10 YEARS
2011 - 2021

SAJEI
South African Judicial Education Institute
Enhancing Judicial Excellence

JUDICIAL EDUCATION NEWSLETTER

SOUTH AFRICA

14th Edition

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

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Enhancing Judicial Excellence

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FROM THE DESK OF THE CEO

Dr Gomolemo Moshoeu

CEO of SAJEI

In the last edition of the Newsletter we were bidding farewell to 2021 and acknowledging outstanding contributions of the architects of the South African Judicial Education Institute. We indeed continue to be very grateful for their sterling work.

We congratulate and extend a warm welcome to our honourable Chief Justice RMM Zondo, Chairperson of the SAJEI Council. We are looking forward to his continued esteemed guidance and leadership of SAJEI.

In line with the celebration of the 10th year anniversary of the Institute, we would like to share with you some of the achievements of the last 10 years:

- The placement of the four Judicial Educators (Senior Magistrates) at the Institute for the training of the District Court Magistrates for five years effective September 2016. We are very proud that Ms Teresa Horne and Ms Jinx Bhoola are still with us doing an excellent job. They sacrifice their time to, amongst others, share their facilitation skills with other Magistrates who are interested in training. They need to be commended for a job well done. Despite all the challenges, they stood the test of time.
- The implementation of virtual training. The commitment of our target audience to attend the webinars despite the challenges is admired. Some of the webinars are conducted after hours and the attendance is always very good.
- The integration of Environmental law into our judicial curricula. SAJEI has published two manuals on Environmental Law and Illegal Wildlife Trade under the leadership of the Magistracy. The nature of these manuals is such that they are reviewable, and SAJEI will welcome your input.
- The launch of an annual programme called Human Rights Week for Judicial Officers during the first week of December. The focus of the programme is on Human Rights related topics such as HIV/TB, AIDS, LGBTQI+, Gender Stereotyping, Sexual Offences, Socio-Economic Rights, Refugee Rights and Stateless Children.

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FROM THE DESK OF THE CEO

- SAJEI led the establishment of the African Judicial Education Network on Environmental Law (AJENEL) which was launched in Maputo during 2018. AJENEL is an Africa-wide network which coordinates common goals, lessons and experiences on judicial education in the field of environment. More information is available on the AJENEL website.
- The International Organization on Judicial Training (IOJT) hosted an international conference on judicial education in South Africa in 2019, the first of its kind in Africa. The conference was convened in collaboration with SAJEI, and attended by more than 300 members of the judiciary from about 45 international countries. The next conference will be held this year in Ottawa, Canada. Please visit the IOJT website to find out more.
- SAJEI publishes a minimum of three Newsletters in a financial year, focusing on pertinent issues relating to Judicial performance. The Editorial Team consisting of Magistrates dedicate a substantial amount of their time to work on the Newsletter, despite their hectic schedules..

The above list is not exhaustive. SAJEI hopes that the Judicial Officers will continue to provide their much needed support to the Institute.

SAJEI is implementing the 2022/23 Annual Training schedule and encourages members of the Judiciary to continue availing themselves for the webinars. A list of our upcoming webinars for June until September appears at the end of this newsletter edition.

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FROM THE DESK OF THE EDITOR-IN-CHIEF

Ms. Jinx Bhoola

Editor-in-Chief

Whilst many colleagues were preparing to embark on their annual vacation during December 2021, various pieces of legislation were either amended and or promulgated. It is enlightening to observe that the drafting of legislation is progressive and addressing the Bill of Rights as enshrined in our Constitution. As colleagues returned from the festivities in January 2022, we were catapulted with a flurry of legislation. Whilst the Covid-19 legislation and regulations were somewhat relaxed, during December 2021 and January 2022, the Courts were gradually returning to normal operations, although everyone still had to and have to remained masked.

This edition is intended to focus on new legislation that is relevant for purposes of the District Courts.

Whilst SAJEI endeavours to create awareness and provide summaries of various relevant pieces of amended legislation, ultimately it is the prerogative of each Colleague to ensure that they constantly read and familiarise themselves with changing legislation. In doing so, colleagues are advised to take note of the dates that the amendments and or legislation become operational and to ensure compliance thereto.

I will consider a kaleidoscope of the legislation and highlight the most important legislation. The most radical changes was evident from is the amended Rules Regulating the Conduct of the Proceedings of the Magistrates Courts of South Africa. An article will be written traversing these Rules.

Presiding officers were invited to provide comments to the Maintenance Amendment Bill by 31 January 2022, be vigilant to embrace changes in Maintenance.

The Cybercrimes Act, which has been signed by the President, ushered in certain sections of the Act which has come into operation on 1 December 2021. The Cybercrimes Act aims to keep society safe from criminals, terrorists, and other countries. It also consolidates cybercrime laws and aims to stop cybercrime and improve the security of the country. It impacts on everyone who process data or use a computer who will probably commit many offences daily. The Cybercrime Act creates many new offences. Some are related to data, messages, computers, and networks. Some examples of the offences that might be committed are hacking, unlawful interception of data, ransomware, cyber forgery and uttering, or cyber extortion, and malicious communications. The Cybercrimes Act gives the South African Police Service extensive powers to investigate, search, access and seize just about anything, including a computer, database or network wherever it might be located, on condition they are in possession of a search warrant.

Regulations relating to the Promotion of Access to Information Act, has been updated by GG 45492. These amendments have been brought about due to the implementation of the Protection of Personal Information Act 4 of 2013.

During March 2022 the Magistrates Court Act of 1944 created and established various Magisterial Districts in various Provinces.

The Magistrates Bill published in GG 46088 dated 25 March 2022 called for comments and the time period has been extended.

The Child Justice Act was amended to provide for accredited diversion service providers and diversion programmes.

Ms Singh has navigated an article on the Criminal Law Amendment Act. Interesting to note that priority and consideration was given to gender based violence.

Government Gazette	Description of Legislation
GG 45645, RG 11369, GoN 1604, 17 December 2021 (Eng/Afr)	Rules Board for Courts of Law Act: Rules Regulating the Conduct of the Proceedings of the Magistrate's Courts of South Africa: (Amendment of rule 1, 16, 22, 22A, 23, 24, 25, 26, 29, 31, 32, 38, 39, 41, 42, 54, 55, 60, Form 3, Form 24, Form 24A, Form 37, Form 37A & Form 59)
GG 45616, GeN 709, 10 Dec 2021	Maintenance Amendment Bill: Explanatory summary (Private Members Bill): Comments invited by 31 Jan 2022
GG 45562, P42, 30 Nov 2021	Cybercrimes Act: Commencement of certain sections of Cybercrimes Act (English / Afrikaans. Chapter 1; (b) Chapter 2, with the exclusion of Part VI; (c) Chapter 3; (d) Chapter 4, with the exclusion of sections 38(1)(d), (e) and (f), 40(3) and (4), 41, 42, 43 and 44; (e) Chapter 7; (f) Chapter 8, with the exclusion of section 54; and (g) Chapter 9, with the exclusion of sections 11B, 11C, 11D and 56A(3)(c), (d) and (e) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act No. 32 of 2007), in the Schedule of laws repealed or amended in terms of section 58, of the said Act, shall come into operation on 1 Dec 2021.
GG 45492, GoN 1504, 16 Nov 2021	Promotion of Access to Information Act: Regulations [Updated PAIA Guide],

Government Gazette	Description of Legislation
GG 46132, GoN 928, 30 Mar 2022	Magistrates' Court Act, 1944 (Act No. 32 of 1944): Conversion of certain places for the holding of court (branch courts), and periodical court as courts at which all court-related services are provided in respect of the Eastern Cape, Gauteng, KwaZulu-Natal Province,
GG 46132, GoN 929, 30 Mar 2022	Magistrates' Court Act, 1944 (Act No. 32 of 1944): Creation of magisterial districts and the establishment of district courts in respect of the Free State Province
GG 46132, GoN 930, 30 Mar 2022	Magistrates' Court Act, 1944 (Act No. 32 of 1944): Creation of magisterial districts and the establishment of district courts in respect of the KwaZulu-Natal Province
GG 46132, GoN 931, 30 Mar 2022	Magistrates' Court Act, 1944 (Act No. 32 of 1944): Creation of magisterial districts and the establishment of district courts in respect of the Eastern Cape Province,
GG 46132, GoN 932, 30 Mar 2022	Magistrates' Court Act, 1944 (Act No. 32 of 1944): Creation of magisterial districts and the establishment of district courts in respect of the Western Cape Province,
GG 46088, GeN 912, 25 Mar 2022 (Objects Memo)	Magistrate Bill, 2022: Comments invited by 29 Apr 2022,
GG 46059, GoN 1909, 18 Mar 2022	Child Justice Act: Accredited diversion service providers and diversion programmes
GG 45739, P 48, 13 Jan 2022	Criminal Law (Forensic Procedures) Amendment Act: Commencement of Section 2 (English/ Afrikaans)

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.

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Norms and Standards Corner

3. CORE VALUES

The norms and standards set out in this document are underpinned by the following core values:

(i) The independence of the Judiciary and the concomitant imperatives of integrity and impartiality of all Judicial Officers.

(ii) Equality and fairness.

(iii) Accessibility.

(iv) Transparency.

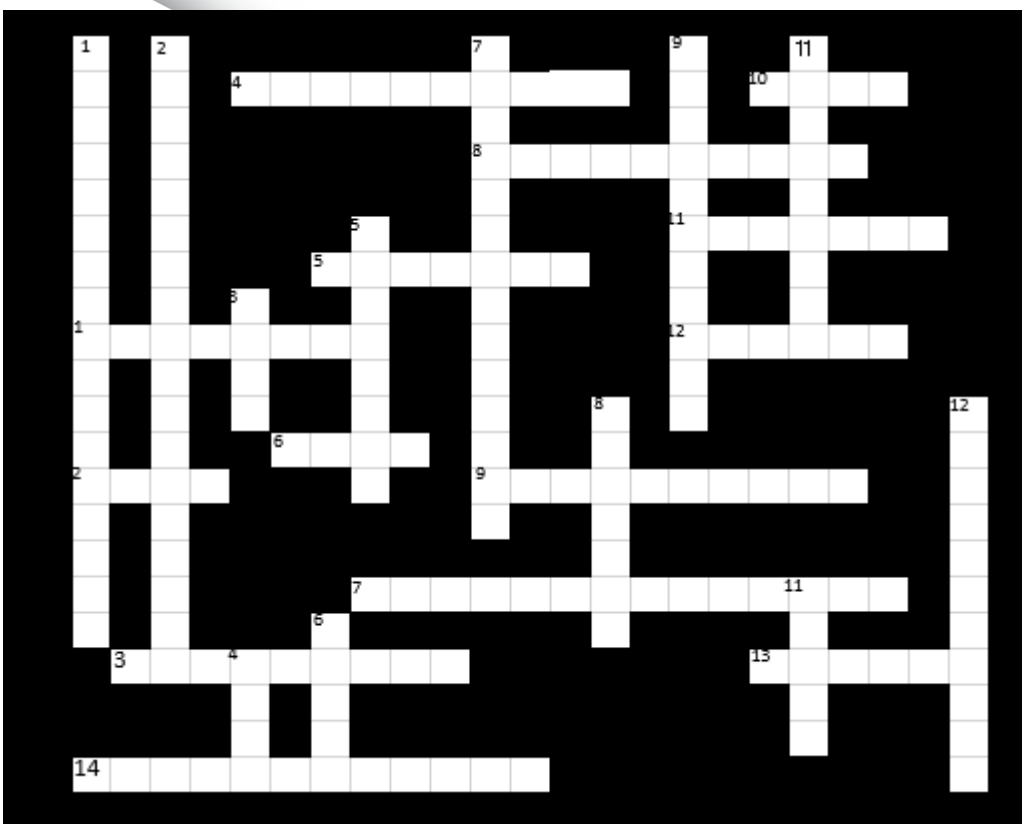
(v) Responsiveness.

(vi) Diligence.

Crossword Puzzle

on

The Evaluation of Evidence



Down

1. Material that serves to prove something.
2. Evidence that can be challenged or rebutted.
3. Tangible object or sound recording of a conversation that is offered in evidence.
4. Responsibility of Plaintiff to discharge in order to succeed.
5. In order to be admissible all evidence must be.
6. Opponent agrees to an averment.
7. Evidence where there are no direct assertions about a fact in dispute.
8. First hand or raw evidence.
9. Evidence introduced to trial in the form of documents.
10. Communication between attorneys and clients have a special duty of secrecy.
11. Process were there is a material dispute of fact.
12. Process were there is no material dispute of fact.

Across

1. Facts or information indicating whether a belief or proposition is true or valid.
2. Making amendments and correcting documents.
3. Documentation, which confirms the existence of unavailable primary evidence.
4. A statement made by a party to a lawsuit or a criminal defense, usually prior to trial, that certain facts are true.
5. Evidence by a party who did not witness the scene.
6. An averment that is not admitted.
7. The facts which help to prove the *facta probanda.*
8. The acceptance of *prima facie* proof.
9. Acceptable evidence by the Court.
10. *Viva voce* evidence.
11. S.A law of evidence is inherited from this law.
12. Attorney invokes this procedure when he is unhappy with a decision by court.
13. Evidence that is oral in nature.
14. Type of Court System.

RECENT CASES OF INTEREST TO JUDICIAL OFFICERS

Ms Jinx Bhoola

Snr Magistrate, Judicial Educator

Civil.

Bayport Securitisation Limited and Another v University of Stellenbosch Law Clinic and Others **(Case no 507/2020) [2021] ZASCA 156 (4 November 2021)**

This judgment from the Supreme Court of Appeal (SCA) provides invaluable clarity on the issue dealing with legal fees that are permissible in enforcing credit agreements. Since enforcement of credit agreements are regulated by certain provisions of the National Credit Act, No. 34 of 2005 (the NCA), the SCA considered what constituted "collection costs" in terms of in section 1 of the NCA and additionally, decided whether "collection costs" as referred to in sections 101(1)(g), read with s 103(5) of the NCA, includes all legal costs: pre and post judgment costs.

In this appeal, the respondents were granted three declaratory orders and certain consequential relief:

a) That collection costs as referred to in section 101(1)(g), as defined in section 1 and contemplated in section 103 (5) of the National Credit Act 34 of 2005, includes **all legal fees incurred by the credit provider in order to enforce the monetary obligation of the consumer under a credit agreement charged before, during and after litigation.**

(b) That section 103(5) of the National Credit Act 34 of 2005 applies for as long as the consumer remains in default of his/her credit obligations, **from the date of default to the date of collection of the final payment owing,** in order to purge his default, irrespective of whether judgment in respect of the default has been granted or not during this period.

(c) That legal fees, including fees of attorneys and advocates, in as much as they comprise a part of collection costs as contemplated in section 101(1)(g) of the National Credit Act 34 of 2005, it may not be claimed from a consumer or recovered by a credit provider pursuant to a judgment to enforce the consumer's monetary obligations under a credit agreement, unless they are agreed to by the consumer or they have been taxed.

Section 1 of NCA defines 'collection costs' as

'[A]n amount that may be charged by a credit provider in respect of enforcement of a consumer's monetary obligations under a credit agreement, but does not include a default administration charge'.

The NCA limits the extent to which a consumer may be held liable to a credit provider under a credit agreement.

Firstly, in terms of s 101(1) of the NCA, the consumer involved in a credit agreement may not be responsible for the payment of any money or other consideration, [costs or legal fees] except those costs expressed in section 101(1) of the NCA: The section 101 costs include the principal debt (subsection (a)); an initiation fee (subsection (b)); a service fee (subsection (c)); interest (subsection (d)); cost of any credit insurance (subsection (e));default administration charges (subsection (f)); and collection costs (subsection (g)).

The SCA emphasised that South African courts have recognised the distinction between collection costs and litigation costs (which is regulated by a tariff). To this extent, the courts have recognised that the attorney who conducts the case recovers the money at law, and is remunerated by the costs awarded to him.

The SCA referred with approval to the case of *D & DH Fraser Ltd v Waller* 1916 AD 494, which stressed that costs of collection referred to those costs incurred in collecting a debt by means other than legal processes (see [15]).

A legal practitioner cannot claim against his principal a commission upon the amount of the judgment; nor can the agent; for neither of them has collected the debt. And it would make no difference should the capacities of collecting agent and attorney happen to be united in the same individual. If it were otherwise, there would be a double charge - **costs plus commission - upon the debtor in every case in which an instrument of debt containing a collection clause was sued upon**. There must be a clear distinction between collection costs and legal fees.

According to the SCA, the High Court failed to take into account that in terms of the tariff applied by taxing masters, legal costs are regarded as commencing with a summons and do not as a general rule allow for pre-litigation costs to be recovered from the losing litigant.

Section 103(5) of the NCA applies for as long as the consumer remains in default of his or her credit obligations, from the date of default to the date of collection of the final payment, irrespective of whether judgment has been granted.

The SCA demonstrated that if the legal fees cannot exceed the unpaid balance of the consumer's principal debt, it would severely limit a court's discretion to make appropriate cost orders, including punitive cost orders in the event of frivolous litigation that may deserve reprimand.

The SCA carefully balanced and confirmed the well-established distinction between collection commission and litigation costs, the latter been subject to maximum tariffs prescribed by law

The SCA held, had the legislature intended collection costs to include legal costs, it could easily have said as much. The language used by the legislature demonstrated that collection costs were not intended to include litigation costs. (See [19].)

The Court held that further the charges contemplated in s 101 (1)*(b)* – *(g)* were not post-judgment charges. The judgment entered was thus for the capital sum fixed at a particular date together with interest. It followed that, even had it been correctly found that s 103(5) found application, it did not apply post-judgment. (See [26].)

It was held that the High Court's interpretation of collection costs in s 1, and its application to ss 101(1)*(g)* and 103(5) of the NCA, which culminated in the declaratory orders granted, could not be supported. Accordingly, the decision of the High Court was set aside and the appeal was accordingly being upheld. (See [27].)

Arum Transport CC v Mkhwenkwe Construction CC and another 2022 (2) SA 503 (KZP)

This matter was heard before the Pietermaritzburg High Court, and concerned an application for summary judgment brought by the plaintiff against the defendants. In terms of the requirements of the Amended Uniform rule 32, the plaintiff filed the application within 15 days after the defendants had entered their plea.

However, after the defendants had filed their plea, and before filing its application for Summary Judgment, the plaintiff had taken 'another procedural step' by filing a Replication.

Under the previous Rules governing Summary Judgments, if a plaintiff took a further procedural step after the delivery of a plea, they waived their right to apply for summary judgment. The question to be determined was whether this was still the position under the new rule? The Court held that it was. (see [10], [15], [24].) In this regard, the court referred with approval to case authority to the effect that there was little reason for extending the scope of Summary Judgment by allowing amplification of the cause of action in either form of summons, if one considered that summary judgments had always been viewed as extraordinary and stringent remedies, and based upon a reading of the rules themselves (see [15] and [24]).

The Court accordingly found that the plaintiff had waived its right to apply for Summary Judgment (see [24]). The Court found it would in any event have refused the application for Summary Judgment, as the defendants had shown there were triable issues (see [25]). The application was accordingly dismissed (see [32]).

Family Law

Segerman v Petersen [2022] JOL 52634 (WCC) : Definition of harassment for purposes of a protection order under the Protection from Harassment Act 17 of 2011?

This is an appeal against the whole order and judgment of an Acting District Magistrate. Pursuant to a judgment in terms of the provisions of the Protection from Harassment Act 17 of 2011 (—the PHA), an order was granted in favour of the respondent (the claimant in the court a quo) against the appellant (the respondent in the court a quo).

The appellant and the respondent had been involved in a romantic relationship. During the course of the relationship, the appellant claims to have been emotionally and mentally abused by the respondent. She also claims that the respondent had raped her. Consequently, she terminated the relationship.

A settlement agreement was reached between the parties which amongst other things included that the parties undertook, not to make any contact with each other. This included, but was not limited to, contact via social media, text messages, phone calls, WhatsApp and electronic mail. They further agreed that should either of them fail to adhere to any of these conditions, the non-defaulting party would be entitled to institute legal proceedings against the party breaching the agreement. One of the essential terms of the order is that it, *inter alia*, prohibits the appellant from telling any other person that the respondent raped her. The reason why the parties came to such an agreement was because of a series of WhatsApp and SMS exchanges between them, prior to the appellant having sought a protection order on 15 December 2016, wherein the appellant repeatedly made the allegation that the respondent raped her. These were private exchanges between the two of them.

The settlement agreement made no reference to the appellant‘s social media discussions of the rape allegedly perpetrated on her by the respondent. There was also no agreement between the parties that the appellant would refrain from making the allegation that the respondent had raped her. Subsequently, the appellant began telling people about her alleged rape. In private posts to two social media groups, she identified the respondent as a rapist. Without her consent, the private posts were made public, leading to the respondent obtaining a protection order in terms of section 10(1) of the Protection from Harassment Act 17 of 2011. At no time did the appellant publish or publicly name the respondent as her rapist. She never consented to the publication, nor did she know about the publication until she was contacted by a third party.

The question for consideration in this case was:

firstly, whether the appellant‘s conduct, having discussions in a private support group about her experience and mentioning that the respondent raped her, and,

secondly, the respondent being identified as a rapist on social media after third parties published the information, without her knowledge or consent,

can be regarded as harassment for the purposes of the act.

In paragraph 22 of the judgment, the Judge emphasises the obligation of a trial court to have regard to the totality of the evidence as presented, before coming to any conclusion.

“ [22] In this particular case, in order to understand the conduct of both parties, the court has to have regard to the totality of the evidence as presented, before coming to any conclusion. In S v Trainor *1 Navsa JA set out the obligation of a trial court:*

‘[9] A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.‘

A court on appeal will in general be slow to interfere with the findings of the trial court, but if such findings are plainly wrong, the court of appeal will indeed interfere therein. See R v Dhlumayo & Another2 . A court of appeal should therefore have regard to the following considerations: it should be aware that in principle a trial court is in a better position than a court of appeal to make reliable findings of fact; that the court a quo indeed sees and hears the witnesses and is steeped in the atmosphere of the trial; and in addition the trial judge is better suited to take into account a witness‘s appearance, demeanour and personality. For these reasons, a court of appeal would not be inclined to reject a trial judge‘s findings of fact. See also S v Robinson & Others3. On the other hand, if such findings are plainly wrong, the court of appeal will indeed interfere.

In paragraph 52 of the judgment the Court of appeal held that the Magistrate failed to consider the totality of the evidence when the protection order was granted.

"[52] The magistrate clearly misdirected himself by not taking into account the totality of the evidence, and by improperly evaluating the evidence, which included the drawing of a negative inference from the appellant's failure to lay a charge against the respondent, which, ultimately, materially influenced his decision to grant a protection order in favour of the respondent. I am also in agreement with the submissions made by the appellant, as well as the first and second amicus, that the appellant is a survivor of gender-based violence and she was not trying to spread "salacious gossip" about the respondent. I agree that she was trying to be heard, to find healing and to protect others from suffering the same fate. The appellant had the right to speak out and to express herself about the experiences she had endured. In my view, the appellant had the right, just like all of us, to freely express herself about this issue. This is exactly what she did and was entitled to do."

In paragraph 56, the Judge considered the interpretation of the definition of harassment and provided

"[56] In term of section 1, harassment means: _directly or indirectly engaging in conduct that the respondent knows or ought to know-

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably-

(i) . . .

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) . . .

' Harm in terms of section 1 means 'any mental, psychological, physical or economic harm'.

Another important provision is section 9 (4), which states that, subject to subsection (5), the court must, after a hearing, issue a protection order in the prescribed form if it finds, on the balance of probabilities, that the respondent has engaged or is engaging in harassment.

(a) for the purpose of detecting or preventing an offence;

(b) to reveal a threat to public safety or the environment.

The other two grounds set out in paragraphs (c) and (d) of section 9 (5) are not relevant for the purposes of this matter. The court a quo at no stage during its judgment or findings, given the circumstances of this case, considered whether the appellant's conduct was reasonable, as contemplated in this section."

The Court referred to case law, international legislation and the definition of harassment and set aside the whole of the judgment and order of the magistrate by upholding the appeal. The Magistrates judgment was replaced with the order that the application for a protection order in terms of the provisions of section 9 (4) of the Protection from Harassment Act 17 of 2011 is dismissed, with costs. In doing so paragraph 58 of the judgment is relevant.

" *[58] In Mnyandu v Padayachi Moodley J, in trying to interpret the provisions of harassment by having regard to a comprehensive study and analysis of international legislation, cases in other jurisdictions, as well as the research conducted by the South African Law Reform Commission, came to the following conclusion, with which I agree, regarding the definition of harassment in terms of the PHA:*

> *Based on its examination of international legislation, the SALRC recommended that the recurrent element of the offence should be incorporated in the definition of —harassment‖. The definition in the Act states that —harassment‖ is constituted by —directly or indirectly engaging in conduct‖. However, although the definition does not refer to —a course of conduct‖, in my view the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked.'*

The definition of harassment in the Domestic Violence Act 116 of 1998 is the following:

"harassment" *means engaging in a pattern of conduct that induces the fear of harm to a complainant including*

(a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;

(b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;

(c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant; . . .'

Both this definition, as well as the definition of the court in Mnyandu, accords with the ordinary dictionary meaning, which also defines harassment to be in the form of persistent' and repeated' conduct.

2017 (1) SA 151 (KZP) para 68

www.dictionary.com defines harassment as 'conduct aimed to disturb or bother persistently; torment, as with troubles or cares; pester; to intimidate or coerce, as with persistent demands or threats; to subject to unwelcome sexual advances; to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid'.

Criminal

Todd v Magistrate Clanwilliam and others [2022] JOL 52292 (WCC)

The applicant, Sean Todd sought a review from the high court regarding an inquest that was held at the Clanwilliam Magistrate's Court following the death of his wife, Theresa Todd.

The application states that during the early hours of January 14, 2016, whilst the applicant and his wife (the deceased), were at a holiday resort in Cederberg, they embarked on a mountain bike trail.

They had stopped to take photos , after which, the applicant walked off and left the deceased behind. The applicant thereafter, heard a scream, and when he turned around he saw the deceased falling down into a cliff, where he found her dead.

The Director of Public Prosecutions (DPP) decided not to proceed with criminal charges and recommended to the Magistrate that an inquest be held in public. The daughter of the deceased also supported this view. The Magistrate, however, was of the view that a formal inquest was not necessary in terms of section 16(2)(d) of the Inquests Act 58 of 1959.

The Magistrates findings were that the circumstantial evidence strongly indicated foul play and the only person implicated was the applicant, who was her husband

The applicant sought the review and setting aside of those inquest findings made by the Magistrate.

The Judge considers whether the Magistrate erred in dispensing with *viva voce* evidence at the hearing of the inquest.

In examining sections 10, 13 and 8(1) of the Inquest Act 58 of 1959 finds that Magistrate's holding of the informal inquest despite the recommendations of Director of Public Prosecution and request by deceased's daughter was wrong.

However, the Judge held that since the applicant failed to show that he suffered any prejudice, the application for the review failed, and was accordingly dismissed.

The requirement of *mens rea* (fault) in enactments creating criminal offences

Mr. FVA von Reiche

District Magistrate

Introduction

The element of fault is a requirement for criminal liability. Burchell & Milton in *Principles of Criminal Law*, Third Edition, 2004, Juta put it as follows:

"*Fault is an element of every crime. It takes the form of either intention (dolus) or negligence (culpa). All common-law crimes require intention except for culpable homicide and contempt of court committed by an editor of a newspaper for which negligence is sufficient. Statutory crimes require either intention or negligence*."[p 455].

In the Supreme Court of Appeal the then Chief Justice Rumpff referred to the phrase 'mens rea' in the following words:

"*Dit is wenslik om in die eerste plek die vraagstuk van mens rea kortliks te bespreek. In ons reg word die uitdrukking mens rea gebruik om dolus of culpa aan te dui … In laasgenoemde saak het hierdie Hof herbevestig dat in ons reg die algemene reel geld dat actus non facit reum nisi mens rea sit [which can be translated to read: An act is not unlawful unless there is criminal intention] en dat by die uitleg van n strafbepaling vermoed word dat die Wetgewer, by onstentenis van duidelike aanduidings tot die teendeel,nie bedoel het om skuldlose oortredings daarvan met straf te bedreig nie. [Refer S v De Blom 1977(3) SA 513(A) at p529 bottom and p 530 top,"* the De Blom-decision"].

Rumpff CJ, in the course of his unanimous judgement, emphasized a principle of the interpretation of statutes that it is presumed, unless the contrary appears in clear wording, that the Legislator did not have strict liability in mind that is punishing unlawful actions (or omissions) without requiring guilt be it intention or negligence.[Refer p532].

In the court a quo the accused (appellant) was found guilty of contravening certain exchange regulations issued in terms of section 9 of the Currency and Exchanges Act 9 of 1933. Her defence was that she was oblivious of the requirement that she had to get the necessary authorization from Treasury to take American dollars and jewels out of the Republic of South Africa.

Rumpff CJ stated that once the State has proved that a person's actions fell within the ambit of the prohibition (here exchange control regulations) it can be assumed that the contravention was willful and intentional with knowledge of the unlawfulness thereof. Should an accused raise a defence that he/she did not know that the actions were prohibited by law, the accused can escape a conviction if there is a reasonable possibility that the accused was unaware that the actions were prohibited by law. On the other hand Rumpff CJ held that where negligence *(culpa)* as opposed to intention *(dolus)* as *mens rea* is required in a statute (or regulation), the accused can escape criminal liability if a reasonable possibility exists that he/she was circumspect in enquiring whether he/she had to obtain permission to take money out of the Republic.

Discussion

Section 4(1) of the National Building Regulations and Building Standards Act 103 of1977 requires prior approval in writing before erecting a building in the area of a local authority, and a contravention thereof is made a punishable offence. The legislator has however omitted to state what form of fault is required, be it intention *(dolus)* or negligence *(culpa)*.

In the *De Blom* decision, Rumpff CJ quoted with approval from an article by D.A. Botha in T.H.R.H.R, band 38,1975 on page 50 where the learned author observed that in a modern State a great number of activities of subjects is regulated by legislation. For example, it can be expected from an employer in the building industry to be informed of the prescripts relating to employing labourers, for a garage owner to be informed of the prescripts relating to that business and for a fisherman to be informed what is prescribed when engaging in fishing. For a person dealing in diamonds they can be expected to be abreast of the strict legislation pertaining to the diamond industry. To the list can be added an urban dweller engaging in building activities. An omission to do so can constitute unlawful and negligent conduct.

The standards set for building should not be lowered but rather raised. In my view the principles adopted with approval by Rumpff CJ as to what can be expected of a person in a certain trade or profession, can be made to apply to a lay person who embarks on a building project in a local authority. The effect of this would be that a lay person who embarks on a building project without any knowledge of municipal bylaws and statutes, will be expected to enquire beforehand at the local authority in question and/or a person. For example, a town planner will be expected to enquire what the basic requirements are. To give a simple example: A person who owns a property and wants to build a swimming pool will on enquiring be informed that a building plan is required before the construction thereof can proceed.

It is submitted that should any person without knowledge of the municipal bylaws proceed and engage in any building project where prior written approval from the local authority in question is required, his/her failure to enquire and be acquainted with what is prescribed can be regarded as having deviated from what can be regarded as reasonable. And when charged could be held liable on the basis of a criminal negligent omission to enquire and or be advised on the legal requirements before proceeding with illegal building.

Conclusion

Requiring intention (dolus) only for a contravention of section 4(1) of the National Building Regulations and Building Standards Act, may lead to a deliberate evasion and frustration of the objects of the Legislator. In my view, having carefully considered the matter in the light of the principles enunciated in the case law and the principles of the interpretation of statutes, the conclusion reached is that *mens rea* in the form of negligence (culpa) is a sufficient form of guilt in a prosecution in terms of section 4(1) read with section 4(4) of the National Building Regulations and Building Standards Act.

Essential Elements of a Valid Customary Marriage and Challenges Regarding Non-Registration Thereof

Mr. T Mokgatle

District Magistrate

Introduction

The purpose of this article is to discuss the court's application of the Recognition of Customary Marriages Act 120 of 1998 (the Act) and to identify challenges which may necessitate legislative intervention.

Validity

In terms of section 3, a customary marriage is valid where the prospective spouses are 18 years old; both consent to be married to each other under customary law; and the marriage is negotiated and entered into or celebrated in accordance with customary law. The latter requirement is complex, due to the multiplicity of customary laws in South Africa.

Below is a discussion of circumstances that may fall under the latter requirement for a valid customary marriage.

Handing over of the bride

The handing over of the bride to the groom's family is a requirement developed through decided cases like *M v K (2017/2016) (2018) ZALMHC 62 (7/11/2018)* and *Fanti v Boto & Others 2008 (5) SA 405 (C).*

In *M v K* matter, the court found that despite the full payment of lobola by the Plaintiff, there had been no transfer of the Defendant to his family; and no valid customary marriage existed between both parties. In the latter, the court held that the ceremonial and ritual processes in customary marriages must be viewed to contain the essential legal requirements for a valid customary marriage, including the handing over of the bride.

The Supreme Court of Appeals in *Moropane v Southon (755/12) (2014) ZASCA 76 (29/5/2014)* found the handing over of the bride to the groom's family to be a crucial part of a customary marriage; serving as her symbolic integration into that family.

In *Moropane, Mbungela v Mkabi (2020) (1) SA 41 and Tsambo v Sengadi(244/19)(2020) ZASCA 46 (30/4/2020)*, the Suoreme Court of Appeal found that the parties have validly waived the requirement of handing over the bride and that a symbolic handing over of the bride is sufficient.

The failure to hand over a bride cannot invalidate a marriage that was negotiated, concluded or celebrated in accordance with customary law.

Payment of lobola

Payment of lobola is common in customary law within South Africa. However, it is not marriage by itself. Full or partial payment thereof is permissible as decided in *Mbungela.*

In *Fanti,* the court found that the marriage was invalid for non- payment of lobola. This decision was criticised that sec 3 of the Act was overlooked. Payment of lobola is not a requirement for a valid customary marriage. However, where full or partial payment of lobola has been made, such a payment falls under sec 3(1) (b) thereof.

Consent of the first wife

The requirement of the first wife has been developed through decided cases. In *Ngwenyama v Mayelane & Another 2013 (4) SA 415(CC)*, the court held that the consent of the first wife in a polygamous marriage is a requirement for a subsequent marriage of a husband to be valid. The Act is silent on this issue; neither does it provide for consequences in the event of failure to comply.

Non-registration challenges

Registration of a customary marriage at Home Affairs is not a requirement for its validity (section 9). Either party may register it at a later stage (section 4) of the Act. Similarly, non-registration of the customary marriage at Home Affairs does not invalidate the marriage.

Where a customary marriage is unregistered:

1) A marriage in community of property is concluded in the absence of an ante-nuptial contract.
2) Claimants against a deceased estate and for maintenance must prove existence of the customary marriage.
3) A Government Employee Pension Fund beneficiary married customarily receives an annuity, although the duty of care and support lies with the new spouse.
4) A child receiving a child support grant from the Department of Social Development, birthed to a parent with the means to maintain, receives it to the detriment of the State.

The compulsory registration of all customary marriages with Home Affairs is highly recommended.

"The rules exist for the courts and not the courts for the rules"

Mr. NL Nemakwarani

District Magistrate

The rules are instructive pillars in fulfilment of the ideal of the constitutional right to access the courts. Van Loggerenberg submits that rules create inexpensive and expeditious legal proceedings. He further submits that the rules should be interpreted and applied within the role of the judicial mandate to settle disputes speedily. [1] These rules exist for the fulfilment of access to courts and entrusting the courts with final judicial authority in administration of justice. The courts are the custodians of the rules and the courts police the application of the rules. Cilliers *et al* submit that rules constitute the procedural machinery of the courts intended to expedite disputes and less costly. [2] The rules provide instructive procedural authority specifically made for the conduct of the court proceedings. The rules are not guides but command obedience and respect from the parties and the courts. The rules play an important role in the management of judicial proceedings and creation of judicial order. Therefore undermining the rules goes to the heart of disrespecting judicial proceedings and enhances judicial chaos. The most serious challenges of the rules are that they are vulnerable to abuse, and misapplied for various reasons. ,In *Standard Bank of South Africa Ltd v Dawood*, [3] the Court warned that courts have in the past taken a less dogmatic view in not insisting on strict compliance with the provisions of the rules of proceedings. The lack of enforcement of the obedience to the rules destroys moral confidence in the courts and weakens the wholeness of the judicial processes.

Rules of court bring life to the rule of law and through their obedience law is preserved and enforced by the courts. In *Trans -African Insurance Co Ltd v Maluleka*, [4] the Court held that parties should be encouraged to become slack in the observance of the rule because they are important elements in the administration of justice. Cilliers *et al* in reinforcing the values of rules submit that High Courts have inherent jurisdiction to prevent the use of the rule for the ulterior purpose and prevent any of their abuse. [5] The Magistrate Court is the constitutional creature within the structure of the courts. It has also the power to prevent the abuse of its rules in adjudication of disputes. The rules also place the courts in a generally amenable position of authority when rules are not adhered to based on good grounds shown. The rules are made for the courts to sustain the ideal of their access and bring good legal order and serve the interest of justice. This means that the courts have the crucial role to play in ensuring that the rules are respected, observed, and applied in the engagement of judicial proceedings. The courts in order to promote the public confidence in their system have an obligation to protect their rules of proceedings because they are designed for them.

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1. Van Loggerenberg DE *Erasmus Superior Court Practice* 2nd ed (Juta Cape Town 2015) D1-7.
2. Cilliers AC, Loots C and Nel HC Herbstein and Van Winsen *The civil practice of the high courts and the supreme court of appeal of South Africa* 5th ed (Juta Cape Town 2009) 30.
3. 2012 (6) SA 155 (WCC) para 12.
4. 1956(2) SA 273(A) at 278 f-g.
5. Footnote 2 at 31.

The competency of a Court is evident from the record of proceedings

Ms. T. Moalusi

District Magistrate

In South Africa every court is a court of record. The process of generating the court record of proceedings is guided by the rules of the courts. The presiding officer is expected to maintain substantial control of and undertakes considerable responsibility for the process. The court record of proceedings is very important in the dispensing of justice.

The court in *S v Woelf and Another* 2021(2) SACR 97 (WCC), found it necessary to emphasise the importance of a complete record in any type of proceedings. "The record of proceedings in court is of cardinal importance. As such, the credibility of the record is very important, because it is one of the guarantees to a fair hearing on review and appeal."

This article introduces a discussion around the right to a fair trial in relation to the court record of proceedings, and the importance of adequate record keeping, while highlighting the importance of such records to review and appeal proceedings.

Meaning, nature and significance of the court record

'Court record' is a broad term denoting the case file, containing all the material admitted into a case by the court and that which the court produces in that regard c Namakula, 2016 who wrote an article on "*The court record and the right to a fair trial: Botswana and Uganda. AFRICAN HUMAN RIGHTS LAW JOURNAL, 175-203*".

Section 1 of the Magistrates' Courts Act 32 of 1944, defines 'to record' as: "*To take down in writing or in shorthand or to record by mechanical means, and 'recorded' has a corresponding meaning*."

A fair trial is guaranteed in proceedings that contain a court record that fairly and accurately represents the proceedings and findings. The record is what accords juridical value to what would otherwise be ordinary information. It also initiates judicial processes such as appeal and review, which are significant to trial fairness (Namakula, 2016). An appeal, particularly, is decided on record only - *S v Magalefe* CLHFT-000 0333/2008 [2008] BWHC 280.

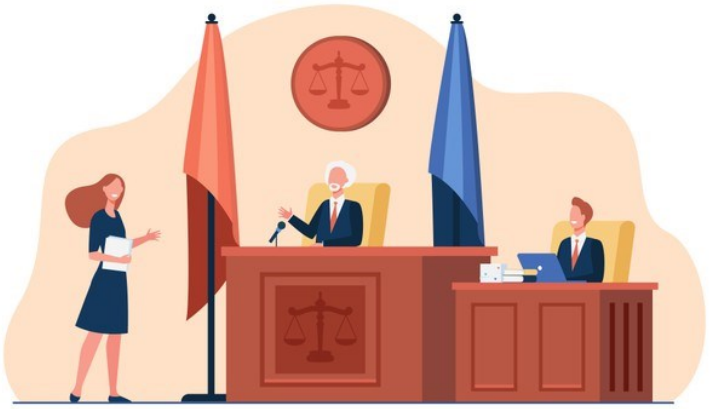
Effect of the court record on the right to fair trial

The significance of the record to the integrity of the judicial process makes the capacity of courts to facilitate the record a core component of court competence. An incomplete and inadequate record may jeopardise a case. The court in *S v Woelf and Another supra* remitted the record to the Magistrate to begin with the procedure of reconstruction of the record. This exercise delays justice as the court could not proceed with review process.

A court record should be made in light of its objective and purpose as a full representation of the proceedings in a case. A record that gives a different rendition of the proceedings may be misleading during a trial. The contribution of the court record to the realisation of the right to a fair trial is assessed on the basis of the impact that the record has on the fulfilment of the minimum guarantees (Namakula, 2016).

In *S v Woelf and Another supra* the mechanically recorded record was incomplete and there was also a hand written record which was complete. The intention of the Magistrate was to proceed with the proceedings being mechanically recorded. The question was whether the record is adequate for purpose of review as it stands. The court held that the fact that the DCRS Data Content Records? did not completely record the proceedings does not necessarily mean that the handwritten record should then automatically be regarded as the official record.

In the case of *Ojaka Yeko and 2 others v Onono Phillips* Civil App 36/2007 [2008] UGHC 111, the record of proceedings did not state whether the evidence of the parties and witnesses had been taken under oath. The court made a finding that this negate the quality of the evidence. The record is everything to a judicial process; it is a means of justice.



Conclusion

In conclusion, this article has to a large extent produced a discourse centred around the argument of what in essence constitutes a fair trial in correlation to the court record of proceedings. It has placed great emphasis not only on the importance of adequate record keeping, but also narrowed down the spectrum through highlighting the importance of such records to review and appeal. This article has evaluated the meaning, nature and significance of the court record by which allowing for the inspection and understanding of the way in which proceeding outcomes of the record are intertwined to that of the procedures implemented by officials in aim of achieving a fair trial.

The competency of a court that cannot accurately record its proceedings and preserve the record to guarantee a fair trial is questionable.

TRAVERSING THE RULES REGULATING THE PROCEEDINGS OF THE MAGISTRATES COURTS OF SOUTH AFRICA

Ms Jinx Bhoola

Snr Magistrate, Judicial Educator

The purpose of these amendments are to ensure uniformity of the Magistrates Court rules of Court with the High Court rules in South Africa. This is welcomed not only for the Judiciary but the entire legal fraternity. Bearing in mind that the Magistrates Courts are creatures of Statutes however, there are ever slight differences between both the Magistrates Court Rules and the High Court Rules due to the inherent jurisdiction that is possessed by the High Courts.

I will traverse these Rules to create awareness of these rules so that Magistrates can apply them efficiently and effectively.

Rule 16 previously allowed for the request of further particulars in preparation for trial 20 days after the **close of pleadings**. Such request may now be made 20 days after the **discovery** of documents.

Rule 22 has introduced the concept of Judicial Case Management into the Magistrates Court. Trial dates may only be allocated once a **Magistrate has certified the matter to be trial ready.**

Rule 22A is a new concept to the Magistrates courts. This rule necessitates a meeting to be held between the parties in preparation for the pre- trial conference. The purpose of this meeting between the parties is for them to prepare for the pre- trial conference. These meetings may be held telephonically or electronically. The parties may, by agreement between themselves, amend the hearing of pre- trial conference meeting on condition the meeting is held not later than 10 days prior to the date of hearing. The parties must address the issues in the meeting as provided for in rule 22A (3) and (5). This meeting is concluded with a signed minute between the parties, which shall be filed with the Clerk of the Court five days prior to the hearing of the pre- trial conference.

Important amendments to Rule 23 include amongst other things, the inclusion of short-term insurer of the vehicle or employer of the driver of the vehicle, in claims involving the Road Accident Fund Act, 56 of 1996 in sub- rule 23(5). Additionally, Rule 23 (14) provides that discovery shall also apply to applications, in so far as the Court may direct.

Rule 24 regulates the costs relating to expert witnesses. Rule 24 (2)(ii) provides that it is mandatory that the cost order for expert witnesses shall be costs in the cause, unless the court directs otherwise. Rule 24(9A) provides that the parties **must try to agree** to appoint a single joint expert on any one or more of the issues and file a joint report within 20 days of the date of the last filing of such expert reports.

Rule 25 previously only dealt with pre- trial minutes. This has now been amended to include Judicial Case management. The rationale behind this amendment is to create a Judicial Case management through Judicial intervention and to create a similar process to the Uniform Rule 37.

The purpose is to alleviate congested rolls and address the problems which causes delays in finalisation of cases. One must be mindful in such instances to ensure the compliance with section 54 of the Magistrates Court Act. The Uniform Rule due to its inherent nature, does not have a similar provision to section 54 of the Magistrates Court Act. The idea of such intervention, is to ensure legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.

Rule 29(16) is a new amendment and provides a new concept in the Magistrates Court. The general rule is that witnesses at the trial of any action shall be examined *viva voce*. This rule empowers the court with a judicial discretion to allow evidence to be adduced at any trial by way of affidavit or for the affidavit of any witness to be read into the record at the hearing, on such terms and conditions as to it may seem fit. This provision is however dependent on the proviso that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit.

Rule 31 regulates adjournments and postponements. Sub- rule 31(1) provides that the trial of an action or the hearing of an application or matter may be adjourned or postponed **by consent of the parties or by the court, either on application or request or of its own motion**. If the parties have reached an agreement to postpone the proceedings, the plaintiff or applicant shall file a notice of the parties' agreement to postpone with the clerk of the court at least 15 days prior to the date of hearing. The clerk of the court must immediately inform the judicial officer accordingly, to enable other cases to be scheduled on the roll.

Rule 31(2) distinguishes between adjournments made *sine die* and when postponements are struck from the roll. If a matter is postponed *sine die*, any party seeking to reinstate the action, application or matter shall file a notice of request for reinstatement. Where an action, application or a matter has been struck off the roll due to the non-appearance of both the parties on the date of trial or hearing, the request for reinstatement of the matter must be accompanied by an affidavit setting out the reasons for the non-appearance and then only matter will be considered for reinstatement of the matter.

Rule 32 has been amended to include Rule 32(4) which provides for striking of a matter off the roll. The rule provides, if both parties do not appear at the time allocated for the trial of an action or the hearing of an application, the action or application shall be **struck off the roll.**

Rule 55 has been amended to provide for the notice of opposition to be filed not less than ten (10) days as opposed to five (5) days.

Navigating the Criminal and Related Matters Amendment Act 12 of 2021

Ms. C Singh

District Magistrate

A number of radical changes are set to come into play when the Criminal Matters and Related Matters Act 12 of 2021 (the "Act") comes into operation.

The Act overhauls the appointment of intermediaries, while simultaneously carving out more room for their use in proceedings involving vulnerable persons; it expands the category of persons who are protected in bail hearings; it creates new grounds for the cancellation of bail; it introduces virtual hearings for witnesses; and it widens the net of scheduled offences in accordance with the new amendments.

At the outset it is plain to see that the amendments to the Act are designed to combat the scourge of violence, particularly gender-based violence, and this protection has been infused in different, but overlapping sections of the bail legislation. Section 60(5) in particular has undergone extensive renovation, and the new insertions direct the courts to give due consideration to violence perpetuated, or likely to occur against victims of domestic violence. Notably, in cases where the complainant in a criminal matter also bears a protection order against the accused, the accused is now compelled to disclose its existence at the bail hearing [1]

This article is limited to a discussion of an overview of the amendments materially connected to a bail hearing and the cancellation of bail.

The Domestic Violence Act and section 60(11)(c) of the Amendment Act

The Act seeks to protect the victims of domestic violence, or those involved in a "domestic relationship"[2] as defined in section 1 of the Domestic Violence Act 116 of 1998 ("DV Act") in two distinct ways: Firstly, by importing the definition of "domestic violence" from the DV Act into section 59(1)(a)(ii) of the Act, both the police and the Director of Public Prosecutions ("DPP") are prohibited from granting bail to an accused who falls into this category. Secondly, the insertion of section 59(1)(a)(iii) of the Act prevents the police or the DPP from granting bail to any person who is alleged to have contravened section 17(1)(a) of the DV Act, or section 12(1)(a) of the Protection from harassment Act, 2011 ('Harassment Act').

In its place, the legislature has grafted section 60(11)(c) into the Act. Bail hearings involving the accused as a person contemplated in section 1 of the DV Act, or an accused who has contravened a protection order now fall within the sole purview of the Court.

The insertion of section 60(11)(c) falls below the usual schedule 5 or 6 bail application and it saddles an accused with the onus of proving his or her release is in the interests of justice.

Subsequent to the release of the accused by the Court, and much like section 41 of the Maintenance Act 98 of 1999, section 60 (12) of the Act compels the *same* Court, in circumstances where an offence was allegedly committed by the accused against any person in a domestic relationship, as defined in section 1 of the DV Act, to hold an enquiry under section 6 of the DV Act, and to issue the complainant with a protection order in appropriate cases.

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1. Section 60(11B)(a)(ii) of the *Criminal Law and Related Matters Amendment Act* 12 of 2022.
2. "Complainant" is defined in section 1 of the *Domestic Violence Act* 116 of 1998 as "any person who is or has been in a domestic relationship with a respondent and who is or has been subjected or allegedly subjected to an act of domestic violence, including any child in the care of the complainant."

Protecting the safety of the person against whom the offence was committed

The Act now makes it compulsory for the State to solicit the views of the person against whom the offence was committed, (*viz.* the complainant) with regard to his or her safety.[3]

Even in cases where the prosecution does not oppose bail, the aspect of safety has been elevated to an express consideration under section 60(10). Thus, in weighing up the personal circumstances of an accused as against the interests of justice, the presiding officer is duty-bound to factor the safety of the complainant into the analysis.

Endangering the safety of the complainant: Section 60(5) of the Act

Section 60(5) (as read with section 60(4)) has been overhauled by substitutions and inclusions. Its design is clearly victim centric made plain by its wording. The words "or any particular person" have been deleted from section 60(4)(a) as well as section 60(5) and replaced with the phrase, "A person against whom the offence in question was allegedly committed against or any other person."

Section 60(5) then broadens the scope of the analysis enumerated in section 60(4)(a) on this phrase, and commands the court to consider the accused's disposition to commit an offence referred to in section 17(1)(a) of the DV Act, or section 18(1)(a) of the Harassment Act, or any other valid court order issued to protect the person against whom the offence has been committed.[4]

Naturally, where there is evidence that the accused has previously committed an offence in terms of a court order in favour of the protection of the complainant, including a protection or harassment order, this forms part of the overall consideration under the newly formed section 60(5)(g)(iii) of the Act.

Disclosure

In addition to the usual disclosures regarding previous convictions and pending matters, the addition of section 60(11B)(a)(iii) now makes it compulsory for an accused to disclose the existence of a protection order granted against him or her under section 5 or 6 of the DV Act, or section 3 or 9 of the Protection from Harassment Act 17 of 2011, if the complainant in the criminal matter is one and the same applicant in possession of a protection order against the accused.

S60(11B)(a)(iv) further demands disclosure by the accused of any present correctional supervision or parole.

It is submitted that good practice would dictate that these disclosures be made at the first appearance of the accused.

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4. Section 60(2A)(b) of the Act.

5. Sections 60(5)(e)(ii)(aa), (bb), and (cc) of the Act.

Cancellation of bail

The grounds upon which the accused's bail can now be cancelled have been substantially broadened.

Firstly, the protection of the person against whom the offence was allegedly committed resurfaces under section 68(1)(d) and section 68(2)(a)(iv) as a ground for cancellation. In effect, these grounds are both the corollary and act as the buttress of sections 60(4)(a) and section 60(5) of the Act..

Secondly, the contravention of any conditions of a protection or harassment order as enumerated in section 7 of the DV Act or section 10(1) or (2) of the Harassment Act respectively, or any other order granted to protect a person against whom the offence is committed is now a recognized ground of cancellation.[5]

In addition, non-disclosure by the accused of the issuance of a protection order granted in terms of section 5 or 6 of the DV Act, or section 9 or 3 of the Harassment Act, or any other order granted by the Court to protect the person against whom the offence was committed forms a new ground for bail to be cancelled under sections 68(1)(eA) and section 68(2)(f) of the Act.

Lastly, the non-disclosure of correctional supervision or parole is a ground upon which bail may be cancelled. [6]

Conclusion

The amendments made to the Act herald a new era for the bail hearing. From what can be seen by the amendments it is clear that the intention of the legislature is to strengthen the protection afforded to victims, especially those who are in a domestic relationship as in terms of the DV Act.

Thus, removing the decision to grant bail from both the police as well as the DPP, and placing it directly into the hands of the court signals the weight resting upon the judiciary to deliver justice. For the courts, presiding officers will consciously deliberate the hearing of these matters under the newly formed section 60(11)(c). Presiding officers will take care to expressly consider the victim's safety, especially where a protection order already exists *vis-à-vis* the accused and the complainant, or where no order exists – to hold an enquiry under the ambit of the DV Act, with a view to granting such protection.

As Magistrates' Courts are *sui generis*, it remains to be seen how the practicalities associated with the amendments, such as disclosures, and if the accused fits the elements of a section 60 (11)(c) bail hearing, as well as the prompt solicitation of the complainant's views will be carried out.

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5. Sections 68(1)(cA)(i), (ii) and (iii) and sections 68(2)(d)(i), (ii) and (iii) of the Act.

6. Sections 68(1)(eB) and 68(2)(e) of the Act.

Thus, removing the decision to grant bail from both the police as well as the DPP, and placing it directly into the hands of the court signals the weight resting upon the judiciary to deliver justice. For the courts, presiding officers will consciously deliberate the hearing of these matters under the newly formed section 60(11)(c). Presiding officers will take care to expressly consider the victim's safety, especially where a protection order already exists *vis-à-vis* the accused and the complainant, or where no order exists – to hold an enquiry under the ambit of the DV Act, with a view to granting such protection.

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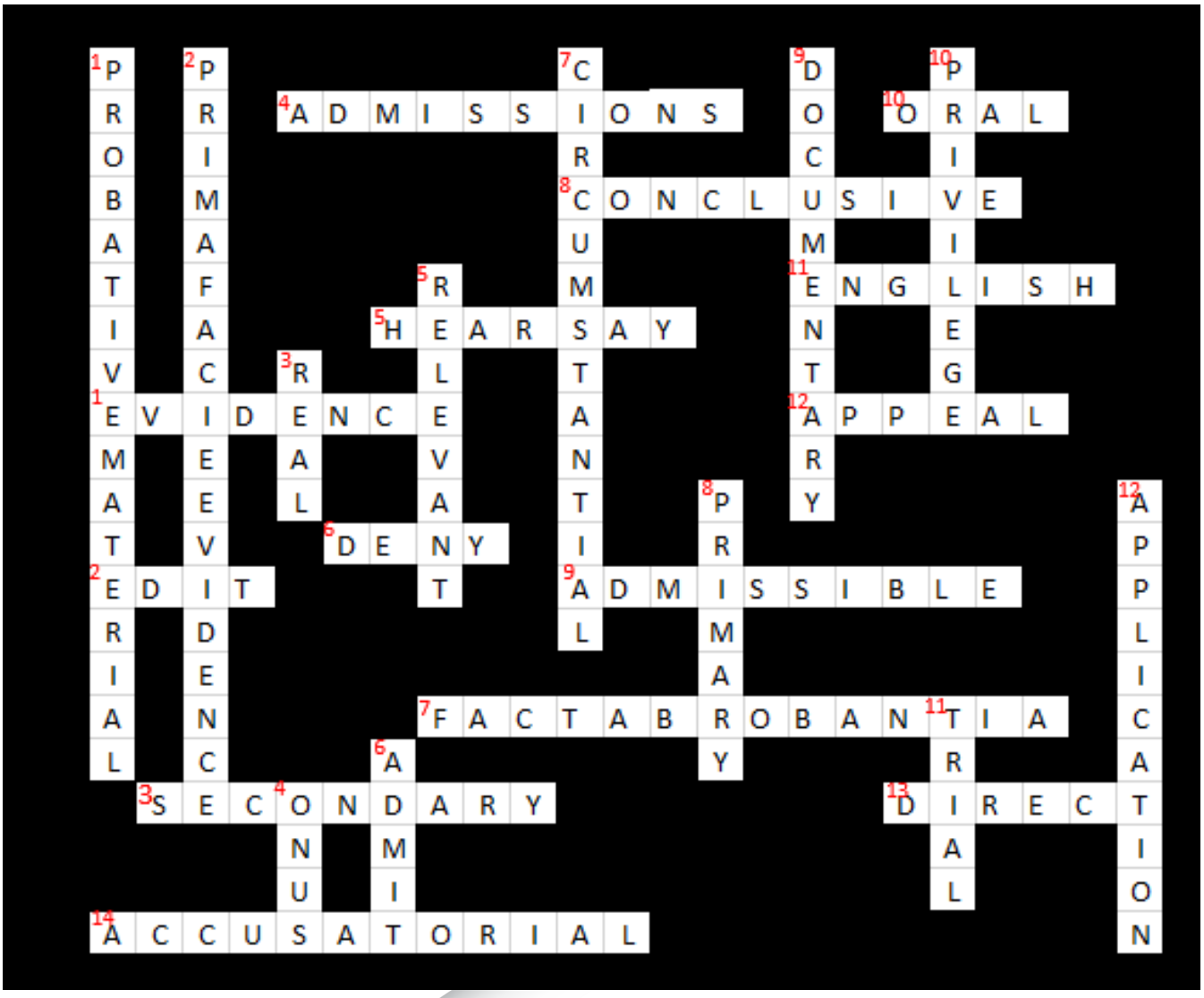
5. Sections 68(1)(cA)(i), (ii) and (iii) and sections 68(2)(d)(i), (ii) and (iii) of the Act.

6. Sections 68(1)(eB) and 68(2)(e) of the Act.

Crossword Puzzle Answers



Upcoming Workshop

DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
1 – 2 June 2022	DCM25: Pilot Training on Wildlife Crimes	ALL (Centralised)
2 – 3 June 2022	DCM26: Inquests	KwaZulu-Natal (Pietermaritzburg cluster)
6 – 10 June 2022	DCM27: National Credit Act	Mpumalanga
6 – 10 June 2022	DCM28: Children in Need of Care and Protection	Western Cape (Clusters A & B)
6 – 9 June 2022	DCM29: Gender-based Violence	KwaZulu-Natall (Pietermaritzburg cluster)
13 – 15 June 2022	DCM30: Gender-based Violence	Eastern Cape (Region 1)
13 – 15 June 2022	DCM31: Extraditions and Mutual Legal Assistance	Gauteng
20 – 24 June 2022	DCM32: Enforcement of Maintenance Orders	Mpumalanga
20 – 24 June 2022	DCM33: Administrative Law – PAIA and POPIA	KwaZulu-Natal (Pietermaritzburg)
27 – 30 June 2022	DCM34: Children in Need of Care and Protection	Western Cape (Clusters A & B)
27 – 30 June 2022	DCM35: Children in Need of Care and Protection	Limpopo

Upcoming Workshop

DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
4 – 8 July 2022	DCM36: Evictions	Western Cape (Clusters A & B)
4 – 8 July 2022	DCM37: Evidence	KwaZulu-Natal (Pietermaritzburg cluster)
4 – 8 July 2022	DCM38: Administrative Law – PAJA, PAIA and POPIA	ALL (Centralised)
11 – 14 July 2022	DCM39: Sentencing and Ancillary Orders	Free State (Clusters A & B)
11 – 15 July 2022	DCM40 Domestic Violence and Gender-based Violence	KwaZulu-Natal (Pietermaritzburg)
11 – 15 July 2022	DCM41: PEPUDA	Gauteng
12 – 14 July 2022	DCM42: Application Procedures	KwaZulu-Natal (Durban cluster)
13 – 15 July 2022	DCM43: Basic and Advanced Computer Literacy Skills	Eastern Cape (Region 1) and KwaZulu-Natal (Pietermaritzburg and Durban Clusters)
18 – 19 July 2022	DCM44: Application Procedures	North West
18 – 22 July 2022	DCM45: PATSAA and the Older Persons Act	Gauteng
18 – 22 July 2022	DCM46: Interlocutory Applications	Western Cape (Clusters A & B)

Upcoming Workshop

DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
19 – 21 July 2022	DCM47: Pleas	KwaZulu-Natal (Pietermaritzburg cluster)
20 – 22 July 2022	DCM48: Execution Proceedings	Mpumalanga
22 July 2022	DCM49: Unreasonable Delays in Criminal Trials	KwaZulu-Natal (Pietermaritzburg)
25 – 29 July 2022	DCM50: Record-keeping	KwaZulu-Natal (Pietermaritzburg)
25 – 29 July 2022	DCM51: Child Justice Act	Northern Cape
1 – 4 August 2022	DCM52: Gender-based Violence and Femicide	Northern Cape
1 – 4 August 2022	DCM53: Trial Proceedings	Gauteng
1 – 5 August 2022 10 – 12 August 2022	DCM54: PEPUDA	Mpumalanga
2 – 5 August 2022	DCM55: National Credit Act, Debt Collection, and Debt Reviews	KwaZulu-Natal (Pietermaritzburg)
10 – 12 August	DCM56: Insolvency	KwaZulu-Natal (Pietermaritzburg cluster)
15 – 19 August 2022	DCM57: Rule 12 Default Judgments	Gauteng

Upcoming Workshop

DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
15 – 19 August 2022	DCM58: National Adoptions	Gauteng
15 – 19 August 2022	DCM59: Extradition and Immigration	Western Cape (Clusters A & B)
15 – 19 August 2022	DCM60: Protection from Harassment Act	KwaZulu-Natal (Pietermaritzburg clusters)
22 – 25 August 2022	DCM61: Proper Record keeping	Free State (Clusters A&B)
22 – 26 August 2022	DCM62: Debt Review and Debt Collection	KwaZulu-Natal (Durban cluster)
22 – 26 August 2022 and 29 August 2022	DCM63: Domestic Violence and Gender-based Violence	Eastern Cape (Region 2)
23 – 25 August 2022	DCM64: Bail	Mpumalanga
23 – 25 August 2022	DCM65: Unreasonable Delays in Criminal Trials	Western Cape (Clusters A & B)
22 – 25 August 2022	DCM66: Confessions and Admissions	Limpopo
30 – 31 August 2022	DCM67: Extradition	KwaZulu-Natal (Pietermaritzburg cluster)
5 – 9 September 2022	DCM68: Debt Review, Debt Intervention and Debt Collection	Western Cape (Clusters A & B)

Upcoming Workshop

DATE	WORKSHOP	PROVINCE
DISTRICT COURT MAGISTRATES		
7 – 9 September 2022	DCM69: Environmental Law	Eastern Cape (Region 1)
12 – 16 September 2022	DCM70: Evictions	KwaZulu-Natal (Pietermaritzburg cluster)
12 – 16 September 2022	DCM71: Child Justice Court	Gauteng
12 – 16 September 2022	DCM72: Applications	Mpumalanga
19 – 21 September 2022	DCM73 Electronic Evidence	KwaZulu-Natal (Pietermaritzburg cluster)
19 – 23 September 2022	DCM74: Evictions	Limpopo
22 – 23 September 2022	DCM75: Sections 77, 78, and 79 of the Criminal Procedure Act	KwaZulu-Natal (Pietermaritzburg)
26 – 28 September 2022	DCM76 Immigration	Mpumalanga
26 – 30 September 2022	DCM77 Maintenance	KwaZulu-Natal (Pietermaritzburg cluster)
26 – 30 September 2022	DCM78: Administrative Law – PAJA, PAIA and POPIA	Eastern Cape (Region 2)

10 YEARS
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