10 YEARS
2011 - 2021

SAJEI
South African Judicial Education Institute
Enhancing Judicial Excellence

12th Edition

SEP | 2021

JUDICIAL EDUCATION NEWSLETTER

SOUTH AFRICA

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

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SAJEI South African Judicial Education Institute
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FROM THE DESK OF THE CEO

Dr. Gomolemo Moshoeu

CEO of SAJEI

The South African Judicial Education Institute (SAJEI) would like to thank all the Judicial officers for their continued support of the Newsletter. It is indeed incredible that this is our 12th issue. May you continue to raise the flag of judicial education higher in South Africa and beyond.

SAJEI has received a number of articles from the Judicial officers. Some of the Judicial officers submitted two articles and for that we are very grateful. We need to recognize the continued support of Dr V. Jameson, Ms Singh and Ms T. Moalusi, this list is not exhaustive.

The transition of SAJEI from in-person to virtual judicial training on ZOOM platform is a remarkable achievement. The training is paperless and training materials are obtainable on sajei.online. Please contact SAJEI if you need training on ZOOM functionalities.

The Institute is almost two months away to achieving the milestone of being in operation for 10 years. It was years of sweat, making dreams come true, joys, hard work, creativity and innovation. We made a lot of mistakes, but we stayed on course. SAJEI officials stood on the shoulders of the Judicial officers in order to make it happen. I salute you all for the support. The journey of success continues unabated. SAJEI strives to be better than yester-year.

The celebrations of this milestone will include several activities such as a regional webinar on questioning Counsel, judicial bullying and judicial collegiality, international webinar on IOJT principles of judicial training, launch of a book on Judicial training in Africa as well as a long term programme for Aspirant Women Judges and special edition Newsletter. You are invited to submit articles on your reflections on SAJEI. You have been there through our growth and you do have thoughts to share with us.

SAJEI proudly announces the placement of Mr Andre Agenbag and Ms Tracy Bossert as Judicial Educators (Acting Senior Magistrates) effective 1st September 2021 on a temporary basis. We are looking forward to a fruitful working relationship.

May you all continue to withstand the storms of transition from in-person training to virtual platform plagued with technological challenges. The future looks brighter, together we will win.

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FROM THE DESK OF THE EDITOR-IN-CHIEF

Ms. Jinx Bhoola

Editor-in-Chief

We wish the outgoing Editor in Chief Judge Vincent Ratshibvumo nothing but the best in his appointment to the High Court Bench in Mpumalanga. He has done an exceptional job and we know that he will continue with excellence in the Judiciary.

Colleagues, amidst the recent unrest in the country and the third wave of Covid- 19, we have much to be thankful for. We are a strong nation and more importantly, we have one of the strongest Judiciaries globally. In a Constitutional democracy our Courts are constantly putting checks and balances in place in advancing Constitutional Supremacy and the Rule of Law without, prejudice and favour.

Whilst theft, looting, arson, and social unrest continued in Gauteng and KwaZulu Natal on the one hand, the Covid -19 pandemic was claiming lives, including that of members of the Judiciary, Administrative support staff, and all other Stakeholders continued to dispense justice efficiently and effectively. We listened to various debates on insurrection and witnessed the Judiciary advancing the Fourth Industrial Revolution by conducting court proceedings virtually with excellence.

We witnessed strong legal arguments as all eyes were glued onto television sets regarding the breaking news of the arrest of former President Jacob Zuma. The Constitution and the Rule of the law were tested extensively.

From a Constitutional perspective, our Apex Court has produced yet another landmark decision that has advanced constitutional imperatives. The case of Jon Qwelane relating to an opinion piece he wrote in 2008 titled "Call me names, but gay is not okay" contained discriminatory remarks about the LGBTQI+ community. This article ignited outrage, which resulted in several people laying complaints to the SAHRC, who were influenced to institute proceedings against Qwelane who died in December 2020. The Constitutional Court found that Qwelane's sentiments constituted hate speech. The Justices found Section 10(1) of the Equality Act 4 of 2000 to be unconstitutional to the extent of the inclusion of the term "hurtful" and parliament had been given 24 months to remedy the constitutional defect.

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FROM THE DESK OF THE EDITOR-IN-CHIEF

The Minister of Justice and Constitutional Development's spokesperson reported that Minister Lamola remarked

"Judgments such as these provide legal certainty and develop our constitutional jurisprudence on issues such as freedom of expression and issues of equality. This can only serve to deepen constitutionalism in our society,"

This issue of the Newsletter is very insightful and impactful. We will continue to keep you abreast with the latest that is happening in the Lower Judiciary and SAJEI. We will provide you with case updates in all four streams by a group of hard-working colleagues who will keep a constant watch out for hot of the press cases. This team comprises Ms. Teresa Moalusi (Family Stream), Ms. Lebogang Raborife (Children's Stream), Mr. IP Du Preez (Criminal Stream), and Ms. Jinx Bhoola (Civil Stream).

We will also hyperlink you with many Law Journal's and we will provide you with links to the latest legislation and articles of interest. Mr. Bradley Swanepoel will manage this section of our newsletter and will bring the latest to your attention.

In November 2021 SAJEI will be ten (10) years in existence. You are advised to keep a look out for special celebrations and invitations. We will also be doing a special ten (10) year edition, capturing memorable moments of the ten years of existence. You are welcome to share your experiences and forward pictures you may have captured.

Colleagues this is your Newsletter, and you are encouraged to write articles, bring anything to our attention that may benefit the Lower Judiciary.

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.

5.4.6 Delivery of Judgments

Judgments, in both civil and criminal matters, should generally not be reserved without a fixed date for handing down. Judicial Officers have a choice to reserve judgments *sine die* where the circumstances are such that the delivery of a judgment on a fixed date is not possible. Save in exceptional cases where it is not possible to do so, every effort shall be made to hand down judgments no later than 3 months after the last hearing.

SAJEI: Advancing the Fourth Industrial Revolution

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

Website links for South African Government

- A guide to latest Legislation in South African Government;

Website links for further reading:

- https://www.africa-legal.com: *What's going on legally in the rest of Africa – commercially orientated, and specialized law interests;*
- https://www.polity.org.za: *Offers free access to SA legislation;*
- https://www.withoutprejudice.co.za: *interesting articles are drawn from all areas of practice including Civil Law, Black empowerment, and Banking law to name a few;*
- www.crimsa.ac.za: Promoting the relevance of criminology;
- https://www.saripa.co.za: South African Restructuring and Insolvency Practitioners;
- Riots in SA: what happens under a state of emergency declaration?;
- Riots in SA: Social Media, riots and Consequences;
- Criminal Law (Sexual Offences and Related Matters) Amendment Act Amendment Bill
- Act 1 of 2021: Recognition of Customary Marriages Amendment Act, 2021;
- LLM Programs | Master of Laws Course Search | LLMStudy.com: Master of Laws programmes worldwide.

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SAJEI: Advancing the Fourth Industrial Revolution

Law Journals available through SAFLII:

- Constitutional Court Review
- African Disability Rights Yearbook
- African Human Rights Law Journal
- African Law Review
- De Jure Law Journal
- De Rebus Law Journal
- Obiter
- Potchefstroom Electronic Law Journal
- SADC Law Journal
- South Africa: Law, Democracy and Development Law Journal
- Speculum Juris
- Tydskrif vir die Suid-Afrikaanse Reg (TSAR)

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SAJEI South African Judicial Education Institute

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CIVIL PROCEDURE CASE SUMMARIES

Ms. Jinx Bhoola

Senior Magistrate - SAJEI Judicial Educator

Civil Court Cases Summaries by Jinx Bhoola

***Blendrite (Pty) Ltd v Moonisami* [2021] JOL 50492 SCA)**

This case revisits the requirements in respect of Spoliation applications. The proceedings involved a situation whereby Mr. Moonisami and Dr. Palani were directors of Blendrite and were involved in a dispute. The web hoster of the company, Global was informed to terminate Mr. Moonisami's email and network/server access from the company Blendrite, which it did since Global was informed that Mr. Moonisami had resigned from the company. Mr. Moonisami approached the High Court for a spoliation order. The question for determination was whether the prior access to an email address and company network and/or server amounted to quasi-possession of an incorporeal which qualified for protection by a spoliation order. The case was most similar to the SCA decision of *Telkom SA v Xsinet (Pty) Ltd* 2003 (5) SA 309 (SCA). The Judge of the first instance granted the spoliation order with a punitive costs order.

On appeal, to the SCA, the learned Acting Judge of Appeal discussed the mandament van spolie; the factual possession of the movable and immovable property, and the plethora of case law on spoliations generally – including water and electricity. The court found that the prior use of the email address and server was not an incident of possession of the movable or immovable property. Additionally, it found that it did not amount to quasi-possession of incorporeal property and was therefore not protectable by way of the mandament. The appeal was upheld with costs. In paragraph [6] it was stated that "*the mandament van spolie is designed to be a robust, speedy remedy that serves to prevent recourse to self-help. The sole requirements are that the dispossessed person had "possession of a kind which warrants the protection accorded by the remedy and that he was unlawfully ousted". All that is required to be proved is the fact of prior possession and that the possessor was deprived of that possession unlawfully.*"

CIVIL PROCEDURE CASE SUMMARIES

By Jinx Bhoola

Standard Bank of SA Ltd v Thobejane **[2021] JOL 50624 (SCA)**

This Appeal emanated against two orders of the Gauteng High Court in Pretoria which dealt with several foreclosure matters. In the court of the first instance, it was ordered that where the monetary value claimed is within the jurisdiction of the Magistrates' courts, civil actions and/or applications should be instituted in the Magistrates' court having jurisdiction unless the High Court has granted leave to hear the matter in the High Court. Other divisions followed the same trend. In Grahamstown, the court found that the National Credit Act 34 of 2005 ousted the jurisdiction of the High Court and that all NCA matters had to be instituted in the Magistrates' court.

The learned Acting Judge of Appeal held the appeals succeed and the orders of the High Court are replaced with orders declaring that:

- The High Court must entertain matters within its territorial jurisdiction that fall within the jurisdiction of a Magistrates' Courts if brought before it because it has concurrent jurisdiction with the Magistrates' Court.
- The High Court is obliged to entertain matters that fall within the jurisdiction of a Magistrates' Court because the High Court has concurrent jurisdiction.
- The main seat of a Division of a High Court is obliged to entertain matters that fall within the jurisdiction of a local seat of that Division because the main seat has concurrent jurisdiction.
- There is no obligation in law on financial institutions to consider the cost implications and access to justice of financially distressed people when a particular court of competent jurisdiction is chosen in which to institute proceedings.

"Call me names – but gay is not okay"

Jonathan Dubula Qwelane v South African Human Rights Commission & Another **[2021] ZACC 22 (31 July 2021)**

The SAHRC took Qwelane to court, contending the article constituted hate speech and was a contravention of section 10 (1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 on the grounds of sexual orientation and marital status. Section 10 of the Act prohibits publishing hurtful statements that cause harm or spread hate.

Section 10(1) of PEPUDA states that: *"Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –*

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred."

Section 12 of PEPUDA states that: *"No person may—*

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice,

that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: Provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section."

The term *"prohibited grounds"* in section 10(1) is defined in section 1 of PEPUDA and includes: *"race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV/AIDS status;"*

In 2017, the Equality Court found that Qwelane's words amounted to hate speech and ordered that he apologise to the LGBTI community and in 2019, the SCA set the Equality Court judgment aside and concluded that section 10 of the act was vague, unconstitutional, and invalid. The Constitutional Court ruled that the former journalist and ambassador's column was harmful. Additionally, in a judgment handed down by the Constitutional Court in a case where Jon Qwelane had challenged the validity and constitutionality of aspects of the Equality Act, the court held

- that while some parts of the Act were indeed vague, the former journalist's column in a Sunday newspaper about gays and lesbians was indeed harmful.
- The Constitutional Court found that Qwelane's "abhorrent" article constituted hate speech in terms of the elements of section 10(1) of the Equality Act which remained constitutional, as it had been harmful and incited hatred.
- In considering whether the terms "hurtful", "harmful" and "to incite harm" were vague, as they appear in section 10 of the Equality Act. It held that the term "hurtful' is indeed vague, while the others are not vague. The Judgment was unanimous and the learned Justice of the Constitutional Court held *"If speech that is merely hurtful is considered hate speech, this sets the bar rather low. It is an extensive limitation. The prohibition of hurtful speech would certainly serve to protect the rights to dignity and equality of hate speech victims. However, hurtful speech does not necessarily seek to spread hatred against a person because of their membership of a particular group, and it is that which is being targeted by section 10 of the Equality Act. Therefore, the relationship between the limitation and its purpose is not proportionate."*

- that the inclusion of both the term “hurtful” in section 10(1) of the Equality Act, and the prohibited ground of “sexual orientation” in section 1, constitute limitations of section 16(1) of the Constitution.
- Considering section 36 of the Constitution, the court held that the limitation occasioned by “hurtful” cannot be justified and is therefore unconstitutional. “Call me names – but gay is not okay”.
- That the Minister of Justice to pay half of Qwelane’s costs in the High Court, the Supreme Court of Appeal and the Constitutional Court.

Mr. Ignatius Du Preez

Senior Magistrate - Pretoria

***S v Mpilo 2021* (1) SACR 661 (WCC)**

Evidence on identification – Witness not able to mention particular facial features of the perpetrator's face – this is not significant since it is seldom that a face presents itself with one (or more) remarkable feature. If there are sufficient cogent evidence on which a conviction can be based, such inability to mention facial features is overcome;

Additional Note – this case may be read with the approach in evaluating evidence on identification as followed in S v Mthetwa 1972 (3) SA at 766 (A)};

***Kunene v The State* (AR21/20) [2021] ZAKZPHC 36**

(17 June 2021)

The Court and Prosecution did not pay any heed to the appellant's rights to a trial within a reasonable time. It is their tardiness and lack of interest that resulted in the huge delays in the matter. It is not only the interests of an accused person that should be considered but also those of the young victims and the public at large. Considering the totality of the circumstances, the passage of time, there was an unreasonable delay in the extreme. It is for these reasons that the convictions and sentences are set aside.

FAMILY COURT CASE SUMMARIES

Ms. Theresa Moalusi

Senior Magistrate - Johannesburg

***Meier v Meier* (15781/2015) [2021] ZAGPPHC 456 (6 July 2021)**

The matter involves an ex-husband and wife who had brought applications against each other. An order was made by the court to consolidate the respective court applications.

The parties brought the following two court applications:

- Mr. Meier applied for an order suspending a warrant of execution issued in favour of Mrs. Meier; and
- Mrs. Meier applied for provisional sequestration of Mr. Meier's estate.

The two court cases related to arrear maintenance owed by Mr. Meier to Mrs. Meier.

On the 26 August 2019, the Registrar of the High Court issued a warrant of execution against the applicant's property in respect of the arrear maintenance amount as founded by the arbitrator.

On or about 2 July 2020, Mr. Meier applied to the High Court for the following relief:

- The suspension of the execution of the warrant of execution against the applicant's property pending finalization of the following matters:
    1. The review application of the arbitration award by the arbitrator;
    2. The finalization of the pending maintenance court application before the Magistrate's court; and
- The setting aside of the warrant of execution.

The consolidated applications were heard before the court on 20 April 2021. The parties filed further documents in court, including affidavits. The filing of these further documents was necessitated by the findings of the Magistrate's Court during maintenance court proceedings on 14 May 2021 during which the Magistrate found that the arbitration proceedings conflicted with the Arbitration Act 42 of 1965, and finding that the arbitration proceedings were void ab initio.

The relevant section in the Arbitration Act, namely section (2) (a) specifically prohibits arbitration in respect of any matrimonial cause or any matter incidental to any such cause. When the matter appeared again on the 6th of July 2021 in the High Court, the following finding were made:

- The arbitration was void ab initio as the relevant Act prohibits arbitration in a matter relating to matrimonial matters.
- As at the hearing all other matters that were in dispute between the parties had been finalized except for the application by Mrs. Meier for provisional sequestration of the estate of Mr. Meier (in terms of the insolvency Act, 24 of 1936.
- The court found that Mr. Meier committed an act of insolvency when he informed the sheriff that he had no assets nor any money to satisfy the judgment debt as per the warrant of execution that had been issued in respect of the arrear maintenance amount. Consequently, the court made an order that Mr. Meier's estate is placed under provisional sequestration.

CHILDREN'S COURT CASE SUMMARIES

By Lebogang Raborife

Ms. Lebogang Raborife

District Court Magistrate - Rustenburg

***Centre for Child Law v Director General: Department of Home Affairs and Others* [2021] ZACC 31**

The following legal issues were raised in the above case regarding the constitutionality of Section 10 read with S9 (3) of the *Births and Deaths Registration Act* 51 of 1992 ('the BDRA'):

1. Does the differentiation constitute unfair discrimination on the grounds of marital status, sex and gender [S9(3) of the Constitution]?
2. Whether the differentiation is reasonable and justifiable.
3. Limitation of unmarried fathers' right to dignity and equality.

Under the BDRA provisions, a child's birth can be registered either under the mother's or father's surnames or both parents' surnames joined as a double barrel surname [S9 (2)]. This is however subject to provisions of section 10 where the parents of that child are unmarried to each other.

Section 10 provides for three scenarios that apply to children whose parents are unmarried [par 102 of judgement paraphrased]:

a) straightforward registration of the birth of the child by the mother regardless of what the views of the father;
b) consensual request by the mother and either the biological father or a man who may not even be the biological father but who has, in writing, assumed the responsibility of being the father;
c) the biological father, or another man, acknowledges in writing that he is the father, and does so with the permission of the child's mother.

The majority judgement finding and ruling on the three issues was as follows:

1. The differentiation between married and unmarried fathers constitutes unfair discrimination on the grounds of marital status, sex and gender:

1.1 A man married to the child's mother does not need consent or permission of the child's mother to register the child under their own surname.

1.2 There is a need for a gender neutral process of registration as it will enhance substantive equality by abolishing gendered and sexist stereotyped attitude of regarding only women as responsible for the care of children.

2. It is not justifiable to distinguish between children born to married parents and children born to unmarried parents for the purpose of regulating what surname may be given to a child as no legitimate reason was advanced for such purpose by the Department of Home Affairs.

3. In respect of a limitation of unmarried fathers' right to dignity and equality:

3.1 Men not married to their child's mother are subjected to the indignity of having their children registered as being born out of wedlock. An expression 'born out of wedlock' will be used to describe their children implying that they are not worthy of equal respect and concern and stigmatises the children.

3.2 The requirements in section 10 deprives the father and child of Ubuntu, as they are being humiliated by prohibiting a father to carry out their obligation to obtain a birth certificate in the paternal surname.

4. The minority judgement finding and ruling was as follows:

4.1 The father in section 10 is not prevented from registering the child under his surname; he must comply with safety measures built into the registration process to help him assume his fatherhood responsibilities notwithstanding the fact that he is not married to the mother.

4.2 The section requires either the consent or permis sion of the mother or next of kin for the child's protection, as the mother or next of kin is in a better position to make an input on paternity as well as whether that registration is in the best interest of that child or not.

'*A reading of sections 9 and 10 in a way that keeps them within constitutional bounds, does not expose a child to known or foreseeable risks. It protects and advances the best interests of a child and rec ognises the paramountcy of those interests. Sect ions 9 and 10 should thus be left intact.*'(par 143)

UNTERMINATED PROCEEDINGS BY EITHER AN ACTING MAGISTRATE WHOSE TERM HAS COME TO AN END OR ONE WHO HAS RETIRED AS SET OUT IN *S V SKOSANA & OTHER CASES* 2015 (1) SACR 526 (GSJ)

Ms. Lebogang Raborife

Additional Magistrate - Rustenburg

Introduction

A retired Regional Court Magistrate had been appointed to the Johannesburg Magistrate's Court to preside over backlog cases. He became unavailable to finalise 22 part-heard cases due to ill health. The Gauteng Regional Court President sent the cases to the High Court for special review. The following issues were raised:

First issue:

Whether or not the unterminated proceedings should be aborted and commence *de novo* before another Magistrate.

Second issue:

Whether or not the proceedings should continue before another Magistrate irrespective of the stage they had reached.

Third issue:

Whether or not the High Court's intervention should be sought to review and set aside or confirm the resumption of trials?

The learned Judge pointed out that there is no provision in the Criminal Procedure Act 51 of 1977 ('the CPA') to deal with unterminated proceedings which have not reached the sentencing stage (those should be dealt with in terms of S275 of CPA).

Section 9 of the Magistrates' Courts Act 32 of 1944 regulates acting appointments. Accordingly, section 9(6) provides that:

UNTERMINATED PROCEEDINGS BY EITHER AN ACTING MAGISTRATE WHOSE TERM HAS COME TO AN END OR ONE WHO HAS RETIRED AS SET OUT IN *S V SKOSANA & OTHER CASES* 2015 (1) SACR 526 (GSJ)

"(6) Any person appointed in terms of subsection (3) or (4) is also deemed to have been so appointed in respect of any period during which he or she is necessarily engaged in connection with the disposal of any proceedings-

(a) in which he or she has participated as such a magistrate, including an application for leave to appeal in respect of such proceedings; and

(b) which have not yet been disposed of at the expiry of the period for which he or she was appointed." (Underlining own emphasis)

In the case of *S v Mokwena* 2008 (5) SA 378 (T), the presiding officer's contract came to an end and the matter was postponed several times thereafter to enable him to finalise the matter. However, he could not be traced. The National Prosecuting Authority submitted that given the delay if an order to start the trial *de novo* is made, it would violate the accused's right to a fair trial as set out in Section 35(3) (d) of the Constitution. The proceedings were set aside.

The empowering provision for *exceptional* circumstances where an Acting Magistrate is unable to finalise part-heard matters is Section 9(7) of MCA. The word '*exceptional'* is written in italics in the last sentence as one would expect that the Administrative Head of a District or Region would be aware of the number of part-heard matters Acting Magistrates have and when their contract ends.

Section 9(7) of the MCA provides that:

'(a) A magistrate appointed in terms of subsection (1) who presided in criminal proceedings in which a plea was recorded in accordance with section 106 of the Criminal Procedure Act, 1977, shall, notwithstanding his or her subsequent vacation of the office of the magistrate at any stage, dispose of those proceedings and. for such purpose, shall continue to hold such office in respect of any period during which he or she is necessarily engaged in connection with the disposal of those proceedings –

(i) in which he or she participated, including an application for leave to appeal in respect of such proceedings; and

(i) which were ***not*** *disposed of when he or she vacated the office of magistrate.'*

There are conflicting High Court decisions on the first issue raised in the *Skosana review,* which in my view is caused by the application of the provisions of section 106(4) of the CPA to answer it instead of section 9(7) of the MCA. (See the cases quoted in the *Skosana review*, paragraphs 10-15). The conflicts are justified by stating that each case is decided on its own merits.

UNTERMINATED PROCEEDINGS BY EITHER AN ACTING MAGISTRATE WHOSE TERM HAS COME TO AN END OR ONE WHO HAS RETIRED AS SET OUT IN *S V SKOSANA & OTHER CASES* 2015 (1) SACR 526 (GSJ)

In my opinion the approach should be that the law is that a Magistrate who has been transferred to another district or division, or has retired or has resigned is empowered by section 9 (7) of MCA to finalise their part-heard matters. The second step should be to analyze the facts of the particular matter that makes Section 9(7) of MCA inapplicable for example ill-health, untraceable, death, etc. This would then call for both the above mentioned first and the second issue in *Skosana* to be considered simultaneously.

The stage at which the pre-conviction proceedings are considered, the constitutional right to a fair trial, and S106 (4) of the CPA will be the deciding factors on whether the proceedings should commence *de novo* or continue as they are before another Magistrate.

Lastly, should the High Court‘s intervention be sought to review and set aside or confirm the resumption of trials?

The learned Judge in the *Skosana review* asks the question in a rather helpful way by stating that:

"In the absence of Legislature dealing with pre-conviction matters does it follow *ex lege* that there was a deliberate intention by the Legislature to exclude the preconviction process from being a merely administrative one and thus enquiring nullity proceedings to be declared so by the High Court?"

The honorable Judge held that the nullity principle applies *ex-lege*, the High Court need not set it aside. In an unreported case of *S v Rakimana (*Unreported decision of the Limpopo High Court, Case No. 27/2021, 28 April 2021) dealing with the same question held that:

"The [H]ead of the Magistrate's court concerned is obliged to apply the 'unavailability or non-availability test to decide whether or not to declare the unterminated proceedings a nullity and the trial to start afresh. The provisions of S9(7)(a) should always be borne in mind when the decision is made. I find no justification that a High Court order should always be sought to avoid unnecessary delay in the speedy finalization of the trial. See S v Polelo, See also S v Hanekom(469/2003) ZAWCHC 67(03.12.2003)par 17, per Yekiso J".

Conclusion

The decisions on how to deal with pre-conviction unterminated proceedings issues raised in the *Skosana review* can only be taken by the Head of the Magistrate‘s Court. It is advisable that the reasons for the decision taken should form part of the record of proceedings.

Competence and compellability of the witness.

Mr. Tebogo Mokgetle

District Magistrate - Tshitale

When a witness is alleged to be mentally incapacitated: what should the courts do? Under common law, every witness is presumed sane until otherwise proven. However, the court must consider their competency and compellability.

A competent witness may lawfully give evidence. A compellable one may be obliged to give evidence.

Section 192 of the Criminal Procedure Act 51 of 1977 (the Act) provides that all persons not expressly excluded by the Act are competent and compellable to give evidence in criminal cases, subject to section 206. Section 206 of the Act states that the law on competency, compellability, or privilege of witnesses which was in force in respect of criminal proceedings on 13 May 1961 shall apply in any case not expressly provided for by the Act or any other law.

According to section 193 of the Act, the court in which criminal proceedings are conducted has to enquire and decide on the competency and compellability of any witness. This duty must be exercised judiciously by holding a trial within a trial. In *S v Thurston* 1968 (3) SA 284 (A), the trial court admitted evidence of a witness who escaped from a mental institution without an inquiry into his competency. However, this was an irregularity.

Section 194 of the Act makes provision for incompetency due to the state of mind of witnesses. It provides that a person, who appears or proven to be afflicted with *inter alia*, a mental illness which deprives him of the proper use of his reason, shall not be competent to give evidence while so afflicted or disabled. Causes for mental incompetency are not exhaustive, due to the wording therein, "*or the like*". A lunatic who possesses sufficient mental capacity to know the difference between truth-telling and lying; and can testify rationally and intelligently is competent. In *R v K* 1951 SA 49 (O), the court which had accepted the medical evidence on the imbecility of the complainant, found her answers to carry a surprising intelligence.

Competence and compellability of the witness.

Here, the court showed a mind shift; showing compassion and dignity. This judicial intervention embraces the spirit and purport of the Bill of Rights and the Constitution Act 108 of 1996.

In *S v SM* 2018 (2) SACR 573 (SCA), the court confirmed the *dictum* in *S v Katoo* (2005) (1) SACR 522 (SCA) , declaring that section 194 od the Act is not a decree for blanket exclusion of the evidence of people suffering from intellectual incapacity, except where it results in an inability to reason properly. The parameters it sets must be met collectively.

Section 194A of the Act further enjoins the court to secure a report from a medical practitioner, a psychiatrist or clinical psychologist regarding the competency of a witness to give evidence. However the report's recommendation is not binding on the court. The court makes a decision on the competency of the witness informed by its own observations, the report, *viva-voce* evidence and the arguments.

Judicial Education and Training as an Essential Element for Judicial Independence

Ms. Theresa Moalusi

Senior Magistrate - Johannesburg

INTRODUCTION

Judicial independence is a fundamental aspect contributing to the honesty and trustworthiness pertaining to democracy. This is evident in the manner in which it is protected and guaranteed by the Constitution of the Republic of South Africa (1996). The former Chief Justice of the Republic of South Africa, Justice Arthur Chaskalson, made a remark alluding to the notion of judicial independence whilst addressing the Cape Law Society to the effect that *"Judicial independence is a requirement demanded by the constitution, not a personal interest of the judiciary, but a public interest, for without the protection judges may not be or be seen by the public to be, able to perform their duties without fear or favour"* (Siyo, 2015).

The South African Judicial Education Institute (SAJEI) was established in 2011. It was established to, *inter alia,* "promote the independence, impartiality, dignity, accessibility, and effectiveness of the courts through continuing judicial education" as provided for in the *South African Judicial Education Institute* Act 14 of 2008.

10 YEARS 2011 - 2021

SAJEI South African Judicial Education Institute

Enhancing Judicial Excellence

It was established to, *inter alia,* "promote the independence, impartiality, dignity, accessibility, and effectiveness of the courts through continuing judicial education" as provided for in the *South African Judicial Education Institute* Act 14 of 2008. The Act is a legislative measure envisaged to encapsulate section 165 (4) of the Constitution.

This article considers whether or not continuous judicial education and training are essential for judicial independence. It will effectively interrogate the extent to which judicial independence grants Judicial Officers the ability to perform their duties free of influence or control by internal or external forces.

THE NEED FOR CONTINUOUS EDUCATION AND TRAINING

Dr. Cheryl Thomas, reported in the review report, that judicial education and training helps to ensure the competency of the judiciary. In an age that increasingly demands more judicial independence and understanding to solve the increasingly complex and sensitive issues which societies leave to be settled, by litigation, the need for judicial education is perceived as greater than ever (C Thomas *Review of Judicial Training and Education in other Jurisdiction* 2006 at 13)

Judicial Education and Training as an Essential Element for Judicial Independence

Media scrutiny of judicial decisions and the growing introduction of quality control measures for the judiciary have required that judicial training provides the judiciary with more than just updates on changes to the law but also 're-learning of the law and the court procedures. This is primarily because of how South Africa's diverse society is organised. With this being said, as the world is evolving so are people, and certain things that would have previously not been considered an infringement of the law or 'unlikely' to occur are happening. Therefore, it would be beneficial for judicial officers to receive continuous training because some may become accustomed to dealing with the same issues and when faced with issues unfamiliar to their expertise, they may struggle to deal with the matters accordingly and opt to deal with the matter in the same manner as other matters familiar to them.

JUDICIAL EDUCATION AND TRAINING IN SOUTH AFRICA

Judicial training and education address what is usually referred to as "judge craft". Judge craft is the specific skills judges need to enable them to do their job efficiently. These skills include training in areas such as opinion writing, sentencing, dealing with certain types of litigants and evidence.

In terms of Section 180 of the Constitution, national legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including (a) training programmes for judicial officers.

The general aim of these programmes is to help the judiciary maintain its independence and credibility, and remain responsive and accountable. The programmes attempt to meet demands by ensuring professionalism amongst judicial officers through continuing professional development training and meeting the institutional demands for continuous performance improvement (Goodman, 2012).

Training is specialised preparation because it is adapted year after year to the new advances in science that are applied to the legal field to legislative reforms. Additionally, training should be multidisciplinary because judicial officers need everyday knowledge on new subject matters that are not so strictly legal and in other areas that provide us with fundamental tools for our work (Martin, 2019).

CONCLUSION

This article sought to explore whether or not, or the extent to which continuous judicial education and training enhance judicial independence. Training opens judicial officer's understanding to cultural diversity and diverse social realities. It may therefor be concluded that training is an essential element that guarantees the independence of judicial officers, as well as the quality and efficiency of the judicial system.

INTRODUCING THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013

Ms Jinx Bhoola

Senior Magistrate - SAJEI

The purpose of this article is to raise conscientiousness on the *Protection of Personal Information Act* 4 of 2013. In this publication I introduced you to this piece of legislation so that you may understand where it fits in the grand scheme of legislation in South African legislation. The Covid–19 pandemic had catapulted the fourth Industrial Revolution into our legal domain. As we embraced remote working, the cyberattacks increased phenomenally. This can be attributed to the fact that remote working from home does not have the same security protection in comparison to organisational protection.

The PoPIA was enacted in 2013, announced by the President on 22 June 2020, promulgated on 30 June 2020, commenced on the 1st July 2020, and is effective from the 1st July 2021. The Regulations relating to PoPIA were gazetted on 14 December 2018. The Act and Regulations were drafted according to International Standards.

The purpose of PoPIA is to protect people from harm by, *inter alia*, protecting the flow of their personal information, and regulating how personal information may be processed, accessed, and stored by establishing minimum threshold requirements or standards. PoPIA ensures that large corporates and governments establish a regulatory framework, develop policies and codes of conduct to protect the data of their data subjects.

The protection of privacy and personal information is regulated in South Africa by several other pieces of legislation such as The *Promotion of Access to Information Act* 2 of 2002 (PAIA), The *Electronic Communications and Transactions Act* 25 of 2002. The *National Credit Act* 34 of 2005 and The *Consumer Protection Act* 68 of 2008. With the promulgation of PoPIA, this will mean that where a conflict exists between PoPIA and other Acts, PoPIA will trump the application of conflicting laws, unless the other Acts provide greater protection than PoPIA.

INTRODUCING THE PROTECTION OF PERSONAL INFORMATION ACT 4 OF 2013

PoPIA is South Africa's data protection law aimed at enhancing the protection afforded by section 14 of the South African Constitution, which provides that *"everyone has the right to privacy."* However, the conundrum arises when balancing PoPIA with PAIA as both Acts are accountable to the same Information Regulator, who is in turn accountable to the National Assembly. Hence, although both Acts juxtapose each other, they must be balanced as they overlap in certain aspects. To come to grips with this legislation, the following definitions must be understood.

Data subject: Is the person to whom the information relates.

Personal Information: This is generally referred to as data for purposes of the Act and includes an individual's personal information.

Data processing: Refers to recording data by automatic or non -automatic means.

Responsible Party: Refers to the person who requires the information and determines why and how to process such data. For example, profit companies, non-profit companies, governments, state agencies, and people.

Information Officer: In public bodies, the Information Officer or deputy is the same as in section 17 of PAIA and the Information Officer of a private body is the head as contemplated in section 1 of PAIA.

Operator: a person who processes personal information on behalf of the responsible party without coming under the authority of that party. For example, an IT vendor

Responsible parties who collect data of data subjects will have to take various steps to ensure that the collection, processing, and storing of such data is lawful. This lawfulness is achieved by ensuring that any natural person or juristic entity who collects data has the following conditions in place:

- Accountability: An Information Officer is appointed.
- Processing limitation: A Privacy Policy is drafted.
- Purpose specification: Raises awareness amongst all employees.
- Further processing limitation: Amend contracts with operators to be PoPIA compliant.
- Information quality: Report data breaches to the regulator and data subjects.
- Openness: Ascertain if they can lawfully transfer personal information to other countries.
- Security safeguards: Only share personal information when they are lawfully able to.
- Data subject participation.

The Penalties for non-compliance are regulated. There are essentially two legal penalties or consequences for the responsible party. Firstly, a fine or imprisonment of between R1 million and R10 million or one to ten years' imprisonment, and secondly, paying compensation to data subjects for the damage they have suffered.

This publication will run a series of short articles on PoPIA. This week I have introduced you to this piece of legislation so that you understand where it fits in the grand scheme of legislation in South African legislation.

WHY ARE NORMS AND STANDARDS SO IMPORTANT?

Ms. Nicola Olivier

Acting Additional Magistrate - Johannesburg

Section 35(3)(d) of the Constitution of the Republic of South Africa 1996, provides that:

'Every accused person has a right to a fair trial, which includes the right –

(d) to have their trial being and conclude without unreasonable delay.'

Do Magistrates meet this requirement every day and is every Magistrate fully acquainted with the Norms and Standards issued by the Chief Justice in GN147, Government Gazette 37390, on 28 February 2014?

The objective of the Norms and Standards seeks to achieve the enhancement of access to quality justice for all; to affirm the dignity of all users of the court system and to ensure the effective, efficient, and expeditious adjudication and resolution of all disputes through the courts. Judicial Officers must strive to finalise all matters, including

outstanding judgments, decisions, or orders as expeditiously as possible.

The purpose of this article is to show that very recently there was no adherence to what is expected with regards to the finalisation of matters.

In Kunene v The State (AR21/20) [2021] ZAKZPHC 36, the court ordered the convictions and sentence be set aside thereby allowing for the appellant's (hereinafter Kunene) immediate release.

Kunene was arrested in 2012 and charged with raping an 11-year-old girl. At the time of the arrest, Kunene was 17 years of age. After protracted proceedings spanning some seven years, Kunene was convicted in 2019 of two counts of rape and sentenced to an effective 15 years imprisonment. The question that could not be ignored is whether Kunene's fair trial rights had been infringed, given the number of lengthy postponements and delays.

WHY ARE NORMS AND STANDARDS SO IMPORTANT?

Kunene was absent on only one occasion by no fault of his own and was present on every other occasion. Periods of time were lost mainly because of what is referred to as "systematic" delays. One underpinning core value in the Norms and Standards is fairness. The right to a trial within a reasonable time is fundamental to the fairness of a trial. It is further required to finalise a criminal case within 6 months. Even in the early stages of the Kunene matter, no adherence was given hereto. Kunene was arrested on 14 September 2012, appeared in court, but the matter was only remanded for trial to 14 May 2013. More than 6 months elapsed since the date of the first appearance to date of which the trial was to commence already surpassing the 6 month time frame Paragraph 17 to 19 the court held that: *"...I consider that there was an overall duty, not only on the court but also on the prosecution, to ensure that the trial commenced and ended within the shortest time possible. The failure in this regard must be placed squarely at the doors of the learned Magistrate and the prosecution…By all accounts, this was not a complex matter… In my view, the matter could have been finalized within a week or two. That it took seven years is simply astounding…it is quite clear that neither the court nor the prosecution paid any heed to the appellant's rights to a trial within a reasonable time…it was the Magistrate's and the prosecutor's tardiness and lack of interest that resulted in the huge delays herein"*

The objectives set out in the Norms and Standards can only be attained through the commitment and co-operation of all Judicial Officers in keeping with their oath or solemn affirmation to uphold and protect the Constitution and the Human Rights entrenched in it and to deliver justice to all persons. Every Judicial Officer must dispose of cases efficiently, effectively, and expeditiously and must at all times act in accordance with the core values.

Qualified Privilege Accorded to Judicial Officers and Members of Parliament: A Comparative Overview

Mr. F von Reiche

Magistrate - Pretoria

Introduction

In the decision of *May v Udwin* 1981 (1) SA 1(A) (the *May* judgment) the Appellate Division delivered a groundbreaking decision on this important matter by citing comprehensively from the common law authorities. The Court stated, among others, that qualified privilege is founded on public policy. This is especially so with the qualified privilege of a Judicial Officer. The public interest in the due administration of justice requires that a Judicial Officer, in the exercise of his judicial functions, should be able to speak his mind freely without fear of incurring liability for damages for defamation. (Refer to page 18H of the *May* judgment). Similarly, the same qualified privilege is enjoyed by members of Parliament. The ratio for Parliamentary privilege is twofold, namely that firstly Parliament has to have complete control over its proceedings and its own Members and that accordingly matters arising in that sphere should be examined, discussed, and adjudged in Parliament and not elsewhere.

Secondly, that a member of Parliament has to have a complete right of free speech without any fear that his motives or intentions, or reasoning would be questioned or held against him thereafter.

In the decision of *Poovalingam v Rajbansi* 1992 (1) SA 283 (A) ("the *Poovalingam* judgment) the Appellate Division ruled on the principle of qualified privilege for defamatory statements of a member of Parliament under section 8 of the now-repealed Powers and Privileges of Parliament Act 91 of 1963. In the latter case, the Appellate Division upheld the appeal of Mr. Poovalingam, a member of the House of Delegates, on the basis that a defamatory letter published by the respondent did not relate to the business transacted in the House on a specific day. It was also not a recognised Parliamentary procedure prescribed by section 8 of the Powers and Privileges of Parliament Act 91 of 1963.

Brief comments on the qualified privilege accorded to judicial officers for defamatory statements made in the exercise of the judicial function

Discussion

The Court in the *Poovalingam* judgment referred to the invoking of the aforesaid section 8 by the Court *a quo* in its decision to uphold the claim of Mr. Rajbansi that he was protected from a defamation claim based on Parliamentary privilege. After a thorough and comprehensive review of English decisions, the unanimous decision of the Court delivered by Chief Justice Corbett was that the defamatory letter published by the respondent did not relate to the business transacted in the House on a specific day and was also not a recognised Parliamentary procedure prescribed by **section 8** of the **Powers and Privileges of Parliament Act 91 of 1963**. The appeal was accordingly upheld.

The Court *a quo* in the *May* judgment, referred disqualifying factors (not exhaustive or a closed number) -- the presence of one or more would then defeat the defence of qualified privilege - to wit: (1) If the words in question are not germane to the subject with which the witness or judicial officer is required to deal; or (2) if the publisher does not act reasonably in the use of the words; or (3) if the publisher was actuated by an indirect or improper motive, that is by malice

The claim for defamation was based on statements made by a Magistrate in written reasons in execution proceedings to the effect that an attorney had been dishonest and had misled the court.

Joubert JA who delivered the unanimous decision in the *May* judgment said, at 19A, the following in the course of his judgement:

"On the other hand, public policy also requires that the courts and their process and proceedings should not be wantonly used by those who resort to them - witnesses, litigants, attorney, and advocates - for the illegitimate purpose of defaming others… .Hence the protection of qualified privilege will only be accorded to such a person if the defamatory words were relevant to the case and found on some reasonable cause. Preston v Luyt … . Voet 47.10.20 (Gane's trans) says:

'This is to prevent a door being otherwise opened for mischiefs, and a freedom being granted apparently to fling and to heap up with impunity under the cloak of self-defence every kind of abuse against opponents and their witnesses like a waggoner from a wain.'

That obviously has no application to judicial officers. Nor does public policy dictate that the limitations to the qualified privilege of such persons just mentioned also be made applicable to that of judicial officers. It is noteworthy that Voet and the other authorities canvassed above do not mention any such limitations in relation to judicial officers. Of course the irrelevance of the defamatory matter to the proceedings or the absence of some reasonable foundation for it, may, depending upon the circumstances of the particular case, be indicative of malice on the part of a judicial officer." (p19 of the report).

Brief comments on the qualified privilege accorded to judicial officers for defamatory statements made in the exercise of the judicial function

Concluding remarks

In summary , the current state of the law is that if a litigant, witness, attorney or advocate is sued, the law set out above and the general principles of the law of delict (defamation in particular) will apply. For any other person (excepting judicial officers), once there is publication of defamatory matter a rebuttable presumption arises that he/she acted unlawfully and was animated by *animus iniuriand*i that is, an intention to defame with the knowledge of the unlawfulness of the defamatory matter. (Refer to the landmark decision of *Suid-Afrikaanse Uitsaaikorporasie v O'Malley* 1977(3) SA 394(A) at 405G-H).

On the other hand, for Judicial Officers, the legal position would be as set out in the *May* judgment . In summary, if a Judicial Officer makes a defamatory statement in the exercise of his/her judicial authority, there is a rebuttable presumption that he/she did so lawfully within the limits of his/her authority.

LET US TALK PROCEDURE VERSUS INTENTION OF THE LEGISLATURE

Ms. Theresa Moalusi

Senior Magistrate - Johannesburg

INTRODUCTION

Domestic violence against women and children remains one of the most horrific forms of gender inequality and violation of Human Rights. It takes most forms including physical, sexual, emotional, and financial. It is an epidemic that destroys the community at large. Domestic Violence Act 116 of 1998 (the Act) serves a crucial role in the protection of the vulnerable groups.

The purpose of the Act as observed from the Preamble is to "afford the victims of domestic violence the maximum protection from abuse that the law can provide as well as introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of the Act".

This article will evaluate how matters are dealt with where interim orders have been issued with a return date and both parties do not appear before the court. It will also question what is to be done in unlegislated circumstances as well as explore the position of the complainant when the matter is removed from the roll due to non-appearance and the interim order is set aside. It will then conclude by offering suggestions on ways in which individuals who fail to attend a hearing due to unforeseen circumstances may remain protected.

UNFORESEEN CIRCUMSTANCES

The Act falls short in making provisions for unforeseen circumstances which plays a fundamental role in the protection of the victims. This is primarily because, in instances where the applicant has proven sufficient evidence that respondent has threatened to harm him/her and has been granted an interim order (Artz, 2004), unforeseen circumstances often occur which result in the applicant being unable to attend court to obtain a final order. These unforeseen circumstances (such as being locked in the house by the respondent) thus result in the interim order being set aside leaving the complainant vulnerable and unprotected..

LET US TALK PROCEDURE VERSUS INTENTION OF THE LEGISLATURE

PURPOSE OF THE PROTECTION ORDER

It is important to revert to the purpose of the Act when attempting to offer reasons as to why the setting aside of the interim order, due to the non-appearance of both parties, contradicts the original purpose of the Act. The issuing of an interim protection order is granted on the basis that the court is satisfied there is *prima facie* evidence that undue hardship may be suffered by the complainant as a result of such domestic violence if a protection order is not issued. Therefore, it is important to say that the main function of the protection order is to protect the complainant thus the removal of the protection order, under any circumstance, suggests that the individual does not require protection. However, in many cases that is not the situation.

INABILITY TO ATTEND COURT

It is important to note that many circumstances occur in the average individual's life. However, the life of an individual who is in need of protection should be viewed through a perspective that takes into account all of their circumstances. Section 6 of the Act provides for instances where the respondent appears or does not appear on the hearing date but fails to provide a procedure for where both parties are not before the court and there is an interim order in place. Courts ordinarily remove the matter from the roll and as a result, the complainant is placed in the original circumstances of hardship.

CONCLUSION

Law is not a straightforward, objective instrument for absolute change. Magistrates should be mindful of the social issues regarding domestic violence. There are instances where applying the Rules of procedure in the Magistrate Court will be defeating and this is one of the instances. The non-appearance of the complainant should be investigated. It is suggested that the procedure followed in Samoa be followed by our legislature. In Samoa, section 19 (2) of the *Family Safety Act* No 8 2013 provides that, the Court, in making a decision, determination, or direction for the granting or refusal of protection order, in cases where no procedure is specifically provided for, shall apply such procedure which the Court deems best calculated to promote ends of justice (World Bank, 2019). With this, removing the matter from the roll and setting aside the order does not promote ends of justice nor does it promote the intention of the legislature.

Pitfalls of section 227(2) and (5) of the Criminal Procedure Act , 51 of 1977

Dr. Vincent Jameson
Magistrate—Hartswater

Section 227 of the *Criminal Procedure Act,* 51 *of* 1977, ("the CPA"), empowers a court upon an application in terms of subsection 2(a) thereof allows a party to cross-examine a complainant regarding his or her sexual history. The court may grant such permission if it is satisfied that such evidence or questioning is relevant, and may be adduced, and such person may be so questioned in respect of the offence for which he or she is being tried. In terms of subsection 5 the questioning about the complainant's sexual history will only be allowed if the court is satisfied that it:

- "Is in the interest of justice, with due regard to the accused's right to a fair trial;
- Is in the interest of society in encouraging the reporting of sexual offences;
- Relates to a specific instance of sexual activity relevant to a fact in issue;
- Is fundamental to the accused's defence;
- Is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or
- Is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue".

Pitfalls of section 227(2) and (5) of the Criminal Procedure Act , 51 of 1977

Section 227(2) and (5) raises two contentious issues before the court that may grant an application to a party to cross-examine a witness about his or her sexual history. Firstly, the proviso *the evidence relating to sexual experience or conduct in respect of the offence which is being tried* (subsection 2).

What is meant by *offence which is being tried?* Is it the offence for which the accused person is before court or is it an unrelated matter but which the evidence may have relevance to the current case? Upon reading cases which deal with this section, it is evident that the courts interpret it to include any other evidence which is unrelated to the *matter being tried* but is of relevance and may have probative value to assist the party to prove its case or to disprove another party's case. The *offence being tried* serves as a proviso which regulates a court's approach in interpreting the requirement of relevance. Differently put, the evidence which the state or the defence is desirous to introduce, must only be relevant to the matter *in casu* and no other matter ***which is not being tried*** (my emphasis).

For instance in the *State v Zuma* 2006 (1) SACR 257 (W) the State introduced evidence during the testimony of the complainant that she had never had unprotected sex had since April 1999 to November 2005 on which date the offender had unprotected sex with her to prove the lack of consent. It was on that basis that the court allowed the defense to cross-examine the complainant about her sexual history from April 1999 to November 2005. Clearly, the events from April 1999 to November 2005 just before the incident for which the offender was on trial are events for which the accused's person *is not being tried.*

In certain circumstances the cross-examination might be to ridicule a witness and portray her or him as a weak or unreliable witness and it is not surprising that it is seldom allowed (*S v M* 2002 (2) SACR 411 (SCA) para 17). Every incident has its own boundaries and it should be kept within those parameters. It is therefore submitted that the introduction of evidence by the State and cross-examination of that evidence must be *in respect of the offence being tried,* which is the one that is relevant at that point. The determination of relevance is problematic, because *relevance is based on a blend of logic and experience lying outside the law* (*R v Matthews* 1960 1 SA 752 (A) at 758 A-B).

The second issue that section 227(2) and (5) raisers is, where does it leave some of the provisions of the Constitution of the Republic of South Africa, Act 106 of 1996 ("the Constitution"). The Constitution is the supreme law of the country (Section 2). Human dignity is one of the founding values that underpin the South African democracy (Section 1(a) Constitution). Human dignity is also proclaimed as an individual right in the Constitution (Section 10) and so is the right to privacy (Section 14).

Pitfalls of section 227(2) and (5) of the Criminal Procedure Act , 51 of 1977

Further, it is not easy to overrule these rights because they form part of the Bill of Rights in the Constitution and can only be limited in terms of section 36 of the Constitution. Further, section 39 of the Constitution requires a court when interpreting a right in the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity amongst others, and should promote the spirit, purport, and objects of the Bill of Rights. The two rights supersede any other law outside the Constitution but are listed second last in section 227(5) as factors a court considers in the determination of whether to allow the introduction of such evidence or otherwise. The scheme of section 227 relegates the rights to human dignity and privacy to a subservient role instead of bolstering them as rights mentioned in the Bill of Rights.

It is already humiliating for a complainant to relive an ordeal of sexual activity in court. How much more humiliation does he or she still need to endure to be cross-examined on his or her past sexual history (*S v M* at 411) which is for an *offence not being tried*. Human dignity is a right that is inherent to a person being a human and is non-derogable. Meaning its protection cannot be lessened or deviated from. On the other hand, the rights of the accused person to a fair trial are not inherent to being human but are non-derogable.

Section 227 presents a court with two conflicting rights, the one inherent and the other not. It is submitted, that to cross -examine a complainant about his or her previous sexual activities based on relevance alone would necessarily limit his or her fundaments rights and as a consequence, the provisions of section 227(2) and (5) should be tested against the provisions of section 36 of the Constitution.

LEGAL PRACTIONERS STRUCK OFF THE ROLL

GAUTENG

Name of Legal Practitioner	Attorney	Advocate	Status	Date of Action
Etienne Van Der Walt	Yes	N/A	Suspended	06 April 2021
Titswa Modise	Yes	N/A	Struck From Roll	20 April 2021
Mario Coetzee	Yes	N/A	Struck From Roll	29 April 2021
Adrian John Stevens	Yes	N/A	Struck From Roll	29 April 2021
Peter Martinus Breedt	Yes	N/A	Struck From Roll	03 May 2021
David Neil Kahn	Yes	N/A	Struck From Roll	04 May 2021
Hermanus Johannes Wessels Bothma	Yes	N/A	Struck from Roll	4 May 2021
Mashudu David Netshitungulu	Yes	N/A	Struck From Roll	06 May 2021
Boy Andries Mahlangu	Yes	N/A	Suspended	18 May 2021
Matthys Christiaan Pretorius	Yes	N/A	Struck From Roll	20 May 2021
Victor Maimela	Yes	N/A	Suspended	25 May 2021
Leeto Isaac Matshidiso	Yes	N/A	Struck From Roll	26 May 2021
Cornelius Modulathoko Kgaka	Yes	N/A	Suspended	01 June 2021
Lebone Thomas Motsuenyane	N/A	Yes	Suspended	08 June 2021
Mputing Lawrance Magolego	Yes	N/A	Suspended	10 June 2021
Shireen Elaine Archary	Yes	N/A	Suspended	15 June 2021
Radhika Singh (Ramdin)	Yes	N/A	Suspended	22 June 2021
Shandukani Danis Daswa	Yes	N/A	Suspended	22 July 2021
Sivuyile Sandile Zilwa	Yes	N/A	Struck From Roll	27 July 2021
Gavin Vernon Joynt	Yes	N/A	Suspended	28 July 2021
Maria Eulalia De Freitas Salgado	Yes	N/A	Suspended	04 August 2021
Edmund William Holder	Yes	N/A	Struck From Roll	17 August 2021
Shaun Muskat	Yes	N/A	Suspended	23 August 2021

LEGAL PRACTIONERS STRUCK OFF THE ROLL

KWAZULU-NATAL

Name of Legal Practitioner	Attorney	Advocate	Status	Date of Action
Thandi Chrishnah Sima	Yes	N/A	Suspended	23 April 2021
Stuart Monty O'Connell	Yes	N/A	Struck From Roll	23 April 2021
Sakhile Isaac Mashiyane	Yes	N/A	Suspended	28 April 2021
Agrippa Mfanufikile Phewa	N/A	Yes	Suspended	26 May 2021

WESTERN CAPE

Name of Legal Practitioner	Attorney	Advocate	Status	Date of Action
Zeenat Mohamed	Yes	N/A	Suspended	01 April 2021
Thanduxolo Kalo	Yes	N/A	Suspended	27 May 2021
Gaolatlhwe Edgar Morake	Yes	N/A	Suspended	07 June 2021

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