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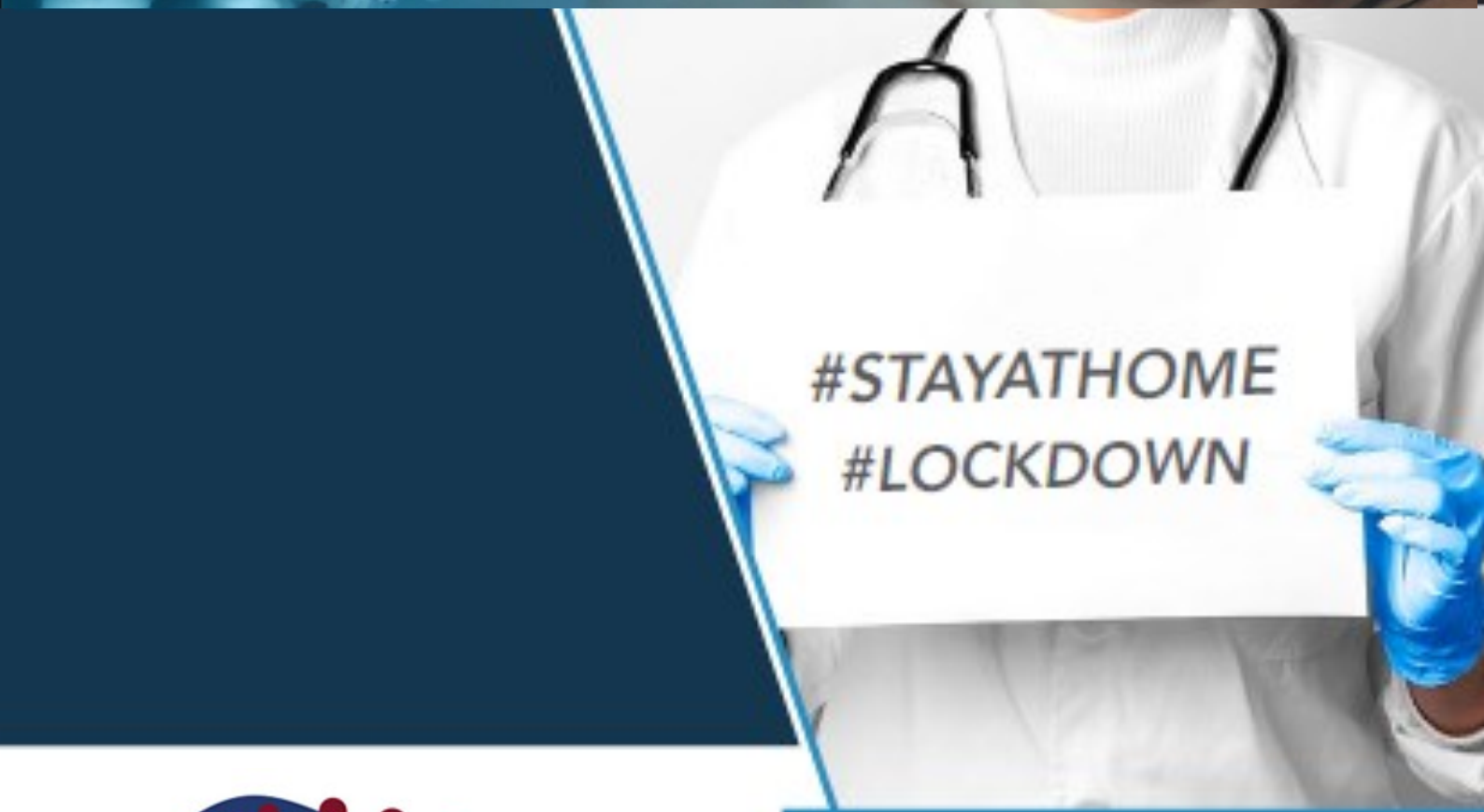
Judicial Education Newsletter Special Edition



SAJEI
South African Judicial Education Institute

Enhancing Judicial Excellence

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FROM THE DESK OF THE CEO

Dr Gomolemo Moshoeu
CEO of SAJEI

The COVID-19 pandemic has instilled a variety of negative emotions in us like fear, anxiety, anger and uncertainty. This pandemic has changed how we relate and how we work. Although it has indeed rattled us, it has not affected SAJEI's commitment to judicial excellence hence this special edition on COVID-19 pandemic as well as the introduction of virtual judicial training.

In order to ensure that judicial education continues unabated during COVID-19, SAJEI has introduced virtual judicial training through the use of the Microsoft Teams platform. There are seven virtual seminars for Judges scheduled to take place during court recess in July 2020. To date, three virtual judicial training sessions for Regional Magistrates have been conducted including one for the aspiring Regional Magistrates.

There are also plans to implement virtual judicial training for the District Magistrates in due course. You are encouraged to familiarise yourselves with the use of Microsoft Teams and please feel free to contact SAJEI for the step-by-step guide.

SAJEI is very grateful for the contributions from the esteemed members of the Judiciary. This special edition would not have been possible without the unwavering support of the Editorial Committee and SAJEI team. We hope that the readers will be inspired to contribute to the next issues of the Newsletter.

Despite all the current challenges emanating from COVID-19 pandemic, do know that this too shall pass. COVID-19 is neither the first pandemic nor the last one. Please remember to wash your hands, wear masks, practice social distancing and live a healthy lifestyle.

FROM THE DESK OF THE EDITOR-IN-CHIEF

Mr. T.V. Ratshibvumo
Editor-In-Chief

A dark cloud hovers over the world and at daybreak, hundreds of thousands of the world population have succumbed to a tiny yet lethal virus that has visited our planet. As to how long these unwelcomed visitors would roam the earth before they are eradicated is anybody's guess. They however seem determined to eradicate human population from the face of the earth. So many of those losing the battle are the soldiers upon whom the population pinned its hope of a vaccination being found. This is war between mankind and the invisible enemy called Covid-19.

Over 100 000 have tested positive of this virus in South Africa and over a million worldwide. Each time we hear a beep on the phone, it is a message about a loved one who also succumbed to this virus. As if the pain of losing our friends, colleagues and relatives is not enough, this virus also denies us the opportunity to say our last goodbyes through a dignified send-off, where we all gather and mourn while we comfort each other.

If lucky, we can only attend funerals virtually from the comfort of our homes, far away from the graves. To say this is painful, it's an understatement.

With crime spiralling out of control, criminals taking advantage of the situation, the wheels of justice cannot stop grinding. Equally so when members of the public feel the regulations passed under the declaration of the state of disaster as defined in Disaster Management Act of 2002, limit their constitutional rights.

The courts continue to be the beacon of hope and the sword of justice even as we drive through this dark tunnel. Unfortunately, in doing so, as members of the Lower Court judiciary, we often find ourselves exposed to the risk of infection by this virus. So many of our colleagues have tested positive of Covid-19. A good number of us have recovered already, or we are in the process of recovery. There are however those such as **Magistrates Nkululeko Nogcantsi of Uitenhage in EC and Mumsy Boikhutso of Pietermaritzburg in KZN** who unfortunately could not make it. They died on duty while dispensing essential services to the people. We dedicate this edition to their memory.

So much attention was focused on prevention from infection and very little was given on what to do in case of infection. Let it be known to you fellow colleagues that there is hope even after testing positive of Corona virus. From the health authorities, we understand that 82% of Covid-19 cases are mild flu and only about 6% would need intensive care. In South Africa, the mortality rate is at 2% (see https://sacoronavirus.co.za). There is therefore a need for us to plan in advance and arrange rooms that could be used for self-isolation should we or any of our family members test positive.

We need to make plans on how isolated members could still feel being part of the family without any contact lest the consequences of the stress caused by isolation would negate all the positives sought. We need not forget that boosting our immune system is the best treatment as we await the vaccine.

This too, shall pass. I still pray that when we meet on the other side of the storm and the lockdown is finally over, those of us in the Lower Court Judiciary so far spared will all be accounted for. May God guide our leaders and protect us all!

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.

RECENT CASES OF INTEREST TO JUDICIAL OFFICERS

Mr TV Ratshibvumo
Regional Magistrate

I.

CM v EM *(*Case no. 1086/2018, Date: 05 May 2020, Supreme Court of Appeal).

Divorce Law: Husband and wife were married out of community of property with accrual in 1999. The husband used his pension from the employment to purchase living annuities. He then instituted divorce in which he claimed spousal maintenance from the wife and a declaratory order to the effect that the living annuities, which provide his monthly source of income, were not assets in his estate and were consequently not subject to the applicant's accrual claim. The wife lodged a counterclaim seeking an order against the husband for the payment 'of an amount equal to half of the difference in the accrual of the respective estates of the parties.

The High Court had granted a declaratory order sought by the husband. Relying on the earlier decision by the SCA (see ***ST v CT*** Case no. 1224/16 of 30 May 2018) the full court dismissed the appeal by the wife. On special leave to appeal, the SCA revisited its earlier decision and held that living annuity income can and should be quantified to be calculated as party's estate for accrual calculation. The case was remitted back to the trial court for calculation of this value and divide according to accrual system.

II

AM v HM (Case no. CCT 95/19 [2020] ZACC 9 Constitutional Court (26 May 2020).

Divorce Law: Parties were married out of community of property. Shortly before they launched divorce proceedings, they signed an agreement that provided for the division of the assets equally and for maintenance of the wife by the husband.

When the divorce proceedings were instituted in the Regional Court a few months thereafter, the wife produced the agreement and requested the court to make it an order of court incorporated into a divorce decree. The agreement was disputed by the husband who claimed to have signed it under duress. The Regional Court rejected the agreement in that it changes the matrimonial regime without going through the prescribed procedure in which courts would allow and authorise the change of matrimonial regime. The RC also held that settlement agreements can only be entered into when divorce is pending or being contemplated, which was not the case *in casu*. Although this position was reversed by the HC on appeal by the wife, on further appeal by the husband, the SCA agreed with the RC approach and reversed the HC decision. The CC confirmed the approach by the RC and dismissed the appeal against the SCA findings.

III.

Monyepao v Ledwaba (1368/18) [2020] ZAS-CA 54 (27 May 2020).

Recognition of Customary Marriages Act. The appellant and the respondent were married customarily to the deceased, one after another. The deceased first paid lobola for Ledwaba and a few years later, he did the same for Monyepao. At the time of his death, the deceased was staying with Monyeopao, the second wife. At that stage, Ledwaba, had moved on and had married another man civilly. Her marriage to the deceased was however not annulled by divorce. In recognising the two women as the existing wives to the deceased, the Master appointed them as co-executors of the deceased's estate. Displeased by this, Monyepao approached the HC with application for the removal of Ledwaba as executor. She also applied for Ledwaba's claim in the deceased's estate to be declared forfeited. The HC in Limpopo granted this application. This was however reversed by the full court on appeal by Ledwaba. On further appeal by Monyepao, the SCA agreed with the full court and dismissed the appeal. Relying on *Netshituka v Netshituka and Others* 2011 (5) SA 453 (SCA) para 15 the SCA held that the first wife remains married unless divorced and any later marriage by her would be invalid.

She could also not forfeit her matrimonial share except through a divorce, and further that forfeiture can only be claimed by a spouse and only during a divorce. Ledwaba's status as co-executor was thus reinstated.

IV.

DA v President of the Republic of South Africa & Others (Case no. 21424/2020), Gauteng Pretoria (19 June 2020).

Following a declaration of the state of disaster in South Africa, the governments introduced various economic initiatives meant to help South Africans to deal with the negative financial impact of the lockdown. Amongst these were the Debt Finance Scheme and the Business Growth Resilience Fund introduced by the Minister of Small Business Development to help SMME's. The DA brought an application before the full court for the Minister to be interdicted from using B-BBEE status, race, gender, ability or disability as criteria for determining which persons or entities will receive funds under the Debt Finance Scheme and the Business Growth Resilience Fund.

It also applied that the decision(s) to use B-BEE status, race, gender, ability or disability as a criteria for determining which persons or entities will receive these funds be reviewed, set aside and declared unlawful. The Minister denied in court papers and many public statements that race would be a consideration for the SMME's to qualify and access these funds.

In what can be described as a success in loss for the applicant, the Minister's decision was reviewed and set aside. The court held that "the geography of our cities remain racially divided, sadly after a more than a quarter of a century of democracy on broadly the same racial lines as was the case before democracy dawned; in turn this has had profound consequences for social distancing, access to clean water and sanitation and the consequences for small businesses in our townships." In dismissing the application by the DA, the court held therefore that in the reformulation of criteria to be employed in the distribution of funds under either the Debt Finance Scheme or the Business Growth Resilience Fund, the Minister must take into account race, gender, youth and disability.

COVID-19: REGULATING PERMITS, AND URGENCY THROUGH THE CASE LAW

Ms. C. Singh
District Magistrate

On 27th March 2020, the day on which the lockdown took effect, Moody's rating agency downgraded the Republic to junk status. Between May and June 2020, a gradual lifting of the economy commenced. Government partially uplifted the ban on alcohol sales but continued the restriction on the sale of cigarettes. Enforcement during the lockdown brought about a number of interesting cases amongst which, a bridal couple were arrested for contravening the regulations relating to public gatherings.

The emergence of disaster management regulations on Covid-19 is a framework to manage the pandemic. The frequent amendment of regulations places pressure on those applying for exception before the courts to demonstrate, on a case by case analysis, that they are an exception to the limitations placed on their rights under s36 of the Constitution. Such pressure has been exhibited in recent judgments and the further amendments to regulations.

Since the judgment delivered in *Ex parte Van Heerden* (1079/2020[2020] ZAMPMBHC 5 (27 March 2020), regulations have been amended to include the relaxation of travel restrictions. For example, insofar as funerals are concerned, initially the regulations prescribed a 48 hour validity period of the permit, but this requirement was later removed. In addition, the amendments excised the category of persons "closely affiliated to the deceased," from its list.

Shortly thereafter, and seemingly in response to the decision of *CD and another vs Minister of Social Development* [2020 JOL 47084 (WCC)("CD") the restriction on the movement of children between co-holders of parental rights and responsibilities was uplifted on production of either a court order, or parental rights agreement.

Thus, case law continued to shape the regulations relating to the movement of persons in different scenarios through the creation of permits. The inclusion of forms attached to the regulations signaled a desire to standardize the paperwork on a national level, and prevent possible unintended *lacunae* by the wording of the regulations.

The initial wording of the regulations relating to the movement of children was drafted with a wide ambit of interpretation, but was quickly rectified. The "risk -adjusted strategy" regulations created a permit designed as Form 3 of Annexure A to the gazette, effectively simplifying children's law for all categories of care-givers and parents, while putting to rest the prospect of arrest for violations of travel.

The ease of lockdown restrictions into alert level four opened the gateway for commerce. The "risk adjusted strategy" regulations opened economic activity in limited industries and activities on possession of a valid permit. In the urgent application brought in *Ally and others v Polokwana Local Municipality and others* (2649/2020 ZAHCP delivered 12th May 2020) the municipality's decision to issue its own temporary permits was found to be invalid.

What is considered urgent under the uniform rules of court during the Covid-19 pandemic is still an evolving debate. In the matter of *Mabunda Inc and Others v Road Accident Fund; Diale Mogashoa Inc v Road Accident Fund (15876/2020) [2020] ZAG-PPHC 118 (30 April 2020)* the applicants failed to prove that the contractual return of their files under a service level agreement ("SLA") in existence between it and the respondents, some 159 attorneys, was urgent (but see also: *Diale Mogashoa Inc v Road Accident Fund (GP)* (unreported case no 18239/2020, 27th March 2020). Later, in the judgment of *FourieFismer Inc. and Two Others v Road Accident Fund (17518/2020) [2020] ZAGP (1 June 2020)* the threshold for urgency was met, and the Court applied s172(1)(b) of the Constitution to extend the SLAs between the attorneys and the Road Accident Fund for a further six months.

The Corona virus global pandemic has revealed the interconnectedness between nature and the fragility of society. This much can be seen from the instructions to obtain funeral permits in instances of death, and permits to bond with one's own offspring. Inadvertently, the *Disaster Management Act* and its regulations have exploited vulnerabilities amongst people, and may reframe the concept of urgency in civil matters. The covid-19 pandemic has shown that disaster law, at least in this country, is still a young discipline.

IMPOSSIBILITY OF PERFORMANCE AND COVID-19

Mr. T. Boonzaaier
Regional Magistrate

THE OUTBREAK of the severe acute respiratory syndrome coronavirus-2 was described as *"...the biggest challenge for the world since World War Two"*. The South African Government forewarned the country that the economy will inevitably be adversely influenced. The consequence thereof on contractual obligations both nationally and internationally will only become evident after the worldwide lockdown has ended.

Our law recognises the principle that where performance of the obligation by a party to a contract becomes impossible, either physically or legally, after conclusion of the contract, that party is discharged from liability if he was prevented from performing his obligation by *vis major* or *casus fortuitis*.

Vis major, or superior force, is defined as some force or power which cannot be controlled by the ordinary individual. It signifies an unforeseen, exceptional occurrence which cannot be anticipated by human foresight.

The requirements for the defence are:

- Objective impossibility;
- It must be absolute as opposed to probable;
- It must be absolute as opposed to relative; if performance can in general be done, but the party seeking to escape liability cannot personally perform, he remains liable;
- The impossibility must be unavoidable by a reasonable person;
- It must not be the fault of either party;
- The mere fact that a disaster or event was foreseeable does not necessarily mean that it ought to have been foreseeable or that it is avoidable;

Casus fortuitis, or inevitable accident, is a type of *vis major*. In *New Heriot Gold Mining Company Limited, Appellant v Union Government (Minister of Railways and Harbours), Respondent* the concept was defined as "*it includes all direct acts of nature, the violence of which could not reasonably have been foreseen or guarded against*".

The legal consequence of a successful defence is the termination of the contractual relationship.

Instances of *vis major* of occurrences of nature which could not reasonably have been foreseen would be lightning or an unprecedented flood. Acts of man that constitute *vis major* are the conduct of State or that of the military. An example of *casus fortuitis* is a serious plague.

However, our law will not in all instances allow a defence of *vis major* to succeed. In *Glencore Grain Africa (Pty) Limited v Du Plessis and Others* it was held that impossibility of performance does in general excuse the performance of a contract, but not in all cases. In *MV Snow Crystal Transnet Ltd T/A National Ports Authority v Owner of MV Snow Crystal* the Court set out the considerations to be applied as *"the nature of the contract, the relation of the parties, the circumstances of the case, and the nature of the impossibility invoked by the defendant"*. Wessels comments that "*the destruction of the object of a contract liberates the debtor only where such object is a specific thing. Even if the object of the obligation is a certain amount or number of a class or genus, the rule has no application*."

An example is where a house is sold but destroyed by fire before delivery, it is impossible to perform and therefore considered material. A change in commercial circumstances that results in performance becoming expensive or unaffordable will not be considered material. If a person cannot afford rent due to a change in his income due to an unforeseeable incident, he will not be discharged from his obligations.

The onus to prove objective impossibility rests on the party relying on that defence.

In most instances a contract will have a clause setting out which circumstances will trigger a force majeure defence. In *Airports Company of SA Limited v BP Southern Africa (Pty) Limited and Others* the court confirmed that in the event that the contracting parties made provision for force majeure in the contract, the consequences agreed upon will take preference over the common law position.

HUMBLENESS: A JUDICIAL OFFICER'S PERSPECTIVE

Mr. I.P. Du Preez
District Magistrate

"If you win say nothing, and if you lose, say even less." – Paul Brown.

28 June 2004, as I entered the small rural village of Bochum, Limpopo Province, I noticed a dilapidated building next to the road. I stopped and asked for directions to the Magistrates' Office. I was told that I drove right past it, being the dilapidated building. I drove back down the only tarred road, maneuvered my vehicle over some challenging rocks, and reached a gate.

A security guard approached me with a friendly smile. I said *'I am lost. I need to report for duty at the Bochum Magistrates' court.'* The gentleman said '*Thobela sir'*. My only response: *'Please show me where the court is'*, convinced that I was completely lost and would be late for work on my very first day. The gentleman looked at me for a few seconds, and then proceeded to open the gate, directing me to enter.

Inside the premises I noticed vehicles parked in a field right next to the dilapidated building. Exiting my vehicle I heard a commotion. Looking in the direction of the gate I noticed a few children pointing in my direction, shouting 'Lekgowa', running into a house opposite the entrance. At the time I made nothing of it.

Following some introductions, I proceeded to my allocated office. Upon entering I noticed a desk that must have dated back pre-1900's, and a chair fitting right in with the table.

Sitting down on the chair I at first thought it to be a rocking chair, only to realize that it is not. In front of me I noticed five chairs, in a fairly good condition, facing me. Since my 'rocking' chair was bigger than the other chairs, I decided to keep it for the time being.

Entering court I climbed the four steps onto the bench and noticed a beautiful leather chair. That must have made me smile as I noticed that everybody in court appeared to smile back at me. Following some formalities, I was able to start my first ever trial as a magistrate. The complainant barely commenced with her testimony when a sudden sound at the court door almost gave me a heart-attack. I immediately switched off the recording machine, at the time still controlled by the magistrate. At the door stood the biggest rooster I have ever seen, announcing his arrival. The prosecutor calmly moved two paces towards the door and ushered him out of court. Pressing the recording button to continue, I could not help but to wonder what the High Court Judge would say should the recording be transcribed for review or appeal.

Driving home that afternoon I struggled to contextualize my experience of my first day as a magistrate. There were so many things I needed to change at 'that' office, nobody could work like that. In the back of my mind there was something that I just could not put into words, a 'strange' feeling. When asked that evening how my first day was, I decided to play it safe and use a word that has a thousand meanings: '*It was "nice*".'

That night I realized what that 'something' in the back of my mind was. The next morning, arriving at court, I stopped at the gate and greeted the security guard '*Thobela, I am IP du Preez'*. (Google came in handy the night before). He looked at me, smiled and said '*Thobela sir, my name is Joseph, welcome to Bochum Magistrates' Court*.' I handed Joseph a few apples and sweets I brought from home and asked him to give the children at the house opposite the entrance.

The third day, as I maneuvered my way past the boulders in the road in order to reach the entrance, I noticed the children standing at the gate, next to Joseph. I pulled up next to them, waiting for the gate to open and saw them waving at me, having the biggest smiles I have ever seen.

The 'something' in the back of my mind, was humbleness waiting to shine. There was nothing that had to be changed at 'that' office; it was me that needed change. The position of magistrate does not make us 'better' people, it only gives us greater responsibility as we hold the key as the guardians to fairness, justice, human rights and service to the community.

A few months after arriving in Bochum my office chair was replaced with a brand new leather chair. I was sad that day because they removed my 'rocking' chair; for it had so much symbolic value. A week later I requested for it to be returned to my office. There it stood in the corner for eight years until I left Bochum. Joseph and I became well acquainted and shared many a story until he went on pension some years later. As for the children that often waited at the gate for my arrival, just in case I had some sweets or an apple …. well that is a story for another day.

Brothers and sisters, stay humble, stay safe and stay blessed.

GIVE ME MY "BILL OF RIGHTS AND GIVE ME DEATH": COVID-19 THROWS UP THE CONUNDRUM BETWEEN PROTECTING CONSTITUTIONAL RIGHTS & PUBLIC HEALTH

Ms. Z. Siwisa-Thompson
Acting District Magistrate

The COVID-19 pandemic has churned up globally a power play between the judiciary and the executive branch of government in the exercise of public power. In the case of South Africa, cognizant of the threat of the COVID-19 pandemic and the constitutional responsibility of the State to save lives; the government declared a 'national state of disaster' and by extension invoked the Disaster Management Act of 2002 (DMA). This legislation empowers the executive arm of government to respond to a public health crisis such as the COVID-19. As defined by the said Act a "disaster":

> '…is the or progressive or sudden, widespread localised, natural or human-caused occurrence which culminates in or threaten to culminate in diseases or death, disruption in the life of a community and coping with the effects using one's own resources.'

According to Section 23 (1) "when a disastrous event occurs or threatens to occur. the National Centre must, for the purpose of the proper application of this Act, determine whether the event should be regarded as a disaster in terms of this Act, and if so the National Centre must immediately- "(a) assess the magnitude and severity or potential magnitude and severity of the of disaster". The national government, led by the Minister of Cooperative Governance and Traditional Affairs (COGTA) having decided that COVID-19 threatens to be a disastrous event, in accordance to Section 27, of the DMA, the appropriate Minister, promulgated and gazetted regulations or the so-called COVID-19 regulations. The present raft of regulations are designed to act as risk mitigation measures and are inclusive of stay at home directives, and the classification of employment as rendering essential or non-essential services.

Notwithstanding the intention and threat of COVID-19, legal fault lines have been identified in relations to the Constitutional validity of such regulations either in part or their entirety by a growing number of applicants. Questions have arisen as to what authority the executive arm of the government has to essentially encroach and suspend the rights of the South African citizenry as enshrined in section 36 of the Constitution. In the recent case of: *Reyno Dawid De Beer and thers , v The Minister of Cooperative Governance and Traditional Affairs*(21542/2020) [2020] ZAGPPHC 184 (2 June 2020), the applicants applied for an order declaring that the declaration of the National State of Disaster be deemed invalid in conjunction with the promulgated COVID-19 regulations pursuant to the declaration, by the Minister with portfolio responsibility.

Judge Davis of the Gauteng Division of the High Court ruled on Tuesday 2 June, that the COVID-19 regulations did not pass the rationality test and infringe on the Bill of Rights:

> '…Insofar as the lockdown regulations do not satisfy the rationality test, their encroachment on and limitation of rights guaranteed in the Bill of Rights contained in the Constitution are not justifiable in an open democratic society based on human dignity, equality and freedom as contemplated in Section 36 of the Constitution.'

The court declared that the confinement measures imposed under levels three and four of a five-tier lockdown are "unconstitutional and invalid", notwithstanding the order was suspended for fourteen days. The implications of this judgement has serious ramifications for the exercise of public power in a time of global or national pandemic. Which quintessentially, speaks to the conundrum faced by the executive arm of governments, as to when can a State impose on individual liberties in favour of public welfare?

In summary, there's no question that this pandemic qualifies as a national state of disaster, and the executive branch of government has attempted to exercise public power not in an arbitrary manner, but towards the unbiased welfare of the general citizenry and residents within the Republic. The pandemic has demonstrated a power play in the exercising of public power, and some legal scholars are of the view that the Constitution as progressive a legal document as it is, seemingly is self-defeating in terms of how the framers of the Constitution envisioned what would constitute a national state of disaster and the nature of the administrative action that would be needed to mitigate effects of such. Others, have viewed the recent judgement as turning the Robert Jackson 1949 statement that "the Constitution is not a suicide pact" on its head. Or to re-paraphrase the American Patrick Henry's 1775 statement, "Give me Liberty or give me death" to mean "give me my bill of rights and give me death".

CHILDREN'S COURT: CASES OF ABANDONED AND OR NEGLECTED CHILDREN (FORM 36) - MARCH TO MAY

Ms. M.M. Lebese
Acting Chief Magistrate

The cases referred to herein are with reference to Soshanguve Magistrates Office, and the article was formulated during my tenure as the Head of Office at the establishment.

The outbreak of Coronavirus in the past few months has not only affected all nations globally, our country was not spared. The declaration of the National State of Disaster and the subsequent Regulations promulgated to prevent the spread of the virus were swiftly implemented, correctly so, but caught our communities unprepared for the worst.

District Courts, being the entry level Courts for the greater number of our community, started to experience unprecedented trends in the types of cases reported.

Soshanguve ordinarily has an average number of new 80 - 100 Domestic Violence (DV) cases reported per month; the number was expected to increase, with family members confined for unusually long periods in close proximity. The number of DV cases declined.

Instead, there was an increase in cases of abandoned children, for various reasons, as outlined in the attached schedule. From the period March to May 2020, the office registered eight cases of abandonment and / gross neglect of children, compared to 18 cases registered during the entire year of 2019. This brought to the surface glaringly social problems which need a concerted and joint effort to be adequately addressed.

#	DATE OF FIRST COURT APPEARANCE	AGE, GENDER & LEVEL OF STUDIES OF THE CHILD (REN)	REASON FOR PLACEMENT	RESULTS
1	24.03.2020	17 - F – Gr 12 13 - F - Gr 08 4 months – M - Infant	Children abandoned by a single, unemployed mother who displayed signs of mental illness. Her current whereabouts are unknown. Fathers are unknown. Case reported to Social Workers by neighbours. Siblings.	Children temporarily placed at FSM CYCC Social Worker to trace the mother and refer her for medical treatment.
2	25.03.2020	17 – M – Gr 12 09 – M – Gr 03	Children abandoned by foster parent due to behavioural problems. Orphans. Case reported by paternal aunt. Family members unwilling to foster them. Siblings.	Children temporarily placed at FSM CYCC.
3	09.04.2020	16 – F – Gr 10 10 – M – Gr 05 07 – M – Gr 01	Mother abandoned children two years ago, left them with their father. He also abandoned them in February 2020.Children left in the care of their 24 year old sister who has now left them to live with her boyfriend at an unknown place, taking along their SASSA social grant cards. Siblings	Children temporarily placed at FSM CYCC. Social Worker to trace their parents and elder sister, suspend social grant payments.
4	15.04.2020	15 – F – Gr 09	Child removed from an alleged prostitution ring during Police raid. She was previously abandoned by her mother who lives with her boyfriend, unwilling to live with the child.	Child temporarily placed at Desmond Tutu CYCC
5	15.04.2020	14 – F – Gr 08	Child found by Police wandering in the streets, allegedly escaped from a prostitution ring. Mother critically ill and bedridden.	Child temporarily placed at Desmond Tutu CYCC
6	16.04.2020	1 year 9 months – M	Child neglected by a single, unemployed teenage mother. Found scavenging and alone in the street, regularly unsupervised. Dirty, hungry, body covered in sores. Mother displaying signs of mental illness, living in the house of the late maternal grandmother, water and electricity disconnected by Municipality as account unpaid. No family support.	Child temporarily placed at FSM CYCC. Social Worker referred the mother for assessment and treatment. Request sent to Tshwane Municipality Social Worker to review terminated services.
7	07.05.2020	Infant born on 16.03.2020 - F	Biological mother passed away several days after birth. Alleged father is an illegal immigrant from Mozambique, denies paternity. Immediate family members unwilling to foster the child.	Child temporarily placed in the care of a distant maternal relative.
8	26.05.2020	13 – M – Gr 07	Child fled the residence shared with biological father following repeated incidents of assault. Father in police custody. Mother living with boyfriend and unwilling to live with the child.	Child temporarily placed at FSM CYCC.SW holding counselling sessions with the mother.

REVISITING THE HEARING OF DIVORCE CASES IN THE REGIONAL COURTS DURING THE COVID-19 PANDEMIC

Dr. J.D. Lekhuleni
Regional Magistrate

The impact of the Corona Virus pandemic has been felt throughout the world. Economies and markets have tumbled. This pandemic has been considered as the most global health calamity of the century and the greatest challenge that human kind ever faced since the Second World War II (UN Secretary General António Guterres at the UN, New York City, 4 February 2020). To date, there is no vaccine that has clinically been approved to prevent Covid-19 infection.

The impact of Covid-19 has been felt in various sectors. The courts were not spared. In South Africa the measures embarked on to curb the rising spread of the pandemic were severe. The Executive has *inter alia*, by way of lockdown and curfew measures taken bold steps to curb the spread. The Minister of Justice and Correctional Services issued Directions to all the courts indicating which cases the courts should prioritize. The Chief Justice also issued Directives and delegated authority to all Heads of Courts to take such action and issue such directions as may be necessary to give effect to his Directives.

The Directives issued by the various Heads of courts had one thing in common, minimizing physical contact in the courts and thus curbing the spread of the virus. The same applied to the Regional and District Courts. This prompted the courts in various seats throughout the country to use video conferencing and teleconferencing platforms in appropriate cases to hear trials and applications.

The majority of cases dealt with in the Regional Civil Courts are divorce matters. Most of them are settled before trial. In bigger centers the Divorce Courts sit daily. It becomes inherently critical that physical contact among persons in the Regional Courts be eliminated or minimized. To this end, courts use audiovisual platforms in the form of Microsoft teams, Zoom etc. which is a novelty in South Africa to engage with legal practitioners and litigants to minimize physical contact. Unlike in Criminal matters (see section 158(2) of the CPA), the Magistrates Court Act 32 of 1944 (the MCA) does not make provision for the hearing of civil matters through the audiovisual means though it is foreseen that the Judicial Matters Amendment Bill, 2018, will in future provide the legislative framework for audiovisual link in courts.

It is trite law that magistrate's courts are creatures of statute and have no jurisdiction beyond that granted by the statute creating them. They only have powers which have been conferred upon them expressly or by clear implication, either in terms of the statute creating them (the MCA) or by other statutes (see *Narodien v Andrews* 2002 (3) SA 500 (C) at 514E-F). They have no inherent jurisdiction as possessed by the High Court and they cannot protect and regulate their own processes. These courts cannot claim any power or authority which cannot be found within the four corners of the enabling statute (see Erasmus and Van Loggerenberg Jones & Buckle *The Civil Practice of the Magistrates' Courts in South Africa* 10th ed (2015, with looseleaf updates) vol 1 (The Act) at p.77 and the authorities there cited).

The Directions of the Minister of Justice and that of the Chief Justice however give authority to the courts including the Magistrate's court to use the audiovisual platforms. These Directions with respect do not supersede or substitute the constitutional powers of Parliament to legislate. While the use of these platforms is apposite during this pandemic, it is however arguable whether it is permissible in law for the Magistrates' court to use them when the MCA and the rules are silent on this. The majority of reported cases where these platforms were used were in the High Courts in terms of rule 38 and these courts exercised their inherent jurisdiction to hear those cases. Therefore the question whether these directions set a binding precedent to the magistracy in matters not covered by the MCA is a debate for another day.

What also compounds the problem is that the majority of people who appear in the Regional Civil Courts for divorce cases do not have the benefit of these facilities, namely, Zoom or Microsoft teams. The majority are indigent and destitute. I submit that in those instances, they should be spared the dangers of travelling to court. Their matters should be heard on affidavit once the pleadings are closed and their cases are ripe for hearing. In other words, in appropriate cases, especially were minor children are not involved, the court should consider granting a decree of divorce once the plaintiff has submitted an affidavit confirming that the marriage has broken down irretrievably rather than requiring the attendance of the plaintiff personally in court. It is submitted that the impact of the pandemic makes it absolutely critical in the interest of all court personnel concerned that the ordinary way of taking evidence should be departed from.

In *Ex Parte Inkley v Inkley* 1995 (3) SA 528 (C), the court found that in order to determine whether a marriage has broken down irretrievably as envisaged in section 4(1) of the Divorce Act 70 of 1979, evidence may be placed before court fully by way of an affidavit which may be accepted by the court as evidence. Not so long ago, in *E v E* (Case Number DIV56/2013) [2013] ZANWHC, Landman J, had an opportunity of considering the necessity of filing an affidavit in a divorce matter where the plaintiff was not available to testify. In this matter, there were no children born in their marriage. The parties had signed a settlement agreement in contemplation of the divorce proceedings. Unfortunately, while the matter was pending and before it could be heard, the plaintiff relocated overseas and did not intend to return to South Africa. The matter was placed before Landman J and the defendant testified as a witness for the plaintiff. After listening to the matter, the Court was satisfied with the evidence and the settlement agreement. The problem was that there was no evidence for the plaintiff on record. Landman J referred to the case of *Ex Parte Inkley v Inkley* (*supra*) in which the court found that in a divorce action public policy demands that a court should consider granting a divorce only after it has had the opportunity of hearing the evidence of at least the plaintiff in an action claiming such relief.

The learned Judge agreed that in a divorce action there must be evidence by the plaintiff however in his view, the fact that a decree of divorce is sought by means of action does not preclude a plaintiff from presenting evidence by means of an affidavit, subject of course to the court hearing the matter, requiring other evidence.

To this end, he referred to the High Court in South Gauteng where it is common practice for the court to grant divorce orders with evidence is presented by way of affidavit. The Court ordered that the plaintiff should file an affidavit before a decree of divorce could be granted. The matter was accordingly removed from the roll.

From the two cases discussed above, it is very clear that a decree of divorce in the High Court can be granted on evidence presented by means of an affidavit if the court is satisfied that the marriage has broken down irretrievably. Rule 38(2) of the Uniform Rules of Court allows a High Court "*for sufficient reason*" to dispense with the hearing of *viva voce* evidence during a civil trial and direct that evidence be tendered by way of an affidavit. Unfortunately, we do not have such or a similar provision in the Magistrates Court rules. There is no rule that empowers the Magistrates Court for sufficient reason to allow the use of an affidavit instead of *viva voce* evidence in a trial action except in default judgment applications based on unliquidated claims. Taking into account the impact of Covid-19 and the measures taken to curb the spread of the virus, the question is, will it be permissible in law for the Regional Courts to dispense with the receiving of *viva voce* evidence and direct that the evidence in settled divorce trials be presented on affidavit? In my view, the answer is "yes".

Rule 1(3) of the Magistrates Court Rule provides that "In order to promote access to the courts or when it is in the interest of justice to do so, a court may, at a conference convened in terms of section 54(1) of the Act, dispense with any provision of these rules and give directions as to the procedure to be followed by the parties so as to dispose of the action in the most expeditious and least costly manner [emphasis added]."

Section 54(1) of the Magistrates Court Act allows a court at any stage in any legal proceedings in its discretion to direct the parties or their representatives to appear before it for a conference to consider such other matters in order to dispose of the action in the most expeditious and least costly manner. It is abundantly clear from these provisions that the court can dispense with the rules and issue directions on how to deal with a matter before it in the most expeditious and least costly manner. In my view, in opposed divorce matters which have become settled, the court can dispense with the giving of *viva voce* evidence at a pretrial conference and direct that the matter be heard on affidavit especially where there are no minor children. It is submitted that this will go a long way in helping indigent litigants and in limiting the number of people appearing in our courts. This will effectively curb the spread of the virus. It is further submitted that the Rules Board for Courts of Law should consider incorporating the provisions of the High Court Rule 38(2) in the Magistrates court rules as this will undoubtedly advance the constitutional right of access to the courts for all South Africans.

THE NEW ERA OF TECHNOLOGY AND COVID-19

As the world fights the novel COVID-19 pandemic, various measures and restrictions have been implemented affecting our daily lives socially and economically worldwide. The South African government placed the country on a lockdown, restricting access to public areas, malls, courts and public gatherings. On the 1st of May 2020 the government employed a risk based strategy, gradually allowing the recovery of certain sectors based on a risk assessment. The disruption of the COVID-19 pandemic in economic activities and learning environments has accelerated the use of remote working and learning i.e (Video Conferencing tools, Document sharing, Online learning, Web conference tools). Technology has taken center stage, as a work around for face-to-face economical interaction and training delivery methods.

The Office of the Chief Justice has piloted a cloud-based digital case and evidence management solution "CaseLines" for High Courts in South Africa. The electronic online system allows for Law Practitioners to file documents to Courts electronically and provide case management processing rapidly. The system provides Litigants with insight of upcoming Court dates and documents filed or served by the Court. It provides Litigants with the opportunity to prepare for cases online before Court date; collaborate seamlessly with state entities involved in the case; and gives the ability for Counsel to provide evidence fluently to the Court.

Aligned to the objective of the South African Judicial Education Institute (SAJEI) "*to establish a national education and training institution for the judiciary so as to enhance judicial accountability and the transformation of the judiciary*" SAJEI has developed an online training platform to ensure that training continues despite the interruptions brought forth by the COVID-19 pandemic. SAJEI online (http://sajei.online) is an online Learning Management System that delivers asynchronous training. The system features pre-recorded videos of Judicial Educators and Guest Facilitators presenting content using various multi-media formats. Judicial Officials can download course material and interrogate the content at own leisure. The system is built with ease-of-use in mind, making it a breeze to navigate, even for technophobic individuals.

THE NEW ERA OF TECHNOLOGY AND COVID-19

Regional Court President Jakkie Wessels (R) , Regional Court President Vuyo Nocembu (L)

The first Judicial webinar was successfully conducted on the 2nd of June 2020. The focus of the webinar was on "Virtual Court Appearances for Regional Magistrates" attended by over 130 participants including the Deputy Minister of Justice and Constitutional Development, Mr John Jeffery, MP as well as Chief Magistrates. The shared experiences and tips of virtual appearances were presented by the following panellist: Ms Jakkie Wessels (Regional Court President LP); Mr Lehlogonolo Moeng (Regional Court Magistrate FS); Ms Jane Ngobeni (Regional Court Magistrate LP); Mr Tinus Boonzaaier (Regional Court Magistrate NW); Ms Heloise Vorster (Regional Court Magistrate NW). The webinar, which was conducted through Microsoft Teams was a great success despite a few teething challenges, technical and production issues need to be addressed in the future, in order to make an impactful contribution to training.

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