JUDICIAL EDUCATION NEWSLETTER

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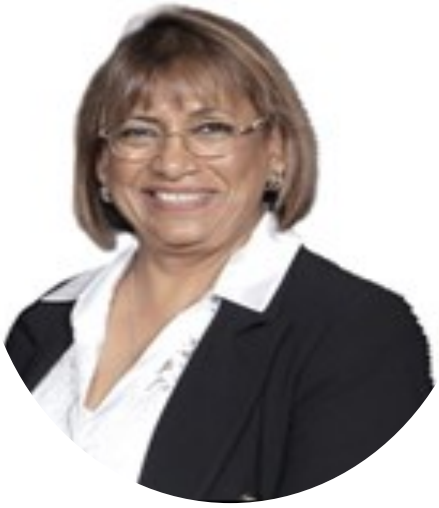
FROM THE DESK OF THE EDITOR-IN-CHIEF



Ms. Jinx Bhoola Editor-in-Chief

The Judicial Education Newsletter is very insightful and impactful for Judicial Officers. The Newsletter is made possible for the benefit of all Magistrates and legal practitioners by our committed authors who regularly contribute to relevant topics and by the committed Editorial team, the SAJEI Research team and not forgetting our designer and compiler Mr Thomas Maseko. This edition of the Newsletter welcomes new authors to the writing club. You have made some invaluable contributions and I encourage you to continue to write. It is also a bitter sweet moment as we say goodbye to two dedicated Editorial Committee members and welcome two new Editorial Committee members. (See article from the desk of the CEO.)

This edition of the Newsletter deals with a myriad of areas of law. The topics range from illegal immigrants, illegal foreigners, the conservation of marine life, a lacuna in the Child Justice Act[1], an overview of the Mental Health Act[2] vis a vie , sections 78 and 79 of the Criminal Procedure Act[3] ("CPA"), domicilium in matrimonial matters against the backdrop of the right to equality, conducting the bail application in domestic violence matters in terms of section 60(12) of the CPA, and issues pertaining to legal representatives fees and the fraudulent interception of emails.

Thank you to our contributors. You have displayed extensive knowledge on various topics and I thank you for sharing your experiences. We have one more edition to wrap 2024 and I trust you will be encouraged to share your experiences for the last edition.

It is inspiring to see newly appointed Magistrates making their debut with fascinating areas of law. Please continue to write. This has also been a very fruitful year for the SAJEI team. You worked long hours and remained dedicated. I want to take this opportunity to thank Dr. Moshoeu, the CEO of SAJEI, thank you for unwavering commitment to Judicial Education in South Africa. You have done a sterling job. The Judiciary in South Africa is indebted to you.

1) Act 75 of 2008.
2) Act 17 of 2002.
3) Act 51 of 1977.

FROM THE DESK OF THE CEO

Dr Gomolemo Moshoeu

Chief Executive Officer, SAJEI

I would like to express gratitude to Regional Magistrate Lebogang Raborife and Regional Magistrate Phumelele Shoba for serving their tenure on the Editorial Committee with excellence. May they continue to render selfless service to the Judiciary.

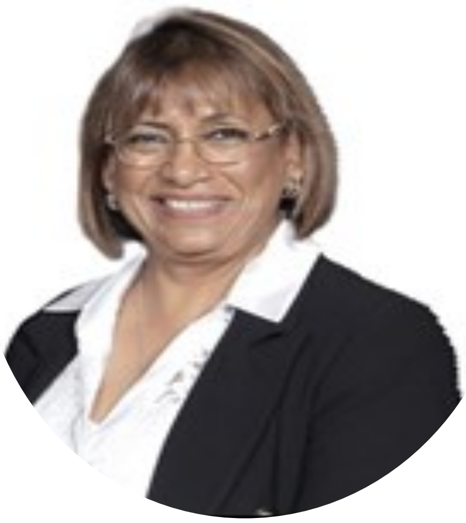
Let us also welcome Regional Magistrate Collen Matshitse and Magistrate Shirley Nemutandani as new members of the Editorial Committee. We are looking forward to their contributions. The hard work of the Editorial Committee members is noted.

The current issue of the Newsletter deals with very interesting topics. The articles provide insights on several critical issues. Of note, are articles on Marine conservation, Immigration, Child Justice, Mental health, etcetera. On behalf of SAJEI, I would like to commend all the authors for their hard work. Their invaluable support is much appreciated. Magistrate Ebrahim Makda even made two submissions, kudos to him.

The efforts of the SAJEI Research team are also acknowledged, especially, of the Law Researcher Ms Sizo Sokhela who selflessly compiles the case summaries. I hope that they are useful to the readers. For this edition, the case summaries focus on immigration with special reference to asylum seekers and refugees. South Africa experiences a remarkable influx of migrants including refugees and asylum seekers looking for better lives. It is therefore imperative for Judicial Officers to be familiar with relevant case law.

Please continue to read the Newsletter and submit your contributions. Sharing is caring.

GRAPPLING WITH DETENTIONS, DEPORTATION AND SENTENCING IN IMMIGRATION MATTERS



Ms. Jinx Bhoola Editor-in-Chief

Introduction

I am going to confine this article to a very important aspect, which is sentencing in Immigration matters. I am not going to focus on the principles relating to sentencing but intend to do a comparative analysis of sentencing in different courts relating to contravention of section 49(1)(a) of the Immigration Act[1], (the Act), as amended. A cursory overview of sentencing in immigration is necessary to ensure effective sentences are imposed to address the issue of the influx of illegal immigrant cases that infiltrate our courts. Although there are various sections that deal with various offences and sentences, my focus is on section 49(1) matters.

Immigration, Extradition and Refugee issues are inter-related and must be considered purposefully and not in isolation. Whilst the Act determines the legitimacy of a foreign national's legal status to be in the Republic of South Africa ("RSA") and whether such person should be deported or not, the Refugees Act[2] often becomes intertwined with Immigration matters as the accused in the Immigration matters, often raises the issue that they are seeking asylum. This then causes the application of the Refugees Act in order for one to determine the refugee status of an asylum seeker.

Immigration and Deportation

Section 25 of the Act regulates the rights assigned to holders of permanent residence permits. This class of persons enjoy all rights, privileges, duties and obligations of a citizen, save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship.

Section 32(2) of the Act provides that any illegal foreigner, shall be deported. Section 34 deals with deportation and detention of illegal foreigners. Usually, referred to as warrantless arrests, an immigration officer or a police officer, acting in terms of section 41(1) of the Act, may arrest an illegal foreigner without a warrant or cause the illegal foreigner to be arrested. The Immigration Officer, then, guided by the National Prosecuting Authority ("NPA"), makes an election to either deport the illegal foreigner in terms of section 34 or to charge the said foreign national in terms of sections 9 and 49(1) of the Act.

Section 34 of the Act

The pre-requisites for the detention in terms of section 34 of the Immigration Act are:

(a) the illegal foreigner shall be notified in writing of the decision to deport and of the right to appeal such decision;

(b) may at any time request any officer attending to him that his detention for deportation be confirmed by warrant of a Court, and, if not issued within 48 hours of request, shall cause the immediate release of such foreigner;

(c) shall be informed in a language he understands upon arrest or immediately thereafter of the rights;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

Subsection (6) provides: "Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time. Section 34(6) makes provision for an accused to be deported prior to the sentence being served. Interestingly, the Act provides that the foreign nationals imprisonment shall terminate at that time. For the purposes of good governance, documentary evidence will have to be placed before the court in the form of a letter from the DCS, justifying that such a person is eligible for parole.

To safeguard such dichotomy, it is recommended that Magistrates pay careful attention when crafting their orders in terms of section 49(1) of the Act. Section 49, read with sections 9 and 32, regulates criminal offences, conditions when an illegal foreigner may enter the RSA and the peremptory provision that any illegal foreigner shall be deported. However, it must not be read in isolation of section 34 as section 34(6) becomes relevant upon conviction.

Section 49(1) of the Act

Section 49(1) reads:

A) Anyone who enters or remains, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years,

B) Any illegal foreigner who fails to depart when so ordered by the Director General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years."

(2) Anyone who knowingly assists a person to enter or remain in, or depart from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years.

(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year: Provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding five years without the option of a fine.

(4) Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence and liable on conviction to a fine.

(5) Any public servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, or otherwise facilitates such illegal foreigner to disguise his or her identity or status, or accepts any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of this Act, shall be guilty of an offence and liable on conviction to imprisonment not exceeding eight years without the option of a fine: Provided that if such public servant is employed by the Department, such offence shall be punishable by imprisonment not exceeding 15 years without the option of a fine.

(6) Anyone failing to comply with one of the duties or obligations set out under sections 38 to 46, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years

(7) Anyone participating in a conspiracy of two or more persons to conduct an activity intended to contravene this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding seven years: Provided that if part of such activity is conducted or intended to be conducted in a foreign country, the offence shall be punishable by imprisonment not exceeding eight years without the option ofa fine

(8) Anyone who willfully or through gross negligence produces a false certification contemplated by this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three years

(9) Anyone, other than a duly authorised public servant, who manufactures or provides or causes the manufacturing or provision of a document purporting to be a document issued or administered by the Department, shall be guilty of an offence and liable on conviction to imprisonment not exceeding 10 years without the option of a fine.

(10) Anyone who through offers of financial or other consideration or threats, compels or induces an officer to contravene this Act or to breach such officer's duties, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding five years; or if subsequently such officer in fact contravenes this Act or breaches his or her duties, to imprisonment not exceeding five years without the option of a fine.

(11) Anyone guilty of the offence contemplated in section 34 (10) (escape from detention under this act) shall be liable on conviction to a fine or to imprisonment not exceeding three years

(12) A court may make an order as to costs in favour of the Department to the extent necessary to defray the expenses referred to in section 34 (3) against:

A) any illegal foreigner referred to in section 34 (3);

B) any person who contravened section 38 or 42;

C) any person who conveyed into the Republic a foreigner without the required transit visa; or

D) any person who committed an offence contemplated in subsection (5), (7), (8) or (10), which order shall have the effect of a civil judgment of that court.

(13) Any person who pretends to be, or impersonates, an immigration officer, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years

(14) Any person who for the purpose of entering or remaining in, or departing from, or of facilitating or assisting the entrance into, residence in or departure from, the Republic, whether in contravention of this Act or not, commits any fraudulent act or makes any false representation by conduct, statement or otherwise, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding eight years.

(15) Any natural or juristic person, or a partnership, who

(a) for the purpose of entering the Republic, or of remaining therein, in contravention of this Act, or departing from the Republic, or of assisting any other person so as to enter or so to remain or so to depart, utters, uses or attempts to use:

(i) any permanent residence permit, port of entry visa, visa, certificate, written authority or other document which has been issued by lawful authority, or which, though issued by lawful authority, he, she or it is not entitled to use; or

(ii) any fabricated or falsified permanent residence permit, port of entry visa, visa, certificate, written authority or other document.

(b) without sufficient cause has in his, her or its possession

(i) any stamp or other instrument which is used or capable of being used for purposes of fabricating or falsifying or unlawfully recording on any document any endorsement under this Act or required to be submitted in terms of this Act.

(ii) any form officially printed for purposes of issuing any permanent residence permit, port of entry visa, visa, certificate, written authority or other document under this Act or required to be submitted in terms of this Act, or any reproduction or imitation of any such form.

(iii) any passport, travel document, identity document or other document used for the facilitation of movement across borders, which is blank or reflects particulars other than those of the person in whose possession it is found; or

(iv) any fabricated or falsified passport, travel document, identity document or

other document used for the facilitation of movement across borders; or

(c) has in his or her or its possession or intentionally destroys, confiscates, conceals or tampers with any actual or purported passport, travel document or identity document of another person in furtherance of a crime, shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years without the option of a fine; or shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years without the option of a fine.

(16) Any person who *(a)* contravenes or fails to comply with any provision of this Act, if such contravention or failure is not elsewhere declared an offence, or if no penalty is prescribed in respect of an offence; or *(b)* commits any other offence under this Act in respect of which no penalty is elsewhere prescribed, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding seven years.

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Inter-relation between section 34 and section 49 of the Act

A Magistrate is expected to draw a distinction between section 34 and 49 of the Act. The fact that an illegal foreigner is still entitled to apply for asylum does not negate the fact that the illegal foreigner has not contravened the Act by entering and remaining in the country illegally. Where the detention is solely for the purpose of deportation then such detention is authorised by section 34 of the Act. However, where the detained person has been charged with a criminal offence in terms of section 49(1), then further detention may be authorised in terms of the CPA. Sections 34 and 49 both regulate illegal entry and stay by non - South African citizens in the country. However, each has a distinct purpose. Section 34 does not create or refer to any criminal offence. But section 49 does. Section 34 is primarily intended for deporting illegal foreigners and detaining them for that purpose whereas section 49 criminalises certain conduct.

When these matters appear before the Magistrates Court, the accused generally, plead guilty in terms of section 112(1)(a) or section 112(2)(2) of the CPA. In such instances, the State usually provides the court with a section 212 statement of the CPA, to secure the conviction for contravention of section 49(1)(a) of the Act. The statement is usually attested to by the Department of Home Affairs (DHA), who generally verify that the illegal foreigner entered the country illegally, alternatively entered legally, however they did not leave within the allocated time, alternatively, that border control has no record of such a person entering the country.

Summarily, if an accused is convicted and sentenced in terms of section 49(1)(a), read with section 9 of the Act, section 34 prescribes that such accused must be deported if he is a foreign national. The defence usually raised by such accused is that that are asylum seekers. In such instances then section 21(1B) and regulation 8 (3) and (4) becomes relevant. Accordingly, "good cause" has to be proven by the accused to enable the accused to apply for asylum. I do not intend dealing with the asylum application proceedings or refugee status in this article.

Sentencing in Immigration matters

Comparative Case Law dealing with sentences imposed in contravening section 49(1)(a) of the Act.

Addressing the issue of the slow pace of deportations in the section 49(1)(a) convictions, the full bench decision of *The State v Luis Alberto Cuna*[3], held the following:

- in para 3.1.16:" The Immigration Act provides that a person who has contravened section 49(1), shall, on conviction, be liable to a fine or imprisonment not exceeding 2 years. It is our view that once an accused has been found guilty in terms of section 49 (1) and sentenced to a fine or imprisonment, the trial court must in addition thereto, make a deportation order.

- in para 3.1.18 "Similarly, even in this instance, it does not appear from the record that such an order was made by the trial court which is a misdirection by that court, which is bound to lead to the accused being released from detention after expiry of his sentence, and in contravention of the law again."
- in para 3.1.20" It is our view that in every case where an order for the deportation for an accused has been made, the judgment must be brought to the attention of all the government departments that deal or are entrusted with the deportation of illegal foreigners.
- In para 3.1.21 the court concluded with:" The Judiciary is required to impose sentences dictated by the facts of each case. This Appeal court agrees that where possible, such sentences should be coupled with an order for deportation"

In *Maphosa Gift v The State*[4], the appeal judgment was delivered on 1 march 2021, where the court held in in para 28 that, "the learned Magistrate failed to make an appropriate order for deportation of the appellant once he served his sentence. This failure is material in my view."

The Court at para 29, referred to the unreported full bench decision of *State v Cuna*, where the court held:

"*once an accused has been found guilty in terms of* **Section 49(1)** *and sentenced either to a fine or imprisonment, the trial Court must in addition make an order for her or his deportation." and*

"….*in every case where an order for the deportation of an illegal foreigner has been made, the judgement must be brought to the attention of all the Departments of Government that deal or are entrusted with the deportation of illegal foreigners and all the other institutions in the value chain."*

Further reference was made to paras 30 and 31, where the court held:

"30 - The full bench carefully set out the various State Departments to whose specific attention a deportation order should be brought and the reasons therefore.**[11]**.

31- These are:

"*3.1.20.1 - the National Department of Public Prosecutions, so that it is brought to the attention of prosecutors that when arguing sentence, a deportation order should be one of the orders that a prosecutor requests from the trial court;*

3.1.20.2 - the Director General of the Department of Justice so that it be brought to the attention of judicial officers that when a court convicts an illegal foreigner in terms of **section 49** *(1) of the* **Immigration Act, an** *order for the deportation of such a person is made, as well;*

3.1.20.3 - the Commissioner of the Correctional Services in order to facilitate the deportation of the person so convicted when his or her sentence comes to an end; and

3.1.20.4 - the Department of Home Affairs so as to commence with the process of the deportation of the illegal foreigner once sentence has been served."

In *S v Jerlina Chivabo*[5], which was a case sent on automatic review, the accused was convicted on a plea for contravening section 49(1) of the Act.

The accused was initially sentenced to pay a fine of R1000 or one-month imprisonment, half of which was suspended for three years on condition that the accused person was not convicted of contravention of the Act. A deportation order was granted in terms of section 34(6). The sentence was then replaced by another order where the accused was fined R1000 or two months imprisonment half of each is suspended for a period of three years on condition the accused is not convicted of the offence of section 49 of the Act during a period of suspension. In the corrected sentence, the court omitted to make a deportation order. In para 9 of the judgment, the court referred to the dictum as quoted from *Cuna* above. Referring to para 11 of the judgment, the court provided a cursory overview of the *stare decicis* principle by quoting "In *Ayres and Another v Minister of Justice and Correctional Services and Another*[6], the Constitutional Court said the following:

'As this Court noted in *Camps Bay Ratepayers' and Residents' Association*, the doctrine of precedent is "not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution". Similarly, in *Ruta*, this Court held: "Respect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule."'

In *State v Kali and Others*[7] (2023), the Magistrate's Court, sent eight (8) cases for automatic review under section 302 of the CPA to the Free State High Court. The accused persons were unrepresented and pleaded guilty to contravening section 49(1)(a) of the Act. All the accused were sentenced to direct imprisonment between 12 months and two years. Referring to various case law, the court held that the sentences imposed did not show sufficient reasoning by the lower court. There was no proportionality between the periods spent in South Africa and the term of imprisonment. The record was silent on the statistics of the offence. This culminated in a sense of shock and an appreciation that the sentences were grossly excessive and that there was an improper exercise of discretion by the court.

The court referred to *S v Mudenda*[8] where the accused was a mechanic by profession and had been in the country without proper documentation since 2006. He remained undetected by the South African authorities until 6 August 2019 (thus approximately 13 years) when he was stopped at a roadblock while conveying passengers in a minibus taxi. He was unmarried but had two children whom he supported and resided with their mother. He was in custody for a period of 5 months whilst awaiting trial. He was a first offender who pleaded guilty to the offence. He was sentenced to an effective 8 months' imprisonment. Reference was also made to *Abore v Minister of Home Affairs and Another*[9], where the Court sentenced the accused to 50 days' imprisonment with an option to pay a fine of R1 500.00. It is unclear from this judgment whether a deportation order was made by the Court . The Court, on appeal, amended the sentences of the accused as follows:

A summary of the sentence imposed were as follows:

Accused	Magistrate's Sentence	Review Court's Sentence
State v TM	Two years imprisonment	One-year imprisonment
State v KM	Eighteen months imprisonment	Four months imprisonment
State v TP	Eighteen months imprisonment	Eight months imprisonment
State v BM	Twelve months imprisonment	Two months imprisonment
State v NT	Eighteen months imprisonment	Four months imprisonment
State v MM	Eighteen months imprisonment	Four months imprisonment
State v NK	Two years imprisonment	Four months imprisonment
State v TM	Eighteen months imprisonment	Four months imprisonment

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In a special review of *The State v Ncube and 4 Others*[10], the lower Court convicted all five accused of contravening section 49(1) of the Act in terms of section 112(2) of Act 51 of 1977. All accused were subsequently cautioned and discharged. The lower court did not make a deportation order, but endorsed the J15 to the effect that no deportation orders were made. The Magistrate's Court did not follow the principles laid down in *Cuna v The State*.

In paragraph 6, the review Judges provided Section 49(1) of the Immigration Act determines as follows: "Anyone who enters or remains, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years". The word "shall" in *Cuna* was interpreted to include the sentence and was intended to be peremptory and the lower Court had no discretion to deviate from the penalty clause. In para 10, the review Judge reminded that a sentencing court does not enjoy a "free" or "unfettered" discretion and is bound by precedents and the law. The review Judges set aside all five cases and referred the cases back to the Magistrate's Court to sentence the accused afresh and to accordingly make the compulsory deportation order as required by law.

In the case of *The State v Thabiso Tseko*, (2024) which was sent on special review to the High Court, the accused was convicted of contravening section 49(1)(a) of the Act and was sentenced as follows: Fine of six hundred-rand (R600) or thirty 30 days imprisonment, and a further one thousand two hundred-rand (R1200.00) or sixty days (60) imprisonment ….". Seemingly, the accused was sentenced twice. Both the fines and the imprisonment imposed was less than two years, and fell within the sentencing jurisdiction of the Magistrate.

An important discussion of this judgment is the proportionality of imposing a fine in lieu of the term of imprisonment imposed. In the absence of the fine to be imposed in a penalty clause of a statutory offence, and the amount of the fine has not been prescribed in section 49(1)(a) of the Act, such fine is to be determined in accordance with the Adjustment of Fines Act 101 of 1991 (AFA). We will cover a detailed discussion of such Act in future editions.

On review, the sentence was amended to read as follows:

"*One Thousand Eight Hundred Rand (R1800) or Ninety (90) days imprisonment, of which One Thousand Two Hundred Rand (R1200) or sixty (60) days imprisonment is suspended for a period of two (2) years on condition that the accused is not convicted of contravening the provisions of section 49(1)(a) of the Immigration Act 13 of 2002, which contravention occurs during the period of suspension.*"

"The Court held, section 297(1)(b) of the CPA applies to section 49(1)(a) of the Immigration Act, when any sentence imposed in terms of the Immigration Act is suspended. Therefore, any sentence imposed within the limits of section 49(1)(a) may be suspended for any period, subject to that period, not exceeding five years. In the present matter, when regard is had to the sentence imposed, the maximum term of suspension is clearly disproportionate to the fines and alternative imprisonment imposed. A shorter term of suspension, reasonably being two years, should have been considered by the Magistrate relative to the maximum term of imprisonment provided for in section 49(1)(a) of the Immigration Act and the peculiar facts of the matter which underscore the conviction of the accused."

Conclusion

From a reading of the above cases, it is important to note that when a Magistrate convicts an accused for contravening section 49 of the Act, a deportation order must be made. A Magistrate who fails to do so is committing an irregularity.

The practicality of failure to make a deportation order by the court has consequences for other stakeholders. For example, once the accused sentence is served, DHA will have to bring the accused before court in terms of section 34 and apply for the accused's deportation. This comes with its own challenges and the waste of resources. Juxtapose this with the convenience of a deportation order being made by the presiding Magistrate at sentence and recorded on the SAP 69s. This will then make the application of section 34(6) more efficient.

This would also allow, DHA, to be able to remove the convicted and sentenced person from prison and deport him within 30 days or approach the court for a further extension if they are unable to do so.

Another important issue for consideration is once the illegal foreigner is sentenced and the Magistrate imposes a fine or imprisonment. Should the accused pay a fine, and a deportation order is granted, this does not entitle the accused to be released. What is expected under these circumstances is that the South African Police Services ("SAPS") must either hand the accused over to DHA (Immigration) for immediate deportation or keep the accused in custody until the SAPS can hand him over to DHA for deportation[11].

1) Act 13 of 2002.

2) Act 130 of 1998.

3) *The State v Luis Alberto Cuna*, an unreported case in the Pretoria High court, A6/2020 on 15 December 2020.

4) Maphosa v S (A198/2020) [2021] ZAGPPHC 84.

5) (HC 14/2024) [2024] ZANWHC 156 (27 June 2024).

6) [2022] ZACC 12; 2022 (5) BCLR 523 (CC); 2022 (2) SACR 123 (CC).

7) (R19/2023; R20/2023; R21/2023; R22/2023; R23/2023; R24/2023; R25/2023; R26/2023) [2023] ZAFSHC 268 (10 July 2023)

8) S v Mudenda [2021] ZAECGHC 5 (12 January 2021).

9) Abore v Minister of Home Affairs and Another, CCT 115/21) [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) (30 December 2021).

10) (6 of 2024) [2024] ZWBHC 4 (11 January 2024).

11) The SAJEI Criminal Court Skills stream training material, is acknowledged as some of the material used in compiling this note.

CONTRAVENTION OF SECTION 9 AND SECTION 49 (1)(a) OF THE IMMIGRATION ACT 13 OF 2002 AS AMENDED

Ms. Felleng Ntilane

Acting Regional Magistrates

Mr. Jacobus Marais

Acting Regional Magistrates

Introduction

This article is aimed at understanding the impact of the provisions in Immigration Amendment Act[1] ("Amendment Act") and the Immigration Act[2], more particularly, the introduction of section 5 and section 24(1)(a) of the Amendment Act. We further re-visit the issue on who is vested with a duty to deport illegal foreigners in terms of section 34 of the Immigration Act.

The effect of the Immigration Amendment Act

1. The Immigration Amendment Act substitutes the wording in the provisions of the Principal Act. For example, the charges created by section 9 prohibit any person from entering in, or remaining in, or departing from the Republic without valid documentation.

2. The offences created by section 49(1)(a) for anyone who has contravened the Immigration Amendment Act, shall be liable upon conviction to a fine or imprisonment not exceeding 2 years. An imprsonment not exceeding 3 months imprisonment has been substituted.

3. Although the substitution brought some confusion, this confusion has been cleared by the High Court in the case of *S v Melous Nyathi*[3].

Deportation of an illegal foreigner

Section 34 (1) and (6) of the Immigration Act

1. Section 34 (1) states that without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, **deport him** or her **or cause**

CONTRAVENTION OF SECTION 9 AND SECTION 49 (1)(a) OF THE IMMIGRATION ACT 13 OF 2002 AS AMENDED

him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned –

A) shall be notified in writing of the decision to report him or her and of his or right to appeal such decision in terms of this Act;

B) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

C) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands; and

D) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and shall be held in detention in compliance with minimum prescribed standards protecting his or dignity and relevant human rights."

S34(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

2. The above section imposes a duty on the Immigration Officer to deport an illegal immigrant / foreigner. The Immigration Officer approaches the court for an application for a warrant of further detention of the Illegal Immigrant, should there be a delay in the processing of deportation documents.

3. However, the case law brought about some changes on what should the trial court do after sentencing the illegal foreigners. In *Luis Alberto Cuna v S*[4]*,* the court held that … 'once an accused person has been found guilty in terms of S49(1) and sentenced to a fine or imprisonment, the trial court must in addition make an order for her or his deportation.'

The above decision found approval in *Maphosa v S*[5]; and *S v Chivabo*[6]*.* In *Chivabo* the court held that the trial courts are bound by the stare decisis in the above decided cases. So far, we have not had any decision from the Supreme Court of Appeal or Constitutional Court on whether the trial court must make a deportation order.

What are your views?

1) Act 13 of 2011.

2) Act 13 of 2002.

3) Review 81/2023 Limpopo Division, Polokwane, dated 05/06/2023.

4) A6/2020, Gauteng Division dated 15/12/2020.

5) (A198/2020) [2021] ZAGPPHC 84 (1 March 2021).

6) (HC 14/2024) [2024] ZANWHC 156 (27 June 2024).

MARINE CONSERVATION TRUMPS PROFITS – THE SUPREME COURT OF APPEAL HAS SPOKEN

Ms. Sherika Maharaj
Additional Magistrates

Introduction

Gannet Works (Pty) Ltd and Others v Middleton Sue NO and Another[1]*.* Technological advances and innovation have cast its hooks into the arena of fishing but much like the 'hook, line and sinker'' metaphor, the Supreme Court of Appeal ("SCA") unanimously ruled that drone fishing is illegal (the proverbial sinker).

This case emanates as an appeal from the Gauteng Division, declaring that the use of drones, bait-carrying remote-controlled boats and other remotely operated devices is prohibited under the Marine Living Resources Act[2] ("the Act"). This formed the crux of the legal question before both courts.

Facts

The five appellants manufacture, import, market and sell angling equipment, which includes bait carrying drones and other remote-controlled bait carrying devices. Much to their chagrin, the DDG for fisheries Management of the Department of Forestry, Fisheries and the Environment (first respondent), published a notice on 24 February 2022 banning the use of use of motorised devices, such as, but not limited to, bait-carrying drones, bait-carrying remote-controlled boats and other remotely operated vehicles, as well as motorised electric reels. The appellants were aggrieved as it affected their bottom line. Crying foul to the perceived unlawful notice, they raised the following issues before the High Court:

1. That neither the Act nor the Regulations prohibited the use of motorized devices such as drones in fishing. The case involved an interpretation of fishing Regulations and the word ''angling'' is not defined in the Act.
2. The publication of the notice was tantamount to an amendment of the Act without the correct procedure being followed.

MARINE CONSERVATION TRUMPS PROFITS – THE SUPREME COURT OF APPEAL HAS SPOKEN

Ratio decidendi - The High Court

The Appellants argued that angling does not exclude the use of drones to drop bait as anglers still apply the manual fishing method, which is to operate a rod, reel and a line with hooks, swivels and sinkers attached.

The respondents opposed the application. The second respondent, Minister of Forestry, Fisheries and the Environment argued that the notice does not amount to new law but serves to inform the public that the use of motorized devices such as drones are not permitted during recreational angling. The court should adopt a purposive interpretation of the Act and its Regulations. Any method that falls outside of the 'manual operation' of a rod, reel and line cannot be permitted as recreational fishing endorsed for angling as per the definition of angling in Regulation 1. The subject matter of fisheries management is a policy-laden issue that entails specialist knowledge and expertise which few judges possess. The court does not have any discretion to declare that the lawful obligations imposed upon it by the relevant legislation, should not be complied with.

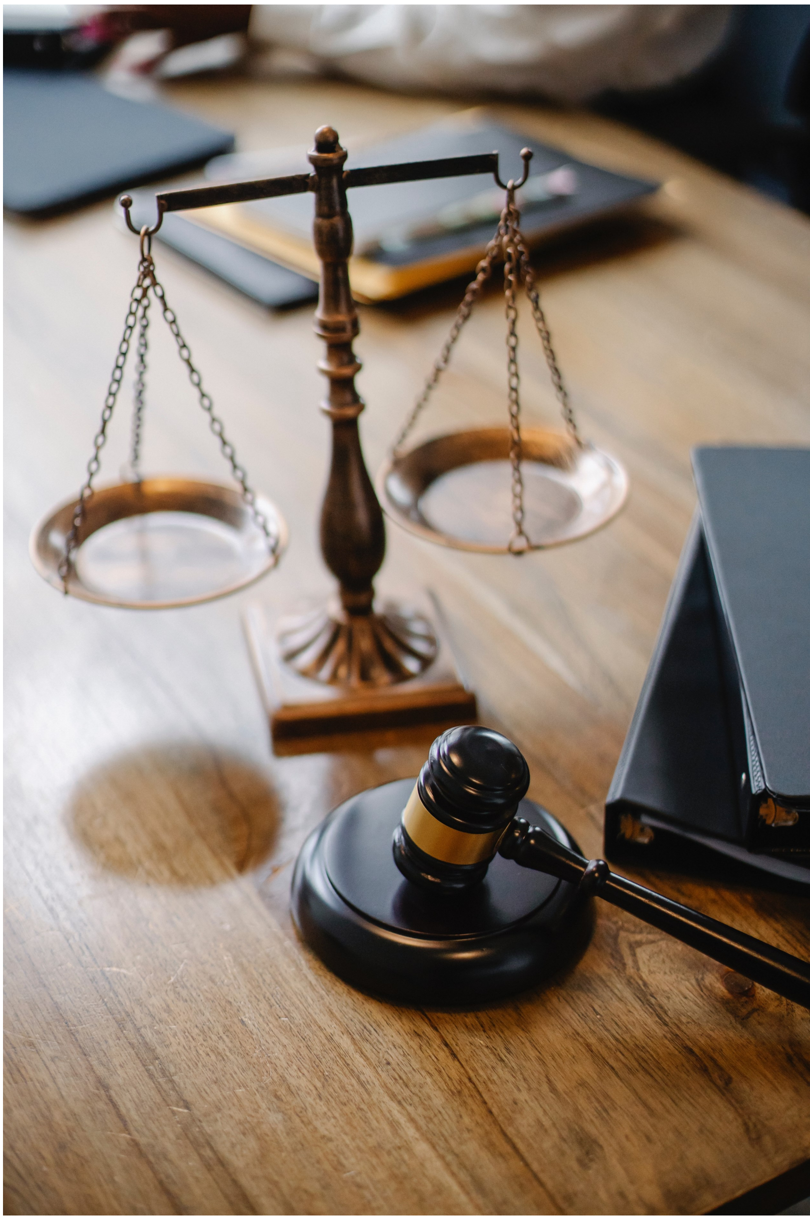
The High Court dismissed the application. It held that the legislature was clear about what constitutes ''legally permissible fishing'' and adopted a purposive interpretation of the word ''angling'' in the Regulations and added that the definition is deemed to be included in the Act.

Ratio decidendi - The SCA

The SCA followed a step by step approach:

1. It adopted an interpretative approach.
2. That Section 24(b) of the Constitution imposes a legal obligation on the Minister to protect the environment for the benefit of the present and future generations through reasonable legislative and other measures that 'prevent ecological degradation; promote conservation; and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development
3. The court considered the objectives and purposes of the Act and the statutory definitions of the words ''fishing'', "aircraft'', ''recreational fishing'' and "angling''. The court held that although angling is defined in the Regulations and not the Act, it is included as the legislation includes any regulation or notice made or issued under the Act. The word angling in the oxford Dictionary refers to a manual activity, by hand.
4. Once a fisherman chooses a permit for angling as the type of fishing, the method to perform angling, as defined in the Regulations, comes into play.

It held that once the angler has been issued with the requisite permit, the angler is not at liberty to use any method other than the one that is provided for in the regulations that is, fishing by manually operating a rod, reel and line or one or more separate lines to which no more than ten hooks are attached per line. To use any other method other than the authorised one would be unlawful.



Legal significance

The enforcement of the Regulations protects marine ecosystems and provides legal clarity to the interpretation of the provisions of the Act.

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1) (Case no 492/2023) [2024] ZASCA 112 (16 July 2024) (reportable).

2) Act 118 of 1988.

3) Regulations in terms of the Marine Living Resources Act, 1998 as published in GNR.1111 of 2 September 1998.

4) Act 108 of 1996.

A CONUNDRUM IN THE CHILD JUSTICE ACT 75 of 2008?

Mr. Ian Cox

Regional Magistrates

Introduction

Amongst other objectives, the Child Justice Act[1] ("CJA") aims to:

1. establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic;
2. extend the sentencing options available in respect of children who have been convicted; and
3. provide for matters incidental thereto.

The question is whether the sentencing provisions sufficiently and more importantly efficiently address incidents where children are sentenced to compulsory residence in a Child and Youth Care Centre ("CYCC"), providing a programme referred to in section 191(2) of the Children's Act[2]?

Should the CJA not also provide for instances where a sentenced child offender becomes unmanageable and uncontrollable? I attempt to answer this question by referring to the case below.

Facts

After his conviction on a count of sexual assault, a 16-year-old child offender was sentenced to compulsory residence in a CYCC in terms of section 76(1) of the CJA. Having served a couple of months of his sentence, the Regional Court prosecutor was approached by officials from the CYCC who averred that the sentenced child has become unruly and troublesome in the centre and that he was not manageable.

The head of the centre compiled a report and requested the prosecutor to apply to the court for an order that the accused be moved from the CYCC to the juvenile section of a of a prison to serve the remainder of his sentence.

A CONUNDRUM IN THE CHILD JUSTICE ACT 75 of 2008?

The Conundrum

The prosecutor advised the officials that it could not be done as what they wanted the court to do was in fact to change the initial sentence of compulsory residence to a term of imprisonment and that could not be done. The officials were disappointed and adamant. They failed to understand the stance taken, as other courts apparently did so without the blink of an eye. Weeks later, a similar request was made under the auspices of sections 76(3)(c) of the CJA read with section 79 and section 158 of the Children's Act. Section 79 could not assist as it applies to community–based sentences imposed in terms of section 73 and not to a sentence of compulsory residence imposed in terms of section 76. Section 76(3)(c) must be read in context with the rest of the section. Section 76(3)(a) refers to the instance where a child offender is sentenced to compulsory residence in a CYCC as well as a term of imprisonment that is to be served after completion of the compulsory residence.

In terms of section 76(3)(b), the head of the CYCC is obliged to submit a report to the Child Justice Court that imposed the sentence which reflects the views on whether the objectives of the sentence as stated in section 69 of the CJA have been achieved, including the possibility of the offender's reintegration into society without serving the additional term of imprisonment.

Having considered the report, the court may if it deems it to be in the interest of justice to do so, in terms of section 76(3)(c):

(i) confirm the sentence and period of imprisonment originally imposed...;

(ii) substitute that sentence with any other sentence that the court considers to be appropriate…; or

(iii) order the release of the child, with or without conditions.

Section 76(3)(c) does not assist the Department with the issue which they are faced with and may require an amendment of the Act to resolve the issue.

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1) Act 75 of 2008.

2) Act 38 of 2005.

A BRIEF SYNOPSIS ON MENTAL HEALTH IN THE CRIMINAL CONTEXT

Mr. Irfaan Khallil

Acting Chief Magistrate

Introduction

Mental health is an issue that lurks in the shadows of society yet demands our attention, empathy, and perhaps most importantly our action. There is an ever-increasing number of particularly accused persons, with mental health issues, facing serious charges, appearing in our courts daily. Foremost, we must acknowledge the gravity of mental health challenges in our country. According to a South African Stress and Health study[1], one in three South Africans will suffer from a mental disorder in their lifetime. This staggering statistic underscores the urgent need, for a further effective implementation of the current legal framework to ensure the protection and support of those grappling with mental health issues.

South Africa, like many countries has faced challenges in addressing mental health issues within the context of the legal system. It is widely accepted that stigma, lack of resources, and systemic barriers have often prevented individuals with mental health conditions from receiving the care and support they need. This not only perpetuates injustice but also undermines the fundamental human rights and dignity of those living with mental illness. The intersection of mental health and the law is fraught with complexities and shortcomings. Historically, mental health has been stigmatized and misunderstood, leading to discriminatory practices and inadequate legal protection for individuals facing mental health challenges, particularly those within our correctional facilities.

The Constitution of the Republic of South Africa

As a starting point, one must of course have regard to our Constitution. Section 35 (2) (e) of the Constitution provides:

(a) "*everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.*"

A BRIEF SYNOPSIS ON MENTAL HEALTH IN THE CRIMINAL CONTEXT

Even before the advent of the Constitution, the Appellate Division as it then was, in *Minister of Justice v Hofmeyr*[2] highlighted the importance of mental health and held that, as part of the right to physical integrity, a detainee also has the right to mental and intellectual wellbeing.

In *B v Minister of Correctional Services*[3], the High Court was confronted with the question of adequacy of medical treatment of HIV infected prisoners. The State contended that adequacy should be determined according to what is provided for patients outside prison at state hospitals and at state expense. The adequacy of treatment at such hospitals, it was further contended, was dictated by budgetary considerations.

In rejecting this argument, the court held that once it is established that anything less than a particular form of medical treatment would not be adequate, the inmate has a Constitutional right to that form of medical treatment. It would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment.

Mental illness and Criminal Responsibility under/in terms of the Criminal Procedure Act 59 of 1977 (CPA).

Sections 77 and 78 of the Criminal Procedure Act[4] is the bedrock of criminal responsibility. A person can only be held liable for the acts that they committed in criminal law if the court finds that they had "capacity to appreciate and understand the wrongfulness of the acts that they committed".

An act can be defined as any human conduct (or omission) while criminal capacity is concerned with the ability of individuals to understand the implications of their actions related to the commission of an offence[5].

Our courts have generally accepted that a defence of criminal incapacity may relate to pathological or non-pathological causes or sane automatism. For a better understanding of these concepts and whether non-pathological criminal incapacity is a watertight defence, it is necessary to have regard to the Supreme Court of Appeal's decision in *S v Eadie*[6].

The CPA contains no definition of the term 'mental illness', nor does it specify which mental disorders constitute mental illness. rehabilitation of persons who are mentally ill. In *S v Stellmacher*[7], the Court held that the term 'mental illness' in section 78 indicates a pathological disturbance of the accused's mental capacity and not mere temporary confusion which is attributable, not to mental abnormality, but to external stimuli such as alcohol. Unlike the CPA, the Mental Heatlh Act in section 1 defines a mental illness as *"a positive diagnosis of a mental health related illness in terms of accepted diagnostic criteria made by a mental health care practitioner authorized to make such diagnosis."*

A BRIEF SYNOPSIS ON MENTAL HEALTH IN THE CRIMINAL CONTEXT

What is clear from section 78(1) is that the test for criminal capacity only identifies the attendant/ conative consequence of a particular mental illness, namely its influence on the *actus reus*. Criminal incapacity due to mental illness is classified as pathological incapacity. The test is accomplished in a two-pronged fashion: The first leg of the test involves a consideration of cognitive mental function and is concerned with the depth of reason or intellect, and the ability to perceive reason and to remember. When considering the cognitive function aspect of the test, the emphasis is on the accused's insight and understanding.

The second leg of the test deals with conative mental function and concerns an ability to control one's behaviour in accordance with one's insights. When considering the conative functions, the emphasis is on self-control[8].

Where the Court deals with mental illness in the form of pathological disturbance as opposed to non-pathological disturbance, psychiatric evidence fulfils an indispensable function. In *S v Harris*[1°] it was stated that "In determining that issue the Court - initially the trial Court; and on appeal this Court must of necessity have regard not only to the expert medical evidence, but also to all other facts of the case, including the reliability of the appellant as a witness and the nature of his proved actions throughout the relevant period."

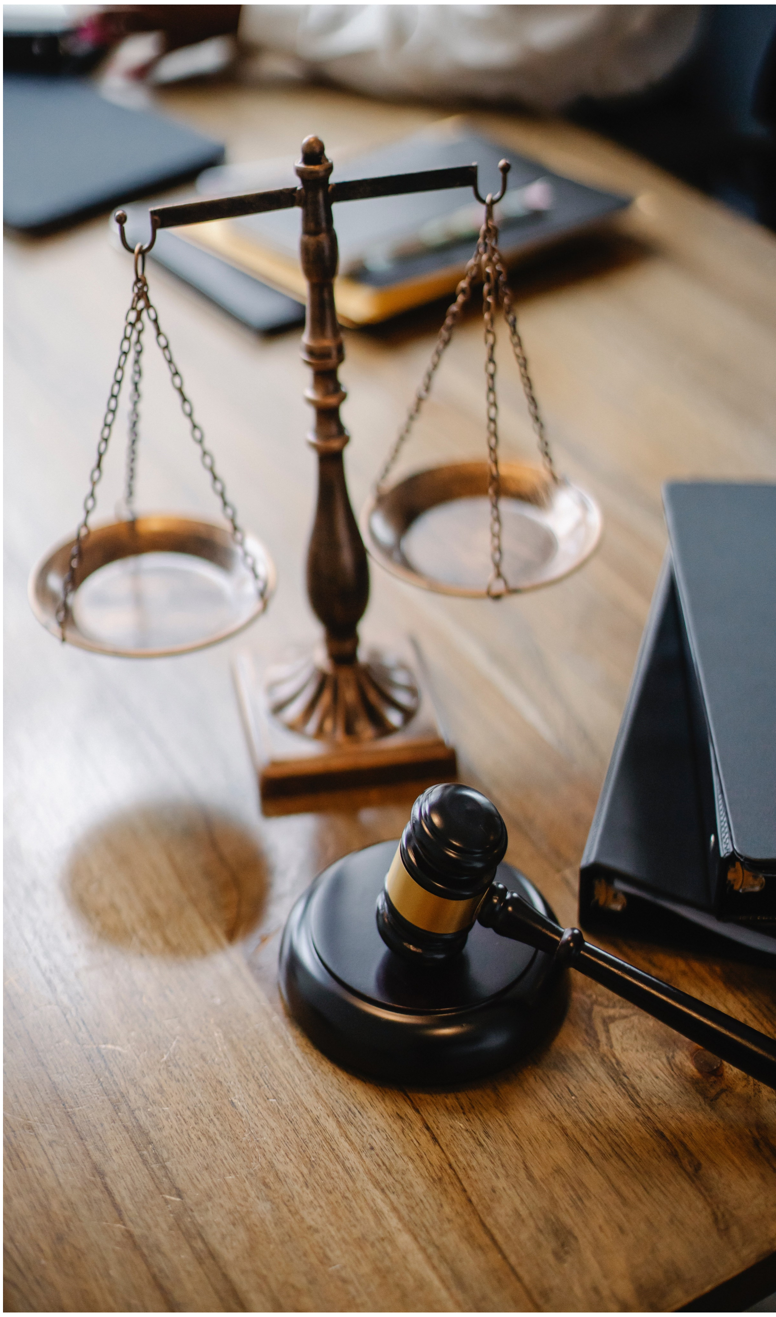
Psychiatric evidence, taken together with all the facts of the case, including the actions of the accused before, during and after the commission of the crimes, will paint an overall picture for the Court to assess criminal capacity[11]. To hold otherwise would result in the untenable situation of the Court being almost entirely in the hands of psychiatrists[12].

Ntshongwana as an example of the Ultimate Issue Rule. The most recent reported case by the SCA of *Ntshongwana v S*[13]*,* illustrates this approach aptly.

The accused, who suffered from a serious mental illness, was convicted by the High court (trial court) for various serious offences including multiple counts of murder and rape and sentenced to imprisonment for life. The accused raised the defence of non-pathological criminal incapacity which was rejected by the trial court. Extensive evidence of a psychiatric nature was led. The SCA unanimously held that on a conspectus of all the evidence, including the actions of the appellant before, during and after the commission of the offences, the appellant was able to appreciate the wrongfulness of his actions and that he was able to act in accordance therewith during the commission of the offences. The court, in dismissing the appeal against the conviction and sentence, also found that there was no diminished responsibility.

A BRIEF SYNOPSIS ON MENTAL HEALTH IN THE CRIMINAL CONTEXT

The second part of the article will be featured on the next edition, dealing with the Mental Health Care Act 17 of 2002, inquiry and suggested solutions thereof.



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1) Williams DR, Herman, Kesler RC, et al (2004) .
2) 1993 (3) SA 131 (AD).
3) 1997 (4) SA 441 (C).
4) Act 59 of 1977.
5) Snyman CR Criminal Law6th Edition (Lexis Nexis Cape Town 2012) page 53.
6) 2002 (1) SACR 663 (SCA).
7) 1983 (2) SA 181 (SWA) at page 187.
8) Hiemstra's Criminal Procedure, service issue 5, pages 13-16 to 13-23, S v Eadie (1) 2001 (1) SACR at 178F G).
9) S v Campher1987 (1) SA 940 (1) (A) at 965 f-g.
10) 1965 (2) SA at 340 (A). particularly at page 365, paragraphs B to C
11) S v Calitz 1990 (1) SACR 119 (A), page 127, paragraph (C)
12) S v Francis 2000 (1) SACR 650 (SCA).
13) (1304/2021) {2023} ZASCA 156; [2024] 1 All SA 345 (SCA)
14) Act 17 of 2002.

THE LEX DOMICILII MATRIMONII V THE RIGHT TO EQUALITY

Ms. Lebogang Raborife
Regional Magistrate

The article deals with the resolution of legal issues raised in divorces of parties whose marriages have a foreign element and the challenge posed by the application of the *lex domicilii matrimonii*.

There are different types of marriages with a foreign element, for purposes of this article the focus will be on one where the parties are domiciled in countries with different matrimonial property laws from South Africa.

When adjudicating foreign marriage divorces, the trial court must take note that 'foreign law governs the proprietary consequences[1] of the marriage (substantive law) while the procedural law relates to the methodology applied by a South African court to enforce the proprietary consequences'. In the absence of an antenuptial contract, the matrimonial property regime of spouses not domiciled in the same country at the time of marriage[2] would be governed by the domicile of the husband at the time of entering into the marriage. This is known as the *lex domicilii matrimonii.*

How is a person 's domicile determined? In South Africa, the Domicile Act[3], provides that a person has a domicile either of choice or of dependence (not dealt with in this article). Domicile of choice is acquired by a person who is above 18 years or unemancipated minors regardless of such person's marital status or gender excluding a person who does not have the mental capacity to make a rational choice[4].

Before the Domicile Act came into force, a married woman acquired the domicile of her husband during the subsistence of the marriage and even after the divorce until she acquired a domicile of choice. This position was changed as it clearly discriminated based on gender as set out in the equality clause of the Constitution[5].

This raises a question why the courts are still applying the *lex domicilli matrimony* in disputes where it has to be determined which matrimonial property law governs the patrimonial consequences of the marriage of the parties upon dissolution of the marriage that have a foreign element.

THE LEX DOMICILII MATRIMONII V THE RIGHT TO EQUALITY

Courts are obliged to promote through their judgements achievement of equality to protect rights of anyone who is discriminated against in this instance on the basis of gender [6].

S173 of the Constitution empowers the Constitutional Court, the SCA and the High Courts to develop the common law. The inherent power must be exercised if it is the interests of justice to do so.

There are two schools of thoughts on whether a Magistrate in the regional court in divorce proceedings can exercise the powers in S173 of the Constitution. One school of thought is that the Magistrate 's jurisdiction in divorce matters is set out in S29(1B) (a) and (b) of Magistrate Court Act 32 of 1944 can rule that application of the *lex domicilii matrimonii* violates the equality clause as it discriminates on the basis of gender as they' have the same jurisdiction as any High Court' in relation to matters in S29 (1B) (a).

The other school of thought is that the Magistrate court is bound by the *stare decisis* principle and until the High Court has ruled on the aspect, the legal principle in the *Franklin's estate* case must be followed. The magistrate court is where most of divorce matters are instituted for financial reasons. If the Magistrate applies the stare decisis principles, parties often do not have the resources to appeal the decision.

The Magistrate cannot on own initiative refer the matter to the High court[7]. When applying the *lex domicillii matrimonii* in a matter where the court has determined that the domicile of the husband is a foreign country, the court will adjudicate on that case as if it is that country and applies the laws of that country. This is the position even when the marriage was concluded in South Africa.

South Africa is an attractive destination for foreigners from neighbouring countries employed in the mining industry (example), most of whom are unaware of the laws applicable on dissolution of their marriage or upon the administration of the estate when a partner has passed away. The countries apply English law. The default matrimonial property position in terms of English law is out of community of property unless the parties have concluded an ante nuptial contract, which rarely happens.

Those that are in favour of the retention of the *lex domicillii matrimonii* argue that it maintains certainty as there is no doubt in the parties' minds which country's patrimonial law will be applied when their marriage is dissolved. The domicile of marriage does not change even if during the subsistence of the matter acquires a new domicile of choice.

In my view, the court which has to decide on the issue of which law to apply in determining the patrimonial consequence of foreign marriage must use the opportunity to invite arguments on the constitutionality of applying the *lex domicilii matrimonlii* in the Constitutional era.

THE CONUNDRUMS OF SECTION 60(12) AND ITS RELATED PROVISIONS OF THE CRIMINAL AND RELATED MATTERS AMENDMENT Act 12 of 2021 (PART TWO - THE DOMESTIC VIOLENCE ENQUIRY)

Mr. Telanthiran Govender
Magistrate

In the previous article, I dealt with the introduction of the amendments to the bail legislation and considerations of a Domestic Violence order granted in such proceedings.

In part two I will be dealing with the considerations of whether an order should automatically follow the enquiry that is held. I show that from an analysis of my considerations that an order is neither automatic nor is there a need for an order where there are other issues relative thereto for consideration.

An enquiry need not follow if there is an order in place. This emanates from the wording of Section 60(12)(b) of the Criminal Procedure Act 51 of 1997 ("CPA");

"*and a protection order as contemplated in that Act has not been issued against the accused".*

It must be remembered that the intent to obtain a domestic violence order is meant to bolster the assistance of and to maximise the protection of the victim. This is consistent with a purposive approach which has been repeatedly recited in a plethora of authority. It is a process of attributing meaning to words so as to achieve a justifiable outcome based on the legislations intent, when it is promulgated. So, if an order is in place, it has that added coverage. What this simply means, is to achieve long term protection to the complainant as opposed to mere bail conditions which terminate upon finalisation of the criminal matter. Some have indicated that an interim order granted in the Family Court must be finalised in the Criminal Court. This is not the case from a clear reading of section 60(12) of the CPA as no enquiry would have to be initiated once such interim order is in place. This position does not gainsay the purposive intent of the legislation. The enquiry provisions of S60(12) are clear to bolster long term benefits to the complainant.

A starting point in this regard, is that it indicates that a protection order has not been issued -The definition of -a protection order is - as indicated in the Domestic Violence Act ("DVA"), as follows, "*Protection Order" means an order issued in terms of section 5 or 6 but, in section 6, excludes an interim protection order*".

Thus, since an order granted in terms of section 5 of the DVA is an interim order and an order granted in terms of section 6 is a final order, it is an order granted in terms of the definition, "protection order". We are obviously aware that an interim order becomes effective upon service and in the event of a fnal order where no interim order was previously granted, upon service as well. The Court shall hold an enquiry to determine the granting of an order when neither has been dealt with. This argument holds water in that if there is a final order, no enquiry shall follow. As long as the victim has an order in place at the time of the bail application, no enquiry shall follow. This is further bolstered by the prescribed form, forms 30 and J566.

The challenge in this regard is that if there is no order and the Court is to grant an order, then, it must be a final order and not an interim order. The recourse and rules of natural justice is hampered by a final order, the right to silence in a criminal matter and the ability of an accused person to truly ventilate an opposition. The provisions of the DVA shall thereafter be applicable in terms of a variation or setting aside of the order granted in the Family Court.

Opportunistic accused may accede to an order in the Criminal Court, only to have the order later set aside in the Family Court, sometimes, even whilst the criminal proceedings may be finalised. I am of the view that whilst that may be a consideration, the accused was released on bail and the order in terms of Section 6 was granted.

The final protection order is axiomatic to the granting of bail (premised upon the interests of justice).

It is therefore necessary to join the State in any application brought to set aside the protection order whilst the criminal proceedings are still underway, this seems logical as the accused's release and safety of the victim -is for the State to consider at that stage. The State continues to hold a vested interest against the continued release of the accused and safety of the victim. Now some Magistrates have even considered allowing the release of the accused and for him or her to return to deal with the enquiry because it is inconvenient to allow a person whom has satisfied the Court to be released to be further detained pending the enquiry. This is a dangerous situation and goes against the grain of the intent and purpose of the introduced legislation.

Albeit an inconvenience, the mere release and rights enshrined in terms of section 35 of the Constitution are restricted against the intent of the legislation. A mere release, provides room for potential anarchy and outcomes. If the accused returns home and causes harm, we have failed the victim and this opens a Pandora's box for liability claims. We should allow due process to follow cause. You should rather have an accused person spend an additional night in custody, than a deceased victim, whom will not see another night. The right to life and in the face of potential gender-based violence, would on any day trump and override the right to liberty in the conscience considerations of justice.

THE CONUNDRUMS OF SECTION 60(12) AND ITS RELATED PROVISIONS OF THE CRIMINAL AND RELATED MATTERS AMENDMENT Act 12 of 2021 (PART TWO - THE DOMESTIC VIOLENCE ENQUIRY)

A hasty approach to release, is disastrous against the backdrop of the purposive approach alluded to above.

Now, the issue of whether a final order should be granted irrespective of the outcome of the enquiry have had many in a “twizzle”. The specificity of section 60(12) of the CPA indicates that an enquiry shall be held. The purpose of the enquiry is to illicit evidence to consider the granting of the order. The issue is, if the enquiry leaves a serious lacuna for the granting of an order, can the Court nonetheless grant an order? I am of the view that the Court cannot simply grant an order in such circumstances as this leaves the door open to an abuse, disastrous consequences and litigants jostling for damages claims.

The issue of ‘***must grant’*** an order associates itself with the Court granting **a final order**, rather than actually granting an order irrespective of the outcome of the enquiry. I recite the mathematical “parenthesis” issue, that certain parts are considered in isolation although recorded as a whole in its reading or equation.

It could never have been the intention of the legislature to allow an enquiry to follow and then, irrespective of the enquiry and its judicial outcome, compel a dictated outcome. This interpretation is respectfully absurd. It may be a badly worded piece of legislation, albeit well intended. It cannot nonetheless allow for an unintended outcome and interpretation because of the wording.

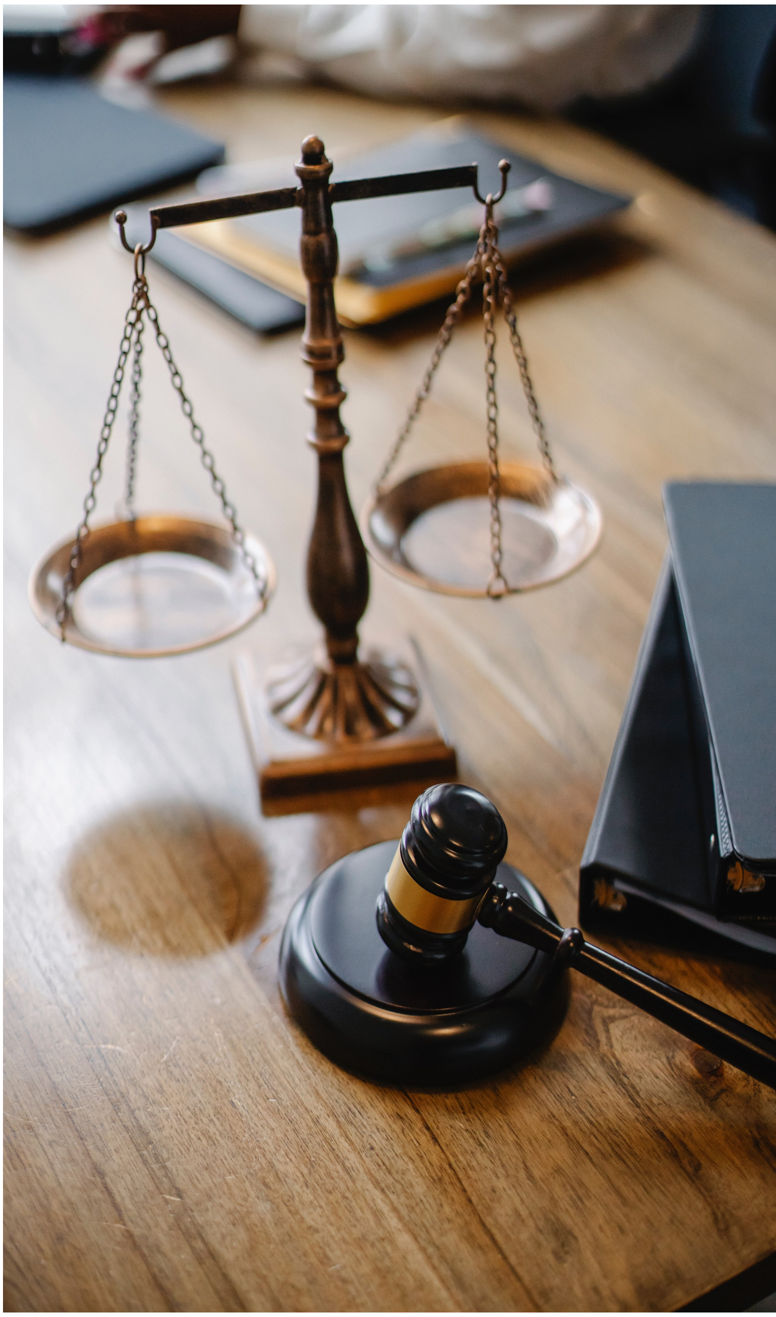
This interpretation of a pre-determined outcome offends against the tenet of statutory interpretation, that, as far as possible statutes had to be interpreted so as not to give rise to absurd, anomalous or unreasonable results.

If there is no evidence of domestic violence abuse, it can never be the case of an absurd order, just for the purpose of making an order. We should not allow ourselves to become slaves to a dictated outcome. A well-established approach to an enquiry, requires the court to consider the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to assess whether the applicant should, on those facts, obtain final relief in due course. The inquiry is fact-based.

I have also found a similar provision in Section 22 of the Cybercrimes Act which provides that the court may hold an enquiry upon finalisation of the criminal proceedings, whether the accused is convicted or acquitted but evidence proves that the person engaged in, or attempted to engage in, harassment as contemplated in the Protection from Harassment Act, the trial court may, after holding an enquiry, issue a protection order contemplated in section 9(4) of the Protection from Harassment Act. In this enquiry, “may”, clearly indicates that an order is not automatic and is dependent on the outcome of the enquiry. We can therefore take some lessons from the above, in terms of the desired approach and general application.

Conclusion

I have come to these conclusions after considering the matter holistically against the backdrop of the intention and affording maximum protection. I hope that this article has given you the insight and considerations to reconsider the issues, although confusing and perplexing as it may be.



1) Act 116 of 1998.

2) Act 19 of 2020.

3) Act 17 of 2020.

THE REQUIREMENT OF 'ABSENCE OF WILFUL DEFAULT' ERODED

Mr. Modise Khoele
Acting Senior Magistrate

In order to successfully prosecute an application for a rescission of a default judgment, among other requirements, an applicant is required to set out and prove reasons for his or her absence of default. This requirement is colloquially known as "the absence of wilful default"[1].

The general enabling provision in respect of applications of this nature is Rule 49(1). The Rule provides that a court may rescind or vary a default judgment on such terms as it may deem fit, upon good cause shown or if it is satisfied that there is good reason to do so. The genesis of the Rule arises from the provisions of Section 36(1) of the Magistrate's Court Act,[2] which empowers a court to rescind or vary any judgment granted by it in the absence of the person against whom that judgment was granted.

The attendant procedural steps and advantages that an applicant intends achieving with an application for rescission of a judgment is stated in sub-rules (3), (4), (5), (5A) and (6). This article is confined to a discussion/an analysis/an overview of the requirement of "the absence of wilful default" as envisaged in sub-rule (3).

Rule 49(3) requires that an application by an applicant who 'wishes to defend the proceedings' must be accompanied by an affidavit. The affidavit must set out reasons for the applicant's absence at the time appointed for trial or default of an appearance to defend and the grounds of the applicant's defence to the claim.

Despite the requirement of compliance with requirements set out in Rule 49(3), Rule 49(1) confers a wider discretion upon the court, in that "the court may rescind or vary if it is satisfied that there is good reason to do so".

The distinction between "Good Cause" and "Good Reason"

The court in *Phillips t/a Southern Cross Optical v S A Vision Care (Pty) Limited*[3], D-J reasoned that *"if the concept 'good reason' should be interpreted to bear the same meaning as 'good cause', it will render the former superficial, meaningless or otiose and offend against the principle of construction that, if possible, a statutory provision should be interpreted in such a way that effect is given to every word or phrase in it"*.

THE REQUIREMENT OF 'ABSENCE OF WILFUL DEFAULT' ERODED

The court in *Phillips* above shared the view expressed by the authors of *Jones and Buckle*[4] that, *"the introduction of the concept 'good reason' in Rule 49(1) was intended to expand the discretion of Magistrates' Courts as regards the rescission of default judgments by the introduction of a less stringent criterion"*.

In its conclusion, the court in *Phillips* held that 'the absence of wilful default' is no longer a requirement when sub-rule (3) finds application[5]. This exposition is confirmed by various other subsequent decisions, such as *Wright v Westelike Provinsie Kelders Bpk*[6] and *Harris v Absa Bank Ltd t/a Volkskas*[7]. It is confirmed in *Wright* and *Harris* that the need to prove 'the absence of wilful default' is no longer a necessary requirement for rescissions in terms of Rule 49(3) or the superior courts equivalent.

Notwithstanding the proclamations by the superior courts that the 'absence of wilful default' is no longer a necessary requirement in applications for rescission of default judgments, the wording 'absence of wilful default' is retained in the construction of Rule 49(3). The anomaly may be attributable to the fact that, for 'good cause' to be present, the applicant must provide a reasonable explanation for his or her default. The applicant must show that he or she has a *bona fide* defence and that the application is made *bona fide*[8].

'The absence of wilful default' is an essential constituent of the concept 'good cause', mindful that Rule 49(3) cannot apply autonomously or to the exclusion of Rule 49(1). On proper application of Rule 49(1) or to establish 'good cause', it is thus inevitable that an applicant for a rescission of default judgment, must present a reasonable and acceptable explanation for his or her default.

On interpretation of *Phillips* above, the need to prove the 'absence of wilful default' is no longer a necessary requirement for rescission of default judgments under Rule 49(3). The 'absence of wilful default' is an essential component in establishing 'good cause' which is a requirement for rescissions under Rule 49(1).

It is trite that the test for good cause is conjunctive; therefore, the reasonable explanation for the default and a *bona fide* defence must co-exist for good cause to be established. In an event where the 'absence of wilful default' is not retained as a substantive or necessary requirement in rescission applications as suggested by the authorities referenced above, a readily anticipatable conundrum is that predicted in *Chetty v Law Society, Transvaal*[9] where it is stated –

THE REQUIREMENT OF 'ABSENCE OF WILFUL DEFAULT' ERODED

> *"…..a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits"*.

It is suggested by our courts that, an application for rescission is never simply an enquiry of whether or not to penalise a party for his failure to follow the rules and procedures laid down for civil proceedings. The Magistrate's discretion to rescind a judgment of his court is therefore primarily designed to enable him to do justice between the parties and to advance good administration of justice[10].

To attain the foregoing, *Harms*[11] intimates that a measure of flexibility is required in the exercise of the court's discretion. An apparent good defence may compensate for a poor explanation for the absence of wilful default and *vice versa*.

In *Vincolette v Calvert*[12] it was held that, where it appeared that the default of the applicant was wilful or was due to gross negligence on part of the applicant, the court may well decline, on that ground alone, to grant the rescission.

The exposition in *Vincolette* was departed from in *Saraiva Construction (Pty) Ltd v Zululand Electrical and Engineering Wholesalers (Pty) Ltd*[13]. The court in *Saraiva* reasoned that such an approach would introduce the 'absence of gross negligence' as an absolute prerequisite, which would in turn limit the exercise of the discretion by the courts and would further necessitate 'gross negligence' being defined.

By comparison, the courts are readily inclined to exercise a discretion in favour of an applicant, where the grounds of the defence to the claim are set out with particularity. On the converse, the courts are hesitant to come to the assistance of an applicant who fails to sufficiently set out the ground of his or her defence, irrespective of the plausibility of his or her explanation for the default.

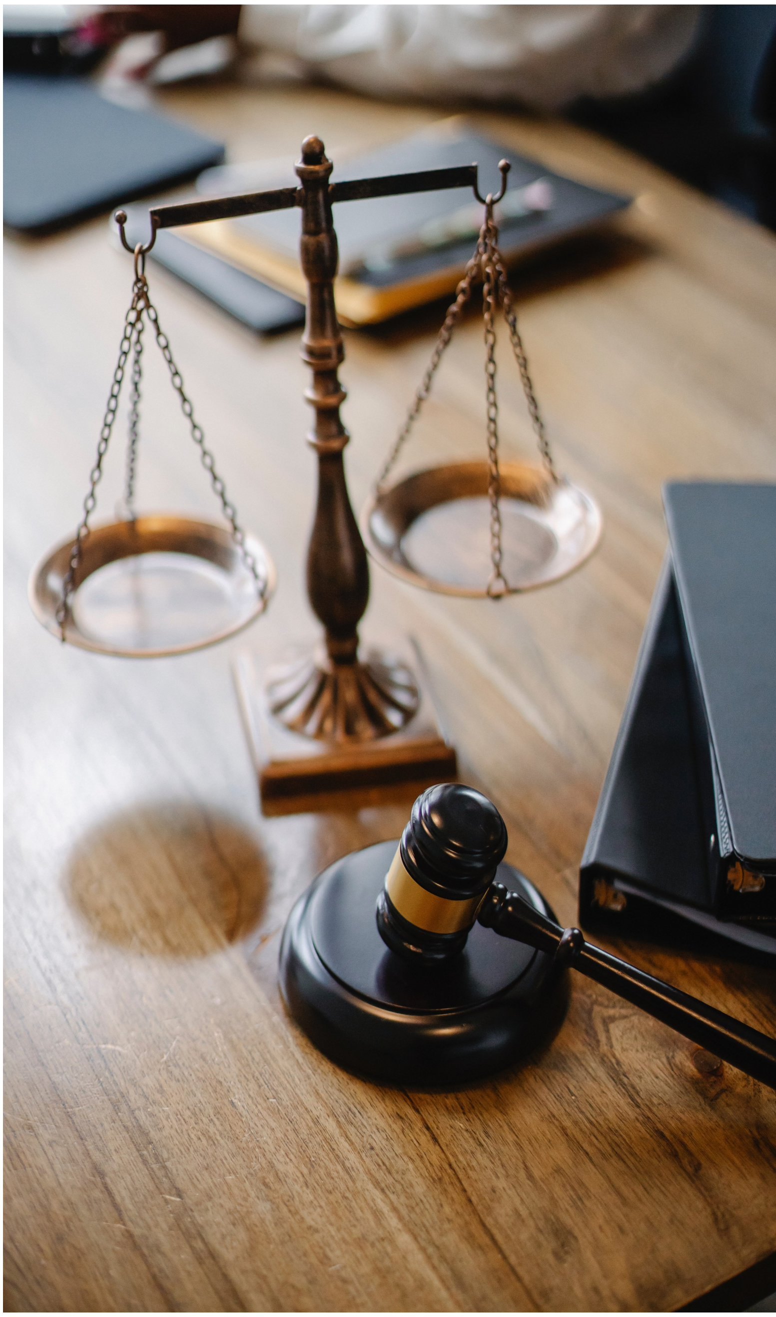
The measure of flexibility suggested by *Harms* above tilts the scale towards the acceptance of the grounds of defence or a *bona fide* defence as an overriding requirement in rescission applications. It appears that, regardless of the shoddiness of the applicant's explanation, the wilful disregard of the rules and time limits or the gross negligence in the conduct of proceedings, an applicant with an apparent *bona fide* defence will invariably succeed with an application for rescission.

THE REQUIREMENT OF 'ABSENCE OF WILFUL DEFAULT' ERODED

The imbalance projected in *Chetty* above is almost invariably perpetuated by the conjunctive test for the existence of 'good cause'. This raises the question, whether the retention of 'the absence of wilful default' as a consideration in rescission applications is still justifiable.

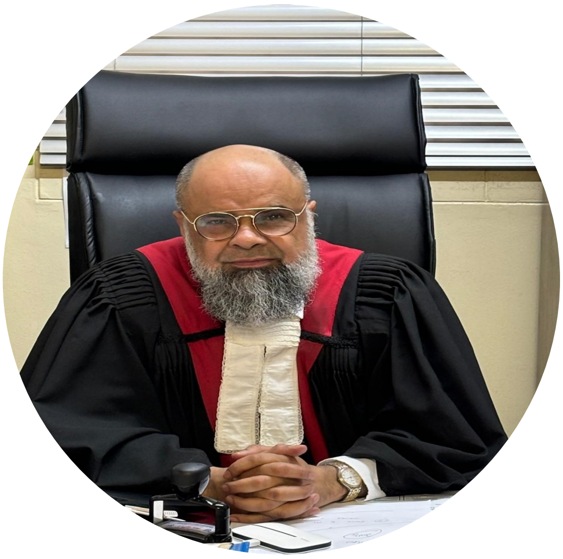
With an acceptance of the essential components of 'good cause', we must begin to debate the relevance of sub-rule (3) with an appreciation that the requisites propagated for in sub-rule (3) are encapsulated in sub-rule (1).

In order to retain judicial harmony and/or certainty, perhaps the time has come for the Rules Board to be deliberate and omit the reference to 'the absence of wilful default" in sub-rule (3) or to repeal it in *toto* for it is rendered nugatory by sub-rule (1).



1) Harris v Absa Bank Ltd t/a Volkskas 2006 (4) SA 527 (T).
2) Act 32 of 1944.
3) 2000 (2) SA 1007 CPD at 1013.
4) Jones and Buckle - The Civil Practice of Magistrate's Court in South Africa 10th ed vol 2 2000 (2) SA 1007 CPD at 1013G-I.
5) 2000 (2) SA 1007 CPD at 1013G-I.
6) 2001 (4) SA 1165 (C) at 1181J.
7) 2006 (4) SA 527 (T) at 530H.
8) Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) and HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E).
9) 1985 (2) SA 756 (A) at 765D-E.
10) De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at 711E-I.
11) Harms, *Civil Procedure in the Supreme Court* 313 (K6)
12) 1974 (4) SA 275 (E).
13) 1975 (1) SA 612 (D).

THEFT BY CONVEYANCING ATTORNEY, APPLICATION TO HOLD SELLER OF PROPERTY LIABLE



Mr. Ebrahim Makda
Senior Magistrate

In the matter of *De Jongh v Phillipides*[1] the conveyancing attorney appointed on behalf of the seller, accepted the balance of the purchase price for a property in cash and absconded with the money. The account that the conveyancing attorney had stipulated to the buyer for payment was not a trust account. Consequently, no transfer of the property took place. The buyer subsequently brought an application to court to compel the seller to effect transfer of the property, which application was opposed by the seller.

The Court had to decide whether the conveyancing attorney acted as agent for the seller, or the buyer in receiving and holding the balance and whether the agreement of sale was validly cancelled by the seller and whether transfer of property should take place.

The buyer argued that the conveyancing attorney acted as agent on behalf of the seller who appointed the attorney, hence payment to the conveyancing attorney was equivalent to payment to the seller, therefore transfer of the property should take place.

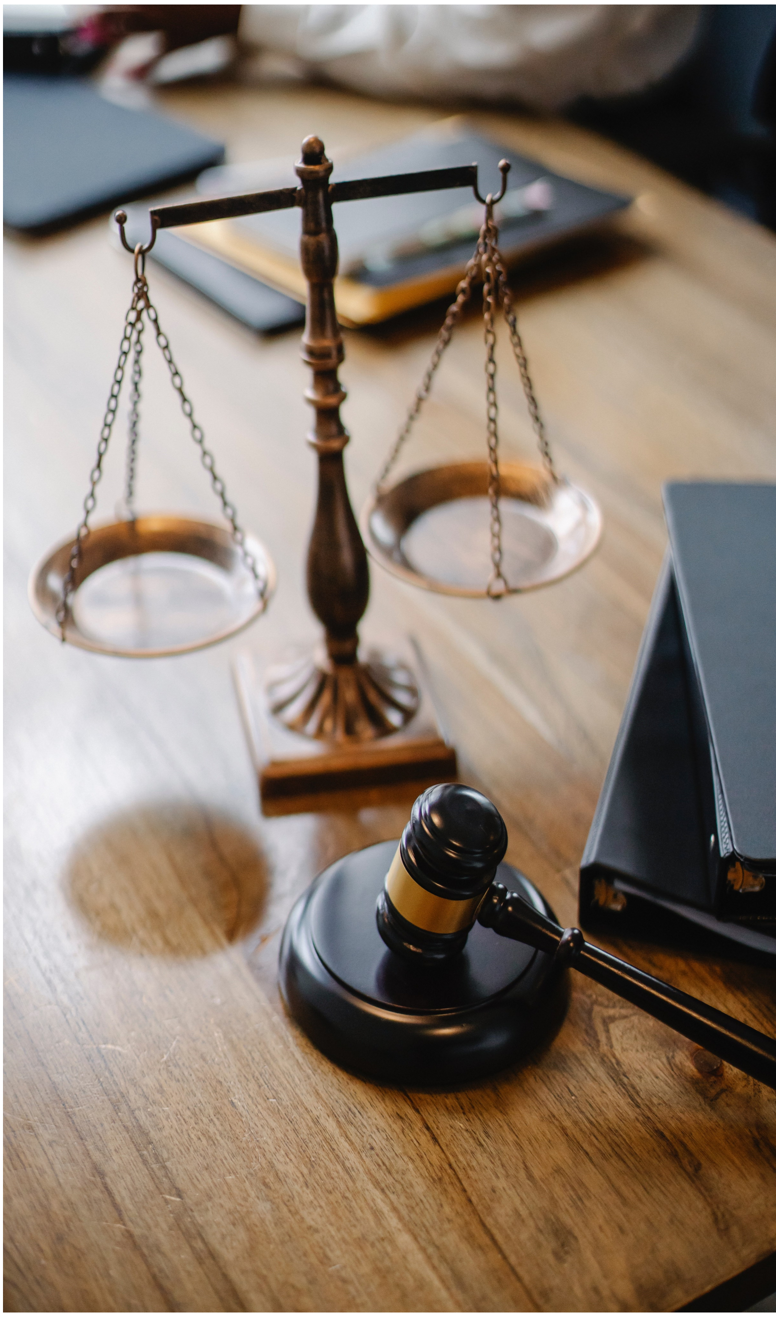
The seller argued that it was an express term of the agreement that the balance of the purchase price was to be paid into the conveyancing attorneys trust account as security for the purchase price, which was not done. On this basis, it was argued that the buyer's application should be dismissed with costs.

The Court in interpreting the payment clause in the deed of sale, found that the payment made by the buyer, to the conveyancing attorney was to secure the balance of the purchase price of the property. The court went on to state at paragraph 31 of the judgment that the buyer's obligations in terms of the deed of sale, would have been discharged only if the conveyancing attorney paid the balance to the seller. Thus, in accepting the balance in cash from the buyer, the conveyancing attorney acted as the agent of the buyer and not the seller.

THEFT BY CONVEYANCING ATTORNEY, APPLICATION TO HOLD SELLER OF PROPERTY LIABLE.

The court discussed the case of *Agu v Krige*[2] where the conveyancing attorney misappropriated the purchase price of a property paid into trust, the court found that the conveyancer acted as the seller's agent because the said conveyancer attorney was the seller's attorney for a long time.

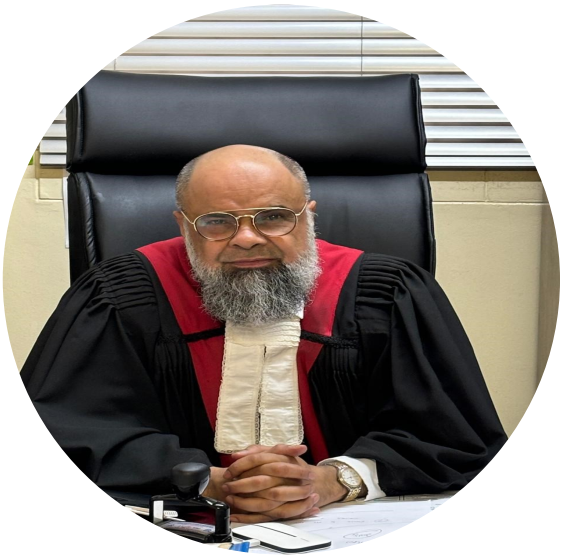
Ultimately, each case has to be decided on its own merits, it doesn't necessarily mean that if a conveyancing attorney is hired by a seller, the seller will be liable for all the actions of the conveyancing attorney in the transaction, the court will decide whether the buyer or seller is liable for any fraudulent actions of the conveyancing attorney, based on the interpretation of the deed of sale.



1) [008709/2023] (SAFLII) .

2) 2019 JDR 0716 (WCC) .

THE FRAUDULENT INTERCEPTION OF EMAILS CAUSING LOSS



Mr. Ebrahim Makda

Senior Magistrate

In *Ian Craig Ross and Anneline Ross v Nedbank*[1] the plaintiffs entered into an agreement of sale for the purchase of an immovable property from a seller, RJ attorneys were duly appointed as the conveyancers. The plaintiffs received an email purportedly from RJ attorneys requesting payment of the purchase price of the property and a few days later, payment was effected, only to find out a day later that the attorneys instruction letter requesting payment had been fraudulently sent, instructing the monies to be deposited into an account not belonging to RJ attorneys. The bank was immediately informed about the fraudulent transaction, the bank informed the plaintiffs that the fraudulent account would be suspended and that no transaction from or to the account would take place, despite this undertaking, the bank allowed a sum of approximately R3 million to be withdrawn from the account.

The plaintiff commenced legal proceedings against the bank for the loss suffered. In defending the matter, the bank raised a special plea of non-joinder arguing that RJ attorneys had a legal duty to take all reasonable steps to ensure that their email communications were not compromised, further that RJ Attorneys had a legal interest in the action and had to be joined as second defendant. The court found that the plaintiff was entitled to sue the bank only, that there was no obligation on the plaintiff to join RJ attorneys to the action. Since the relief claimed against the bank did not impact on RJ attorneys and any order against the bank would not have prejudiced RJ attorneys, they did not have a direct or substantial interest in any order that the trial court may make in the matter.

The court quoted the case of *Knoesen and another v Huijink-Maritz and others*[2], if parties have a liability, which is joint and several, the plaintiff in not obliged to join them as co-defendants in the same action but is entitled to choose his target. The special plea was dismissed.

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1) (008709/2023) [2023] ZAGPJHC 1308 (14 November 2023)

2) (5001/2018), ZAFSHC 92 (31 May 2019) at para 8 (e)

CASE SUMMARIES ON IMMIGRATION

Ms. Sizophila Sokhela

Law Researcher, SAJEI

Illegal immigration is a topic that has sparked interest in the legal fraternity as there is an influx of foreign nationals entering and staying in the Republic of South Africa. Most of foreign nationals in the republic enter for different reasons, including economic and asylum. Through these case summaries, readers will gain an insight into the frameworks that govern immigration and asylum in South Africa.

Ashebo v Minister of Home Affairs and Others[1] The applicant fled his country of origin 'Ethiopia', due to political and religious persecutions on 11 June 2021. On 7 July 2022 he was arrested for entering and staying in the Republic of South Africa ("RSA") illegally. He advised the arresting officer that he was a refugee and had tried to apply for asylum without success, which the arresting officer did not accept and accused him of being in the country for economic gains. The High Court dismissed the applicant's case on the basis that it was not urgent and ordered applicant to pay costs. The applicant applied for leave to appeal directly to the Constitutional Court.

At the Constitutional Court, the applicant, now appellant, argued that the legislation that regulates his circumstances as an asylum seeker is the Refugee's Act[2].

He relied on section 3 of the Refugees Act and section 21(1)(a) of the Refugees Amendment Act[3], Regulations 8(1)(a) and (3) of the New Regulations. The applicable legislation envisages two requirements, namely, (a) an asylum seeker must report to the Refugee Reception Office ("RRO") within 5 days for an interview by an immigration officer if the asylum seeker fails to produce a valid asylum transit or other visa, and must show good cause for his or her illegal entry or stay in the country, (b) the application must be made in person.

The issues that had to be determined by the Constitutional Court were in respect of the time afforded to an illegal foreigner to apply for asylum and whether the illegal foreigner was entitled to be released from detention after expressing his intention to seek asylum while awaiting deportation until such time that the application is finalised.

The court found that the first issue had already been settled in the case of *Ruta*[4]. Once illegal foreigners have indicated their intention to apply for asylum, they must be afforded the opportunity to do so. A delay in expressing that intention is not a bar to applying for refugee status. In respect of the second issue, the court found that continued detention only becomes unlawful once a reasonable period has lapsed with no efforts made on the part of the respondents to bring the appellant before the RRO to process his asylum application as envisaged in section 21(1B) of the Refugees Amendment Act.

The court granted leave to appeal, set aside the High Court's decision, and declared that in terms of section 2 of the Refugees Act, the applicant may not be deported until he has had an opportunity of showing good cause as contemplated in sections 21(1B) of the Refugees Amendment Act, read with Regulation 8(3) thereto. The court accordingly held that the illegal foreigner could not be deported until such good cause had been shown and until his application for asylum had been finally determined in terms of the Act.

***Ruta v Minister of Home Affairs and Others*[5]**
The applicant, 'Mr Ruta', a foreign national from Rwanda, illegally entered the RSA through Zimbabwe in December 2014. 15 months later, he was arrested for a road traffic violation. It was discovered that he was in the RSA illegally. He was tried and imprisoned for the charge on the traffic violation. While serving his sentence, the representatives of the Department of Home Affairs moved to deport him from RSA.

Mr Ruta then sought to apply for asylum under the Refugee's Act. The application was opposed by the Department of Home Affairs, alleging that it was too late for Mr Ruta to apply for asylum and that deportation should continue unabated.

The High Court found in favour of Mr Ruta. The crux of the High Court's decision was that once an illegal foreigner communicates an intention to apply for refugee status, the Department of Home Affairs is obliged not to obstruct the application and that Mr Ruta's delay in seeking asylum did not diminish his entitlement to apply.

Home Affairs appealed the decision of the High Court, which succeeded. The Supreme Court of Appeal ("SCA"), by majority, upheld the High Court's decision and considered that, asylum seekers who enter RSA are not afforded indefinite time to apply for asylum, they are offered reasonable time. When Mr Ruta entered the RSA, he became liable to be dealt with as an illegal foreigner.

The Constitutional Court held that all asylum seekers are protected by the principle of non-refoulment and that the protection applies as long as the claim to refugee status has not been finally rejected after proper procedure. The principle of non-refoulment as articulated in section 2 of the Refugees Act must prevail. The Court held further that delay in seeking refugee states is irrelevant however a crucial factor is the determination of credibility and authenticity.

This determination is performed by the Refugee Status Determination officer. At no stage however, does delay function as an absolute disqualification from initiating the asylum application. The SCA decision was dismissed with costs.

Ahmed and Others v Minister of Home Affairs and Another[6] The Constitutional Court handed down judgment in the application for leave to appeal against an order of the SCA. The SCA had overturned a decision of the High Court, which declared the Immigration Directive 21 of 2015 (the Directive) issued by the Department of Home Affairs inconsistent with the Constitution, invalid and set it aside.

In 2008 the Director-General of Home Affairs issued Circular 10 of 2008 (the Circular) which confirmed a court order to the effect that asylum seekers and refugees, in terms of the Refugees Act, were allowed to apply for visas or permits under the Immigration Act. The Circular was withdrawn in February 2016 when the Directive was issued.

The first applicant, Mr Tashriq Ahmed, was an attorney specialising in immigration law and the legal representative of the second to fourth applicants, Ms Fahme, Mr Swinda, and Mr J Ahmed respectively, who were all asylum seekers who had made applications for asylum in terms of the Refugees Act. Their applications for asylum were denied. Ms Fahme attempted to apply, under the Immigration Act, for a visitor's visa as her spouse and children were legally in South Africa.

However, an official of the Department of Home Affairs (the Department) refused to accept her application, citing the Directive as the reason. Mr Swinda and Mr J Ahmed both applied, under the Immigration Act, for critical skills visas, and both applications were declined.

The applicants approached the High Court seeking an order declaring the Directive inconsistent with the Constitution and to have it set aside. The High Court, held that the Directive was arbitrary and liable to be set it aside as it was irrational and not borne out of a proper interpretation of the provisions in the context of the two Acts as a whole. With regard to Ms Fahme, the Court held that her right to dignity had been violated.

In respect of Mr Swinda and Mr Ahmed, the Court held that it could find no reason why an unsuccessful asylum seeker should be barred from applying for temporary work rights if they met the requirements and that this interpretation better promotes the objects and purposes of the Immigration Act. Dissatisfied with the outcome, the respondents approached the SCA.

The SCA held that the High Court had erred in its interpretation of the Immigration Act and that an application for a visa by a foreigner must be made outside the Republic and not within South Africa. The SCA held that the High Court's conclusion was based on an erroneous interpretation of the Immigration Act and that asylum seekers are subject to the Refugees Act which is a separate regime to that of the Immigration Act.

As such it upheld the appeal and the High Court order was set aside.

In the Constitutional Court the applicants submitted that the provisions of the Immigration Act that relate to temporary and permanent residence permits referred only to “foreigners” and did not expressly exclude asylum seekers. The applicants averred that the fact that section 27(d) of the Immigration Act makes express provision for refugees to apply for permanent residence five years after their recognition as a refugee did not mean that an asylum seeker or a refugee may not be eligible for any other permit in terms of the Immigration Act.

In addition, they argued that the Directive is unlawful as it is ultra vires (beyond its legal power or authority) and unjustifiably limited the right to dignity of asylum seekers with familial relations in the country.

The respondents submitted that the Directive was consistent with the legislative and regulatory framework of the Refugees Act and Immigration Act. They further contended that even if the Directive was invalid, the officials of the Department had no discretion to accept and consider applications made within the borders of the country.

In a unanimous judgment, the Constitutional Court confirmed the finding of the SCA that asylum seekers are subject to the requirement that applications for visas or permits must be made from outside the borders of the country, and as Ms Fahme, Mr Swinda, and Mr J Ahmed did not apply for exemption from this requirement, they were not entitled to make such an application inside the country.

The SCA did not consider the validity of the Directive. This Court, while not making a finding on the nature and status of the Directive, held that the fact that the Directive is treated as binding by the people tasked to implement it, is sufficient for this Court to make a determination on whether the Directive is ultra vires and thus invalid.

This Court held that to the extent that the Directive prohibited the second applicant, and similarly prevented asylum seekers from applying for permanent residence permits while inside the RSA, it was declared inconsistent with Regulation 23 of the Immigration Regulations, 2014 and invalid. The Court further held that, to the extent that the Directive imposed a blanket ban on asylum seekers from applying for temporary residence visas without provision for an exemption application under section 31(2)(c), it was inconsistent with the Immigration Act and invalid.

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1) [2023] ZACC 15.
2) Act 130 of 1998.
3) Act 11 of 2017.
4) Ruta v Minister of Home Affairs and Others (79430/16) [2016] ZAGPPHC 1252 (23 November 2016).
5) See footnote 4 above.
6) (CCT273/17) [2018] ZACC 39; 2018 (12) BCLR 1451 (CC); 2019 (1) SA 1 (CC) (9 October 2018).
7) Act 13 of 2002.

5.2.3 DETERMINATION OF THE SITTING SCHEDULES AND PLACE OF SITTING FOR JUDICIAL OFFICERS

The Head of a Court shall determine the sitting schedules and places of sitting for Judicial Officers. Without derogating from the abovementioned general standard, presiding Judicial Officers shall retain the discretion to arrange sittings in the cases before them to make efficient use of court time.

5.2.4 JUDICIAL CASE FLOW MANAGEMENT

(i) Case flow management shall be directed at enhancing service delivery and access to quality justice through the speedy finalisation of all matters.

(ii) The National Efficiency Enhancement Committee, chaired by the Chief Justice, shall co-ordinate case flow management at national level. Each province shall have only one Provincial Efficiency Enhancement Committee, led by the Judge President; that reports to the Chief Justice.

(iii) Every Court must establish a case management forum chaired by the Head of that Court to oversee the implementation of case flow management.

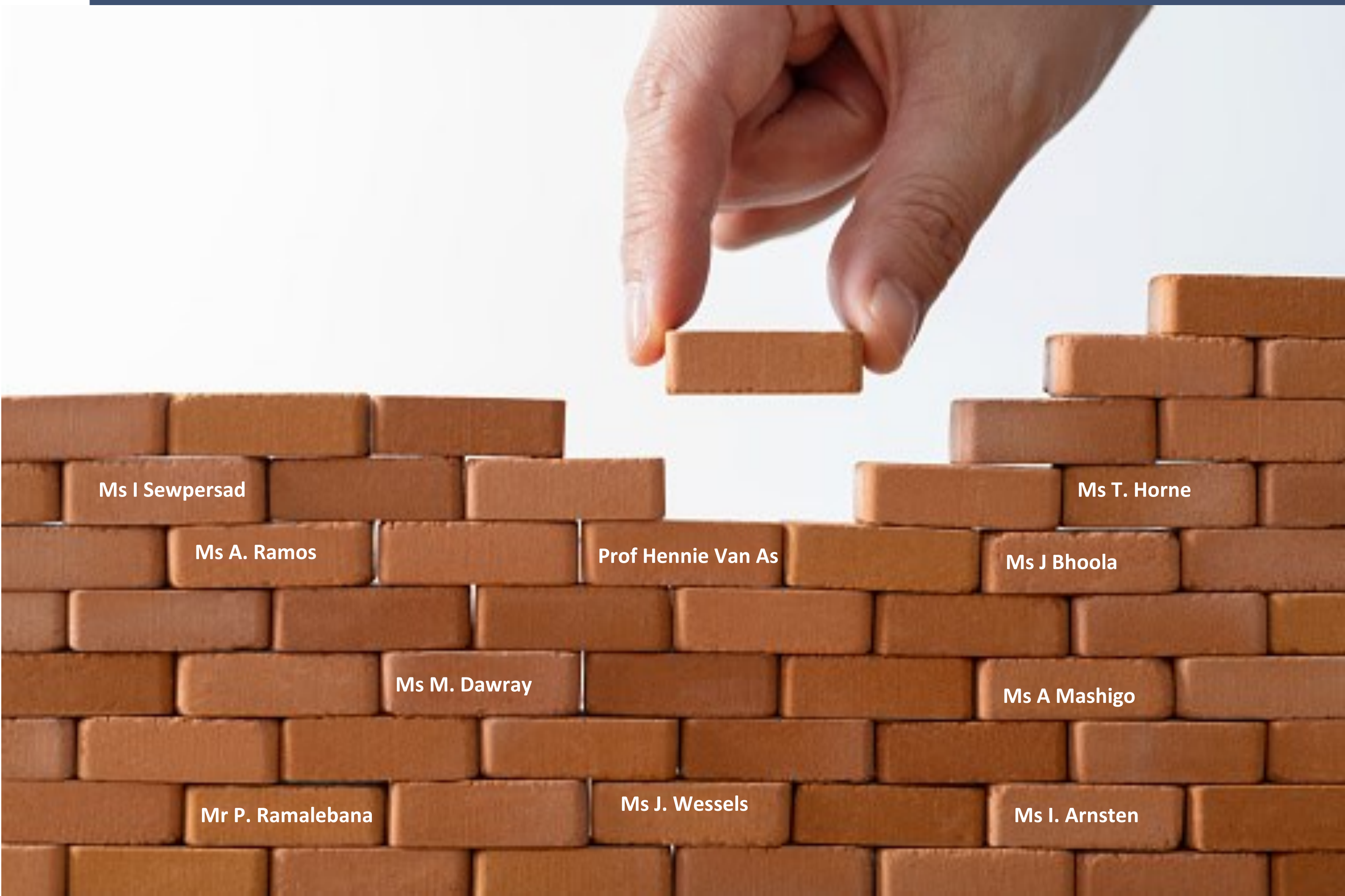
(iv) Judicial Officers shall take control of the management of cases at the earliest possible opportunity.

(v) Judicial Officers should take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay.

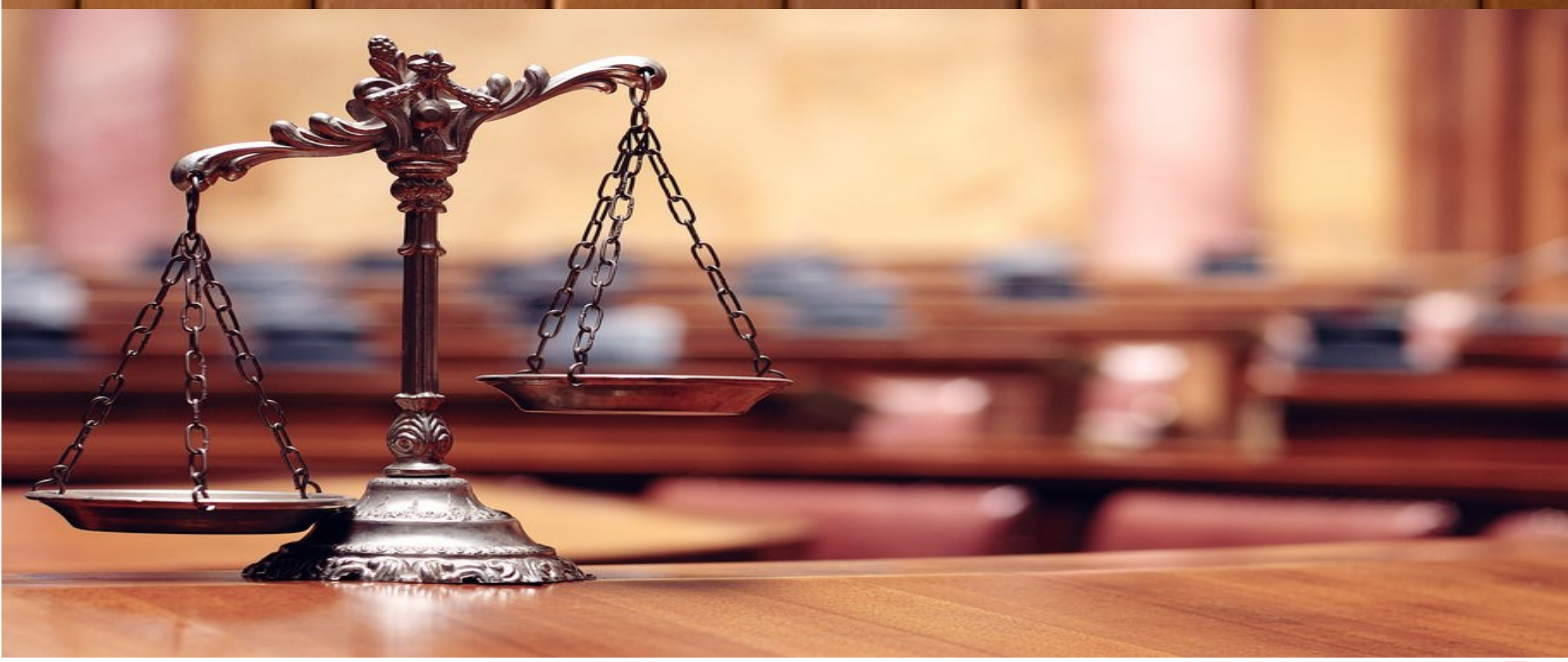
(vi) The Head of each Court shall ensure that Judicial Officers conduct pre-trial conferences as early and as regularly required to achieve the expeditious finalisation of cases.

(vii) Judicial Officers must ensure that there is compliance with all applicable time limits.

WALL OF FAME



Ms I Sewpersad
Ms T. Horne
Ms A. Ramos
Prof Hennie Van As
Ms J Bhoola
Ms M. Dawray
Ms A Mashigo
Mr P. Ramalebana
Ms J. Wessels
Ms I. Arnsten



WORD SEARCH

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T	S	T	N	A	R	G	I	M	M	I	B
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A	I	D	E	P	A	R	T	U	R	E	N
C	A	J	B	N	T	I	M	R	E	P	E
I	F	D	L	A	G	E	L	L	I	E	Z
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W	O	R	K	C	B	S	R	S	V	F	N
A	H	E	M	P	L	O	Y	E	R	S	A

WORDS

Foreigners	Visas	Entry
Home affairs	Immigrants	Departure
Deport	Citizen	Applicant
Employer	Record	Permit
Act	Work	Asylum
Illegal	Fine	Custodial

STRUCK OFF & SUSPENDED LEGAL PRACTITIONERS

JUNE 2024 - SEPTEMBER 2024

Name	Designation	Status of Legal Practitioner	Province	Date of Action
Phetogo Gladness Lemogang Ramaru (Molati)	Attorney	Struck From Roll	Gauteng	2024-09-12
Shahir Vinesh Rajkumar Ramdass	Attorney	Suspended	KwaZulu-Natal	2024-09-09
Alugumi Given Mulaudzi	Attorney	Suspended	Gauteng	2024-09-05
Gugu Nokuthula Mogotsi	Attorney	Struck From Roll	Free State	2024-09-05
Mbuso Emmanuel Nkosi	Attorney	Suspended	Mpumalanga	2024-09-02
Thembinkosi Sydney Nkosi	Attorney	Struck From Roll	Gauteng	2024-08-29
Darren Roger Sampson	Attorney	Struck From Roll	Gauteng	2024-08-29
Gustav James Smit	Attorney	Suspended	Gauteng	2024-08-29
Werno Van Aswegen	Attorney	Suspended	Mpumalanga	2024-08-23
Christiaan George Frederick Maree	Attorney	Suspended	Free State	2024-08-16
Joseph Modupi Mtambo	Attorney	Suspended	Free State	2024-08-15
Nonhlanhla Likameng	Attorney	Suspended	Free State	2024-08-15
Elmarie De Vos	Attorney	Struck From Roll	Gauteng	2024-08-13
Mashudu Fortunate Muzila	Attorney	Suspended	Gauteng	2024-08-13
Mandie Janse Van Rensburg	Attorney	Suspended	Free State	2024-08-08
Yolanda Madikizela	Attorney	Struck From Roll	KwaZulu-Natal	2024-08-02
Riaan Nel	Attorney	Suspended	Mpumalanga	2024-08-02
Mxolisi Adolphus Cassius Ndhlovu	Attorney	Struck From Roll	Gauteng	2024-08-01

STRUCK OFF & SUSPENDED LEGAL PRACTITIONERS

JUNE 2024 - SEPTEMBER 2024

Name	Designation	Status of Legal Practitioner	Province	Date of Action
Jon Greg Wilson	Attorney	Suspended	Western Cape	2024-07-26
Pearl Nomfusi Keleku	Attorney	Struck From Roll	Eastern Cape	2024-07-23
Delia Petronella Southon	Attorney	Suspended	Western Cape	2024-07-18
Mandla Macbeth Ncongwane	Attorney	Suspended	Mpumalanga	2024-07-17
Zonica Leanda-Marsha Vilakazi (Mtshali)	Attorney	Suspended	Gauteng	2024-07-09
Prudence Chilwane	Attorney	Suspended	Gauteng	2024-07-09
Solomon Malebogo Maeyane	Attorney	Struck From Roll	Gauteng	2024-07-03
Vusumuzi Reuben Sinky Nkosi	Attorney	Suspended	Mpumalanga	2024-07-02
Ayanda Lennox Pupa	Attorney	Suspended	North West	2024-06-27
Radhika Singh (Radmin)	Attorney	Struck From Roll	Gauteng	2024-06-25
Petrus Johannes Vivier	Attorney	Suspended	Gauteng	2024-06-25
Isiah Botsotso Chiloane	Attorney	Suspended	Mpumalanga	2024-06-24
Mzamo Clearance Mkhatshwa	Attorney	Suspended	Mpumalanga	2024-06-24
Klaas Mashilo Latakgomo	Attorney	Struck From Roll	Gauteng	2024-06-24
Michael Leonard Jennings	Attorney	Struck From Roll	Western Cape	2024-06-13
Karabo Montgomery Mokoena	Attorney	Struck From Roll	Gauteng	2024-06-13
Novelwano Alicia Nonxuba	Attorney	Suspended	Gauteng	2024-06-06

LIST OF UPCOMING WORKSHOPS

No	Course code	Course	Date	Province
1	DCM78	Criminal Court Skills - Electronic and Documentary Evidence	01 – 04 October 2024	KwaZulu Natal
2	DCM79	Family Court Skills -Case Flow Management	03 October 2024	Gauteng
3	DCM80	Criminal Court Skills - Cybercrime, POPI, POCA	07 – 09 October 2024	Gauteng
4	DCM81	Civil Court Skills -Application Procedure	07 – 11 October 2024	Limpopo
5	DCM82	Children's Court Skills - Children in need of care and protection	07 – 10 October 2024	Free State
6	DCM83	Family Court Skills - Protection from harassment	08 – 10 October 2024	KwaZulu Natal
7	DCM84	Equality Court Skills PEPUDA	14 – 16 October 2024	North West
8	DCM85	Civil Court Skills -Application Procedure	14 – 18 October 2024	Eastern Cape
9	DCM86	Equality Court Skills PEPUDA	15 – 17 October 2024	Mpumalanga
10	DCM142	Civil Court Skills – Execution Procedure	16 – 18 October 2024	KwaZulu Natal
11	DCM87	Children's Court Skills Preliminary Enquiry in terms of Child Justice Act - Application Procedure	21 – 24 October 2024	Northern Cape

LIST OF UPCOMING WORKSHOPS

NO	Course code	Course	Date	Province
12	DCM88	Children's Court Skills - Child Justice Act	21 – 24 October 2024	Gauteng
13	DCM89	Civil Court Skills Action Procedure	21 – 25 October 2024	KwaZulu Natal
14	DCM90	Criminal Court Skills - Enquiries in terms of S77 of CPA 51 of 1977	22 – 24 October 2024	Eastern Cape
15	DCM143	Criminal Court Skills - Specific Offences	28 – 31 October 2024	KwaZulu Natal
16	DCM91	Children's Court Skills - Foster Care as Alternative Placement	29 – 31 October 2024	KwaZulu Natal
17	DCM92	Family Court Skills Adjudication	04 – 05 November 2024	Gauteng
18	DCM93	Criminal Court Skills Judgment Writing	05 – 06 November 2024	KwaZulu Natal
19	DCM96	Criminal Court Skills Firearms Control Act	11 – 12 November 2024	Gauteng
20	DCM101	Equality Court Skills PEPUDA	12 – 14 November 2024	KwaZulu Natal
21	DCM144	Family Court Skills Older Persons Act	18 – 20 November 2024	KwaZulu Natal

WORD SEARCH ANSWERS

A	S	L	A	I	D	O	T	S	U	C	S
T	S	T	N	A	R	G	I	M	M	I	B
N	R	R	M	U	L	Y	S	A	M	T	J
A	I	D	E	P	A	R	T	U	R	E	N
C	A	J	B	N	T	I	M	R	E	P	E
I	F	D	L	A	G	E	L	L	I	E	Z
L	F	B	R	D	V	I	S	A	S	K	I
P	A	X	K	O	I	D	E	P	O	R	T
P	E	T	C	A	C	L	N	R	I	M	I
A	M	F	I	N	E	E	T	J	O	A	C
W	O	R	K	C	B	S	R	S	V	F	N
A	H	E	M	P	L	O	Y	E	R	S	A

WORDS

Foreigners	Visas	Entry
Home affairs	Immigrants	Departure
Deport	Citizen	Applicant
Employer	Record	Permit
Act	Work	Asylum
Illegal	Fine	Custodial

10 YEARS 2011 - 2021

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