

JUDICIAL EDUCATION NEWSLETTER

SOUTH AFRICA

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Enhancing Judicial Excellence

Towards 10 YEARS In Operation



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HUMAN RIGHTS EDITION



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LIST OF CONTRIBUTORS TO JUDICIAL EDUCATION NEWSLETTER 1st TO 10th EDITION

A SPECIAL THANK YOU TO THE FOLLOWING CONTRIBUTORS TO THE JUDICIAL EDUCATION NEWSLETTER

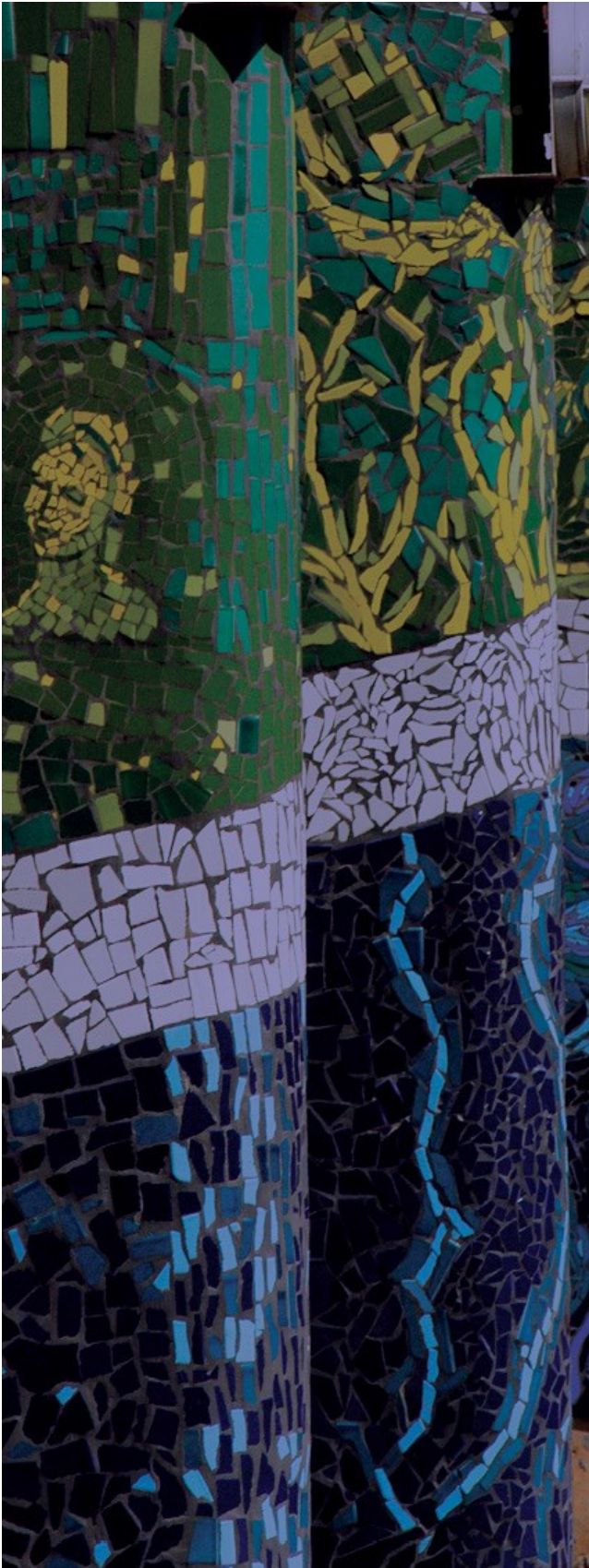
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HUMAN RIGHTS EDITION



FROM THE DESK OF THE CEO



Dr Gomolemo Moshoeu

CEO of SAJEI

Welcome to the 10th edition of Judicial Education Newsletter.

Although 2020 was a challenging year marred by pandemic and bereavement, there is still a need to acknowledge significant achievements. It was not all doom and gloom. It is through the hard work of the Editorial Committee, SAJEI Research team and colleagues in the Office of the CEO that SAJEI is able to publish the Judicial Education Newsletter. Furthermore, Judicial Officers have consistently contributed to the Newsletter and for that SAJEI remains grateful.

As the Chief Justice stated in the first issue of the SAJEI Journal “SAJEI’s failure would be the Judiciary’s failure”. It is therefore imperative that members of the Judiciary continue to contribute articles and keep the Newsletter alive.

It is worth noting that Dr Jameson contributed three articles to this issue and we applaud his commitment. SAJEI is also thankful for the contributions by Mr Von Reiche and Ms Singh towards this edition. We are looking forward to more contributions from the Judicial Officers. As a sign of recognition, SAJEI has included a list of contributors to all Newsletters. Their names will be etched in the history of the Institute as we will be celebrating the tenth year of operation in 2021.



FROM THE DESK OF THE EDITOR-IN-CHIEF



Mr TV Ratshibvumo

Editor-in-Chief

The late US Supreme Court Justice Ruth Bader Ginsburg was asked in a 2012 interview with Egypt's Al Hayat TV— in the wake of the Arab Spring uprising and democratic optimism there, whether she thought Egypt should use the Constitutions of other countries as a model. She advised that the South African Constitution was a better model to follow than the American one because of its more recent creation, but also because of its content. “That was a deliberate attempt to have a fundamental instrument of government that embraced basic human rights, had an independent judiciary. It really is, I think, a great piece of work that was done. Much more recent than the US Constitution.” (<https://youtu.be/KuMXqcK4Nrg>).

As part of the judiciary in South Africa, we should be proud of the crafting of the Constitution, incorporating all human rights as it did. Our duty is to see to it that it stays relevant to citizens of this country. While the Bill of Rights in the Constitution provides that everyone has the right to have access to adequate housing (section 26), the question should be asked as to how this translated into a roof over the heads of average South Africans.

In a landmark judgment of the *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC), the Constitutional Court declared that “the State housing programme in the area of the Cape Metropolitan Council fell short of compliance with the [constitutional] requirements (in paragraph (b)), in that it failed to make reasonable provision within its available resources for people in the Cape Metropolitan area with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.”

When we celebrate landmark judgments that entrench human rights like these, we need not lose focus of the fact that when Mrs. Grootboom died in 2008, some eight years after winning the case in the Constitutional Court, she was still living in a shack as she was before the judgment. This is a clear example that the judiciary can only do so much in protecting the human rights entrenched in the Constitution. Other arms of the government are responsible for the implementation.

This is however in sharp contrast with similar orders made by the courts in respect of the right to access healthcare services. Today, all prisoners in the South African Correctional facilities have access to ARV's, a treatment for HIV positive patients. It all started through a court order as the Department of Health had a different view and approach to the need for this treatment. In *N & Others v Government of the Republic of South Africa & Others* 2006 (6) SA 543 (D), the government was ordered to “remove the restrictions that prevented all the prisoners at Westville Correctional Centre, who met the criteria as set out in the National Department of Health's operational plan for comprehensive HIV and AIDS care, from accessing anti-retroviral treatment at an accredited public health facility.”

(See *Minister of Health & Others v Treatment Action Campaign & Others* 2002 (5) SA 721 (CC), where a similar order was made by the Constitutional Court giving pregnant woman access to an antiretroviral drug called nevirapine, from public health facilities.)

Upon closer inspection of the two cases, it is apparent that the government reaction is similar. The government in the two matters reacted by not implementing the decisions of the courts or postponing the implementation thereof. About a year passed without the implementation of the order to give prisoners access to ARV's. It took the prisoners with the help of other organisations such as the Treatment Action Campaign, to bring two further applications and the threats of contempt of court inquiries, before there could be compliance (see Hassim A, Burger J. *Prisoners' right of access to antiretroviral treatment*. Economic and Social Review 2006;7(4):1-24).

As members of the judiciary, we have all the reasons to walk tall knowing that we are playing our part in protecting the human rights entrenched in the Constitution. Court orders and judgments we hand down may not be enough for a man on the street to enjoy the human rights. The implementation of the Bill of Rights is an effort requiring all other stakeholders to play their part; otherwise, these rights will remain just a piece of a beautiful paper that is admired internationally, while delivering little at home.

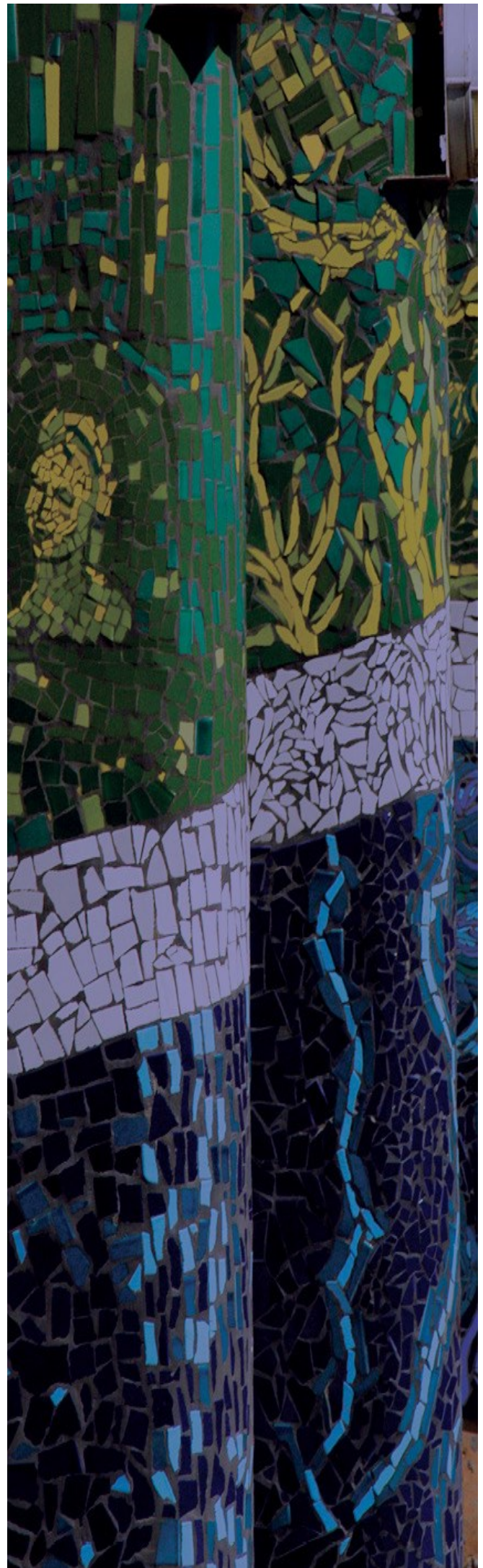
This edition is dedicated to the protection of human rights.

TV Ratshibvumo

Editor-in-Chief

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

The Editorial Committee wishes to express its gratitude to the CEO of SAJEI, Dr Gomolemo Moshoeu for ensuring the sustainability of the Judicial Education Newsletter as we celebrate the milestone of the 10th edition.





NORMS AND STANDARDS



Norms and Standards Corner

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

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 as may be required to achieve the expeditious finalisation of cases.
- vii. No matter may be enrolled for hearing unless it is certified trial ready by a Judicial Officer.
- viii. Judicial Officers must ensure that there is compliance with all applicable time limits.



HUMAN RIGHTS EDITION



RECENT CASES OF INTEREST TO JUDICIAL OFFICERS



Mr TV Ratshibvumo

Regional Court Magistrate - Johannesburg

I.

S v Burger (Case no. 15/2020, NC – Kimberly, Date: 30 October 2020).

Contempt of court

The High Court dealt with review proceedings in terms of section 108 of Act 32 of 1944 (Magistrates Court Act). The accused was convicted of contempt of court after he had insulted the Regional Magistrate using vulgar language and also accused him of conspiring with the public prosecutor in order to punish him. He was sentenced to two months' imprisonment.

On review, the High Court had no doubt that the accused had committed contempt *in facie curiae* and that he should be punished for that. It however set aside the conviction and the sentence after questioning if contempt of court proceedings envisaged by section 108 of the Magistrates Court Act could withstand constitutionality in view of the rights an accused person enjoys in terms of section 35 of the Constitution. However, the High Court did not declare the provisions in the Magistrates Court Act unconstitutional. It however referred its judgment to the Director of Public Prosecutions for a decision on whether the accused should not be tried for contempt of court in a normal trial proceeding whereby his constitutional rights would be observed throughout.

II.

S v Mashaba (Review Case no. 27/20 Gauteng Local Division, Johannesburg Date: 22 October 2020).

Contempt of Court

The High Court also dealt with review proceedings in terms of section 108 of Act 32 of 1944 (Magistrates Court Act). A public prosecutor was convicted of contempt of court after his request for a postponement of a trial matter was refused by the Magistrate. The Magistrate had expected that the public prosecutor would then withdraw the charges, but he indicated that he "stood by his request."

This prompted the Magistrate to hold a contempt of court inquiry as he felt the court cannot be forced to strike the matter off the roll. The public prosecutor was as such sentenced to a fine of R5 000.00 or three months' imprisonment.

Concerns raised in Burger above (regarding the constitutionality of contempt of court proceedings) manifested themselves when the Magistrate warned the public prosecutor saying, "you can appoint your own attorney or if you cannot afford an attorney you may apply for Legal Aid however the matter is not going to be postponed as that would defeat the ends of the said section [108 of the Magistrates Court Act]".

Beside the issue of the constitutionality, the High Court found no contempt on the side of the public prosecutor who is expected to vigorously present the case for the State. Conviction and the sentence were set aside.

III.

In re: Ms. December (Case no. CA&R 207/2020, EC Division Grahamstown. Date: 27 November 2020).
Contempt of Court

In what appears to have been a worst case scenario of a conviction on contempt of court, a Magistrate was frustrated that she could not finalise a partly heard matter in which an accused was convicted on a charge of assault. The accused was represented by an attorney from Legal Aid South Africa. On a date that the Magistrate had hoped the case would run to the end, the attorney was not in court. A candidate attorney (Ms. December), was sent to attend to the postponement of the case with strict instructions from her principal that she should not take over the trials that she had not started. The Magistrate insisted that Ms. December should appear and do nothing much as she will be passing the sentence. Ms. December did not give in to the pressure.

Without any warning about the constitutional rights or the duty to show why she (Ms. December) should not be convicted, the Magistrate then sentenced Ms. December for disrespecting her to imprisonment in the cells until the rising of the court. The proceedings were not even in terms of section 108 of the Magistrates Court Act as it later transpired the Magistrate did not even know what the section provides. Ms. December was punished for disrespecting the Magistrate, not contempt of the court. Whereas section 108 of the Magistrates Court Act makes it mandatory for the Magistrate to send the record of proceedings to the High Court for review, the Magistrate did not do this. It was only when her senior learned of this that the matter was sent on review.

The High Court set aside the proceedings and even remarked that more corrective measures should be done than just setting aside the proceedings.

IV.

Gordhan v The Public Protector & Others (Case no. 48521/2019, Gauteng Division, Pretoria. Date: 07 December 2020).

Perception of bias and dishonesty on the Public Protector.

The Public Protector had released a report involving Minister Gordhan in which she had ordered various institutions such as the President, the National Director of Public Prosecutions, the Speaker of Parliament and the Minister of State Security to take remedial steps against Minister Gordhan and others within specific periods. She further ordered them to submit reports on how they intended to implement the remedial steps to her office within 30 days, for her approval.



HUMAN RIGHTS EDITION

The Minister of State Security was ordered to implement all the recommendations contained in the Office of the Inspector General of Intelligence's classified report. Interestingly, the Public Protector indicated in the same report that she had not seen that report as her attempts to get it declassified were unsuccessful. She claimed to have been reliably informed of what it contained as recommendations. The challenge on this aspect was that she made recommendation on a report she had not seen personally. When this aspect was raised on review, the Public Protector filed an affidavit in which she admitted to have seen a copy of the classified report before writing her report. The court was not impressed with what appears to be dishonesty on her part in this regard and referred the judgment to the Legal Practice Council for further action. The full court reviewed and set aside her findings and ordered her to pay costs personally, limited to 15 per cent.

V.

Mulaudzi v Mudau & Others (Case no. 1034/2019,

SCA. Date: 18 November 2020)

Marital rights over joint estate

A husband sold the matrimonial home a month before instituting divorce proceedings against his wife. In the sale agreement, he misrepresented himself as being single, thereby avoiding the need for the wife to co-sign it. For that reason, the full court of Limpopo Division had set aside the sale agreement as being fraudulent and invalid. The buyer appealed this decision as it prejudiced him as an innocent third party who did not know that the seller was married.

The Supreme Court of Appeal upheld the appeal relying on section 15(9) of Act 88 of 1984 (the Matrimonial Property Act). It provides:

“when a spouse enters into a transaction with a person contrary to the provisions of subsection (2) or (3) of this section, or an order under s 16(2), and—

*(a) that **person** [not spouse] does not know and cannot reasonably know that the transaction is being entered into contrary to those provisions or that order, it is deemed that the transaction concerned has been entered into with the consent required in terms of the said subsection (2) or (3), or while the power concerned of the spouse has not been suspended, as the case may be...*”

The court held that the wife was deemed to have given the consent as the buyer did not know the seller and the contract of sale reflected that he was single. There was unfortunately no recourse for the wife as the divorce was long finalised.



HUMAN RIGHTS EDITION

Does a request by the Director of Public Prosecutions in terms of section 8(1) of the Inquests Act, 1959 (Act 58 of 1959, “the Act”) override a discretion exercised by a Judicial Officer?



Mr. FVA von Reiche

Magistrate - Pretoria

The following transpired in an Inquest matter dealt with by a Magistrate at the Cullinan Magistrate’s Court. The inquest was dealt with at the court and finalized without hearing oral evidence, contrary to a written request by the Director of Public Prosecutions (“the DPP”). The DPP had requested the conducting of a formal inquest and receiving oral testimony of a list of witnesses which were provided by the DPP.

The Magistrate recorded her findings under sections 16(a), 16(b), 16(c) and 16(d) of the Act without hearing oral evidence.

Since the finding under section 16(d) was that the death was brought about by an act or omission *prima facie* involving or amounting to an offence by the two named persons, the magistrate acted in terms of the provisions of section 17(1)(b) of the Act and submitted the record of the proceedings to the DPP (the out dated name of Attorney-General is still used in the Act).

Subsequent to the dispatch of the record to the DPP, the Magistrate was requested in a letter to reopen the inquest and hear *viva voce* (oral) evidence from persons who had previously submitted sworn statements.

This request was done in accordance with section 17(2) of the Act which reads as follows:

“If the Attorney-General at any time after the receipt of the record so requests, the judicial officer shall re-open the inquest and take further evidence generally or in respect of any particular matter or cause an examination or further examination of a dead body or of any part, internal organ or any of the contents thereof to be made and, if necessary, cause such body to be disinterred for the purpose of the examination, and the provisions of section 3(3) shall apply to such examination.”

“If the Attorney-General at any time after the receipt of the record so requests, the Judicial Officer shall re-open the inquest and take further evidence generally or in respect of any particular matter or cause an examination or further examination of a dead body or of any part, internal organ or any of the contents thereof to be made and, if necessary, cause such body to be disinterred for the purpose of the examination, and the provisions of section 3 (3) shall apply to such examination.”

This, the Magistrate it seems, was not prepared to do for a number of reasons.

This discussion deals with the question posed in the heading and with reference to the Act and general law.

Section 8(1) of the Act reads as follows:

“The Judicial Officer who is to hold or holds an inquest may, of his own accord or at the request of any person who has a substantial and peculiar interest in the issue of the inquest, cause to be subpoenaed any person to give evidence or to produce any document or thing at the inquest: provided that the said judicial officer *shall, if so requested by the Attorney-General* within whose area of jurisdiction the inquest is to be held, cause persons or any particular persons to be subpoenaed to give oral evidence in general or in respect of any particular matter at the inquest.” (My emphasis)

Section 13(1) and (2) of the Act respectively make provision for the receiving of statements under oath or affirmation and the receiving of oral evidence of persons who made statements under section 13(1) by a Judicial Officer.

For present purposes the two subsections referred to can be summarized to mean that the presiding officer may in the normal course receive statements under oath or affirmation or statements not so admissible under subsection (1) or may under subsection (2) in his or her discretion cause a person who made such a statement to be subpoenaed to among others give oral evidence at the enquiry.

It is submitted that the wording “and take further evidence generally or in respect of any particular matter” appearing in section 17(2) of the Act, is subject to the powers granted to the presiding officer in sections 13(1) and (2) of the Act. In line with this submission it is accordingly submitted that despite the wording of section 8(2) “compelling” a Judicial Officer to receive oral evidence at an enquiry, this cannot and does not override a judicial officer’s discretion in terms of section 13 (2) of the Act not to receive such evidence. (This interpretation is according to the adage in the interpretation of statutes to wit *Generalia non specialibus derogant*.)

A question to be asked in the present context is this: How is the phrase “and take further evidence generally or in respect of any particular matter” to be interpreted and understood? Does it mean that the presiding officer referred to has to reconsider evidence already received and considered before her finding was made; or does it refer to new evidence not already received and considered?

It is submitted that the legislator had the last mentioned option namely receiving new evidence in mind. To hold otherwise would mean that the presiding officer is required to reconsider evidence already received and on which a finding was made. This would lead to an absurdity and would if accepted mean that the DPP has the power to dictate to a presiding officer how to exercise his or her discretion in deciding how and in what manner evidence is to be received and decided on or attempt to influence a decision already made by requiring the reconsidering of evidence already received and on which a finding was made.

In my view it would constitute an unwarranted interference with the functioning of a presiding officer by the National Prosecuting Authority and would be prohibited by section 165 of the Constitution of the Republic of South Africa , 1996 (“the Constitution”). Section 2 of the Constitution establishes the supremacy of the Constitution and reads:

“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”

In considering the above matter I have taken into account that an inquest differs in nature and form from a criminal trial, and that an important object in an inquest is to receive and consider evidence which could or not lead to instituting a criminal proceeding against a person or persons who are implicated in causing the death of a person amounting to an offence.

The above research was done due to the inquest being referred to me to receive oral evidence. Since I had grave doubts that I could continue in a matter where another magistrate had already made a finding and was thus *functus officio* (also the matter of jurisdiction), I decided before proceeding with the matter to request oral or written submissions by both the State and legal representative of the witnesses subpoenaed or to be subpoenaed and first rule on the legal issues raised.



HUMAN RIGHTS EDITION



Human rights and the role of the judiciary



Dr. VI Jameson

Magistrate - Hartswater

Cyrus the Great declared the first human rights in 539 BC, inscribed on a clay tablet, releasing all slaves, allowing freedom of religion and established racial equality. In South Africa, Parliament passed *ad hominem* laws revolving around race; tyranny; subjugation and disempowerment of the non-white population. The parliamentary sovereignty system barred the courts from questioning unjust laws and from scrutinizing human rights violations perpetrated by the State against its citizenry (*S v Rudman*; *S v Mthwana* 1992 (1) SA 343 (A) 38A-B).

During the Rivonia Trial, South Africa's freedom struggle hero, and global icon, Nelson Mandela, denounced the court in which he appeared as an illegitimate symbol of oppression, and announced that the objective of the struggle was to establish a new legal system that would embody the values of a non-racial Constitution that protected human rights. The statement reverberated with the ideals of a constitutional democratic State with an independent judiciary that would serve as the final arbiter in legal disputes and would protect human rights in particular.

Mandela's herculean stance paid off when the government of the day ushered in an Interim Constitution, in terms of the Constitution of the Republic of South Africa Act 200 of 1993, which started a new legal order (*Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC)). This was followed by the final Constitution of South Africa, in terms of the Constitution of the Republic of South Africa Act 108 of 1996 (hereafter referred to as 'the Constitution'). The Constitution established a democratic State based on the values of its supremacy, which incorporates the values of human dignity, equality, the advancement of human rights and freedoms as well as the rule of law (Section 1(c) Constitution).

The basic principles of criminal procedure were constitutionalized in the matter of *S v Scholtz and others* 1996 (2) SACR 623 (C) at 625b-c. The Constitution contains a Bill of Rights in Chapter 2, also known as the *Human Rights Charter*. The Bill of Rights constitutes the cornerstone of democracy of South Africa and its design protects the civil, political and socio-economic rights of all South Africans (Section 7(1) and (2)). It places certain constrictions on police, prosecutorial and judicial powers, thereby making the enforcement of the criminal law more burdensome than before (see Cameron, Edwin 1997 '*Rights, constitutionalism and the rule of Law*' 114 *SALJ* 504 at 508; see also sections 8(1), 34, 38, 39 and 36 Constitution).

The judiciary is independent (s165 Constitution), separate from Parliament (s44 Constitution), and the Executive (s85 of the Constitution) and is empowered to review unjust laws and judge the desecration of human rights (s167 of the Constitution). In the cases of *S v Makwanyane* 1995 (6) BCLR 665 (CC) and *S v Williams and others* 1995 (7) BCLR 861 (CC), the Constitutional Court ruled that the death penalty and corporal punishment was cruel, inhuman and degrading, and thereby, unconstitutional. To date, the courts have revisited numerous unjust laws and human rights defilements and in applicable cases provided constitutional remedies.

Section 35(3) of the Constitution forms the bedrock of fair trial rights in criminal matters which require courts to conduct trials with the notion of basic fairness and justice. In that sense Judicial Officers are primary protectors of human rights, and in egregious circumstances a Judicial Officer can be held accountable for dereliction of constitutional duties if his or her negligence and/or omission resulted in human rights abuses (see *De Klerk v Minister of Police* 2019 (12) BCLR 1425 (CC) paras 66 and 88).

Therefore, in South Africa, an independent judiciary, as one arm of government, is a *primus inter pares* in upholding the supremacy of the Constitution and serves as a guardian of the basic rights of all people.



HUMAN RIGHTS EDITION

Aspects of fair trial rights in sentencing under the Criminal Law Amendment Act 105 of 1997



Dr. VI Jameson

Magistrate - Hartswater

In *S v Ndlovu* 2017 (2) SACR 305 (CC), the Constitutional Court held that if a court convicts an offender for an offence read with the provisions of section 51(2) of Criminal Law Amendment Act, 105 of 1997 (hereafter 'the CLAA'), it has no jurisdiction to impose the sentence prescribed in section 51(1) of CLAA. The State charged the offender for rape read with the provisions of section 51(2). The evidence during the trial brought to light that the perpetrator inflicted serious injuries to the victim during the commission of the offence triggering the sentencing jurisdiction of section 51(1). After the court had found the accused *guilty as charged*, it invoked the provisions of section 51(1) of the CLAA and sentenced the accused to life imprisonment.

The issue for determination in the Constitutional Court was whether the accused person's right to fair trial were infringed by being sentenced under the provisions of section 51(1) and not section 51(2).

The Constitutional Court in an unanimous decision concluded that indeed the Regional Court had no jurisdiction to impose life imprisonment, but 15 years' imprisonment as provided for in section 51(2) (para 46). The Constitutional Court held that it was the responsibility of the trial court to invite the parties to apply for the amendment of the charge sheet in terms of section 86 of the *Criminal Procedure Act*, 51 of 1977 (hereafter the CPA), (para 56). The court *a quo* should have done that upon realizing that the charge did not accurately reflect the evidence led by the witnesses (para 56).

The Supreme Court of Appeal in *S v Kekana* 2019 (1) SACR 1 (SCA) dealt with an appeal from the high court where the perpetrator was charged with four counts of murder read with the provisions of section 51(1) of the CLAA which each carries a sentence of life imprisonment (para 2). The offender pleaded guilty on those counts, but indicated in his plea explanation made in terms of section 112(2) of the CPA, that he pleads guilty to charges of murder read with the provisions of section 51(2) of the CLAA (para 3), an aspect also accepted by the Supreme Court of Appeal (para 14). The State accepted the content of the statement and the court *a quo* duly convicted the accused person for murder read with the provisions of section 51(2) (para 15).

In line with what was said in *Ndlovu* supra, the court *a quo* in *Kekana*'s sentencing jurisdiction was statutory limited to 20 years 'of imprisonment, because the conviction was for murder read with section 51(2). However, the Supreme Court of Appeal took a different view that it was open to the court *a quo* to consider life imprisonment in terms of section 51(1), because sentencing fall within the discretion of the court (*Kekana* para 18).

Based on the facts delineated in the section 112(2) statement of the offender, the court *a quo* did not have any reservations of the correctness of convicting the perpetrator for murder read with section 51(2). The State in *Kekana* also did not cross-appeal the matter with the Supreme Court of Appeal to query the correctness of the conviction of the court *a quo*.

The question is, was the Supreme Court of Appeal in the *Kekana* case correct to invoke the provisions of section 51(1) for the purposes of sentencing. It is correct that the CLAA does not create new offences (*Kekana* para 22), however, the listed offences with their corresponding sentences, forms an integral part of the charge sheet at the plea stage which should correlates with the type of sentence a court may impose upon conviction (*Ndlovu supra*) . It is submitted that a court cannot have choices between which provision to invoke, be it sections 51(1) or 51(2) only at the sentencing stage, it must be clear from the onset, at least before judgment which one of the two is applicable (*Ndlovu case supra*).



HUMAN RIGHTS EDITION

Appropriate sentence for offences listed in the Criminal Law Amendment Act, Act 105 of 1997



Dr. VI Jameson

Magistrate - Hartswater

Parliament introduced the *Criminal Law Amendment Act, Act 105 of 1997* (hereafter ‘the CLAA’) in part on 1 May 1998 (Proclamation R43 GG 6175 of May 1998) as a temporary measure to curb the surge in the commission of serious offences (Tonry *Sentencing Matters* 159-61). On 31 December 2007, the introduction of the *Criminal Law (Sentencing) Amendment Act 38 of 2007* secured its permanency. The CLAA list serious offences like; murder, rape, arm robbery, etc., with corresponding severe sentences for each offence. The view is held that the harsh sentences serve the purpose of remedying crime rates, increasing public satisfaction, and decreasing sentencing disparities (Roth *South African Mandatory Minimum Sentencing: Reform Required* 155).

The Supreme Court of Appeal and the Constitutional Court agree that the harsh sentences prescribed in the CLAA, are undoubtedly to deter offenders (*S v Malgas* 2001 (1) SACR 469 (SCA) par 25 and *Centre for Child Law v Minister for Justice and Constitutional Development and others* 2009 2 SACR 477 (CC) para 16 respectively).

Further, section 51(5) of CLAA specifically preclude courts from suspending a minimum sentence (*S v Mabena* 2012 (2) SACR 287 (GNP) para 21; *S v Thabethe* 2011 (2) SACR 567 (SCA) para 23).

However, the Supreme Court of Appeal also held that once substantial and compelling circumstances are present in a case, a court is at liberty to impose any appropriate sentence, because such a sentence will not be in terms of the CLAA (*Hildebrand v The State* (00424/15) [2015] ZASCA 174 (26 November 2015) para 10, see also *S v Harker* 2004 (2) SACR 63 (C) where a sentence was suspended; Terblanche *Guide to sentencing in South Africa* 69 and *S v Nziyane* 2000 (1) SACR 605 (T) at 610d-e, *S v Legoa* 2003 (1) SACR 13 (SCA) at 26), which sometimes create opportunities to circumvent sentencing under the CLAA (Roth *South Africa Mandatory Minimum Sentence* 169).

The question that comes to mind is, does a regional court revert to its general sentencing jurisdiction of 15 years in terms of Section 92(1) *Magistrates' Court Act* 32 of 1944 or continues to impose a sentence in terms of CLAA, bearing in mind that the CLAA provides a regional court with a sentencing jurisdiction of 30 years imprisonment if it find substantial and compelling circumstances exists (Section 51(3), as well as a further five years of imprisonment for certain offences (Section 52(2)). A detailed exposition of these sentences can be found in the Schedules of the CLAA. The Supreme Court of Appeal in the case of *S v Abrahams* 2002 (1) SACR 116 (SCA) para 25, emphasizes that sentences under the CLAA are heavier than before.

The words used by Parliament in the CLAA and in the *Malgas* case are a “*lesser sentence*” (see *Malgas* para 24.1). If a court assesses a *lesser sentence*, it must pay due regard to the benchmark Parliament provided for in the CLAA (the *Malgas* case para 25 sub para e-f), and that those sentences are generally appropriate for those offences (*Malgas* para 18). The court in the *Hildebrand* case para 8, regards a *lesser sentence* as any *appropriate sentence*, or, an *alternative sentence* (Terblanche *Guide to Sentencing in South Africa* at 64). The reasoning is that after a court finds substantial and compelling circumstances in a case, a court establishes the normative sentencing discretion (*S v Nziyane* 2000 (1) SACR 605 (T) at 610d-e and *S v Legoa* 2003 (1) SACR 13 (SCA) at 26).

The pertinent question is, whether any other form of punishment, like a fine, correctional supervision, a suspended sentence etc., listed in section 276(1) of the *Criminal Procedure Act*, 51 of 1977, is appropriate for offences listed in the Schedules of the CLAA. Bearing in mind that the CLAA does not create new offences, it just provides the [regional] court with an increased sentencing jurisdiction for specific offences committed under certain circumstances (*S v Kekana* 2019 (1) SACR 1 (SCA) para 22) of which the preferred sentence is imprisonment.

It is important to note that a suspended sentence does not necessarily translate into a lesser sentence when put into operation (see *S v Moipolai* 2005 (1) SACR 580 (B) para 26). The author Terblanche *Guide to Sentencing in South Africa* at 350 does not agree with this contention), although it may have a softening effect (*S v Vries* 1996 (2) SACR 638 (Nm) at 648d and *S v Shangase* 1972 (2) SA 410 (N) at 428C).



HUMAN RIGHTS EDITION

Human Rights and the Role of the Judiciary



Ms. C. Singh

Magistrate - Evander

Human rights are “universal rights which the entire mankind can enjoy freely irrespective of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” It is widely accepted that the core of a nation’s peace, solidarity and better governance is embodied in the widespread dissemination, practice and protection of Human Rights. An independent Judiciary plays a key role in the enforcement of these rights. In South Africa, the coming into effect of the Constitution and the creation of the Bill of Rights may be easier to appreciate by those who were disenfranchised and disempowered under the Apartheid era. The transformation itself was a cause for celebration especially for the Judiciary which previously did not have the option to review and reverse unjust laws.

In present day South Africa, the Judiciary is involved in instituting limitations and preventions to restrain the two other branches of government. Item 16(6) of Schedule 6 to the Constitution instructed the rationalization of all Courts “suited to the requirements of the new Constitution.” This entailed the creation of a Constitutional Court as an institution of change and reform, and a break away from the unjust laws of colonialism and apartheid.

The test of our Constitutional dispensation is the accessibility of these rights and protections to the people who actually need them. The preservation and enforcement of Human Rights rests solely in the hands of an independent judiciary. Presiding Officers therefore have an important role to play in upholding the rights of ordinary citizens.

An independent judiciary is a symbol of protection of the rights and freedoms of the people. It is this independence, free from interference from the legislature and the executive in which Presiding Officers have liberty in the execution of their mandate, “without fear, favour or prejudice” to the people of South Africa.

Presiding Officers are therefore required to perform their duties in a manner that enhances confidence in the justice system. In the absence of an independent system, Presiding Officers will not be able to adjudicate matters impartially.

An independent judiciary is a hallmark of a functional democracy. Standards developed by the Judiciary have a significant beneficial effect of making the lives of people better.

In emphasizing their independence, Presiding Officers should strive to maintain an overt sense of fairness and independence of thinking in their courtrooms. Presiding Officers should take care not to adopt unconscious bias in their dealings with others, both in and outside the courtroom as this can affect not only their substantive independence but can also influence the decision-making process or the final verdict.

“There is no better test of the excellence of a government than the efficiency of its judicial system, for nothing more nearly touches the welfare and security of the average citizen than his sense that he can rely on the certain and prompt administration of justice if the Law be dishonestly administered, the salt has lost its savour ; if it be weakly or fitfully enforced, the guarantees or order fail, for it is more by the certainty than by the severity of punishment that offences are repressed. If the lamp of justice goes out in darkness, how great is that darkness”

The role of the Judiciary in dispensing justice independently is therefore an indispensable component of a free and democratic society, and it is left to the Presiding Officer’s internal moral compass to guide the decision-making in a manner that upholds his/her highest conscience.



HUMAN RIGHTS EDITION

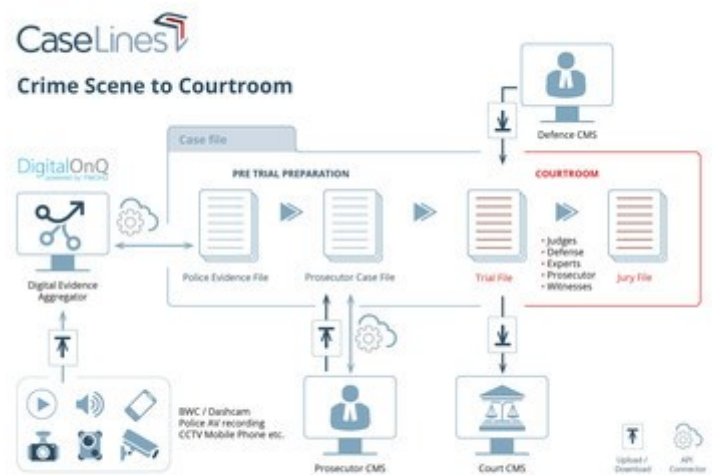


Courts in the New Era



In the Fourth Industrial Revolution (4IR), modern technology has proven to be a great utility for human rights. The world-wide web (www) has provided greater access to knowledge, even while connectivity might be an issue in some communities. Technology has provided a media outlet for human rights activists to share their messages at a grander scale with minimal cost inputs. The processing of judicial data through the use of machine learning and artificial intelligence has proven to improve the predictability of the application of the law and its consistency (J. A. De Oliveira., 2018). Countries like Estonia have taken the bold move of trying to adopt artificial intelligence (AI) to adjudicate small claims disputes through the development of a robot Judge. The artificial intelligent Judge will issue judgments that can be appealed to a human Judge (E. Niiler., 2019). However, despite the contributions machine learning and artificial intelligence can make to the judiciary, there has been some concern expressed regarding biased sentencing algorithms. In the United State artificial intelligence systems were criticised for being biased against African and Hispanic individuals. Thus it is important to ensure AI technology used in Courts does not have internal biases (N. Siboe., 2020).

Setting up machine learning and artificial intelligence to support the Judiciary may require financial support and resources which may be a challenge in some developing countries (N. Siboe., 2020). Nevertheless, developing countries like South Africa have expressed their interest in using technology to aid effectiveness in the Judiciary.



Example of Caseline process flow

One exciting project rolled out by The Office of the Chief Justice “Caseline” entailed implementing an advanced end to end filing application for High Courts. The cloud based application is intended to provide case and evidence management capabilities. The system will provide a platform where litigants can file documents to the High Courts electronically.

By. NT Maseko

E-Learning Administrator



HUMAN RIGHTS EDITION



LIST OF STRUCK OFF LEGAL PRACTITIONERS



KWAZULU NATAL

<u>PERSON</u>	<u>STRUCK</u>	<u>SUSPENDED</u>	<u>INTERDICTED</u>	<u>DATE</u>
Surendra Lutchman		•		22 September 2020
Soraya Adam Essop		•		15 October 2020
Edward Richman Zibonele Zwane		•		19 October 2020



HUMAN RIGHTS EDITION



LIST OF STRUCK OFF LEGAL PRACTITIONERS



GAUTENG

<u>PERSON</u>	<u>STRUCK</u>	<u>SUSPENDED</u>	<u>INTERDICTED</u>	<u>DATE</u>
Mbulelo Penrose Toko		•		01 September 2020
Zukiswa Inert Skepu - Lyimo	•			06 October 2020
Siphiwayinkosi Sibangani Mchun		•		13 October 2020



HUMAN RIGHTS EDITION



LIST OF STRUCK OFF LEGAL PRACTITIONERS



NORTH WEST

<u>PERSON</u>	<u>STRUCK</u>	<u>SUSPENDED</u>	<u>INTERDICTED</u>	<u>DATE</u>
Hendric Jacobus Hattingh	.			22 October 2020

LIMPOPO

<u>PERSON</u>	<u>STRUCK</u>	<u>SUSPENDED</u>	<u>INTERDICTED</u>	<u>DATE</u>
Rembuluwani Dolby Gadabeni		.		17 September 2020



HUMAN RIGHTS EDITION



UPCOMING WORKSHOPS



DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
11 – 18 January 2021	Children's Court Skills - Child Justice Act 75 of 2008	Mpumalanga
19 – 21 January 2021	Children's Court Skills – Foster Care	Gauteng
25 – 29 January 2021	Civil Court Skills – Promotion of Administrative Justice Act	Gauteng
26 – 29 January 2021; 2 – 5 February 2021	Equality Court Skills	Gauteng
1 – 4 February 2021	Application Procedures	Northern Cape
8 – 9 February 2021	Judgment Writing	Gauteng
9 – 12 February 2021; 16 – 19 February 2021	Children's Court Skills – Adoptions	Western Cape
10 – 12 February 2021	Evictions	KwaZulu-Natal (Durban Cluster)
15 – 19 February 2021	Debt Collection Procedures	Gauteng
15 – 19 February 2021	Environmental Crime	Free State
22 – 26 February 2021	Criminal Court Skills	KwaZulu-Natal (Durban Cluster)



HUMAN RIGHTS EDITION



UPCOMING WORKSHOPS



DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
22 – 26 February 2021	Children's Court Skills	Western Cape
1 – 5 March 2021	Costs	Gauteng
2 – 4 March 2021	Dept. of Home Affairs Legislation and the Impact on Family Law	KwaZulu-Natal (Durban Cluster)
4 – 5 March 2021	Judicial Conduct and Ethics	Northern Cape
8 – 12 March 2021	Child Justice Act	Gauteng
8 – 12 March 2021; 15 – 19 March 2021	Children's Court Skills	Western Cape
15 – 19 March 2021	Criminal Court Skills	KwaZulu-Natal (Durban Cluster)
18 – 20 March 2021	Judgment Writing	Free State



HUMAN RIGHTS EDITION



UPCOMING WORKSHOPS



DATE	WORKSHOP	PROVINCE
REGIONAL COURT MAGISTRATES		
26 January 2021	Wildlife Crimes	All
9 February 2021	Unlawful Arrests	All
23 February 2021	Cyber Crimes	All
9 March 2021	Sentencing	All
30 March 2021	Sections 77, 78 and 79 of the Criminal Procedure Act 51 of 1977.	All



HUMAN RIGHTS EDITION



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