violence. An article regarding this section can be found in this newsletter.

The Criminal Law Amendment Act, 1997, also regulates sentences in respect of offences that have been committed against vulnerable persons.

The purpose of the Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Act, 2021 (Act 13 of 2021) is to amend the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, by extending the ambit of the offence of incest, introducing a new offence of sexual intimidation, substituting the phrase "a person who is mentally disabled' 'or "persons who are mentally disabled" wherever the phrase appears with the phrase "a person with a mental disability" or "persons with mental disabilities." It further regulates the inclusion of particulars of persons in the National Register for Sex Offenders, extending the list of persons who are to be protected in terms of Chapter 6 of the Act. The Act extendes the list of persons who are entitled to submit applications to the Registrar of the National Register for Sex Offenders. The act also regulates the removal of particulars of persons from the National Register for Sex Offenders; and regulates the reporting duty of persons who are aware that sexual offences have been committed against persons who are vulnerable, and to provide for matters connected therewith.

The Domestic Violence Amendment Act, 2021 (Act 14 of 2021) is addressed by my fellow colleague and Judicial Educator, Tracey Bossert where she provides a synopsis of the amendments to the Domestic Violence Act, 1998, which relates to the amendment and insertion of certain definitions. She will address the provision for the manner in which acts of domestic violence and matters related thereto, must be dealt with and the regulation of protection orders in response to acts of domestic violence. Colleagues are urged to visit the website ***https://www.gov.za/GBV*** to keep abreast of GBV maters and the various resources that are available. Below is a list of useful numbers obtained from the website for Judicial Officers to have readily available.

Magistrates are urged to pay careful attention regarding such applications that are brought before them and scrutinize such applications with great circumspection.

USEFUL NUMBERS TO KEEP	
SAPS Emergency Services:	10111
Childline South Africa	Report child abuse to Childline South Africa's toll-free line: **0800 055 555.**
GBV Command Centre	Contact the 24-hour Gender Based Violence Command Centre toll-free number **0800 428 428** to report abuse
South African Police Service	Report all cases of rape, sexual assault or any form of violence to a local police station or call the toll-free Crime Stop number: **086 00 10111.**
Legal Aid South Africa	Call the toll-free Legal Aid Advice Line **0800 110 110** for free legal aid if you who cannot afford one
Commission for Gender Equality	Report Gender Discrimination and Abuse: **0800 007 709**
South African Human Rights Commission	Call **011 877 3600** to lodge a complaint about human rights violations.
Domestic violence Helpline:	Stop Women Abuse: 0800 150 150
AIDS Helpline	0800 012 322

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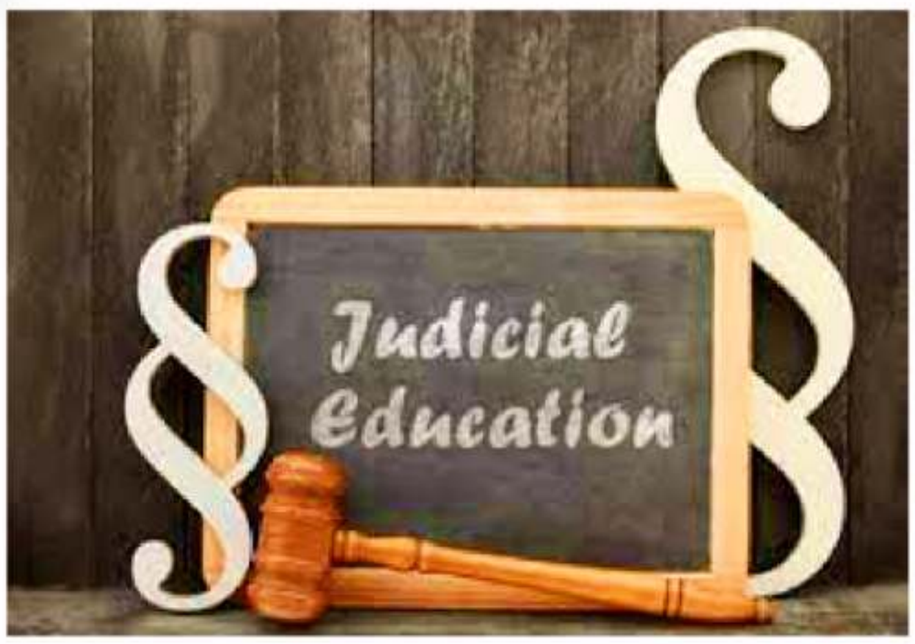
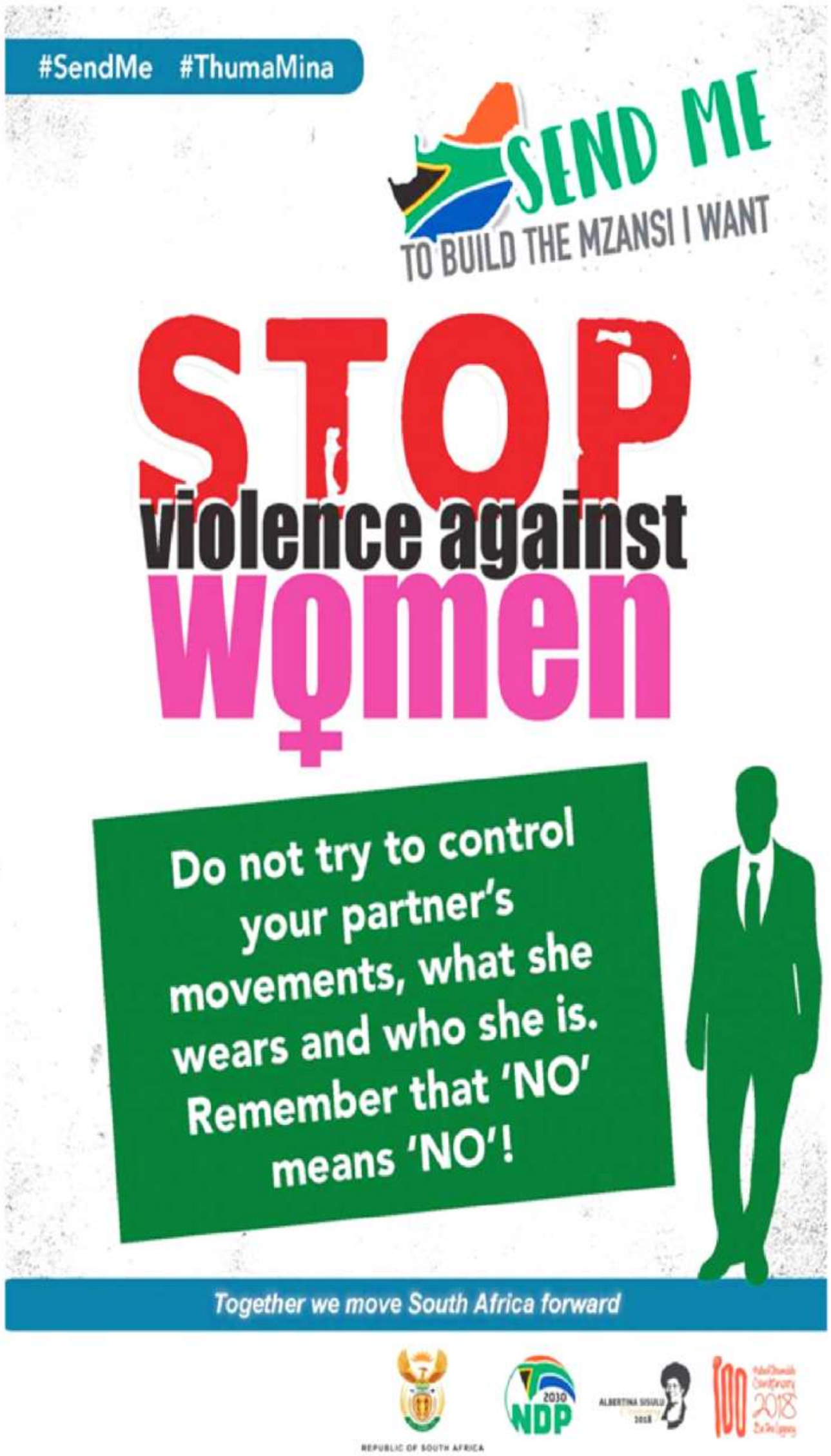


On the aspect of judicial education, SAJEI has a vibrant pool of facilitators who have displayed great skill and creativity in conducting training. We have recently held a workshop for facilitators on "Train the Trainer" and had a fantastic group of Magistrates who showed great initiative, confidence and courage. Be on the lookout for more of such trainings.

Colleagues, Judicial Education is extremely important, due to the ever-changing ligisaltrion and innovations. The changes in legislation is vast. We grapple with an amendment, only to find that it is amended again. SAJEI, tries its best to keep you informed of the latest in the ever-changing legislation, Case Law and literature. You are encouraged to share your views and options by writing articles for the newsletter. The facilitators from all the streams are thanked for their selfless commitment to Judicial Education.



SAJEI: ADVANCING THE FOURTH INDUSTRIAL REVOLUTION

SAJEI has embarked on paperless training. As a result of this initiative by the CEO, we have elected to provide you with very interesting links that will assist you in the execution of your duties as well as topics of general interest. Access the hyperlink and it will provide you with immediate access to the relevant journals, legislation, and articles.

Website links for South African Government

A guide to latest Legislation in South African Government;

Website links for further reading:

https://www.africa-legal.com : What's going on legally in the rest of Africa – commercially orientated, and specialized law interests;

https://www.polity.org.za : Offers free access to SA legislation;

https://www.withoutprejudice.co.za : interesting articles are drawn from all areas of practice including Civil Law, Black empowerment, and Banking law to name a few;

www.crimsa.ac.za : Promoting the relevance of criminology;

https://www.saripa.co.za : South African Restructuring and Insolvency Practitioners;

Riots in SA: what happens under a state of emergency declaration?;

Riots in SA: Social Media, riots and Consequences;

Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill

Act 1 of 2021: Recognition of Customary Marriages Amendment Act, 2021;

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You can also find very resourceful articles from the journals enlisted below:

Constitutional Court Review

African Disability Rights Yearbook

African Human Rights Law Journal

African Law Review

De Jure Law Journal

De Rebus Law Journal

Obiter

Potchefstroom Electronic Law Journal

SADC Law Journal

South Africa: Law, Democracy and Development Law Journal

Speculum Juris

4. MANAGEMENT OF JUDICIAL FUNCTIONS

The overall responsibility of managing judicial functions and for overseeing the implementation of these norms and standards vests in the Chief Justice as Head of the Judiciary in terms of section 165(6) of the Constitution and section 8(2) of the Superior Courts Act.

The co-ordination of the judicial functions of all Magistrates Courts falling within the jurisdiction of the Division of the High Court is the responsibility of the Judge President of that Division. The Heads of the various Courts will manage the judicial functions and ensure that all Judicial Officers perform their judicial functions efficiently. In the case of the Magistrates' Court, the Heads, who are the Regional Court Presidents and the Heads of the Administrative Regions will account for such management to the relevant Judge President. The President of the Supreme Court of Appeal as well as each Judge President will account to the Chief Justice for the management of his or her court and, in the case of Judges President, the management of the Magistrates' Courts falling within his or her jurisdiction. The Chief Justice may designate any Judge to assist him or her in his or her judicial or leadership functions.

The list of judicial functions envisaged in section 8(6) of the Superior Courts Act (as well as section 165 of the Constitution), which is not exhaustive, is set out below:

(i) Determination of sittings of the specific courts;

(ii) Assignment of Judicial Officers to sittings;

(iii) Assignment of cases and other judicial duties to Judicial Officers;

(iv) Determination of sitting schedules and places of sittings for Judicial Officers;

(v) Management of procedures to be adhered to in respect of:

(a) Case flow management;

(b) The finalisation of any matter before a Judicial Officer (including any outstanding judgment, decision or order);

(c) Recesses of Superior Courts.

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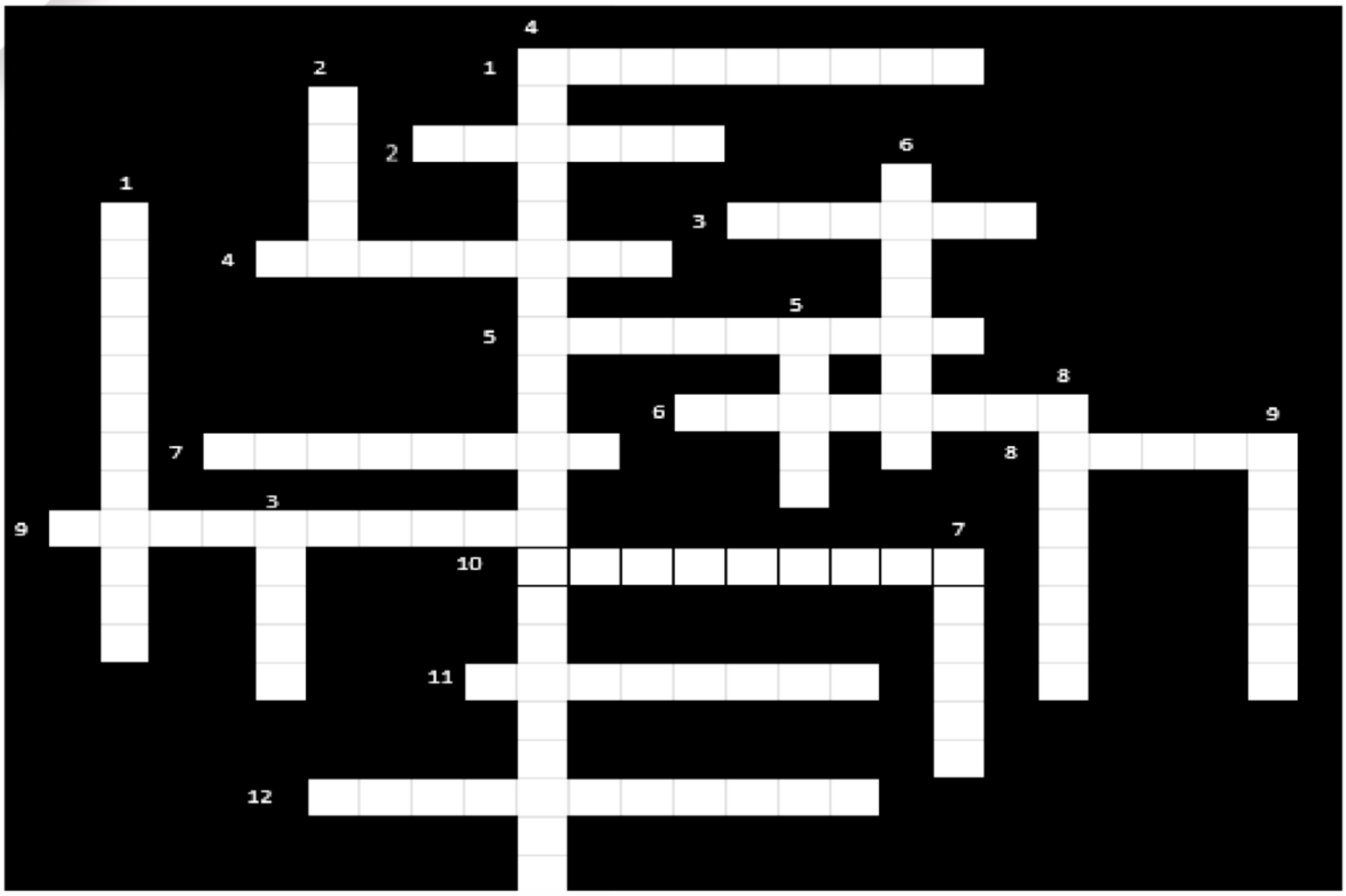
AUTOMATIC RENT INTERDICT AND ATTACHMENT OF PROPERTY IN SECURITY OF RENT



DOWN

1. Court establishes this in montary and territorally before hearing a matter
2. Function performed by Sheriff or Messenger
3. Place where legal cases are heard
4. Name of summons to attach movables for non-payment of rent
5. Court documents must not be hand written
6. Guarantee for damages requested by Court, litigant or Sheriff
7. A person who leases property
8. The offence of not complying with a court order
9. The action of taking away goods from plaintiff's property.

ACROSS

1. Evidence is set out in this document in application proceedings
2. Another word for trial proceedings
3. Type of application where Rules of Court are dispensed with
4. Free legal representation
5. List of movable goods made by the Sheriff at tenants premises
6. Common Law remedy for attachment of goods in support of rent
7. Type of goods subject to Landlords hypothec
8. Prounounced by a Court at the end of a hearing
9. An order of Court saizing specific property
10. Order prohibiting the tenant from removing movable goods
11. To disagree with and overturn a decision of a court
12. Process where affidavits are used to litigate

GRAPPLING WITH SECTION 60(12) OF THE CRIMINAL AND RELATED MATTERS AMENDMENT ACT 12 OF 2021 (AMENDMENT ACT)

Ms Jinx Bhoola
Senior Magistrate

Section 60 of the Criminal Procedure Act 51 of 1977 (CPA) deals with the issue of a bail application in Court. The Amendment Act brought about numerous amendments to the bail provisions in the CPA, regarding granting and cancellation of bail since its enactment on the 5th August 2022.

Section 4 (i) of the Amendment Act substitutes section 60 (12) of the CPA with following subsection:

"12(a) *The court may make the release of an accused on bail subject to conditions which, in the court's opinion, are in he interests of justice: Provided that the interests of justice should be interpreted to include, but not be limited to, the safety of any person against whom the offence in question has allegedly been committed.*

"(b) *If the court is satisfied that the interests of justice permit the release of an accused on bail as provided for in subsection (1), in respect of an offence that was allegedly committed by the accused against any person in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998, with the accused, and a protection order as contemplated in that Act has not been issued against the accused, the court must, after holding an enquiry, issue a protection order referred to in section 6 of that Act against the accused, where after the provisions of that Act shall apply."*

There appears to be different interpretations on this section. The question that arises is whether the bail application or the domestic violence should be considered interdict first?

What we are dealing with is the balancing of the accused's rights against that of the complainants. We are considering section 1 of the Constitution of the RSA. We are providing value judgments based on human dignity, the achievement of equality and the advancement of human rights and freedoms.

In interpreting any provision, one must consider the directive provision of the Constitution which is section 39. Section 35 of the Constitution deals with arrested, detained and accused persons.

The twist in section 60(12) and the intention of the legislator in my opinion, is to address the issue of gender-based violence and simultaneously balance the rights of the accused and the victim. It must be remembered that section 36 of the Constitution is not absolute. Both the acussed and the victims rights are subject to limitions in enshrined in Section 36.

It is against this backdrop that my interpretation of section 60(12) is enumerated as follows:

1. The granting of bail of the accused is discretionary.
2. If it is in the interest of justice for the accused to be admitted to bail, the court has a discretion to grant bail and set conditions.
3. When considering whether it is in the interest of justice to grant bail, amongst other factors, the court must consider the safety of the victim (complainant).
4. Once the court has established it is in the interest of justice for the accused to be released on bail, the court must then consider whether the offence allegedly committed by the accused against the complainant is an alleged offence involving a domestic relationship in accordance with the definition of a domestic relationship in terms of section 1 of the Domestic Violence Act, 1998.
5. This means section 60(12) will be applicable to any perons in a domestic relationship as defined in terms of the Domestic Violence Act, 1998. A 'domestic relationship' as defined in the said Act, includes any of the following definitions:

'(a) they are or were married to each other, including marriage according to any law, custom or religion;

(b) they (whether they are of the same or of the opposite sex) live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other;

(c) they are the parents of a child or are persons who have or had parental responsibility for that child (whether or not at the same time);

(d) they are family members related by consanguinity, affinity or adoption;

(e) they are or were in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or

(f) they share or recently shared the same residence;'

6. *The court, having established that a domestic relationship does exist between the accused the complainant, must then establish whether a protection order in terms of the Domestic Violence Act, 1998 has been issued against the accused or not.*
7. If there is a protection order in place then the Court may continue with the bail application and determine whether it is in the interest of justice for the accused to be released on bail or not.
8. However, if there has been no protection order issued against the accused, the Court MUST (peremptory), after holding an enquiry (in terms of the Domestic Violence Act), issue a protection order against the accused in accordance with section 6 of the Domestic Violence Act, 1998.

In my opinion, the bail application cannot be decided in isolation from the consideration of the protection order enquiry. In terms of section 60(12)(a) "the safety of any person against whom the offence in question has allegedly been committed", can only be considered and determined after the Domstic Violence enquiry is held, if there is no protection order in place. This should all be considered on the first appearance of the accused. The SAPS should ensure detailed statements are to be taken from complainants to expedite these matters.

The rights of both the accused and the victim must be considered in conjunction with each other and not in isolation. Once the protection order is issued, the safety of the victim has been considered as a factor to consider in the interest of justice and then the bail application is considered. Wether or/ not the bail is granted, is largerly dependent on the outcome of the Domestic violence inquiry.

The protection order enquiry must be considered and held by the Criminal Court and not transferred to the Domestic Violence Court. I do not believe that it is in the interest of justice for the bail to be considered and then for the matter to be transferred to the Domestic Violence Court.

In our next article we will address the practicalities of holding the enquiries and any challenges experienced. You are encouraged to share your opinions and views in this Newsletter by forwarding them to the SAJEI law researcher at the following email address:
BSwanepoel@judiciary.org.za

In my opinion this is Constitutional progressiveness by implementing gender justice and advancing the Bill of rights as enshrined in the Constitution.

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CHILD TRAFFICKING & THE BEST INTERESTS OF THE CHILD: DOES THE INTERCOUNTRY ADOPTION SYSTEM LEGITIMIZE CHILD TRAFFICKING?

Ms Teresa Moalusi
District Court Magistrate

The Children's Act 38 of 2005 ('the Act'), regulates all adoption processes. In terms of Section 229 of the Act, the purposes of adoptions are to:

'(a) protect and nurture children by providing safe, healthy environment with positive support; and

(b) promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.'

This article does not claim that our adoption system explicitly authorizes stealing, kidnapping, trafficking and buying of children. It will instead illustrate how inter-country adoptions are highly monitored to prevent these illegal acts and also look at the laws used to prevent trafficking of children through the adoption system. The article also aims to determine whether inter-country adoption is in the best interest of the child or not. It does this through discussions surrounding child laundering, what constitutes the best interests of the child and offers an alternative in measuring who would be the "best fit" to adopt a child.

CHILD TRAFFICKING AND INTER COUNTRY ADOPTIONS

Despite the need for adoption, adoption numbers have declined by 50%, from 2 840 to 1 448.

Only 1 165 adoptions took place, a further 30% drop from 2014. Up to 80% of those 1 165 adoptions in 2016 were probably family adoptions.

In the research conducted for the National Adoption Coalition of South Africa in 2016/2017, abandonment estimates have levelled at around 3 000 children a year. There was a real fear that African children are being sent overseas to become "slaves" to white adoptive parents. However,there are no statistics from the Department of Social Services (Blackie, 2019) to back this up.

In terms of Section 4(2) of the Prevention and Combating of Trafficking in Person Act 7 of 2013 ('the Trafficking Act'), :

'any person who –

(a) adopts a child, facilitate or secure through legal or illegal means; or

(b) concludes a forced marriage with another person within or across the borders of the Republic, for the purpose of exploitation of that child or other person in any form or manner, is guilty of an offence.'

Section 284 of the Children's Act criminalises trafficking in children. This criminal sanction is seen as a preventative measure.

The court in Minister of Social welfare and Population Development v Fitzpatrick and others 2000 (3) SA 422 (CC), reintroduced the concept of inter-country adoptions into the South African legal system. The Act addresses the concerns raised by the absence of a regulatory framework for inter-country adoptions by incorporating the provisions of the Hague Convention in chapter 16 of the Children's Act. Chapter 16 contains clear-cut provisions dealing with inter-country adoptions in South Africa and is seen as the medium through which the principles of The Hague Convention are applied in South Africa. Section 256(2) of the Children's Act states that The Hague Convention is to be applied in circumstances where there is any conflict between South African domestic law and The Hague Convention principles.

BEST INTEREST OF THE CHILD

The Hague Convention on Protection of Children and Co-operation in Respect of the Inter-country Adoptions of 1993 is the leading authority on inter-country adoptions and the best interest of the child standard. The basic intention of The Hague Convection is not to promote or increase inter-country adoptions, but to ensure that the adoption is done legally, openly, and that it is in the best interest of the child. The Hague Convention requires a Central Authority which should supervise the accredited bodies on inter-country adoptions. Section 260 of the Children's Act permits accredited bodies in South Africa to enter into adoption agreement with foreign adoption agencies under the supervision of the Central Authority. In terms of Section 261(5)(f) of the Children's Act the central authority must give its consent before an adoption can commence. The ethos of the Hague Convention is that adoptions should always focus on the child and finding him or her the best possible parent (Section 254 (c) of the Children's Act).

Reasonable consideration is given to the impact on the child once the child is removed, with specific reference to culture, language and race of the child. The Director-General is required to keep and maintain a register to be called the Register on Adoption Children and Prospective Adoptive Parents (RACAP). RACAP is not intended for the use of non-South Africans who wish to adopt a South African child. The purpose of Section 232(1) - (4) is to enable all local adoption possibilities to be exhausted before allowing non-citizens to adopt. Only if no local placement is practically possible or advisable, or if the specific child has formed strong and constructive emotional bonds with another caretaker, must a finding be made in terms of the best interest of the child standard (Hester Bosman-Sadie, 2013)

CONCLUSION

It is clear in South Africa that there is a national legislative framework in place which regulates inter-country adoptions in South Africa. Inter-country adoption remains a viable option for children in need of permanency who cannot find homes in their countries of origin. It must always be remembered when considering inter-country adoptions, the needs of the child is of paramount importance, which takes precedents over all other considerations

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Children's Act 38 of 2005

Hague Convention of Children and Co-operation in Respect of the Intercountry Adoption of 1993

Prevention and Combating of Trafficking in Person Act 7 of 2013

South African Constitution, 1996

The Minister of Social Welfare and Population Development V Fitzpatrick 2000 3 SA 422 (CC)

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A GATE AJAR FOR BIGAMOUS MARRIAGES

Mr Tebogo Mokgetle
District Court Magistrate

INTRODUCTION

This article intends to discuss the possibility of bigamous marriages within the existing South African legal framework; and what can be done to remedy this situation.

DEFINITION OF BIGAMY

Bigamy is committed if a person who is already married is unlawfully and intentionally a party to a marriage ceremony purporting to bring about a lawful marriage between himself (or herself) and somebody else (C.R Snyman Criminal Law, 6th ed, at 393). It is a punishable offence which exists merely to protect the institution of marriage, be it a customary or civil marriage.

INCOMPETENCY TO ENTER INTO A FURTHER MARRIAGE

Save as provided for in section 10(1) of the Recognition of Customary Marriages Act 120 of 1998 ('the Act'), no spouse in a customary marriage shall be competent to enter into a marriage under the Marriage Act, 1961 (Act 25 of 1961) during the subsistence of such a customary marriage. In terms of section 10(4) of the Act, no spouse of a civil marriage is, during the subsistence of such marriage, competent to enter into any other marriage. These sections reflect the Legislature's intention that all civil marriages should remain monogamous.

According to section 10 (1) of the Act, a man and a woman between whom a customary marriage subsists are competent to contract a civil marriage with each other under the Marriage Act, 1961, if neither of them is a spouse in a subsisting customary marriage with any other person.

A LACUNAE IN THE ACT

In terms of section 2(1) of the Act, a customary marriage is for all purposes recognised as a marriage. A person commits bigamy if married according to customary law and then enters into a civil marriage with a third person; conversely, if married in civil law and then enters into a customary marriage with a third person.

However, in terms of section 4(9) of the Act, registration of a customary marriage is not a requirement for its validity. Either party may register it at a later stage according to section 4 of the Act. This provision is merely permissive. To remedy this, the Green Paper on the new framework on marriages aims to resolve this by ordering both parties to be present for the registration of their marriage.

This legal position opens a loophole in that a party to a valid customary marriage concludes a civil marriage with a third party during the subsistence of such a valid but unregistered customary marriage. The latter marriage is registered without any hindrance, especially where the former marriage was not registered in terms of section 4 of the Act. In this way, the offence of bigamy is committed. This results in an abuse of the existing legal framework on marriages.

CHALLENGES OF NON-REGISTRATION OF CUSTOMARY MARRIAGES

Non-registration of customary marriages is loophole to a plethora of challenges, including but not limited to the following:

Lack of proper record keeping, theft or loss of lobola documents amongst many cultural and ethnic groups, results in the need to call witnesses who can attest to the existence of such a customary marriage. Their recollection and credibility may be compromised due to ill health or age, at times.

The court rolls are unfairly burdened with cases, where an enquiry is made as to the existence and validity of marriages concluded in terms of the Act.

Without the conclusion of an ante nuptial contract excluding the community of property, all customary marriages are marriages in community of property, where the requirements set out in sec 3 of the Act are met.

Bigamous marriages are a rampant occurrence, sadly without any prosecution in the interests of the State.

A widow or widower who receives an annuity from the Government Employee Pension Fund (GEPF), who concludes a customary marriage without registering it, continues to accrue the benefit, whereas the duty of care and support devolved to the new spouse.

A child birthed by a parent with the means to maintain the said child, whose customary marriage is unregistered, receives the benefit of a child support grant or relief of distress grant from the Department of Social Development, without notice, which is an unfair burden to the fiscus.

RECOMMENDATION

The compulsory registration of all customary marriages with Home Affairs is highly recommended on the grounds of the interests of justice, good public policy and the rule of law. The Legislature should amend the Act to make registration of customary marriages compulsory.

The National Prosecution Authority should consider prosecuting those who wrongfully, unlawfully and intentionally commit the offence of bigamy in contravention of the permitted legal framework for customary marriages.

Public awareness campaigns by government and non-governmental organisations are highly recommended to educate communities by holding roadshows.

ASSAULT GBH - A GLARING OMMISSION FROM SCHEFULE 1

Mr Gregory Nel
District Court Magistrate

The title to this article may come as a shock to the majority of judicial officers, prosecutors and defence practitioners alike. I am, however, convinced that assault with intent to cause grievous bodily harm (GBH) was unintentionally excluded from Schedule 1 offences in terms of the Criminal Procedure Act ('the CPA') 51 of 1977, and it was also excluded from Schedule 1 offences in terms of any of the preceding legislation from which the CPA evolved.

The only reference to assault in Schedule 1 is an offence of 'assault, when a dangerous wound is inflicted'. In fact, assault GBH is not listed in any of the Schedules to the CPA and apart from being a potential element of the definition of 'aggravating circumstances', is only mentioned in Chapter 26 under competent verdicts.

The confusion lies in the misconception that the two offences are synonymous with each other.

In Bobbert v Minister of Law and Order 1990 (1) SACR 404 (C) at 408G-H, Tring AJ found as follows:

'M*r Slabbert endeavoured to surmount this obstacle to the defendant's case by* arguing that there were reasonable grounds for Antha to h*ave suspected the plaintiff of having attempted to commit an "assault, when a dangerous wound is inflicted", and thus an offence wit*hin the ambit of categories (1) and (3) *of Schedule 1 referred to above, read together. In my opinion, however,* this ingenious argume*nt cannot succeed. For it to succeed, the concepts of "grievous bodily harm" and "dangerous wound" in the context of assault would have to be syno*nymous to the extent that it wo*uld be said that a person who commits an assault with intent to do grievous bodily harm necessarily attempts to commit an assault in which a dangerous wound is inflicted. This, in my view, is not so*.'

The ruling in Bobbert v Minister of Law and Order is cited by Bloem J with approval in Goliath v Minister of Police (CA107/2017) [2017] ZAECGHC 119 (14 November 2017) par 8:

'It was held that the term "grievous bodily harm" was not always synonymous with the term "dangerous wound". It does not follow that a person who intends to do grievous bodily harm necessarily intends to inflict a dangerous wound.'

This misconception was laid to rest by the Supreme Court of Appeals in De Klerk v Minister of Police 2018 (2) SACR 28 (SCA) par 9:

'It is common cause that sch 1 does not include assault with intent to do grievous bodily harm. It lists an offence of "assault when a dangerous wound is inflicted".

At para 11 the Court further states:

'The arresting officer wrongly assumed that the assault was committed with intent to do grievous bodily harm and that the offence is listed in Schedule 1. Arrest without a warrant in these circumstances was not lawfully permissible.'

And finally, Rogers AJA states at para 22 that:

'The respondent's counsel also conceded, correctly, that assault with intent to cause grievous bodily harm is not an offence for which a warrantless arrest is permissible.'

In assault GBH, a conviction is based on the intention of the accused and can follow even where no injury was caused at all. In assault when a dangerous wound is inflicted, it is the wound itself that is of primary concern and not just the intent of the accused.

The Supreme Court of Appeals in De Klerk v Minister of Police (5 deals specifically with the concept of a 'dangerous wound' and finds at para 10 that:

'It was pointed out in R v Jones 1952 (1) SA 327 (E) at 332D-F that the concept "a dangerous wound" is not capable of easy definition. The court held that "by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ".'

There is the further misconception that all wounds are potentially dangerous due to the possibility of ensuing factors such as septicemia or other medical complications and that this would be the criteria for classification as a dangerous wound.

This misconception was laid to rest in Bobbert v Minister of Law and Order 1990 (1) SACR 404 (C) at 409C-E where the following passage from R v Jones 1952(1) SA 327 (E) at 332D-Fwas quoted:

'The expression "dangerous wound" is not easy to define. One may well ask, "Is a serious wound always a dangerous wound?" A minor wound may be dangerous because of the extra possibility it creates for septic infection. Then, however, it is not the wound which causes the danger but the sepsis. It seems to me that by a dangerous wound is meant one which itself is likely to endanger life or the use of a limb or organ.'

An arresting officer is further not entitled to assume the wound is dangerous but must rely on objective facts such as a comprehensive J88 Form or similar medical evidence prior to effecting an arrest. (See De Klerk v Minister of Police paras 10 - 11.)

The final avenue attempted in civil suits to justify a warrantless arrest on a charge of assault GBH lies in the wording of the penultimate item of Schedule 1 which reads:

'*Any offence, except the offence of escaping from lawful custody in circumstances other than the circumstances referred to immediately hereunder, the punishment wherefor may be a period of imprisonment exceeding six months without the option of a fine.*'

This inclusion in Schedule 1 is of no consequence as this was found to be applicable exclusively to statutory offences. See Areff v Minister van Polisie 1977(2) SA 900 (A) at 913B and De Klerk v Minister of Police para 21.

I am convinced that the omission of assault GBH was an unintended consequence of the current Schedule 1 simply being adopted from its predecessors being the Criminal Procedure and Evidence Act 31 of 1917 which was based on English law which had its own concept and definition of 'grievous' when describing bodily injuries, and the Criminal Procedure Act 56 of 1955, which simply adopted the Schedules of Act 31 of 1917 literally verbatim.

In my 28-year career in the legal profession I am yet to see an accused charged with the offence of 'assault, involving the infliction of a dangerous wound', nor has any judicial officer, prosecutor or defence practitioner I took the liberty of consulting.

The amendment of Schedule 1 to substitute 'assault, involving the infliction of a dangerous wound', with 'assault with intent to do grievous bodily harm', is absolutely imperative and its continued omission is inexplicable in light of all the rulings in the various Courts set out above. This has resulted in extreme injustice to the thousands of victims of violent crime, and in particular, domestic violence where no prior order has been issued, and who cannot be assisted by the SAPS with the immediate removal of the perpetrator.

Currently, the CPA (Schedule 1) provides for an arrest without a warrant in respect of assault only when a dangerous wound has been inflicted. There are no clear distinctive measures to differentiate between a dangerous wound and grievous bodily harm

In light of the scourge of violent crime in South Africa which is escalating at an alarming rate, such an amendment should receive immediate attention if the government's stated intention is to stamp out violent crime, and in particular, gender-based crimes.

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MATERIAL CHANGE IN CIRCUMSTANCES UNDER THE PROTECTION FROM HARASSMENT ACT

Mr Tshepang Monare
District Court Magistrate

At common law any cause of action, which is relied on as a ground for setting aside a final judgment, must have existed at the date of the final judgment. The Constitutional Court has decided that allowing a generalized revisiting of final orders simply because their underlying basis has supposedly changed was not in the interest of justice. Section 13 of the Protection From Harassment Act 17 of 2011 ('the Harassment Act') deals with the variation or setting aside of the protection order. Subsection (2) states:

'I*f the court is satisfied that circumstances have materially changed since the granting of the original protection order and that good cause has been shown for the variation or setting aside of the protection order it may issue an order to this effect: Provided that the court may not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.*'

'Material change' is not defined in the Harassment Act and the legislature has left it to the judiciary to determine the meaning of the provision. Whether or not a change of circumstances is material will depend upon the facts and context of each specific case. What may be relevant in one case may not suffice in another. In terms of the Oxford Dictionary the word 'material' used as an adjective means 'significant' or 'important'.

The word 'change' in terms of the Oxford Dictionary means 'to make different, alter or to undergo different'. A combination of the words for the meaning of material change will mean a 'significant different circumstance'.

What is clear from the definition is that the circumstances that prevailed before the original order was granted must be significantly different from the circumstances that have arisen during the variation application. In contrast, where the original decision was made based on overwhelming evidence it may require any change of circumstances to be very substantial indeed in order to be material.

2. Requirements under the Domestic Violence Act vis-a-vis the Protection from Harassment Act

Section 10(2) of the Domestic Violence Act 116 of 1998 provides as follows:

"*If the court is satisfied that good cause has been shown for the variation or setting aside of the protection order, it may issue an order to that effect: Provided that the court shall not grant such an application to the complainant unless it is satisfied that the application is made freely and voluntarily.*'

The requirements in the Domestic Violence Act regarding the setting aside of the protection order are different under the Harassment Act. The distinction between the Domestic Violence Act and the Harassment Act is that the Harassment Act saddles the applicant with the additional burden of proving "material change in circumstance". The provision is instructive to the courts, to be satisfied that there has been material change in circumstance in considering a variation or setting aside of the protection order.

3. What may constitute "material change"

Magistrates, in dealing with applications in terms of section 13(2) of the Harassment Act, may apply the provisions strictly in determining what would constitute a material change in circumstance. Some of the factors that may constitute material change in circumstance may include:

a) moving to another country which was not foreseeable at the time of the order was originally made; proof of abandonment of the case by the applicant;

b) waiver of rights by the applicant under the Act;

c) proof of reconciliation following counselling or mediation;

d) change of reporting lines at workplace agreed by the parties

e) settlement agreement entered into by the parties after the order ; and

f) any other factor that the court may deem a material change in circumstance.

Magistrates are urged to pay careful attention regarding such applications that are brought before them and scrutinize such applications with great circumspection.

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AMENDMENTS TO DOMESTIC VIOLENCE ACT – A CRUCIAL LINE OF DEFENCE AGAINST GENDER-BASED VIOLENCE AND FEMICIDE

Ms Tracy Bossert
Senior Magistrate

The scourge of violence against women has increased exponentially worldwide and more specifically within our own national borders. In reaction to this problem, and as part of the National Strategic Plan, three important pieces of legislation have been promulgated to deal with the response to gender-based violence and femicide. The Criminal and Related Matters Amendments Act 12 of 2021 which came into operation on 5 August 2022, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 which came into operation on 31 July 2022 and the Domestic Violence Amendment Act 14 of 2021 which is not yet fully in operation, but which appears to be imminent.

The Domestic Violence Act 116 of 1998 is arguably the only legislation that provides a holistic approach to protection for victims of domestic violence and gender-based violence. After several years of the implementation of the said,1998 Act, amendments became necessary to bring the legislation in line with the objectives set out in the National Strategic Plan and to afford victims of domestic violence additional protection.

The Domestic Violence Amendment Act 14 of 2021 will introduce innovative provisions into the law and will place additional obligations on all stakeholders, who are responsible for rendering such support to victims.

The Domestic Violence Amendment Act introduces a list of persons who are regarded as functionaries. Functionaries, in terms of the aforesaid Amendment Act are defined as medical practitioners, health care personnel, social workers, officials in the employ of a public health establishment, educators, or care-givers. Where a functionary believes or has a suspicion, based on reasonable grounds that either a child, disabled person or older person may be a potential complainant in a domestic violence matter, then a duty is placed on the functionary to compile a report which must be handed to either a social worker or South African Police Services member.

Additionally, such functionary must compile a risk assessment, of the circumstances of the case and refer the complainant for any services required and may make an application for a domestic violence order on behalf of a complainant.

Section 2B of the Act will place an obligation on any other adult person who is neither a functionary nor a South African Police Service member to report an act of domestic violence. Where an adult person knows or believes on reasonable grounds, that an act of domestic violence has been committed against a child, disabled person, or an older person such adult person has a duty to depose to an affidavit and hand same to a social worker or South African Police Service member.

A person reporting a domestic incidence in good faith is not liable to criminal, civil or disciplinary action based on the report and is furthermore entitled to have their identity kept confidential unless it is not in the interest of justice to do so.

Peace officers are obliged to arrest a respondent at a scene relating to an incident of domestic violence. This arrest will be done without a warrant if the peace officer has a reasonable belief that the respondent has committed an act of domestic violence which constitutes an offence containing an element of violence against the complainant. The obligations of such peace officer are to, if necessary, arrange for the complainant to obtain medical care, and if there is no pending or issued protection order against the respondent, to provide the complainant with a list of names and contact particulars of shelters. South African Police Service members may enter a private residence without a warrant, to obtain evidence in respect of an act of domestic violence.

Access to justice via electronic submission of an application to an electronic address of the court with jurisdiction in the matter, will become possible. Urgent applications may be submitted outside of ordinary court hours or court days.

A further new provision empowers a court to authorise a domestic violence safety monitoring notice, which may be used where the complainant shares a joint residence with the respondent. The court will order a member of the SAPS to contact the complainant at regular intervals to enquire about the complainant's well-being. Where the SAPS member is prevented from seeing the complainant, to enter the joint residence to see and communicate with the complainant in private, he/she may overcome resistance against entry using as much force as reasonably required.

Electronic Service providers may be ordered to furnish further particulars to court relating to electronic communication or an electronic identity number which may be relevant to the application before court.

Use of intermediaries or audio-visual links to interview witnesses in domestic violence matters will also be possible and will assist with providing a victim-centred approach when dealing with gender-based violence matters in a court environment.

A very useful provision is inserted in Section 7(4A). The court may order the respondent to appear before a specific Magistrate's Court if the court is satisfied that the respondent is a person contemplated in terms of section 33(1) of the Prevention and Treatment for Substance Abuse Act 70 of 2008 for an inquiry to take place, to determine if the Respondent may be a person abusing substances, and whether admission to a treatment centre would benefit the Respondent. In assisting the Respondent, the victim of domestic violence is also protected.

It is submitted that the amendments contained in the Domestic Violence Amendment Act will be crucial for the protection of victims of domestic violence and gender-based violence and avoidance of secondary victimization of complainants during the judicial process.

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SUMMARIES OF CASE LAW

By: Jinx Bhoola & SAJEI Research Team

Gauteng Refinery (Pty) Ltd v Eloff [2022] JOL 55614 (GJ): Summary Judgment

Gauteng Refinery appealed against the granting of summary judgment to Mr Eloff, an erstwhile employer, who had sued for payment of arrear salaries for two months and travel expenses. The appeal was based on averments that the Magistrate ought to have found that Mr Eloff failed to comply with Rule 14(2)(b), and that the Magistrate erred in failing to find that Mr Eloff's failure to respond to a counterclaim was fatal to his summary judgment application.

The only issue was whether the respondent's failure to deal with the counterclaim prevented the grant of summary judgment.

In his application for summary judgment, the respondent dealt only with the contents of the plea. The appellant, in its affidavit opposing summary judgment, criticised the respondent's affidavit, but did not provide any facts in support of its opposition. The affidavit is remarkable in its vacuity. It must be noted that Rule 14(3)(b) of the Magistrates' Court Rules requires the defendant to satisfy the court, either by way of affidavit or oral evidence, that it has a *bona fide* defence, by disclosing fully the nature and grounds of the defence and the facts on which the defence relies. The appellant's affidavit contains almost no facts. However, if the respondent's application was fatally defective, this becomes irrelevant.

On the question of whether the respondent's failure to deal with the counterclaim was the sort of failure which is fatal to a summary judgment application, the court stated that "*To require as a formal requirement an explanation why the counterclaim does not raise an issue for trial is inconsistent with the purpose of the summary judgment rule.* *The counterclaim ought rather to be considered when the merits of the summary judgment application are considered, and a plaintiff who does not include an explanation of why the counterclaim does not raise a triable issue and therefore is a bar to summary judgment, runs the risk of failing on the merits.*" The proper place for the consideration of the plaintiff's failure is in the consideration of the merits of the summary judgment application.

Smuts NO v MEC, Eastern Cape Dept of Economic Dev [2022] 1199-2021 (ECM): Interplay of Promotion of Access to Information Act 2 of 2000 (PAIA) and the Protection of Personal Information Act 4 of 2013. (PoPIA)

This case dealt with access to information held by a government department where there was an application to issue permits issued to trap or kill leopards. The request was refused on the grounds of disclosure of personal information of third parties and the right to privacy. This was a classical application of the interplay between both the Promotion of Access to Information Act 2 of 2000 (PAIA) and the Protection of Personal Information Act 4 of 2013. (PoPIA)

In this case, The Landmark Foundation Trust, which is a conservation NGO and registered charitable trust, which focuses on effective predator management methods in support of a healthy ecosystem and the conservation of endangered species, had a project centre which focused on the rescue and conservation of leopards. Leopards are a vulnerable species and any hunting or capturing of them requires a permit.

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By: Jinx Bhoola & SAJEI Research Team

The Foundation requested the information officer of the department to provide access to all applications received and permits issued by the department to trap, kill, hunt or translocate any leopards in the Eastern Cape. The request was made in terms of section 18 of the Promotion of Access to Information Act 2 of 2000 (PAIA) and was refused. The internal appeal application to the MEC was also refused, on the premise that it would entail the unreasonable disclosure of personal information of third parties and on an interpretation of section 34 of the Act.

The learned Judge discussed PAIA and its purposes; the protection of PoPIA and the interplay between both PAIA and PoPIA. The Judge additionally discussed the state management in conservation of threatened and protected species and public interest; access to information and the right to privacy; that PoPIA reflects contemporary *boni mores* of society and gives further expression to the appropriate balance to be struck between both these Acts.

The learned Judge considered whether the respondents put forward sufficient evidence to conclude, on the probabilities, that the information withheld falls within the exemption where the refusal was claimed. The meaning of "unreasonable disclosure of information" in section 34 of PAIA was discussed, including whether the respondents have discharged the burden; and whether the relief and an order was just and equitable.

The Information Officer's decision to refuse the Foundation's request for access to information made in terms of section 18 of PAIA was set aside and he was directed to provide the Foundation with access to the specified records within fourteen days of the order.

Meme-Akpta and Another v The Unlawful Occupiers of Erf 1168 and Another [2022] ZAGPJHC: Eviction requirements

This case relates to the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) and the requirements for an application for eviction. The court considered that the requirements to be met are: that the application must be drawn in accordance with the rules of court (meaning the notice of motion must contain a stated date on which it will be heard), service must be effected in accordance with the prescribed methods in accordance with the relevant legislation and regulations or rules and the importance of complying with the PIE Act and the Court's directives as well as the fundamental rights of the unlawful occupiers.

The applicants applied to have 200 people evicted from various units that they unlawfully occupied in a block of units in Johannesburg. The main issue the Court had grapple with was the manner in which the application had been drawn and dealt with procedurally which was grossly derelict. The application exhibited a profound lack of appreciation for the importance of compliance with the legislative requirements enacted in the PIE Act. The Court noted that the PIE Act prescribes special and additional features in applications for evictions of illegal occupants. These special provisions are in keeping with the fundamental constitutional rights (right to housing) of the respondents. The provisions are in relation to notification and jurisdiction that must be discharged by the applicant.

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By: Jinx Bhoola & SAJEI Research Team

The court discusses the grossly derelict manner in which the application has been drawn and dealt with procedurally and that it exhibits a profound lack of appreciation for the importance of compliance with the legislative scheme enacted under the PIE Act. The prescripts of the Act are in keeping with the recognition of the fundamental constitutional imperatives which an eviction entails and especially the right to housing in terms of section 26 of the Constitution. These measures are especially important in a country where extreme poverty and homelessness is endemic. From section 4 of the Act and the Practice Manual of the Division, the court sets out the peremptory procedural prescripts, particularly for effective service of notice on the occupiers, at para [13].

The High Court dismissed the application for eviction on the basis that the application disregarded the PIE Act and the Practice Manual due to deficiencies in the application. The Court found the application to be fundamentally flawed both procedurally and on the merits.

Miya v Matlhko-Seifert [2022] JOL 55209 (GJ): Evictions and Just and equitable

This appeal considered the question of just and equitable and the Magistrate Court's jurisdiction to make an eviction order.

The Appellant appealed against an eviction order evicting her and all other occupants from a residential property on the basis that she had purchased the property first and therefore could not be evicted. The court found that appellant could not be owner as registration of transfer was not affected to her in the Deeds Office [paras 18-19]; and confirms basic principle in our law that a real right generally prevails over a personal right [para 21]. The latter principle is subject to the doctrine of notice [para 23].

Absent a right to ownership, the appellant's occupation was unlawful. The eviction order was further subject to compliance with section 4 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 which the court found to have been complied with and consequently, dismissed the appeal.

Grobler v Phillips and Others [2022] ZACC 32: Evictions

This case dealt with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the PIE Act) and section 4(7) which relates to the factors to be considered when granting an eviction order.

The applicant is the registered owner of the property which is currently occupied by the first and second respondents. The first respondent, Mrs Clara Phillips (Mrs Phillips), an 84-year-old widow who occupies a residential house on the property together with her son, Mr Adam Phillips (Mr Phillips), who suffers from a disability. Mr Johan Venter N.O., is the *curator bonis* of Mr Phillips. The second respondent filed a notice to abide the outcome of the proceedings before this Court and had not opposed any of the proceedings in the Somerset West Magistrates' Court (Magistrates' Court), the Western Cape Division of the High Court, Cape Town (High Court) and the Supreme Court of Appeal. The third respondent, the Helderberg Municipality of Somerset West also filed a notice to abide the outcome of these proceedings.

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SUMMARIES OF CASE LAW

By: Jinx Bhoola & SAJEI Research Team

Mr Grobler purchased a residential property situated in Somerset West at an auction. The property was registered in his name on 15 September 2008. Mrs Phillips has been residing on the property since 1947. Mr Grobler requested Mrs Phillips to vacate the property. Mrs Phillips refused to vacate the property, allegedly, on the ground that she enjoyed a right of life-long *habitatio* granted to her by a previous owner which she sought to enforce against Mr Grobler. Mr Grobler made various offers to Mrs Phillips in an attempt to reach a compromise, including paying for relocation costs and offering alternative accommodation. These offers were declined. Mr Grobler then approached the Magistrates' Court and launched an eviction application which was later referred to trial.

Before the trial commenced, the parties concluded an oral pre-trial agreement to the effect that the provisions of the PIE Act were applicable to the proceedings and that the only issue for determination was whether Mrs. Phillips held some title of occupancy and whether her occupancy was lawful or not in terms of PIE. The Magistrates' Court held that Mrs Phillips had no registered interest in the property, whether in the form of habitation or a usufruct. Furthermore, the Court held that Mrs Phillips is an unlawful occupier as she had no tacit and/or express consent from Mr Grobler to occupy the property. It granted the eviction order and determined that the eviction date would be 30 August 2017.

Mrs Phillips appealed to the High Court. The High Court set aside the eviction order issued by the Magistrates' Court and upheld the appeal with costs. The High Court held that Mr Grobler had not established that Mrs Phillips was an unlawful occupier as defined in PIE. The High Court took the view that Mrs Phillips was also entitled to rely on the Extension of Security of Tenure Act 62 of 1997 (ESTA), which was raised for the first time on appeal to that Court.

The High Court held futher that Mr Grobler had not discharged the onus of establishing that the provisions of ESTA did not apply. The Court further held that even if Mrs Phillips were an unlawful occupier, and even if ESTA did not apply, it would not be just and equitable to grant an eviction order having regard to her advanced age, the period for which she had resided on the property, and the fact that her household was occupied by a disabled person.

Mr Grobler subsequently launched an application for leave to appeal against the order and judgment of the High Court to the Supreme Court of Appeal. The Supreme Court of Appeal dismissed the appeal holding that the High Court was entitled to exercise a discretion not to grant an eviction order in spite of the unlawful occupation, and that there was no misapplication or misdirection of the law, or any misdirection on the facts. The Court further held that this was a situation in which the full exercise of ownership had to give way to the right of vulnerable persons to a home.

In a unanimous judgment the Constitutional court, the Court held that its jurisdiction is engaged because as held by it in Machele, eviction from one's home will always raise a constitutional issue. Additionally, the Court held that another ground which strengthened its jurisdiction was that the issues raised concerned the interpretation of the provisions of section 4(7) of PIE.

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The Court held that apart from relevant factors that have to be considered in eviction proceedings, the Supreme Court of Appeal also considered Mrs Phillips wishes that she preferred to remain in occupation of the property and did not place sufficient weight on the offers of alternative accommodation. An unlawful occupier's wishes, the Court held, is not a relevant consideration as an unlawful occupier such as Mrs Phillips does not have a right to refuse to be evicted on the basis that she prefers or wishes to remain in the property which she is occupying unlawfully.

The Court went on to highlight that when dealing with considerations of justice and equity, the capacity of a landowner to provide alternative accommodation and the peculiar circumstances of an evictee are relevant. But, in these circumstances, the fact that Mr Grobler had repeatedly made offers of alternative accommodation to Mrs Phillips should not be construed as creating any obligation on him as a private landowner to offer alternative accommodation. Having regard to the competing interests of both parties, the Court held that it would be just and equitable to grant the eviction order. In granting the eviction order, the Court stated that an eviction order in these circumstances would not render Mrs Phillips homeless. Mrs Phillips would essentially only be required to relocate from one home to another in the same immediate community within Somerset West.

Accordingly, the Court granted leave to appeal, upheld the appeal on its merits and set aside the SCA's order and substituted it with an order of its own.

Solomons v State (1292/2021) [2022] ZASCA 124 (26 September 2022) : : Supreme Court of Appeal: Criminal and Domestic Violence

The appeal deals with imposition of non-custodial sentences for murder, where domestic violence is present in the relationship between the accused and the deceased, as well as the evidence in this regard. The appellant and the deceased had been in a relationship, which was subject to numerous incidents of domestic violence. After the accused was found guilty by a Regional Court of murdering the deceased, the court found that there were substantial and compelling reasons to depart from minimum sentence legislation, and it imposed a sentence of eight years' imprisonment.

On appeal to the High Court, her sentence was amended TO eight years' imprisonment, three of which were suspended. The appellant then further appealed against her sentence to the SCA, arguing that she should have received a non-custodial sentence.

The SCA noted that the appellant had not placed much evidence before the court regarding her allegations surrounding the abuse, but the High Court had nevertheless accepted the existence of domestic violence in the relationship from the fact that the appellant had obtained a domestic violence interdict against the deceased one year prior to the murder.

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By: Jinx Bhoola & SAJEI Research Team

Furthermore, despite the appellant having made allegations regarding the impact on her of the history of intergenerational violence in her own family, she had not placed any evidence of this before the court. Furthermore, there was no evidence regarding any of the factors which may have caused her to remain in the relationship.

In light of this, the SCA found that the High Court had reduced the severity of the sentence in light of the presence of the inter-partner violence in the relationship. There had thus not been any misdirection by the High Court in not imposing a non-custodial sentence. The SCA therefore confirmed the High Court's sentence

S v Abbas 2021 JDR 2578 (GP): Bail and accused in the country illegally

During a bail application, should a court consider the fact that an accused is in the country illegally? On 3 December 2020, the appellant brought a bail application in the Pretoria Commercial Crimes Court (Regional Court) where his bail application was refused. Aggrieved by such decision, the appellant brought an appeal in terms of section 65(1)(a) of the Criminal Procedure Act 51 of 1977 ("CPA"). It was agreed by the parties that the offence which the appellant is charged with, falls under the provisions of section 60(11)(b) of the CPA (Schedule 5 offence). The appellant, in terms of the above subsection, can only be released from detention if he adduces evidence which satisfies the court that the interest of justice permits his release.

It was common cause that the appellant's status in the country was classified as being that of an illegal foreigner by the Department of Home Affairs, as the appellant failed to renew his visitor's visa when it expired in 2019. At the time of his arrest, his visitor's visa had been expired for almost a year. No reasons were proffered by the appellant as to why such was not renewed whilst the appellant was not arrested.

The bail applicant's status in the country, mainly as to whether he is a foreigner, was not the only consideration in refusing or granting bail. The main purpose for granting bail was to secure the attendance of the bail applicant at court pending finalization of his trial matter. If a court is of the view that a bail applicant is a flight risk, then the court is entitled to deny the bail applicant bail. The court held right not to be deprived of freedom arbitrarily or without just cause applies to all persons in South Africa whether they are here illegal or not.

Dumisani Vuyisile Tsobo v Bridgitta Matseliso Tsobo (287/2021) [2022] ZASCA 109 (15 July 2022) : Domestic Violence Protection Order

The Appellant brought an application for a protection order against the Respondent in terms of Section 4(1) of Domestic Violence Act, 1998 in the Bloemfontein Magistrate's Court on 3 June 2019. At the time, the parties were married, but living separately; the Appellant was living in Pretoria and the Respondent in Bloemfontein.

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By: Jinx Bhoola & SAJEI Research Team

They have one minor child, namely a boy who was two years old at the time. They divorced from each other during October 2020.

The Appellant sought wide-ranging relief against the Respondent, including an order restraining her from committing any act of domestic violence against him. The application was dismissed on the basis that he had failed to establish that the Respondent had committed any act of domestic violence. The Appellant subsequently appealed against the Magistrate's order to the High court. That appeal was also dismissed.

Section 5(2) of the Act requires an applicant for an interim protection order to satisfy the court that there is prima facie evidence that the Respondent is committing or has committed an act of domestic violence and that 'undue hardship may be suffered by the complainant as a result of such domestic violence, if a protection order is not issued immediately'.

In terms of Section 6(4), when an application is opposed, the court must, after hearing evidence and if it is satisfied on a balance of probabilities that the Respondent has committed or is committing an act of domestic violence, issue a protection order in the prescribed form.

The Appellant, having relied on harmless SMSes, which he received from the Respondent months before he launched the application for the protection order, was unsurprisingly unable to establish that he would suffer any hardship as a result of domestic violence, if a protection order was not issued immediately. The Appellant has accordingly failed to establish, on a balance of probabilities, that the Respondent has committed an act of domestic violence.

Instead of establishing a prima facie case of verbal, emotional or psychological abuse, the facts of this case have shown that, in applying for the protection order, the Appellant was not bona fide and was merely abusing his superior economic position to harass the Respondent. The High Court correctly found that, the SMSes did not constitute repeated insults, ridicule or name-calling and dismissed the appeal.

Afriforum v Economic Freedom Fighters: [2022] ZAGPJHC 599 (25 Aug 2021) Equality Court

This case deals with hate speech in the context of a political chant, and the court held that the words used must be interpreted in the context in which they are said.

The main issue in this case was whether the chanting of the song Dubula ibhunu ('shoot the Boer/farmer') constituted hate speech. The Equality Court in *Afriforum and another v Malema and Another 2011* (6) SA 240 (EqC) had previously found that the song was hate speech, however this decision was based on a finding that the song was 'hurtful' in terms of section 10(1)(a) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). Subsequent to that decision, section 10(1)(a) had was found to be unconstitutional in *Qwelane v South African Human Rights Commission and another 2021 (1) SA 579 (CC)*, and the word 'hurtful' had been severed from the Act.

SUMMARIES OF CASE LAW

By: Jinx Bhoola & SAJEI Research Team

In this matter, the complainant had laid two complaints regarding the song. The first complaint was based on section 10(1) of (PEPUDA) being that the song constituted hate speech. The second complaint was in terms of section 7(1) of PEPUDA being that the song constituted unfair discrimination.

During the hearing, the complainant had led expert evidence of one its own employees regarding various aspects relating to farm murders in South Africa. This included statistics on the prevalence of farm attacks, the motivation for such attacks, the political climate that promoted the attacks, and the connection between such attacks and the singing of the song which promoted the attacks. His evidence also related to the effect of the song and that the main problem was the denial of politicians regarding the attacks.

The respondent had challenged the witness suitability as an expert witness, arguing that he was not an independent and objective witness due to his relationship with the complainant. In response, the complainant had argued that the standard of expert witnesses in Equality Court matters should not be the same as in normal litigation, as PEPUDA envisages a more informal approach regarding expert witnesses. However, the court found that this argument was unsustainable and that if that had been the case, PEPUDA would have expressly said so.

The court then went on to find that the witness was disqualified as an expert witness. This was because he was employed by the complainant, responsible for coordinating its campaigns, and that on his own evidence he was an activist for issues relating to the political affairs of the Afrikaner community, which was central to the issue in dispute. He therefore had a vested interest in the outcome of the case.

Furthermore, his qualifications did not provide him with sufficient qualifications to be an expert on statistical analysis, and his evidence was based on hearsay in several cases. He therefore had ascribed that the farm attacks were consequent on the singing of the song.

The second respondent was the president of the first respondent. The second respondent testified that the main objective of the first respondent was economic emancipation of previously disadvantaged South Africans, and that he was taught that the song should be not taken in its literal meaning but rather that it refers to the oppressive state system. Thus, the reference to 'boers' in the song referred to a system of oppression, and to farmers who represent the face of land dispossession. The song constituted a 'chant', and a chant was intended to agitate and mobilise.

The respondents also called their own expert witness who testified that the song carried huge weight as a historical statement and showed how 'songs can move through time and cause inspiration through memory to a later generation'. A political idea could be enacted through a song, and the listeners of the song could enact a political idea and deduce messages through a song.

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The requirement of 'incitement' in PEPUDA, meant that the speech must amount to an instigation or active persuasion of others to cause harm.

The complainant further argued that the song is sung in a climate or environment in South Africa where farmers were frequently tortured and murdered, and there was good reason to believe that the words chanted by the respondents call on people to kill farmers. This amounts to the promotion of hatred on the grounds of race and ethnicity and constitutes incitement to harm.

It also argued that the song was also harmful in the sense that 'harm' also related to society at large and democracy and nation building. Thus, because the song was inimical to reconciliation and nation building, it was also harmful to broader South African society.

Regarding the complaint based on unfair discrimination, the complainant argued that the song constituted unfair discrimination because it was racist propaganda which incites racial violence, that it directly harmed because it caused severe trauma by reminding victims of farm attacks of their experience.

In its judgment, the court touched on the objectives of PEPUDA, and its purpose to advance constitutional values and reconcile South Africa society. It then referred to comments made in *Qwelane* regarding having to balance equality and dignity with freedom of expression. It also referred to *S v Mambolo 2001 (3) SA 409* (CC) which said that freedom of expression was particularly important in South Africa because South African democracy was not yet firmly established and must still feel its way. It was therefore important to be tolerant of unpopular views.

The court then turned to the test for hate speech as set out in *Qwelane* namely whether a reasonable listener's view would regard the statement as harmful. In doing so, the court referred to South African Human Rights v Khumalo 2019 (1) SA 289 (GJ) which had said that the test entailed determining whether a reasonable person could (not would) conclude that the words mean the author had a clear intention to bring about the prohibited consequences. It also referred to *South African National Editors' Forum and others v Economic Freedom Fights and another* [2019] ZAEQC 6 (24 October 2019) which had said that even if the speech could qualify as hate speech on its terms, if it did not incite, or could not be reasonably construed as inciting, it would not infringe section 10 of PEPUDA.

The court found that the test involves determining what meaning a reasonable listener of ordinary intelligence would attribute to the statement in its context. It referred to a comment made in Khumalo that circumstances surrounding the speech may aggravate or mitigate the likelihood of incitement to cause harm which would be dealt with when considering remedies. It also referred to *Holt v University of Cape Town* 2017 (2) SA 485 (SCA) which held that a statement with an aggressive tone of hostility and overtones of race do not necessarily fall within the prohibition of section 10.

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The court mentioned that the complainant had failed to show that the lyrics of the impugned song were based on *prohibited grounds set out in PEPUDA.* It added that the complainant had also failed to show that the song's lyrics could reasonably be construed to demonstrate a clear intention to harm or incite harm or propagate hatred. The reason for this, it said, was because the complainant had based its complaint on the literal interpretation of the lyrics of the song.

However, the second respondent had testified that the song had a significant relationship to both the issues of land and economic empowerment of the previously disadvantage members of society, and that before democracy the song was directed at the apartheid regime, and after democracy at issues of land justice and towards highlighting the failures of the current government. Furthermore, the first respondent's expert witness had testified that the song had a political role in South African public life, because of its long cultural matrix in the history of politics, song and performance. She interpreted the song as not literally advocating for an attack, but as a tool to advance the interests of land justice. Therefore, the song has to be located within the political context in which the second respondent is pushing for land reform and radical economic policy.

The song, the court held, should therefore be left to political contestations and engagement on its message by political role players. A reasonable listener would therefore conclude that the song does not constitute hate speech but deserves protection under the rubric freedom of expression. The complaint was therefore dismissed. The court also ordered the complainant to pay costs.

Central Authority for RSA v SC [2022] ZAGPJHC 700 : Hague Convention and International abduction of children

This case deals with international abduction of children and the resistance to return to a foreign country. The mother brought the three minor daughters to South Africa from Texas in the United States, with the father's written consent. She then instituted divorce proceedings in South Africa and shortly thereafter notified the father that she did not intend returning to the USA with the children. The mother was a South African when married to her husband, a USA citizen who had been born in Mexico, and the children were born in the USA and are USA citizens.

Proceedings were instituted under article 12 of Chapter III of the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996 (the Convention) seeking the return of the children to San Antonio, Texas.

The court considered the purpose of the Convention and whether the children would be exposed to grave risk and or psychological harm and or whether they would be placed in an intolerable situation, as envisaged by article 13(b) of the Convention. The case also discussed whether the children be returned to the USA and whether where the children were constituted where the children habitually resided.

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Additionally; it discussed when the family came into hard times including when the father lost his job and the picture painted by the mother of a family not having any roots since they resided in Mexico for most of the two years before departing to South Africa.

The undisputed facts were that the family lived mostly a nomadic life, that the children have a factual connection to Texas, USA on a cultural, social and linguistic level.

The issues that the court was grappled with was whether the children were wrongfully removed or retained in South Africa; whether the mother has secure accommodation and employment in Gauteng, the fact that they were living on the same property as her parents; and the differing opinions of the clinical psychologist and the children's curator ad litem.

The undisputed evidence established various intolerable features of the minor children's family life immediately prior to their departure to South Africa. There was clear and compelling evidence that there was a substantial and severe risk that the children would be placed in an intolerable situation if they were returned to the USA. The Court dismissed the application and ordered that the children were not to be returned to Texas and the mother was granted leave to remain resident with the minor children in Gauteng and other ancillary orders of maintenance and contact with the minor children.

Centre for Child Law v DPP, Johannesburg [2022] ZACC 35: Children and Cannabis

This case dealt with children and cannabis and whether the criminalisation of the use and or possession of cannabis by a child serves the purpose of protecting the child.

The case also dealt with whether the courts should impose less restrictive means available. The court was called upon to delve into the constitutionality of section 4(b) of Drugs and Drug Trafficking Act 140 of 1992.

In this case, four children tested positive for cannabis during a school-sanctioned drug test. They were brought before the Magistrates' court and agreements were concluded that included that the children participate in diversion programmes. They did not comply with the diversion programmes and an order for admission to a compulsory residential diversion programme came before the High Court on review.

The proceedings led to the High Court looking into the question of the constitutionality of section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 to the extent that it criminalises the use and/or possession of cannabis by a child. The section was declared inconsistent with the Constitution. The application was to confirm the approach adopted in the case of Prince (CC); the impact of criminalisation on the child; children's rights in section 28 of the Constitution; a child's right to dignity and the case of Teddy Bear Clinic (CC); the Children's Act 38 of 2005; and the limitations on a child's rights and whether the limitations were justified.

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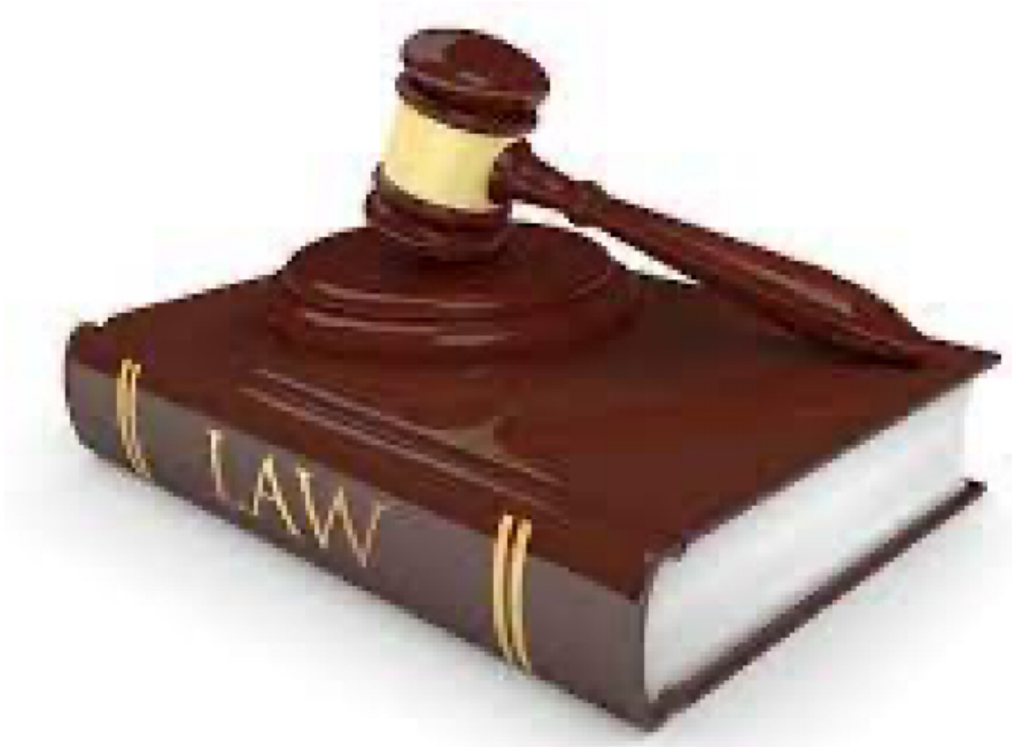
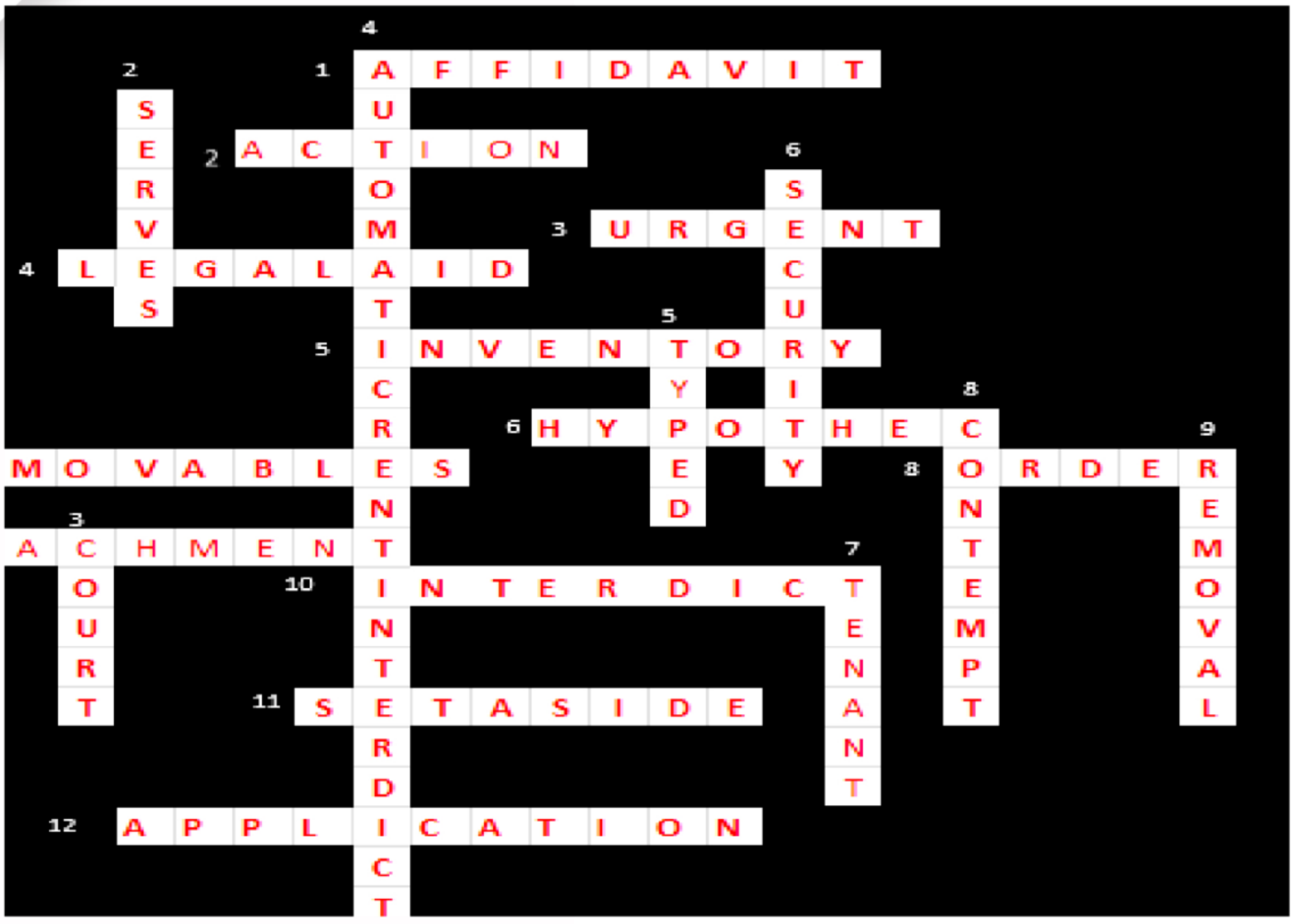
The court found that the criminalisation of the use and or possession of cannabis by a child does not serve the intended purpose of protecting the child. The court found that there are less restrictive means available to protect a child from cannabis use and or exposure and that section 4(b) of the Drugs Act infringes a child's rights in sections 10 (dignity) and 28 (children) of the Constitution.

The High Court in its order, confirmed and declared section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 to be inconsistent with the Constitution and invalid to the extent that it criminalises the use and or possession of cannabis by a child.



AUTOMATIC RENT INTERDICT
AND ATTACHMENT OF PROPERTY IN SECURITY OF RENT



DOWN

1. Court must possess this montary and territorial
2. This may be done by a Sheriff or Messenger
3. Place where legal cases are heard
4. Summons to attach movables for non payment of rent
5. Court processes not hand written
6. Guarantee for damages requested by Court, litigant or Sheriff
7. A person who leases property
8. The offence of not complying with a court order
9. The action of taking away goods from plaintiff's property.

ACROSS

1. Document required in application proceedings
2. Another word for trial proceedings
3. Type of application where Rules of Court are dispensed with
4. Free legal representation
5. List of movable goods made by the Sheriff at tenants premises
6. Common Law remedy for attachment of goods in support of rent
7. Type of goods subject to Landlords hypothec
8. Prounounced by a Court at the end of a hearing
9. An order of Court saizing specific property
10. Order prohibiting the tenant from removing movable goods
11. To disagree with and overturn a decision of a court
12. Process where affidavits are used to litigate

UPCOMINNG WORKSHOP

DATE	WORKSHOP	PROVINCE
	DISTRICT COURT MAGISTRATES	
01 – 04 November 2022	DCM96 Criminal Court Skills Bail	NC
01-03 November 2022	DCM 97 Civil Court Skills Costs	Kwazulu- Natal
07 – 11 November 2022	DCM98 Civil Court Skills Applications	KZN Pmb
07 – 11 November 2022	DCM99 Equality Court Skills PEPUDA	Western Cape
07 – 10 November 2022	DCM101 Criminal Court Skills Extraditions	Mpumalanga

10 YEARS
2011 - 2021

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UPCOMINNG WORKSHOP

DATE	WORKSHOP	PROVINCE
	DISTRICT COURT MAGISTRATES	
14 – 18 November 2022	DCM102 Family Court Skills Maintenance	Eastern Cape
14 – 15 November 2022	DCM103 Criminal Court Skills Specific Court Skills	Gauteng
16 – 17 November 2022	DCM104 Judicial Ethics and Conduct	KZN Durban
14 – 18 November 2022	DCM105 Children's Court Skills Children in need of care and protection (Block 1)	Free State
21 – 24 November 2022	DCM108 Children's Court Skills Children in need of care and protection (Block 2)	Free State
22 – 24 November 2022	DCM109 Criminal Court Skills Inquests	Western Cape
28 – 30 November 2022	DCM110 Civil Court Skills Judgment Writing	KZN Pietermaritzburg