JUDICIAL EDUCATION NEWSLETTER

16TH EDITION

Dec 2022

10 YEARS
2011 - 2021

SAJEI
South African Judicial Education Institute
Enhancing Judicial Excellence

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EDITORAL TEAM & CONTRIBUTORS

Editorial Enquiries

Telephone: +27 10 493 2621

Email: mmokgetle@judiciary.org.za

Design By:

Mr. Ngwato Thomas Maseko

@OCJ_RSA

Judiciary RSA

@OCJ_RSA

TheSouthAfricanJudiciary

10 YEARS 2011 - 2021

SAJEI South African Judicial Education Institute

Enhancing Judicial Excellence

FROM THE DESK OF THE CEO

Dr Gomolemo Moshoeu

CEO of SAJEI

Generally, I am passionate about writing and look forward to preparing the note for the Newsletter. For this one, I found it difficult to pen my ideas because I am featured in it. I have been bullied by the Editor-in-Chief and could not withstand the pressure.

We come out of a year which was good for some and challenging for others. Despite that we need to be thankful for being alive. SAJEI continues to grow from strength to strength. We have successfully implemented hybrid format of training and included judicial wellness into SAJEI training programmes. The delegates have indicated that judicial wellness should include mobile health services to check their vitals. SAJEI thanks the Magistrates Commission for allowing ProActive Health Solution (PHS), the wellness service provider, to conduct judicial wellness sessions.

In this edition, SAJEI introduces the ***WALL OF FAME*** on page 7 to share with readers the names of outstanding advocates of judicial education who sacrificed their time to contribute a brick towards the establishment of SAJEI.

On behalf of SAJEI, I would like to express heartfelt gratitude for the excellent services rendered by dedicated and committed SAJEI team. To all the readers, may you have a blessed festive season and a new year full of grace.

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10 YEARS
2011 - 2021

SAJEI South African Judicial Education Institute
Enhancing Judicial Excellence

FROM THE DESK OF THE EDITOR-IN-CHIEF

Ms Jinx Bhoola

Editor-in-Chief

First and foremost, I would like to thank the CEO of SAJEI and members of the editorial team for their selfless time and unwavering support throughout this year. You have sacrificed your busy work and personal schedules to ensure that the publication deadlines have been met. You are applauded for your commitment in advancing Judicial Education. You have displayed the quality that nothing is impossible with effective communication and teamwork.

To our budding writers and contributors, thank you for your ongoing contributions to the Newsletter. You have written on various topics, that were always relevant and topical to the Judiciary. You kept our readers entertained with various amendments on many pieces of legislation. The Newsletter has been able to address topical issues due to your invaluable contributions. I want to encourage you to continue to write and support the Newsletter as your articles have been appreciated by our readers and have assisted many in the execution of their duties. To our regular contributors thank you for your consistent flow of articles in enhancing Judicial education.

To the support team at SAJEI, you displayed excellent work ethic and determination in ensuring that each edition was published timeously. The management of edits, collating of edits to and from all members of the editorial team and emails back and forth, working through long hours late at night and into the early hours of the morning, to ensure timeous delivery is distinguished. You are true champions and conquerors. Your enthusiasm and excellence is acclaimed. Continue with your professionalism and excellence.

What an impact filled year this has been. Back from the COVID-19 pandemic, and gradually returning to normal working patterns, has left the nation rebuilding the country with many businesses having to close down as they could not sustain themselves. This in turn left many people unemployed and battling to make ends meet. We have certainly not forgotten our family members, colleagues and friends who have succumbed to this pandemic. This year we were shocked to hear the tragic killings and death of many colleagues and their family members. We note the passing on of the mother of the CEO of SAJEI Doctor Moshoeu. Your mom has left a strong legacy in you and your contribution to the nation. Once again, our heartfelt condolences are extended to everyone who suffered losses in their families. May God continue to bless and comfort you during this festive season. As we continue to mourn these losses. May their souls rest in peace and rise again in eternal glory.

We also saw the stability of our country being rocked by many social issues as well ground-breaking decisions by our courts, jealously guarding and upholding the Constitution and application of the Rule of Law. From the community's reaction to certain decisions from the Apex court, it is evident that there is still a lot of work to do to ensure the citizens at large understand the true meaning of a democracy. There is a need for more road shows in strategic plans to ensure that citizens understand the values as enshrined in section 1 of the Constitution. The advancement of PAIA, PoPIA, PAJA and PEPUDA in the Magistrates' Courts safegaurd the responsibility placed on Magistrates' Courts to ensure progressive Constitutionalism is the cornerstone on which judgments are based.

This year we also have a lot to be thankful for. We embrace and congratulate the new Chief Justice, CJ Raymond Zondo as well as the Deputy Chief Justice, DCJ Mandisa Maya. We also congratulate all other members of the Judiciary who have aspired to progress in their professions and have been elevated to such positions. Congratulations are in order.

Magistrates are encouraged to ensure that their judgments speak to section 1 of the Constitution as well as all rights enshrined in Chapter 2 of the Constitution. We have all taken our oaths of office to uphold the Constitution and let's continue to do so without fear, favour and prejudice.

Gender-based violence remains a challenge and we saw various pieces of legislation promulgated to address the scourge. SAJEI has addressed this issue extensively in our previous editions and has held a number of centralized and decentralized trainings to empower the Magistrates. We encourage Magistrates to continue the good fight in protecting the rights of women, children and vulnerable groups.

In so far as creativity in training is concerned, each Province had their own preference on learning styles. We are grateful that they expressed their choices so it made delivery easier for the Judicial Educators. When it came to PowerPoints. Techno design and modern technology was used in designing PowerPoints. Different streams excelled in their own style of PowerPoints ensuring creativity and suitability. We have brought you the latest in PowerPoints from across the globe and you are kept abreast with the latest trends.

What was really popular in all Provinces were the puzzles and the rush to see which group completes the answers in the quickest time. I am glad to announce that SAJEI are the leaders in teachings through puzzles. This was enjoyable for the colleagues and next year we will perhaps introduce virtual badges for the winners. Anyone who is interested in developing this style of learning is welcome to contact our editorial Secretary.

However, what proved to be the most engaging and ever popular learning style is mock applications. Colleagues enjoyed this and I am certain we will pick up a couple of Grammy and Academy awards from the participants. What is truly impressive about this methodology is the fact that there is a display of correct procedure in court. Magistrates are exposed to court room situations and learn how to properly handle their courts.

It is envisaged that more of these practical applications in court room scenarios will assist Magistrates in being more confident in the court room.

To all the Regional Court Presidents, Chief Magistrates and Facilitators thank you for your continued support and commitment. Our pool of facilitators is increasing due to your commitment and the release of Magistrates to engage in facilitating training. SAJEI is constantly holding material development and facilitation skills workshops. Colleagues who are keen to facilitate are required to inform their Chief Magistrates who will liaise with SAJEI. We are hoping that more colleagues will join the team of facilitators and a special plea to all those colleagues who are sitting on the bench for 15 years and more to consider availing yourselves for material development as we thrive on keeping the resources practical so sharing your experiences on the bench will only empower other colleagues. We look forward to building capacity in the new year.

We also celebrated the annual Human Rights Week which was very emotional, enlighting and informative. We laughed, we cried and were in a safe space. Losing family and friends to HIV/AIDS remains an issue that leaves an indelible impression in loved one's minds. Emotional Intelligence, healing, mediation and relaxing exercises were imparted by the participants.

The highlight was the PHS counselling services that are available to the Judiciary. A group of vibrant professionals conducted an induction of what the programme entails. We were in awe of budding young leaders taking the lead in ensuring stress management is addressed by SAJEI. Everyone destressed and were inspired by the popular tune of 'we will, we will, rock you.' Contact details are available from your Chief Magistratesand SAJEI secretariat.

All of this would not be possible with our industrious, innovative and committed IT department. Both our staff members at SAJEI who head this department are thanked for their dedication in advancing the Fourth Industrial Revolution in the Magistracy. We as Judicial Educators, share our ideas with them and they make it a reality. Many a time they are burning the midnight oil. They are both a formidable force to be reckoned with. They are responsible for the design of the beautiful newsletter you receive every quarter. There is a lot that goes in behind the scenes. We have the glitz, the glamour and the studios at SAJEI so thank you to the IT team. Allow me to share photographs of them.

Left: Thomas Maseko & Right: Magauta Mphahlele

I want to take this opportunity to wish everyone a blessed and peaceful festive season. Take a break, unwind and enjoy the simple things in life. May you enjoy quality time with your families and recharge to embrace the new year with thanksgiving. Be safe and may you be blessed always.

Human Rights Week 2022

Reminder: Every Magistrate is welcome to contribute by writing articles on law, judgments analysis or any topic that can enhance the judiciary. Articles will be edited by the editorial team before publication. Articles need not exceed 600 words (not more than two pages). You are all encouraged to take part in this, for it is your newsletter.

Note: The views expressed by the writers are not necessarily the views expressed by the CEO of SAJEI and the Editor in Chief.

WALL OF FAME
ADVOCATES JUDICIAL EDUCATION
2013

NORMS AND STANDARDS

Norms and Standards Corner

Extract from Norms and Standards issued by the leadership of the Judiciary:

5.1 Norms

The following norms are hereby established:

(i) Judicial Officers must at all times act in accordance with the core values stated above.

(ii) Every Judicial Officer must dispose of his or her cases efficiently, effectively and expeditiously,

(iii) The Heads of all Courts must take all necessary initiatives to ensure a thriving normative and standardised culture of leadership and must ensure that these core values are adhered to.

(iv) The Heads of all courts should engender an open and transparent policy of communication both internally and externally. Collegiality amongst Judicial Officers should be fostered and encouraged.

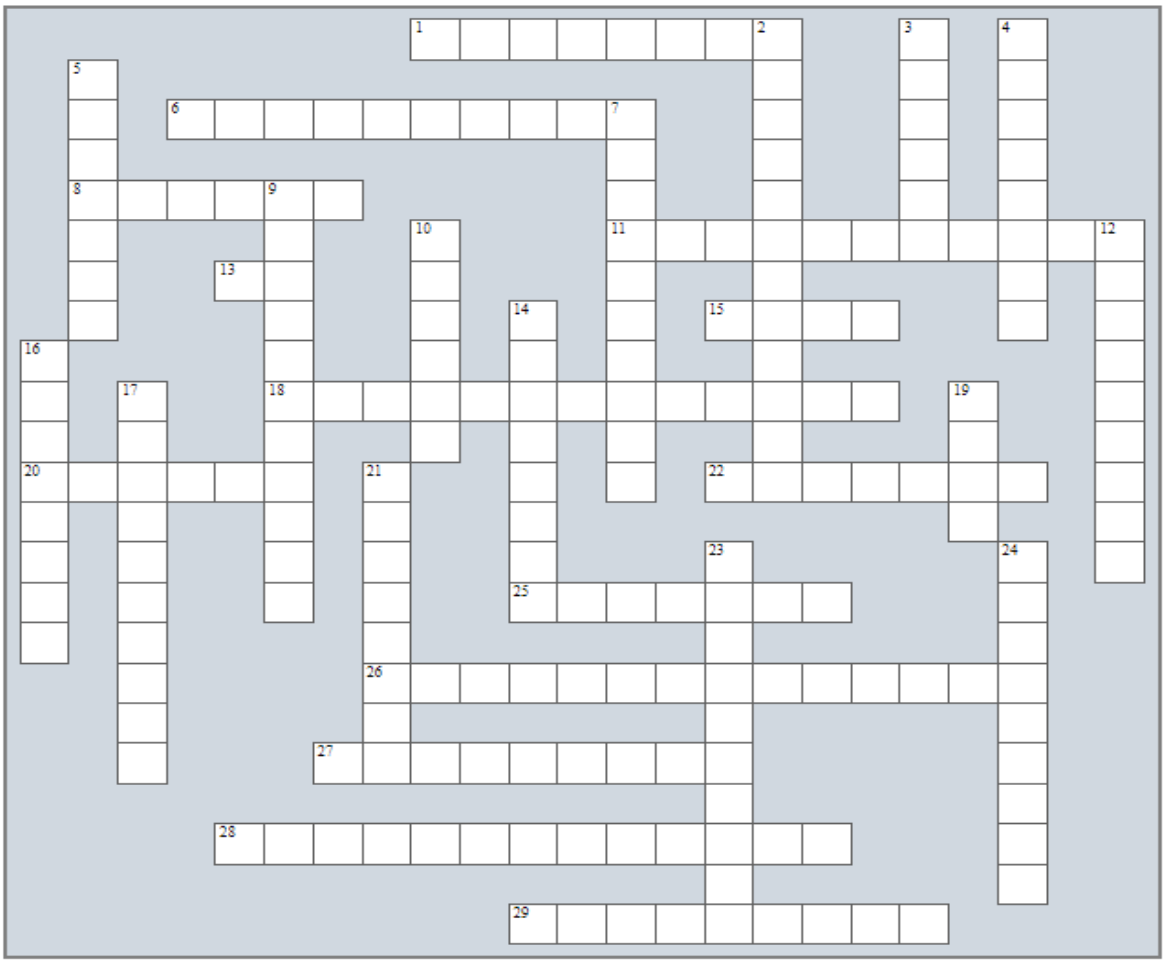
(v) The Head of each Court should encourage Judicial Officers to ensure that all courts and related services should be open and accessible.

(vi) Judicial Officers should make optimal use of available resources and time and strive to prevent fruitless and wasteful expenditure at all times.

(vii) Judicial Officers should at all times be courteous and responsive to the public and accord respect to ail with whom they come into contact.

(viii) Judicial Officers should strive for and adhere to a high level of competence and excellence and to this end are encouraged to participate in regular training under the auspices of the South African Judicial Education institute.

CROSSWORD PUZZLE



Across

1. Type of abuse: Lying about shared properties and assets.
2. S v .....declared section 14(1)(b) of Act 23 of 1957 inconsistent with Constitution.
3. Type of abuse: Calling you names, egging you on, silent treatment.
4. Pattern of behavior in which the abuser intentionally denies that acts or events happened in the way that victims knows they did.
5. DS and ..... overturned the order prohibiting the appellant from telling any other person that the respondent raped her
6. Masiya v DPP, Pretoria and another extended the common law definition of .....
7. Repeated use of electronic communications to harass the victim.
8. Differentiating cyberstalking from cyberharassment is that the respondent communicates a .....
9. .....relationship of power in gender based relationship.
10. Section 9 of Act 17 of 2011: Prima facie proof and proper .....
11. Pattern of degrading or humiliating conduct.
12. Act 17 of 2011 applicable when subjected to harassment in the workplace; Mnyandu v .....
13. Section 5(b) of Act 17 of 2011: Time frame for provision of order where other legal remedies are appropriate and will be sought.
14. Maximum penalty for incarceration under section 18(1) of Act 17 of 2011.

Down

1. An electronic service provider may apply for ..... if the requested information is not in their records.
2. Power and Control Wheel.
3. "The killing of a woman or girl, in particular by a man and on account of her gender."
4. Often cited as the most dangerous phase in an abusive relationship.
5. S v .....Court held: "It is fallacious to take the absence of resistance as per se proof of consent...."
6. Section 2 of Act 17 of 2011.
7. To fist (syn.)
8. Test in section 9(8) of Act 17 of 2011.
9. Impact of stalking on victim; fear, alarm (syn.)
10. Section 12 of the Constitution; right not to be....
11. Delictual liability could follow police in circumstances where State obliged to protect dignity and security of women (lcase law).
12. Constitutionality of section 8 of Act 116 of 1998 (case law).
13. Manner of proceedings in section 8 of Act 17 of 2011.
14. Replacement of mentally disabled
15. Test for effect of harm on victim.

THE STALWART OF THE SOUTH AFRICAN JUDICIAL EDUCATION INSTITUTE

By Ms Jinx Bhoola

Dr Gomolemo Moshoeu, fondly known as “Dr G”, and a “phenomenal woman” in the words of Maya Angelou, was seconded to Office of the Chief Justice in November 2011 to ensure that the Institute is operational. She was then appointed as the Chief Executive Officer (CEO) of the South African Judicial Education Institute (SAJEI) in 2012.

This position was not, 'proverbially', handed to her on a plate. She is a highly acclaimed academic who has excelled in extensive studies both nationally and internationally. Furthermore, she boasts numerous qualifications ranging from undergraduate and postgraduate degrees, various management University Programmes and a never-ending list of Short-Term Courses ranging from corporate governance, ethics, monitoring and evaluation, and management. I have elected to highlight only a few of her accolades and qualifications. She obtained her BA(Law) from the University of Fort Hare in 1987, where she majored in Criminology and Private Law. Thereafter, she was conferred with a BA(Hons) in Criminology in 1989. She then travelled abroad and obtained her Masters in Criminal Justice (MCJ) in 1997 from the University of Colorado in Denver, United States of America. She juggled work and studies simultaneously and received her Doctorate in Penology (litt et Phil) from UNISA in 2010.

In between her academic studies, she attended various programmes which equipped her for the position of CEO at SAJEI. In 2001, she obtained a qualification in Programme in Human Resource Management through UNISA.

Immediately thereafter, in 2002, she proceeded with the Programme in Financial Management through the same institution. In 2005, she pursued a Management Advance Programme (MAP) through Wits Business School. The list of short-term Courses and Training workshops she attended is insurmountable and endless.

To ensure that SAJEI was on top of its game in Judicial Education, Dr G attended and presented at various international conferences, seminars and symposia. She extrapolated trends and ideas from numerous countries' Judicial Institutes, created and implemented valuable systems for the Institute. She has established strong international relations to ensure that South Africa is on the cutting edge and a formidable force to be reckoned with in the Judicial Education space.

The test of her character and tenacity to enhance Judicial training was during the COVID-19 pandemic. Her qualities of leadership, confidence, and effective communication earned her the respect to think critically under crises and to take precise and concise operational decisions in the best interest of the Institute.

THE STALWART OF THE SOUTH AFRICAN JUDICIAL EDUCATION INSTITUTE

One could see she was a keen team-player and engaged in being inclusive rather than exclusive in decision-making based on how she executed her duties. She has great foresight in terms of being outcomes-based driven and could easily adapt to the changing climate of judicial training.

During this time, her focus was on deliverables and ways to fulfil the mandate of ongoing training, whilst the target audience was housebound for a substantial period. Research was conducted immediately by the Directors and Law Researchers and within a short space of time, the impossible was achieved and SAJEI was back in the market to serve the Judiciary. This displayed exemplary commitment and management skills to me.

What I learnt in this environment is the sky is not the limit. I have learnt that beyond the sky is another spectacular dimension, where only a select few pass the test. I have learnt from Dr G that you must be true to yourself. You must have purposeful missions with long-term and short-term goals. Hard work, sleepless nights, sending emails at 02h00 and providing services to the Judiciary require strong leadership, tenacious determination and a well-balanced life.

Her creativity in Judicial Training never fails to amaze us. She is always encouraging us to try new initiatives in Judicial Education. A strong supporter of hybrid training, she is committed to advancing both virtual and in-person training, depending on the needs of each province.

The Judiciary is supported with training on many new topics due to her expertise and skill in Judicial Training. I attended an international conference with her in Kerala, India, and my observation was that she commands the respect of many Commonwealth Judicial Education Institutes. Many of the leaders of the Institute sought her advice on many issues. Whenever new issues arose, the draw would always fall on Dr G to inform the house what was happening in South Africa. She has not only made waves in Judicial Training in South Africa but has imbedded her international footprint globally.

I have observed her develop and mentor many young men and women in various aspects of their lives and upskill them in the professional world. Integrity, transparency and accountability are some of the aspects that she encourages in the workplace.

I want to congratulate Dr G on the sterling job that she has done at SAJEI. She stood the test of time and has taken the Judiciary to greater levels of Judicial Education. She is responsible for ensuring that Judicial Education training meets international standards, which she does by engaging with various stakeholders at Regional and International levels. Furthermore, she explores numerous topical subjects to ensure the Judiciary is informed and enlightened. She is responsible for excellence in judicial training.

Dr G, on behalf of the Judicial Educators, we salute you for your commitment, guidance and support in ensuring a high standard of Judicial Education at SAJEI. You inspired us to take risks, to be creative and innovative in executing our duties in Judicial Education. We were encouraged to think out of the box, use our strengths and be our own unique selves.

We thank you, and always remember, you are a force to be reckoned with not only in South Africa but across the globe.

You are truly a "Phenomenal Woman" who truly inspires other women and celebrates all the obstacles you overcame in life by being a woman under the race of human beings who took Judicial Education on a journey in South Africa.

https://www.ubuy.za.com/product/1AFCEWRXI-maya-angelou-quotes-wall-art-positive-quotes-wall-decor-black-and-white-artwork-phenomenal-woman-wall-art-african-american-wall-art-inspirational-

THE DAWN OF A NEW APPROACH FOR PRESIDING OFFICERS WHEN DEALING WITH GENDER-BASED VIOLENCE & FEMICIDE MATTERS

Ms Tracy Bossert

Senior Magistrate

As Judicial Officers, we have entered a new era of adjudication principles. An "arm's length" approach is no longer appropriate when dealing with complainants involved in domestic relationships with an accused or respondents. In 2022, gender-based violence legislations in the form of Criminal and Related Matters Amendment Act 12 of 2021, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 13 of 2021 and the Domestic Violence Amendment Act 14 of 2021 came into operation.

In terms of these legislations, focus is placed on ensuring that a victim-centred and survivor focused approach is taken in adjudication of all matters relating to gender-based violence matters. This approach requires a Judicial Officer to implement and enforce a more open-minded approach when interacting with victims within court processes. Listening skills and a focus on victim safety and well-being are essential elements of a victim centred approach. Assessing victims' evidence and orders focusing on victims' safety has similarly been brought to the forefront.

An issue which is closely linked to gender-based violence is that of secondary victimisation. Secondary victimisation refers to attitudes, processes, actions, and omissions that may, intentionally or unintentionally, contribute to the re-victimisation of a person who has experienced a traumatic incident as a victim. This is done through failing to treat the victim with respect and dignity. Judicial Officers often unwittingly become responsible for secondary victimisation within the courtroom during the adjudication process.

Victims, especially adult victims, are obliged to give evidence in open court. Many victims find the court process daunting and traumatic. Besides the traumatic incident giving rise to the court appearance, the actual appearance in court to give evidence may reinforce feelings of powerless and anxiety in the victim.

It is expected of Judicial Officers adjudicating on gender-based violence matters to ensure that any victim or witness, who may be unduly traumatised or fearful during the process of providing evidence, is protected by taking special measures. Special measures may include the use of closed-circuit television or other electronic methods to enable victims or witnesses to give evidence in a safe and private environment. Consideration can also be given to making use of evidence through intermediaries in all matters of gender-based violence. This method will allow victims who are not able to fully express themselves in situations of fear and trauma, to give evidence in a more secure place.

Some victims find it difficult to recount the events in the manner generally used in trial matters. By enforcing rigid methods of recounting details of the incident the court may not be given all the information it requires in adjudication. Allowing victims to recount the events in their own manner and thereafter trying to put it in a more chronological manner may be more advisable. Some victims find it therapeutic to verbalise and recount their experiences. Restricting the manner of recounting that experience may lead to secondary victimisation.

It is required of a Judicial Officer to ensure that judicial stereotyping does not take place. Often it is accepted that displays of emotion are a logical consequence of a traumatic experience. Where these emotional displays are not present during the court process, or were not present during or after the incident, it is often concluded that the victim may not be telling the truth or is partly responsible for what happened to them. Visible distress is seen as a logical reaction to gender-based violence, but this approach does not consider that people react differently and express themselves in different ways, especially during traumatic events.

THE DAWN OF A NEW APPROACH FOR PRESIDING OFFICERS WHEN DEALING WITH GENDER-BASED VIOLENCE & FEMICIDE MATTERS

Failure to conduct proceedings in a respectful manner, or allow other stakeholders in the courtroom to interact with a victim in a disrespectful manner, is a further way in which a Judicial Officer can allow secondary victimisation to be perpetuated. A primary manner in which secondary victimisation can be curtailed is to ensure that harsh and repetitive cross-examination must be put to a stop by the Presiding Officer.

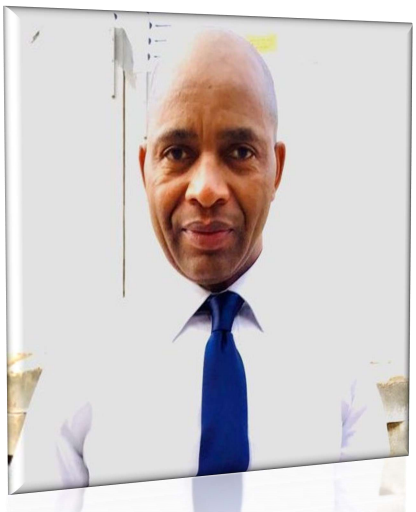
Assessment of victims' evidence is equally important. As Judicial Officers we must, during consideration of evidence, recognize that a variety of circumstances may have an impact on the consistency and thoroughness of statements made. Issues of the timing of the incident, being interviewed by a trained person, and whether the victim feels protected and supported at the time the statement is being delivered are some examples. Often victims give evidence months or years after the incident took place and during that time the victims must manage their lives and may choose to avoid thinking or dealing with the traumatic event. This could lead to inconsistencies between statements made and oral evidence given during trial.

Presiding Officers should acknowledge that inconsistencies can be expected, especially in respect of minor details. The practise of interpreting these inconsistencies as discrediting the evidence of the victim should be avoided.

Any orders that a Presiding Officer may grant should be effective, with the focus on protecting victims of gender-based violence. Thought must be put into the practical application and the desired results that orders are to achieve.

In moving away from the "arm's length" approach, Judicial Officers will be required to apply creative and innovative ways, within defined parameters, to protect and empower victims of gender-based violence.

CREATIVE INNOVATION IN JUDICIAL TRAINING: JUDICIAL TRAINING & THE RULE OF LAW



Dr Vusi Mhlanga

District Magistrate

When persons access the courts, they are not merely looking for a resolution of their disputes. They are seeking a broader notion of "justice", which is located in some general societal consensus about what is fair, right or morally acceptable. To the extent that individual understanding of rightness differs, and the judicial officers' challenge is to show some standard of legitimacy that is premised in something more durable and credible than the caprice of the individual judicial officer hearing a case, and that persuades public trust and confidence[2]. Hence the objectives of judicial training are to locate, articulate, communicate and fundamentally apply those principles' rectitude to which our personal preferences, inclinations and emotions must be subordinated. It is this notion that we call the rule of law.

Where do we locate this notion of the rule of law?

In Anglophone common-law jurisdictions we can trace our legal roots back to the Magna Carta[3] which we might today call fundamental human rights or "charter of rights":

"First, We have granted to God, and by this Charter have confirmed, for Us and our Heirs for ever, That the Church of England shall be free …"[4]

The Charter also provided some underwritten liberties:

"No Freeman shall be taken, or imprisoned, or disseised of his Freehold, or Liberties, or the free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will We pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by Law of the Land. We will sell to no man, we will not deny or defer (delay) to any man either Justice or Rights." [5]

Some 560 years later the American Declaration of Independence provided these ideals to their modern form:

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by the Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are entrusted among Men, deriving their just powers from the consent of the governed …" [6]

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1. Former Acting Chief Magistrate Johannesburg and Cluster Head Gauteng; Former Acting Chief Magistrate Ekurhuleni Central: Palmridge; Senior Magistrate Johannesburg. Part-time SAJEI Facilitator. B.iurs; LLB; LLM and LLD (University of South Africa).
2. Mr Justice Ivor Archie, the Chief Justice of the Republic of Trinidad and Tobago. Paper titled "'*Judicial Training and the Rule of Law*" delivered at the conference of the International Organisation for Judicial Training held in Bordeaux, France, from 31 October to 3 November 2011, at 15. (Hereinafter 'Chief Justice Archie of the Republic of Trinidad and Tobago').
3. Magna Carta Libertatum commonly called Magna Carta is a royal charter agreed to by King John of England at Runnymede, near Windsor on 15 June 1215. Magna Carta, which means "The Great Charter", is one of the most important documents in history as it established the principle that everyone is subject to the law, even the king, and guaranteed the rights of individuals, the right to justice and the right a fair trial.
4. Magna Carta (1215) 25 Edw 1, cl 1.
5. Ibid at cl. 29.
6. United States Declaration of Independence (1776).

CREATIVE INNOVATION IN JUDICIAL TRAINING: JUDICIAL TRAINING & THE RULE OF LAW

Some 220 years later the South African Constitution was adopted and it sought to protect these basic rights:

"The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."[7]

"Everyone is equal before the law and has the right to equal protection and benefits of the law."[8]

One of the tasks of the judicial educator is to sensitize judicial officers to the danger of assuming that their personal sensibilities or prejudices are normative, to raise their awareness of social and economic realities of fellow citizens that may be outside the realm of their personal experience, to educate them concerning current international norms and best practice and to equip them with the tools of argumentation that would make the articulation of their reasoning processes in their judgments both sound and transparent.[9]

The Nuremberg Declaration on Peace and Justice which hearkens back to the Magna Carta states:

"Justice" is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards …

What is "justice"?

The Nuremberg Declaration on Peace and Justice which hearkens back to the Magna Carta states:

"Justice" is understood as meaning accountability and fairness in the protection and vindication of rights, and the prevention and redress of wrongs. Justice must be administered by institutions and mechanisms that enjoy legitimacy, comply with the rule of law and are consistent with international human rights standards … [10]

Citizens remain confident that they will be protected from injustice, while the traditional legal education most judicial officers acquired 20 or 30 years ago simply did not equip them to fully discharge that responsibility in a contemporary context.[11]

While the most fundamental characteristic of the early 21st century was the rapid changes that continue to sweep the entire world, these also presented promises of hope and of new beginnings. However, it also presented unprecedented challenges, especially for a profession whose existence and sense of stability and dependence on precedent has relied primarily on an unchanged world order.[12]

Two Australian legal scholars state that the process of globalisation is part of an "ever more interdependent world", where political, economic, social and cultural relationships are not restricted to territorial boundaries. Developments in technology and communications and international law profoundly affected the context within which each person and community lives and the role of the Courts.[13]

New and emerging technologies dramatically transformed the way in which we interact and judicial officers should be equipped to and be able to understand the context in which disputes that are brought for adjudication arise. Judicial training is at the heart of that preparation since it addresses the need for the Courts to exist and serve in the changing environment.

Knowledge of the law can no longer be the only tool for judicial officers. The judicial officers of tomorrow must be efficient managers knowledgeable in case management techniques and litigation support technology.[15]

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7. Section 8 of the Constitution of the Republic of South Africa, 1996. Hereinafter the '1996 Constitution'.
8. Section 9 of the 1996 Constitution.
9. Chief Justice Archie 17.
10. The Nuremberg Declaration on Peace and Justice A/62/885 (2008).
11. Chief Justice Archie 18 – 19.
12. Chief Justice Archie 19.
13. Robert McCorquodale and Richard Fairbrother "*Globalisation and Human Rights*" (1999) Human Rights Quarterly 735 at 735 – 736.
14. Chief Justice Archie at 19.

CREATIVE INNOVATION IN JUDICIAL TRAINING: JUDICIAL TRAINING & THE RULE OF LAW

Some areas upon which our judicial training must focus as we plan future education and training programs should be:

- Impartiality – this requires not merely an absence of conscious corruption, high moral standards and desire to be fair. There must be a deeper self-analysis and contextual education to root out unconscious bias.
- Competency – implies a basic level of understanding of science, economics, sociology and psychology as well as written and procedural law.
- Efficiency – in the age of online commerce requires quicker response times and more user friendly procedures to meet expectations of an increasingly sophisticated and demanding clientele, in which the number of self-represented litigants is rising. We cannot assume that all judicial officers come to the bench with the kind of management skills needed for the modern court or courtroom.
- Effectiveness – one aspect of judicial effectiveness is the collective responsibility of listening and responding to the community's legitimate complaints about the justice system and using our influence to effect change. Again, we cannot assume that all judicial officers come to the bench with some kind of stakeholder management, people and case management skills and or some of the training needs emanating from the effects of globalisation as well as developments in technology and communications.

I can speak of experience with the South African Judicial Education Institute (SAJEI). While all of these considerations that I have mentioned underpin SAJEI's training efforts, they have built a solid case for such an establishment which is also built on its guiding pillars. Nonetheless when looking into the future, there are certain new training areas that can be explored and incorporated into our training programmes.

SAJEI's guiding pillars have been to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education and training. They have inspired the implementation of thousand training and education programmes covering a wide range of topics as part of a high quality service to the Judiciary of South Africa and its global partners.

Judicial officers of tomorrow are faced with ever-changing challenges which require judicial training to focus not only on knowledge of the law but also on other courtroom related issues. In order to maintain relevance and consequently, legitimacy, judicial officers have to keep pace. In the light of the above challenges, a comprehensive study is necessitated to investigate the nature and the scope of new training programmes which could equip and prepare judicial officers to face these new challenges and be more prepared to serve efficiently in the courtrooms in achieving the Institute's goal of promoting through education and training, the quality and efficiency of services provided in the administration of justice as provided for in the South African Judicial Education Institute Act.

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RE-INVENTING THE WHEEL TOWARDS A PRINCIPLED APPROACH TO INNOVATIVE JUDICIAL TRAINING

Ms Chenta Singh

District Magistrate

At the heart of judicial training are the objectives of imparting knowledge and developing impartiality. In a broader context, filling the training gaps appropriately and creatively should underpin the major objective of reducing the backlog of cases which have risen exponentially since the covid-19 pandemic and continue to do so, unabated by the electricity crisis.

Identifying training needs through the gathering and collation of information allows the trainer to see directly through the lenses of the trainee, as to what is puzzling, or challenging, or frustrating in the law and within the enclosure of the courtroom.

The journey into innovation is an exercise in contemplating the future which begins in the present and retraces its steps backwards, paying careful attention to signposts that can provide an indication of future training needs. 'The 2019 survey of South African Magistrates' perceptions of their work environment' (the 'Survey') is an example of such a journey and will be discussed in more detail hereunder.

Through an exploration of the Survey, it is the aim of this article to demonstrate potential creative innovation in training with reference to the signposts that were illuminated therein, and to suggest ways in which creative solutions can be introduced to resolve training gaps and improve the efficiency of the justice system.

The 2019 survey of South African Magistrates' perceptions of their work environment

To begin then, the Survey is the first of its kind. Out of the 386 district and regional court magistrates surveyed, the vast majority were previously prosecutors, and almost a quarter (24%) were attorneys. A staggering 57% were appointed between 2000 and 2019. The majority of participants had at most, 10 years of experience.[2] Curiously, although the majority of younger Magistrates were doing both civil and criminal courts as compared to the older ones, on the totality of the data analysis, one of the significant conclusions reached in the report was the indication of training needs in the civil and family section.[3] This finding makes sense in light of the fact that most magistrates surveyed had at most, ten years of experience, but it may not be a true reflection of the actual position.

Going deeper, the findings reflect a gap in the lack of support to dealing with stressful conditions imposed by amongst other things a high workload of Magistrates. The survey noted that the behaviour in court and testimony of witnesses, a sense of social isolation and insufficient support ranked among the top causes of stress. Consequently, 1 in 3 magistrates experienced depression, and just over half noted irritability, muscle tension, sleep disturbances and headaches.[4]

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1. "The 2019 survey of South African Magistrates' perceptions of their work environment" *Magistrates Matter,* available online at https://www.magistratesmatter.co.za/2020/08/26/magistrates-perceptions-of-their-work-environment. Accessed 29th November 2022. (The "Survey").
2. 29% of those surveyed were in service for between 1 and 5 years; 17% between 6 and 10 years, and 16% between 16 and 20 years, and 21 and 25 years respectively.
3. Page 16 of the Survey
4. Page 16 of the Survey

REINVENTING THE WHEEL TOWARDS A PRINCIPLED APPROACH TO INNOVATING JUDICIAL TRAINING

Reversing the trends: innovating for improvements and progress

The results of the Survey reflect a need to innovate training in at least two ways: First, an overarching approach to traditional legal theory and practice involving the intersection of technology. Second, the creation of soft-skills training for resilience-building amongst magistrates.

In as far as traditional law training goes, the era of the 4th Industrial Revolution is knocking on the doorsteps of the district courts, waiting to cohort with the likes of civil procedure and its half-siblings of the Family Court. The much-awaited introduction of an online application form in the Domestic Violence Court springs to mind. Already technological workflow tools have featured in civil cases such as that of *Borcherds and Another v Duxbury and Others* (1) SA 410 (ECP) regarding the validity of an e-signature, *MassBuild v Tikon* [2020] JOL 48548 (GJ) regarding Adobe Acrobat and the validity of a surety, and *Knuttel v Bhana* [2022] 2 ALL SA 201 (GJ) regarding the commissioning of a document over WhatsApp

Training on legislation and case law in tandem with sessions on workflow tools and their value – both in and out of the courtroom can improve legal knowledge and boost productivity. In all the cases above, the common denominator is an intricate awareness of the intersection between law and information technology communication. In the long run, knowledge and methods of application of these tools through innovative training, can improve productivity and reduce the backlog of cases.

But innovation can also be sustained by introducing the 'real' experience to the trainee. Lecture sessions involving new legislation, can be coupled with tangible ancillary sessions. Very much like teaching the wording of section 212(4) of the CPA could be coupled with a day visit to a forensic lab. This exposure would assist for magistrates to be innovative as innovation arises from broadening the lens of understanding.

Diversity training about the social context, covers a broad area of culture, gender, ethnic, racial stereotypes. Social innovation in this instance is linked to the paradigm of the supremacy of the Constitution and equality. Equity and rights are the cornerstones of developing new means of shaping the legal landscape. Therefore, diversity, inclusion and social context training should be practical. Heritage month in September, the human rights days and the 16 days of activism on gender based violence provide an ideal opportunity to focus training and the lack of exposure by magistrates, in an innovative way such as eroding prejudices through the sharing of cultural experiences and measuring it against the principle of equality in the Constitution.

Noting the stresses experienced by magistrates in the report is an avenue for the pursuit of aggressive training on courses in personal development which can be hosted in parallel to the usual training categories. Short sessions on for example developing emotional intelligence or improving mindfulness and self-awareness can do wonders to improve the overall output in particularly the family court which witnesses daily, the disruption of the family unit. Much like assessors bearing experience in a particular area can be called upon in trials or inquests, it is respectfully submitted, that training sessions apply the same model, and call upon recognized persons bearing an appropriate skill-set. The same may be said of courses such as anger management, managing workplace anxiety, or stress management and resilience. Even simplified courses on public speaking and critical thinking have the potential to re-shape brain patterns thereby improving judgment writing.

Looking ahead to the future

By using the Survey as a compass from which to navigate to new frontiers in training, and therefore by implication, improved results, innovation must find a new axis upon which to rotate.

Judging by the indication of the results of the stressful working conditions of magistrates, the quest for excellence should also not lose sight of the importance of supporting the well-being of magistrates.

Innovation may thus require the lecture-type setup, virtual, in person or hybrid to create space for news ways of striving for judicial excellence in both hard and soft skills. Under the aegis of SAJEI, creative innovation in judicial training may undoubtedly spawn a diverse array of ideas which can be moulded and adapted to fit the evolving needs of magistrates. Thus, innovation can direct the focus of future training by abundantly filling its gaps, in turn opening kairotic windows of change.

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5. *Borcherds and Another v Duxbury and Others* 2021 (1) SA 410 (ECP) regarding the validity of an e-signature, *MassBuild v Tikon [*2020] JOL 48548 (GJ) regarding Ado- be Acrobat and the validity of a surety, and *Knuttel v Bhana* [2022] 2 All SA 201 (GJ)

CREATIVITY & INNOVATION IN JUDICIAL TRAINING

Ms Fiona Seedat

Deputy Director: Events Coordinating

William Butler Yeats wrote: "Education is not the filling of the pail but the lighting of a fire."

Learning is not meant to be contained (in a pail), it is meant to spread, to catch aflame, to roar into every crevice and corner, to prepare the path for growth. I have been a witness to this preparation, learning and growth in the process of judicial training.

From the viewpoint of an observer, the growth and development has been a two-way flow, as SAJEI Judicial Educators also learn as they impart knowledge to their colleagues. It is also a continuous experience that is not static. There has previously been a reliance on the tried and tested method of classroom training, however the global COVID-19 pandemic pushed our boundaries and catapulted us into a search for new and unconventional methods of training which are technology based. What has emerged is a display of creativity and innovation that creates fresh interest in judicial training. There has been role playing, crossword puzzles, Q and A, and interactive debates to name a few learning practices. The traditional classroom has been left behind and a new participative environment has emerged.

For some, the participation through the barrier of an electronic device provided more confidence than being in the center of a room with all eyes on them. Also, the fear of making an error or responding with an incorrect answer somehow diluted. For others, the distance provided by this electronic channel provided a boost to their confidence and a sense of anonymity. It was observed that posting a question in an Online Chat Forum, the ability to switch off video feed and just speak proved more comfortable than facing a full audience.

As an avid crossword puzzle fan, I found this training tool to be of particular interest. When tackled in breakaway rooms, the puzzle drew judicial learners in as they offered answers in their efforts to complete the puzzle first. Their competitive spirits came alive and there was the pleasure of achievement when their answer was correct. It appeared to be one of the favourite learning experiences, reading the clues out loud and testing how the answer fit into the blocks provided.

The mock trials are a fun learning experience, drawing the audience in as they wait to see behaviours often displayed by respondents in their courts. Advice and suggestions of how to manage challenging situations that they find themselves in as presiding officers are learnt along with the important legal concepts and principles. This is multi-dimensional learning, in which the role players show their creativity in developing their 'characters' and creating scripts. There is a certain freedom expressed in being in someone else's skin, demonstrating actions and speech that are true to real-life court situations. The passing of information in this training activity may be unstructured and unconventional, yet it does tend to stay in the judicial learner's minds.

The ability to use technology with competence in the professional world is an advantage that is emerging with the prevalence of remote working arrangements. With virtual court hearings contributing significantly to the judiciary's goal of providing wider access to justice, technological proficiency is increasingly an integral requirement for Judicial Officers. Training through the medium of virtual/online platforms assists Judicial Officers to transition to virtual courts. The learning is imperceptible and gradual, navigating this new environment as a learner whilst developing technical knowledge to manage a virtual court. The process of acclimatizing as a judicial learner and being comfortable in a virtual setting is part of the journey.

CREATIVITY & INNOVATION IN JUDICIAL TRAINING

I recall a particularly innovative training session I was involved in. I had the privilege of observing a Regional Court President presenting Equality Court training to District Court Magistrates. The brief was to present a scenario with only hate speech being excluded as an example. This led to a plethora of cases being heard, some quite refreshing and all different which provided some interesting decisions and judgements as a result. This condition, the limitation on hate speech, led to creativity and diversity which opened up a world of cases which ordinarily would not have been raised. A valuable lesson, as in our rainbow nation with diverse cultures, such cases are likely to be presented in their courts.

My observation of the judicial learners when they are participants in role playing during mock trials is they were comfortable, this stepping aside from their own personality proved less daunting than simply reading a judgement out loud or submitting a judgment that is critiqued. Any input in these cases is constructive, with the sting removed as it is your 'character' receiving feedback. While the lesson is serious, this outlet or methodology is lighter in nature and the learning more easily absorbed. Preparing a script for a mock trial, evaluating the points that can be raised and trying to anticipate objections is forward thinking in practice.

The Facilitation Skills training is in my opinion a necessary soft skill for all Judicial Officers not only for those interested in becoming Judicial Educators. I believe that this training will develop mentorship capacity, in learning to set out material and highlighting the relevant aspects of certain Acts. It will instill discernment and perception of what needs to be communicated and through this process the retention of important facts. This appeared to be the case during the October 2021 training of Newly Appointed District Court Magistrates with the deployment of Assistant Training Facilitators to the various venues. The feedback from the Magistrates who benefitted from this experience was positive and there can be no doubt that these pioneer mentors transferred their insight, experience and knowledge to their groups of judicial learners.

For me personally, there was an opportunity to be creative and innovative in my capacity as part of the support team to the Judicial Educators, Facilitators and learners during the inaugural virtual training in October 2021. I was responsible for the Civil Stream coordination and noticed the questions being asked in response to the information emails sent to the Magistrates. I realized that there was a degree of uncertainty expressed about learning through a virtual platform. I implemented an induction session each Sunday evening prior to the Monday of the week-long training for each group. The willingness to log in to an introductory meeting by all the Magistrates on a Sunday during their personal time was proof of their need for clarity on the virtual training process. This informal session assisted in dissipating concerns about participation in virtual training. The Judicial Educator took advantage of this opportunity and logged in to provide a brief summary of the expectations of Civil Court. The judicial learners were subsequently more relaxed when starting training on a Monday morning having had some of their qualms set to rest the evening before.

Judicial training is a journey, a path we are all travelling on and we rely on each other notwithstanding our different roles to embark on this growth process. From preparation, to implementation, new learning, feedback on the process and the cycle of new inductees to the role of future Facilitators.

JUDICIAL EFFECTIVENESS: THE SOUTH AFRICAN CONTEXT

Mr Bradley Swanepoel

SAJEI Law Researcher

It is often stated one of the objectives of judicial education, alongside independence, impartiality and competence, is that of judicial effectiveness.[1] Judge Sandra Oxner argues that it is not enough for the judiciary to be impartial and competent when interpreting the law and issuing judgments, it also has to be effective when doing so. She writes that when seeking to reach a just solution to a matter, a presiding offer:

> 'must also be "effective" in interpreting and shaping the law to achieve a just solution. Knowledge and understanding of the community in which one lives is a prerequisite for an effective judge. Another prerequisite is a high level of judicial skills. Other aspects of the effectiveness include predictability and a collective judicial responsibility of listening to the community's complaints about the justice system. In its role as guardian of the image of justice, the judiciary has an interest and a responsibility in supporting necessary process reforms in non-political ways. To be effective a judiciary must be legitimate, it must be trusted, respected and relevant.'[2]

In this article, I submit that in addition to those components that Judge Oxner identifies in the above quote, effectiveness in the South African context also encompasses the transformation of the judiciary. A transformed judiciary does not only mean one that reflects the demographic realities of South Africa, although this is certainly important. A transformed judiciary also encompasses a change in judicial mindset.[3] It is through this change in mindset that such effectiveness is achieved.

Many writers have noted that, historically, judiciaries in western democracies have by and large adopted a positivist approach to law. Goodman and Louw-Potgieter described this as 'traditional, positivist, a-contextual' in which the law is treated as 'a scientific discipline where objective principles are dispassionately applied to actual cases.' [4]

The presence of such approach in South Africa has been identified by judicial officers such as Judge Dennis Davis, who has described the pre-democracy South African legal culture as having followed 'predominantly a formalistic and technical approach to law'[5] This legal culture largely ignored the fact 'that law invariably expresses a particular politics and enforces a singular conception of society'.

However, as Judge Pius Langa has noted, the Constitution demands a shift away from this approach, towards one in which judicial officers deliver decisions based on both the authority of the law, as well ideas and values.[6] Fundamental rights have to be interpreted broadly having regard to the spirit and objectives of the Constitution, and an overly legalistic or positivist approach should be avoided.[7] This in turn requires a change in mindset because as Klare has noted:[8]

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1. S Oxner 'Evaluating judicial education organizations: What can and should be measured?' The @nd International Conference on the Training of the Judiciary: Judicial Education in a World of Challenge and Change, Ontario, Canada (2004) at 3.
2. Oxner note 2 above at 4.
3. D Davis and K Klare 'Transformative Constitutionalism and the common and customary law' (2010) 26 *SAJHR* 403 at 405.
4. S Goodman and J Louw-Potgieter 'A Best Practice Model for the Design, Implementation and Evaluation of Social Context Training for Judicial Officers' *African Journal of Legal Studies* 5 (2012) 181 at 185.
5. DM Davis 'Judicial Education in a Transformative Context' (2018) 1 (1) *South African Judicial Education Journal* 11 at 11

JUDICIAL EFFECTIVENESS: THE SOUTH AFRICAN CONTEXT

'[j]udicial mindset and methodology are *part of the law*, and therefore they must be examined and revised so as to promote equality, a culture of democracy and transparent governance.'(Emphasis in the original)

As the preamble to the South African Judicial Education Institute Act 14 of 2008 acknowledges, the quest for a transformed judiciary has created a need for judicial education and training. Education in general has long been recognised as an agent of change[9] and thus judicial education constitutes the agent through which a change in judicial mindset can be achieved. A change in judicial mindset means that the judiciary delivers judgments that emphasise the values underlying the Constitution rather than a purely positivist interpretation of the law.

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6. P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351 at 353.
7. Per Khumalo J in *Moyo and another v Minister of Justice and Constitutional Development and others* 2017 (1) SACR 659 (GP) para 24 – 25.
8. K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146 at 156
9. L Armytage 'Judicial education on equality' (1995) 58 The Modern Law Review 160 at 164

THE FUTURE OF COURT-BASED MEDIATION IN SOUTH AFRICA - A REALITY OR PIPEDREAM?

Mr Akho Ntanjana

SAJEI Law Researcher

1. Introduction

Very frequently people rush to courts to litigate on issues that can easily be resolved through mediation. As a result, our courts are flooded with many applications and at time litigants have to wait for over a year or two for their matter to be enrolled for trial or hearing. In a quest to deal with this problem, the Magistrates' Courts Rules (chapter 2) came into operation on 1 December 2014 to provide for an alternative to formal litigation, voluntary mediation. Additionally, on the 9 March 2020, Uniform Court Rule 41A was brought into effect, and applies to all High Court matters in the country. This rule mandates parties to consider mediation prior to pursuing litigation in the High Court. The overall objective of mediation is to promote access to justice.

This article, will discuss relevant legal provisions, key features of mediation, advantages of mediation and selected South African Judicial Education Institute (SAJEI) judicial education interventions.

2. What is mediation?

Mediation has been defined as a process whereby a third party (mediator), assists the parties in identifying issues, clarifying priorities, exploring areas of compromise and generating options in an attempt to resolve the dispute. It has been said that mediation '…premised upon the intention that by providing disputing parties with a process that is confidential, voluntary, adaptable to the needs and interests of the parties, and within party control, a more satisfying, durable, and efficient resolution of disputes may be achieved' [1] Therefore, mediation is intended to facilitate discussions, preserve good relationships and obtain a sustainable resolution/settlement.

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1. Prof Maureen A. Weston "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good-Faith Participation, Autonomy, and Confidentiality", 76 IND. L.J. 591, 592 (2001). See also *Kalagadi Manganese (Pty) Ltd and Others v Industrial Development Corporation of South Africa Ltd and Others* (2020/12468) [2021] ZAGPJHC 127 (22 July 2021).

THE FUTURE OF COURT-BASED MEDIATION IN SOUTH AFRICA - A REALITY OR PIPEDREAM?

3. Rule 41A of Uniform Rules of Court

Due to space limitation, this article will not discuss all the passages of Rule 41A except for few significant parts worth highlighting.

Rule 41A (1) provides the following working definition of mediation:

"*a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute*."

Rule 41A(2)(a) advises that in every new action or application proceeding, "*the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation*". This indicates that parties are obliged to give Rule 41A notice to another party to 'consider' referring the matter to mediation.

In *Koetsioe and Others v Minister of Defence and Military Veterans and Others* (12096/2021) [2021] ZAGPPHC 203, the court opined that:

"[Rule 41A] not only requires a notice but clearly contemplated that a party must have considered the issue earnestly prior to exercising its election. This is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated."

Further, in another unreported case *Van der Merwe N.O and Others v Superplant Hire (Pty) Ltd and Others* (36421/21) [2022] ZAGPPHC 799, the Court remarked *"It follows that the applicants were compelled by sub-rule (2)(a) to serve a notice in terms of Rule 41A, stating whether they consent or opposes the matter to be referred for mediation, and such notice ought to have been filed prior to summons being issued or an application being launched. ..... It is clear from the requirement that a party must state its reasons for its belief that a dispute is or is not capable of being mediated. The applicants did not state the reasons why they are of the view that the issues in dispute could not be resolved by mediation, save to state that the process is inappropriate and will not suffice. Nonetheless, neither party followed the rule, and it is rather disturbing for litigants to disregard this rule and its requirements."*

Rule 41A (6) identifies a further characteristic embedded into the process of mediation:

"(6) Except as provided by law, or discoverable in terms of the Rules or agreed between the parties, all communications and disclosures, whether oral or written, made at mediation proceedings shall be confidential and inadmissible in evidence."

Unlike court-driven or arbitration processes, these provisions presuppose that mediation process is controlled by the parties themselves. The parties must discuss openly and frankly in order to reach a desirable compromise. The mediator must establish parties' trust and confidence.

4. Main features of mediation

The following elements are key foundations of mediation, and these have been juridical sanctioned by Rule 41A:

a. A voluntary, non-binding dispute resolution process.

b. The parties agree on the terms of the process to be adopted (ownership).

c. The mediator facilitates the process to enable the parties to reach a

solution themselves.

d. The process is confidential.

Mediation principles are appropriate in divorce or in matters where children's rights are implicated. The Children's Act 38 of 2005 refers to child participation. It states '..every child that is of such an age, maturity and stage of development as to be able to *participate* in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

THE FUTURE OF COURT-BASED MEDIATION IN SOUTH AFRICA - A REALITY OR PIPEDREAM?

5. Selected judicial education initiatives

There has been a number of judicial education programmes spearheaded by SAJEI with a view to enhance the mediation skills of Judicial Officers. These trainings are usually often facilitated by international as well as local experts, mostly Judges and legal practitioners.

On the 6th – 8th and 9th – 10th July 2022, SAJEI convened a workshop on Mediation with the target audience being Magistrates and Traditional Leaders. A total of 40 participants from the Judiciary, Traditional leadership, Magistracy and SAJEI attended the 3-day training.

In January 2019, SAJEI organized several workshops on Court Annexed Mediation and Case Management attended by Judges, Magistrates and members of the legal profession. A total of 82 participants attended the one-day seminar. The topics covered during these trainings included *inter alia* mediation principles; R41A; private-discussion/ caucus, effective questioning, exploring interests, empathizing and validating, and dealing with difficult personalities. It apposite to highlight that a number Heads of the Judiciary are in support of mediation. Chief Justice RMM Zondo in one of the seminars on Mediation in Cape Town, Western Cape, indeed expressed full support of court-based mediation stating that he would like it to take off as soon as possible.

Facilitators of workshops on Mediation are respected judges in their divisions and the country.

6. Conclusion

Court-based Mediation is indeed a great and an advantageous dispute-resolution mechanism, if used appropriately by qualified mediators. Mediation is cheaper and quicker than the normal litigation route. It is proposed that SAJEI should continue to facilitate Mediation trainings for the judiciary.

THE IMPORTANCE OF MOCK APPLICATIONS IN JUDICIAL EDUCATION TRAINING: *THE STATE & SAMORA KANSAS MASHABA* (R29/2022) [2022] ZAMPMBHC (8 December 2022)

Ms Jinx Bhoola

Senior Magistrate

The Review judgment of The State and Samora Kansas Mashaba has sparked National comments on the need to attend Judicial Education training. After reading this review judgment it sparked creative juices to think out of the box and to consider how could this anomaly be avoided. Creative innovations in training are imperative. This issue illustrates the importance of conducting mock applications in Juridical training. I believe creating a courtroom situation in the training space is the key to successful training. The facts of this case are simple but many important legal principles emanate from this judgment.

In this case, Mr Mashaba faced a charge of contravening section 31(1) of the Maintenance Act 99 of 1988, (the Act) where he failed to comply with an order made against him regarding the maintenance of his minor child.

The following issues arose during the proceedings which has a direct bearing and impact on the lower Courts:

- The court recording machine was non-operational. **What procedure ought to have been followed by the Magistrate?**
- The proceedings were – recorded long hand. **What procedure ought to have been followed by the Magistrate?**
- The Judge's file contained a record reconstructed from notes by the Magistrate. What is apparent from the record is that there was no reason advanced by the presiding Magistrate for the reconstruction of the record and neither was there any indication as to who participated in the reconstruction other than the Magistrate.
- The facts of the review, which is apparent from the reconstructed record is that the accused was summoned to appear in court. Before his appearance in Court, there were negotiations between the accused and the Public Prosecutor regarding the alleged charges and the arrears of R6000.00 owed by the accused. The accused undertook to settle the arrears in two instalments of R3000.00 each. The first such payment was to be made on the date of the hearing and the second payment was to be made in September 2022.
- The Prosecutor subsequently informed the court of this arrangement and requested that the court confirm the accused's admission.
- Surprisingly, the Magistrate pronounced the accused guilty as charged and the accused was requested to address the court in mitigation of sentence. The public prosecutor did not address the court in aggravation of sentence and made no further submissions. **What procedure ought to have been followed by the Magistrate?**
- The Court thereafter decided on its own accord to convert the trial into an inquiry in terms of section 41 of the Act. **What procedure ought to have been followed by the Magistrate?**
- Despite the conversion, the accused was sentenced based on the reconstructed record with the inscription to see J15 for sentence, which in fact should have been the J605. The sentence read
- "Accused fined R6 000.00 (six thousand rands) or 6 (six) months imprisonment. [Sentence amended in terms of S 298 of CPA 51/1977]. The matter converted to a Maintenance Court in terms of S 41 of the Maintenance Act 99/1996 (sic). Arrears deferred: R2 000.00 on the 29/07/2022 and R4 000.00 on/before 29/09/2022."
- **What procedure ought to have been followed by the Magistrate? Was the order properly worded?**

THE IMPORTANCE OF MOCK APPLICATIONS IN JUDICIAL EDU ATION TRAINING: *THE STATE & SAMORA KANSAS MASHABA* (R29/2022) [2022] ZAMPMBHC (8 December 2022)

- The Magistrate sent the matter on special review and raised a query as to whether it was procedurally correct for an accused to be convicted by merely admitting the elements of a crime without the State putting a charge against him and without affording him a chance to plead. Additionally, she conceded by remarking that the proceedings were not in accordance with the law, but did not request that the sentence be set aside. **What procedure ought to have been followed by the Magistrate?**

- What is clear from these proceedings is that the Court did not know how to conduct these proceedings.

- The issues that arise in this matter and required to be addressed are the following:
  How is a criminal record reconstructed?
  - ⇒ The importance of understanding the charge of failure to comply with section 31(1) of the Act.
  - ⇒ Magistrates courts are creatures of statute and do not possess inherent jurisdiction.
    The accused rights in terms of section 35 of the Constitution, 1996
  - ⇒ The importance of charges being put to the accused and the need for the accused to plead to such charges- Section 105 and 106 of the CPA,
  - ⇒ Can a conviction and sentence be pronounced without charges being put on an accused?
  - ⇒ What procedure is followed when converting a criminal trial, for contravening section 31(1) of the Act to an inquiry in terms of section 41 of the Act?
  - ⇒ Can a sentence be passed after a criminal trial is converted to an inquiry?

The Judge in the matter remarked in paragraphs 18 -19

> '[18]. This is one of the cases that expose the need for continuous peer training on the part of the judiciary. Mistakes such as this have the potential to bring the judiciary into disrepute and can cause grave injustice to members of the public with serious repercussions to judicial officers, including but not limited to being sued. It is incumbent upon members of the judiciary to always remember the oath of office we took, in which we swore to protect every citizen's rights enshrined in the Constitution and apply justice to all without fear, favour and prejudice. Every case we handle in court should be accorded the necessary weight because while it may appear to be a trivial matter in our view, it could mean everything to the litigants appearing before us.'

I am inviting articles to be written by Colleagues on the various issues raised. SAJEI will ensure mock applications will be done on the various issues raised in this review judgment, to ensure the practical application of the procedure is understood. SAJEI will publish all articles received from Colleagues on the issues raised and offer guidance in the next edition.

TO TRAIN OR NOT TO TRAIN (APOLOGY TO SHAKE-SPEARE)

Mr Edward Hall

Additional Magistrate

"The members of the court…are by training and experience as judicial officers themselves, better equipped, it is true, to exercise objective judgement than a lay litigant but it is that very training and experience which also give them a subjective position and knowledge not possessed by the notational reasonable person…"

This quotation by the Supreme Court of Appeal in the matter of S v Roberts 1999 (2) SACR 243 (SCA)_may have stemmed from a criminal case but is equally applicable to presiding officers in the civil courts in South Africa.

This dictum was referred to in the recent matter of *MJ Vermeulen Inc v Engelbrecht and Another* (21562/2021) [2022] ZAWCHC 250 (30 November 2022). Hereafter referred to as 'the *Vermeulen* case' which forms the basis for this article.

This case dealt with an application to review and set aside a judgement made against the Applicant when the Applicant's action was dismissed after a lengthy trial. The application was based on several grounds raised but the presiding officer only opposed the cost order sought against him on a personal capacity, but not the merits of the application.

of *Vermeulen* highlighted certain important principles and as a decided case to empower and guide presiding officers in terms of the *stare decisis* rule.

Case law provides a record as to issues and disagreements and the decisions in the application of the principles of law and the guidelines and as such also to provide guidance to others as to how to interpret and apply the guidelines in similar matters going forward. At the same time it also serves as a caution to presiding officers to fully equipped themselves in order to adjudicate fairly.

In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) it was held by the Court, as follows:

"Stare decisis is therefore not simply a matter of respect for Courts of higher authority. It is a manifestation of the rule of law itself, which is in turn a founding value of our Constitution."

Section 34 of the Constitution of the Republic of South Africa provides that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court , or where appropriate ,another independent and impartial tribunal or forum. "(My emphasis)

As the underlined two aspects were found not to be present in *Vermeulen* and the first Respondent was found to be "overwhelmed" and his inability to deal with the trial "was to the extent that the need for training was identified." It is important for all judicial officers to take heed from this case.

This piece of opinion is not intended to be a lecture or an in-depth discussion of the case but merely a reflection with reference to the principles identified in the grounds for review as found by learned Judge. As a result thereof the judgement made in the Magistrate's Court was set aside.

A Magistrate's power to set aside or amend its own orders

The High Court held that the "reversal" on 27 October 2021 of an earlier order made by the presiding officer in pre-trial proceedings dated 7 December 2018 was inexplicable and irregular and that there was no basis for such "reversal" . The applicant suffered prejudice and substantial wrong and that the proceedings could be set aside on that ground.

The concept "reversal of own order" reminds of section 36 of the Magistrates' Courts Act Act 32 of 1944 and specifically section 36(1)(c) which allows for a Court to on its accord correct any patent errors in any judgement in respect of which no appeal lies. That is where the order does not reflect the correct intentions of the presiding officer or where there are obvious mistakes and the corrections must also be done within a reasonable period. Furthermore, must the presiding officer then in terms of Rule 49(8) advise the parties of such corrections done?

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It seems that the "reversal "of an earlier own order as in *Vermeulen* does not fall strictly within the ambit of section 36 or that a basis was made for that. The Magistrate's Court is a creature of statute and that "magistrates cannot exercise powers which are not given to them by the Act or the rules."(Jones and Buckle The Rules Of the Magistrate's page 6)

Because of the "reversed order" dealing with the attorney's costs, one can also take note of *Tredoux v Kellerman* 2010 (1) SA 160 (C) where it was held that the disputed bill of an attorney's bill of costs is not a liquidated amount and that a client is entitled to the taxation of the attorney's account.

To allow or disallow expert evidence

The reviewing judge accepted the version of the applicant on this ground as that version was not opposed. To disallow the expert witnesses to give evidence and to give an opinion which would be fair and reasonable to explain the compensation for the work performed by the attorney was found to be irregular. The reason is that the evidence would have been relevant and would have assisted the presiding officer.

The relevant law applicable is Rule 24 (9) and this sub-rule requires proper notice and a summary of the nature of the evidence to avoid any surprises on the day of the trial to the opponent. Proper compliance may also allow the parties to exchange views before giving evidence and to reach agreements in order to save the court time and also costs limits.

Rule 24(9) also contains a sanction that if the rules are not complied with, a party is then precluded from calling that expert witness. This confirms the discretion of the Court to allow the evidence despite the non-compliance.

It is also important to look at new developments and the pre-trial procedures in Rule 22 and Rule 25, which came into effect on 1 February 2022, which may also assist greatly to resolve the issues of expert witnesses before the day of the trial.

Failure to hear oral arguments before judgement

The reviewing judge also found that denying the applicant's request to address the court in oral argument was irregular and prejudicial to the applicant. The reason is that the presiding officer would have benefitted and may have influenced the presiding officer before deciding. That refusal was held to have tainted the proceedings and was irregular.

This was the finding on the unopposed application of the applicant. Rule 29 (14) is the legislation applicable for consideration. Generally, the arguments after the evidence should be delivered orally in open court. The court should not also insist on written argument except in special circumstances and after discussions with the parties and/or their attorneys on this aspect.

The failure to allow a party to address the court is a serious irregularity except where the failure was caused on the part of that party self. See *Transvaal Industrial Foods Ltd v BMM Process (Pty) Ltd* 1973 (1) SA 627 (A) and also *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ)

Apart from above, it is also a failure of the *audi alterm partem* rule to afford a party an opportunity to address the court before an order is made against them.

The perceived bias of a presiding officer

The test for recusal is now well settled: the question is whether, seen objectively, the presiding officer is either actually biased or whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the presiding officer has not or will not bring an impartial mind to bear on the decision of the case. *President of the Republic of South Africa and others v South African Rugby Football Union and others*' 1999 (4) SA 147 (CC).

The grounds are as follows: Direct or indirect interests in the case; close relationship to one of the parties; a colleague is involved with the matter; hostility towards a party; prior unprofessional conduct on the part of the presiding officer; opinions expressed about a party; conduct indicating bias or where the presiding officer is a witness in the matter.

The discussion in Jones and Buckle The Act Section 12 page 40 D is informative on this aspect.

In this matter it was held that the cumulative effect of the irregularities as indicated and the result of previous applications indicated bias on the part of the presiding officer but that there was no malice to warrant a cost order as requested by the applicant.

The need for training

The South African Judicial Education Institute (SAJEI) does strive to fulfil that need in presenting training and facilitate specific topics of interest among judicial officers. Feedback is also requested from the judiciary regarding the topics and areas that need consideration for specific training. The facilitators also undergo training themselves in order to act as mentors and impart their experience and knowledge

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Furthermore, training is available for the newly appointed Magistrates on all the aspects of law divided in four streams: Criminal, Civil, Family and Children (as well as Equality Court). To achieve this the training was dealt with virtually during the COVID-19 period and is still done so in order to reach as many judicial officers as possible country wide.

SAJEI plays an invaluable role in empowering Magistrates and to assist them to stay abreast with latest developments in respect of case law and to ensure Constitutional compliance with reference to Sections 34 and 39 of the Constitution.

The duty is however on Magistrates to attend the trainings and to take part actively for the training to be effective and of value. The practical challenges of connectivity and availability of Magistrates, apart from the court duties, do however not go unnoticed.

In light of this, *Vermeulen* judgement and the guidance given highlights the positive role and need of SAJEI .Presiding officers are encouraged to be part and partake whenever opportunities arise for practical training.

Finally, in light of the *Vermeulen* judgement the question whether to train or not be trained has only one answer.

CONSTITUTIONAL RIGHTS ADVANCED BY THE CONSTITUTIONAL COURT IN CLARIFYING THE INTERPRETION OF UNLAWFUL ARREST & DETENTION

Ms Nicolette Joseph

District Magistrate

In a unanimous judgement of *J E Mahlangu and Another v Minister of Police* [2021] ZACC 10, the Constitutional Court overturned a judgement and order by the Supreme Court of Appeal, refusing to hold the Minister of Police liable for damages for the entire period of an unlawful detention.

The first applicant (Mr Mahlangu) was arrested on 29 May 2005 following the murder of a family consisting of a mother, a father and two minor children at Middelburg on 25 May 2005. One of the deceased was a little girl who was brutally raped. A third child survived the ordeal. Various statements were taken from persons who visited the house but no one was implicated by witnesses for the crimes. Mr Mahlangu was arrested without a warrant of arrest and without police having any basis of suspecting him. He was severely tortured by police resulting in him confessing to a crime he did not commit and also falsely implicating Mr Mtsweni (as his supposed co-perpetrator) who was his acquaintance and neighbour.

The prosecutor was unaware of the illegally obtained confession from Mr Mahlangu and therefore opposed bail with a request to remand for further investigation. Mr Mahlangu and Mr Mtsweni were not afforded an opportunity to address the court on their first appearance and the matter was postponed 13 times over a period of approximately eight months during their detention. They were released on 10 February 2006 after the real perpetrators were arrested.

They lodged an action for damages for unlawful detention at the Gauteng High Court. The trial court affirmed that their detention was unlawful but limited the Minister of Police's liability for damages from date of arrest to date of first appearance as the Magistrate made an order for further detention. Leave to appeal to the Full Bench at Pretoria was granted to the Applicants. The full bench held that there was a ''significant gap" in the applicant's case seeking to hold the Minister liable for the full period of the applicant's detention.

The full bench entertained the question of whether the unlawfully obtained confession had influenced the prosecutor's decision to oppose bail, however the court ruled that this was not proved on the facts, indicating that the prosecutor and the court have a Constitutional obligation for which they must account for when taking decisions on the further detention of the applicants. The full bench upheld the trial court's refusal to award the applicants damages for the full period of detention and dismissed the appeal with cost.

The Applicants then appealed to the full bench to approach the Supreme Court of Appeal which held that the inclusion of the false confession in the police docket constitutes a factual but not legal cause to the applicant's further detention beyond 14 June 2005. They held that bail would probably have been granted if the applicants had applied for it as the Magistrate and the trial court would not have had any difficulty in finding that the confession was inadmissible. The Supreme Court of Appeal delivered a split judgment wherein the majority agreed that the Minister is not liable for damages for the full period of unlawful detention post the applicant's first appearance. This was because the Applicants failed to apply for bail which was fatal to their claim, regardless of the fact that the police concealed the illegally obtained confession which provided the applicant with a basis for holding the Minister liable for the full period of detention.

The Constitutional Court held that the Supreme Court of Appeal's approach in shifting the onus onto the applicants is an error in law and it misdirected itself when it held that if the applicants had applied for bail it would have been granted and that their failure to apply "constituted a new intervening act breaking the chain of legal causation".

The Constitutional Court also held that the detention by the Magistrate did not relieve the Minister of liability. Thus, the arrest and unlawful detention of Mr Mahlangu and Mr Mtsweni amounted to an arbitrary deprivation of freedom substantially and procedurally. When that has been determined then deprivation is prima facie unlawful. The Constitutional Court held that the wrongful arrest is the basis for the unlawful detention and thus the Minister of Police is liable for the entire period of detention from their date of arrest to date of release. The Minister was then subsequently ordered to pay R550 000 to Mr Mahlangu and R500 000 to Mr Mtsweni with cost

CASE SUMMARY: *Democratic Alliance v Brummer* [2022] ZASCA 151 (3 NOVEMBER 2022)

Mr Bradley Swanepoel

SAJEI Law Researcher

Special Plea – Res judicata *by way of issue estoppel – issue for determination being raised in previous litigation between parties – court in previous litigation dismissing matter due to case for relief sought not being made out in application papers - no final determination of issue in previous litigation – dismissal tantamount to order of absolution from instance - special plea of* res judicia *dismissed.*

The respondent (plaintiff) had been a member of the appellant (defendant), a South African political party. The appellant had terminated the respondent's membership due to his alledge failure to pay memberships fees to the appellant. The respondent had then brought an urgent application to reinstate his membership, but that application had been dismissed.

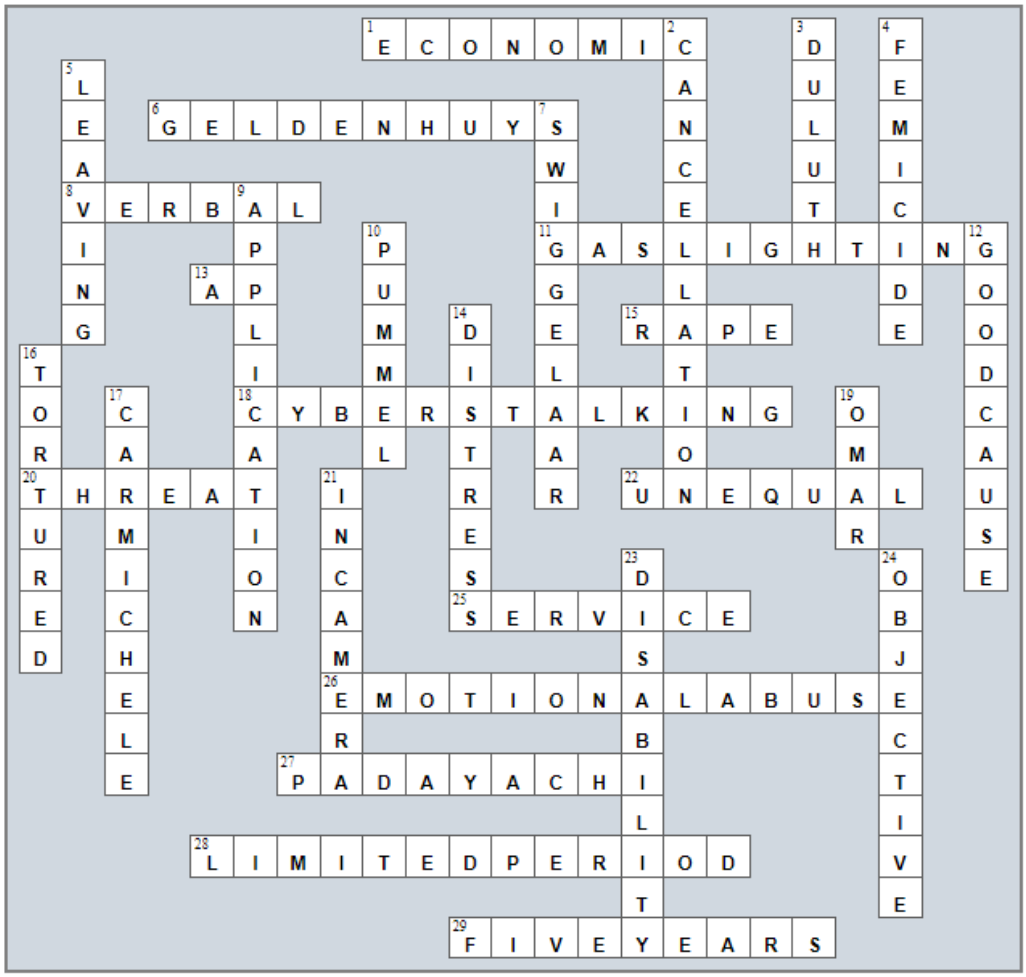
The respondent then brought an action for damages against the appellant arising from the termination of his membership. The appellant raised a special plea of *res judicata,* pleading issue estoppel and arguing that the action would require the court to determine the lawfulness of the termination, an issue that already been dealt with in the previous application proceedings. Both the trial court, and the provincial full bench, had dismissed the special plea.

In considering the matter, the Supreme Court of Appeal noted that if the issue in question had not been determined by the previous court, the plea of *res judicata* in the form of issue estoppel could not be raised. This was because determination of the issue was an essential requirement for such a plea. Where the judgment of the previous court does not deal expressly with an issue of fact or law, careful attention should be given to what the court was called upon to determine and what must necessarily have been determined by the court, for it to come to the conclusion it had reached.

Thus, the question to be determined by the court considering the special plea, is what issue of fact or law did the previous court decide and whether or not it was finally decided. The fact that the same issue may have arisen is not sufficient to sustain a plea of *res judicata* in the form of issue estoppel. The previous court must have actually determined the issue with finality.

The court analysed the judgment in the previous application proceedings and concluded that the application had been dismissed because the respondent had not made out any case in his papers for granting the relief he sought. Thus, in dismissing the application, that court could not have intended the order to mean that the termination of the respondent's membership was lawful, and this issue had therefore not been finally determined by that court. Rather, the court's order was akin to an order of absolution. Therefore, the plea of *res judicata* could not be raised and the appeal was dismissed.

CROSSWORD PUZZLE



Across

1. Type of abuse: Lying about shared properties and assets.
2. S v .....declared section 14(1)(b) of Act 23 of 1957 inconsistent with Constitution.
3. Type of abuse: Calling you names, egging you on, silent treatment.
4. Pattern of behavior in which the abuser intentionally denies that acts or events happened in the way that victims knows they did.
5. DS and ..... overturned the order prohibiting the appellant from telling any other person that the respondent raped her
6. Masiya v DPP, Pretoria and another extended the common law definition of .....
7. Repeated use of electronic communications to harass the victim.
8. Differentiating cyberstalking from cyberharassment is that the respondent communicates a .....
9. .....relationship of power in gender based relationship.
10. Section 9 of Act 17 of 2011: Prima facie proof and proper .....
11. Pattern of degrading or humiliating conduct.
12. Act 17 of 2011 applicable when subjected to harassment in the workplace; Mnyandu v .....
13. Section 5(b) of Act 17 of 2011: Time frame for provision of order where other legal remedies are appropriate and will be sought.
14. Maximum penalty for incarceration under section 18(1) of Act 17 of 2011.

Down

1. An electronic service provider may apply for ..... if the requested information is not in their records.
2. Power and Control Wheel.
3. "The killing of a woman or girl, in particular by a man and on account of her gender."
4. Often cited as the most dangerous phase in an abusive relationship.
5. S v .....Court held: "It is fallacious to take the absence of resistance as per se proof of consent...."
6. Section 2 of Act 17 of 2011.
7. To fist (syn.)
8. Test in section 9(8) of Act 17 of 2011.
9. Impact of stalking on victim; fear, alarm (syn.)
10. Section 12 of the Constitution; right not to be....
11. Delictual liability could follow police in circumstances where State obliged to protect dignity and security of women (lcase law).
12. Constitutionality of section 8 of Act 116 of 1998 (case law).
13. Manner of proceedings in section 8 of Act 17 of 2011.
14. Replacement of mentally disabled
15. Test for effect of harm on victim.

UPCOMING WORKSHOPS

PROVINCE	DATE	WORKSHOP
DISTRICT COURT MAGISTRATES		
All Provinces (Centralised in Gauteng)	25 – 27 January 2023	Ad Hoc RCM Civil Refresher Course
All Provinces	30 January – 03 February 2023	Ad Hoc Regional Trafficking in Persons
All Provinces (Centralised in W. Cape)	01 – 03 February 2023	Ad Hoc RCM Sexual Offences
Eastern Cape (PE & EL clusters)	13 – 15 February 2022	DCM122: Criminal Court Skills Cybercrime
KZN (Pietermaritzburg cluster)	06 – 10 February 2023	DCM118: Civil Court Skills Rule 12 Default Judgments
KZN (Pietermaritzburg cluster)	13 – 17 February 2023	DCM121: Civil Court Skills Form and Evaluation of Evidence
Limpopo	13 – 17 February 2023	DCM119 Children's Court Skills Parental Responsibilities and Rights (Block 1)
Northern Cape	06 – 10 February 2023	DCM117: Equality Court Skills PEPUDA
Western Cape	06 – 09 February 2023	DCM116: Family Court Skills Gender Based Violence

SAJEI
South African Judicial Education Institute

Enhancing Judicial Excellence

Telephone number:
+27 (0)10 493 2500
Website address:
www.judiciary.org.za

Physical address:
188 14th Road
Noordwyk
Midrand
1685

Postal address:
Private Bag X10
Marshalltown
2107