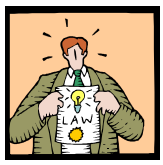
e-MANTSHI

A KZNJETCOM Newsletter

January 2011: Issue 60

Welcome to the Sixtieth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to gvanrooyen@justice.gov.za.



New Legislation

1. A *Draft Land Tenure Security Bill, 2011* has been published for public comment in Government Gazette no 33894 of 24 December 2010.The purpose of the bill is "To provide for the continued protection of rights of persons who live and work on farms; to provide support framework for sustainable livelihoods of persons who live and work on farms; to provide for State assistance in the settlement of interested and affected persons on alternative land; To provide measures aimed at security of tenure, sustainable livelihoods and production discipline; to establish a land rights management board; to provide for acquisition of rights in land for resettlement; to provide transitional provisions for the finalisation of applications under Chapter III of the *Land Reform (Labour Tenants*) *Act, 1996*; and to provide for matters connected therewith".

2. The National Prosecuting Authority has published a code of conduct for prosecutors in terms of Section 22(6) of the *National Prosecuting Authority Act, Act 32 of 1998* for general information. The code was published in Government Gazette no 33907 of 29 December 2010.

3. The Rules Board for Courts of Law has published an amendment to the rules of the Magistrates Court in terms of section 6 of the *Rules Board for Courts of Law Act (107/1985*). The amendment was published in Government Gazette no 33897 of 24 December 2010.It affects the following parts of the rules: Schedule (R1222/2010) amends Annexure 2 Table A Part I (R740/2010) on 28 Jan 2011.Schedule .(R1222/2010) amends Annexure 2 Table A Part II (R740/2010) on 28 Jan 2011.

Recent Court Cases

1. Crookes v Sibisi 2011 (1) SACR 23 KZP

In an application for a stay of prosecution in a private prosecution the mere fact that the private prosecutors are willing to accept compensation, instead of pursuing charges, is not sufficient to show that the charges are being pursued for an improper purpose.

The respondents instituted a private prosecution against the appellant on charges of contravening s 23(1) of the Extension of Security of Tenure Act 62 of 1997 (ESTA). Before the prosecution could proceed, however, the appellant brought an application for a permanent stay of prosecution. The application was dismissed, following which the appellant approached the High Court, basing his appeal on three grounds. Firstly, that various summonses had been served upon him in the matter over a period of five years, only to be withdrawn. This was a violation of his right to a speedy trial and, in effect, the threat of prosecution was nothing more than an attempt to obtain money from him, which constituted an abuse of court process. Secondly, that the passage of time had resulted in inevitable prejudice to him, since witnesses and documents were no longer available and memories had been dimmed. Thirdly, that a private prosecutor was entitled to institute a private prosecution only once and must then pursue or abandon it; the repeated institution of fresh prosecutions was thus impermissible.

Held, that the present proceedings were at least the third brought against the appellant on the same charges. However, it was apparent that various discussions had taken place between 2002 and 2007, with a view to resolving the disputes between the parties; these may have influenced the decisions not to pursue earlier proceedings. On the evidence as a whole, there was insufficient basis for finding that the dominant motive of the respondents was one of extortion or oppression, rather than a desire to have justice done. The mere fact that they might have been willing to accept compensation, instead of pursuing charges, did not suffice to show that the charges were being pursued for an improper purpose. (Paragraphs [6] and [7] at 26e-f and 26h-j.)

Held, further, that the prejudice of which the appellant complained was not such as to deny him a fair trial. As to the alleged destruction of court files, the onus of proving the unlawfulness of the evictions (with which the appellant had been charged) was upon the respondents, and it was for them to prove that no court order for the evictions had been obtained. In the face of the secondary evidence that the appellant and his then attorneys ought to be able to present, the prejudice seemed to lie rather on the side of the respondents. All in all, it was insufficient to justify the extreme remedy of a stay of prosecution. (Paragraphs [8] and [9] at 276b-g.)

Held, further, that s 6(a) of the Criminal Procedure Act 51 of 1977 provided that anyone conducting n prosecution at the instance of the State could withdraw a charge at any time before an accused had pleaded to it. There was no similar provision in relation to the conduct of a private prosecution. However, it could not be inferred, from the absence of a positive provision allowing the withdrawal of charges by a private prosecutor, that such withdrawal was prohibited. For example, it would be absurd to suggest that, if a private prosecutor received legal advice that a prosecution had no prospects of success, he or she could not withdraw it, but must simply leave it hanging in the air. Furthermore, it was recognised that parties to a private prosecution could settle their differences; there was no good reason why a private prosecutor who was offered acceptable compensation could not retire from the battle. As in any other private litigation, the prosecutor was *dominus litus* and should be able to withdraw the proceedings if he or she wished to do so. As to the objection that criminal proceedings could be repeatedly instituted and withdrawn in order to harass the accused and enhance the bargaining position of the private prosecutor, such an approach would constitute an abuse of process that the court, exercising its inherent powers, would constrain. (Paragraphs [14], [15] and [20]-[23] at 29f-30d and 31g-32i.)

Held, accordingly, that the contention, that a private prosecutor could not withdraw criminal charges before the accused was required to plead, was incorrect; and, *in casu,* the withdrawal of the previous charges and the institution of fresh proceedings were not an abuse of the process of the court. (Paragraph [25] at 33d-e.) Appeal dismissed with costs.

2. S v Dladla 2011 (1) SACR 80 KZP

The competence of a mentally disordered person as a witness can only be determined with the aid of psychiatric evidence.

The appellant was a nurse employed at a mental institution. He was convicted of assault with intent to do grievous bodily harm, and sentenced to a fine of R1000 or 100 days' imprisonment, half of which was suspended. The complainant had been an inmate of the institution for five years. He testified that the appellant, together with a colleague, had administered tablets to him, but when he had refused to take them they had hit, kicked and attempted to strangle him. The magistrate found the complainant's evidence to be true and correct, and rejected that of the appellant, on the grounds that the complainant was sane, and that he had given a clear, full and consistent account of what had happened. She also held that, in order for the appellant to succeed, he would have to prove his innocence on a balance of probabilities. On appeal, the court was required to decide whether the complainant, suffering from a mental illness and who was a schizophrenic, was a competent witness; and whether the appellant had had to discharge any onus in order to be acquitted.

Held, that mental illness could be permanent or temporary; in terms of s 194 of

the Criminal Procedure Act 51 of 1977, it was only while the mental disability continued that the person was incompetent to give evidence. Whether a witness was suffering from a mental illness or defect was to be determined with the aid of psychiatric evidence, but the magistrate had held the complainant to be in a lucid interval, without hearing any expert medical evidence. Without such evidence it could not have been established with certainty that the complainant had not been afflicted with mental illness, or that he had not been labouring under imbecility due to the medication he had been taking. It could not be assumed from his behaviour in court that he had been in a sane interval. Accordingly, the decision by the magistrate that the complainant had not been suffering from any mental illness or mental disorder, amounted to a serious irregularity, on account of which the conviction must be set aside. (Paragraphs [13]-[23] at 84c-86i.)

Held, further, that it was a general principle of criminal law that an accused was not obliged to convince or persuade a court of anything; the magistrate's suggestion to the contrary was misplaced and she had misdirected herself in holding that the appellant had borne an onus to discharge on a balance of probabilities. (Paragraph [24] at 86i-87b.)
Appeal upheld. Conviction and sentence set aside.

From The Legal Journals

De Villiers, D W

"*National Credit Regulator versus Nedbank Ltd* and the practice of debt counseling in South Africa"

Potchefstroom Electronic Law Journal 2010 Volume 2

Bennett, T W

"The cultural defence and the custom of *Thwala* in South African Law"

University of Botswana Law Journal June 2010

De Vos, P

"On 'Shoot the Boer', hate speech and the banning of struggle songs"

Pretoria University Law Press 2010

De Villiers, D S

"Old 'Documents' ,'Videotapes' and new 'data messages' – a functionalist approach to the law of evidence (part 2)"

TSAR 2010 720

Neethling, J

" Arrest without a warrant and abuse of right"

TSAR 2010 821

Tennant, S-L

"A default notice under the National Credit Act must come to the attention of the consumer unless the consumer is at fault"

TSAR 2010 852

Grobler, J

" Debt review : Back to reality "

De Rebus January/February 2011

Joffe, G & Stamper, C

"It is rude to point your finger at someone and it is illegal to point a firearm at another person :But what really constitutes 'pointing at'?

De Rebus January/February 2011

Stadler, S

" Delivery of S129 notices : The final chapter"

De Rebus January/February 2011

Van Loggerenberg,D

"Former Magistrate's Courts Rules applicable to pending proceedings"

De Rebus January/February 2011

(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

Flexibility in sentencing : a discussion of 3 recent cases.

Samuels v S (262/03) 2010 ZASCA 113 (22 September 2010);
S v Matyiki (695/09) [2010] ZASCA 127 (30 September 2010);
S v Saziso Notice Mtshali case no cc 147/09, High Court, Durban.

Introduction

In the case of *S v Dlamini 1991 (2) SACR 655 (at 661i-667a)* Nicholas AJA observed that 'whereas criminal trials in both England and South Africa are conducted up to the stage of conviction with scrupulous, time-consuming care, the procedure at the sentencing stage is almost perfunctory.' The Supreme Court of Appeal, some 20 years later, confirmed that, generally, this continues to be the position *(S v Matyiki (supra) p 8/16 para 15*).

This note, however, considers 3 recent cases where a great deal of attention was paid to getting the sentencing part of the proceedings right. In the two cases heard by the Supreme Court of Appeal, one sentence was increased, and one was reduced. The third case was decided by the High Court, where Penzhorn AJ took an active role in ensuring the he had the necessary information to achieve justice in sentencing the accused.

The three cases, which I will discuss in chronological order, illustrate two main points: firstly, the need for the presiding officer to be flexible, within the constraints of the prescribed minimum sentencing legislation, in sentencing; and secondly the need for the presiding officer to acquaint himself sufficiently with the facts of the case to enable him to properly exercise his discretion as to sentencing; playing an active role where appropriate.

1 : Samuels v S (262/03) 2010 ZASCA 113 (22 September 2010)

1.1 Introduction and judicial history

The appellant, a 21 year old first offender, pleaded guilty, and was accordingly convicted on one count of possession of an unlicensed firearm. He was sentenced to imprisonment for 2 years. He approached the High court, aggrieved by what he considered to be an unfair sentence. The High Court, after considering the facts, concluded that the appellant's conduct did not justify the sentence imposed on him in the court a quo, but nevertheless considered that a sentence of direct imprisonment was appropriate. They therefore reduced the sentence to one of imprisonment for 18 months, of which 6 were suspended on the usual terms.

He then appealed against his sentence to the Supreme Court of Appeal.

1.2 Delay

Astonishingly, the case only came before the Supreme Court of Appeal 11 years after his original conviction and sentencing. In the intervening period, the appellant had transformed himself. He had got a permanent job, was earning R 5 000 per month, had become married, and had two children. He had had no further brushes with the law. And throughout all of this, he had had the threat of a sentence of imprisonment hanging over his head. This came to be important for the Supreme Court of Appeal in determining the appropriate sentence.

1.3 Evidence re: sentencing

The Supreme Court of Appeal examined the transcript of the proceedings at the magistrate's court, and discovered that there was virtually no evidence before the magistrate 'to enable her to exercise a proper judicial sentencing discretion.' The appellant had pleaded guilty, and the only information before her was the very brief section 112 statement. At the sentencing stage, the transcript revealed that the magistrate asked only 2 questions – the first was whether the firearm had a serial number of it, the answer to which was 'No'. The second question was "How did the accused come into possession of the fire-arm?" The answer was that "The accused picked it up. He wanted to keep it. When he saw the SAP on the day of the arrest he threw it away*."(Samuels v S (supra) at p 3-4 para 3*)

When sentencing the appellant, the Supreme Court of Appeal found that the magistrate had not taken into account numerous 'weighty' factors which should have been taken into account in determining the appropriate sentence. These were:

> "…that he was a [young] first offender; that the firearm given its state when found could not have been put to any immediate unlawful use,[it was without a cartridge or ammunition]; that he became so frightened upon seeing the police that he immediately attempted to dispose of the firearm; that following upon his arrest he made a full confession to the police; that he fully co-

> operated and demonstrated his remorse by pleading guilty at the first available opportunity; and most importantly as I have stated, that he did not retain the firearm for any other nefarious purpose [but rather picked it up out of idle, unsophisticated curiosity.]" (Samuels v S (supra) p7 para 15)

The Supreme Court of Appeal concluded that the result of failing to take into account material factors was that the court had imposed a "punishment that was grossly disproportionate to what could be considered fair in the circumstances of this case." (*Samuels v S (supra) p 7/10 para 15*)

Even though the accused was represented, the court held that the magistrate had a duty to call for such evidence as she required to exercise a proper sentencing discretion. The court quoted from the case of *S v Siebert 1998 1 SACR 554 SCA* as follows: " Sentencing is a judicial function sui generis…In this field of law, public interest requires the court to play a more active inquisitorial role. The accused should not be sentenced until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court….and an accused should not be sentenced on the basis of his or her legal representative's diligence or ignorance." (*Samuels v S (supra) p5/10 para 8*)

It is clear then, that the presiding officer is required to take an active role in ascertaining the relevant facts – he may not take a passive role even where the accused is represented. And where the accused provides only scanty information, the magistrate must probe until he has sufficient information to sentence appropriately, or call for a pre sentencing report. In the case of *Samuels v S,* the SCA noted the 'trying conditions under which magistrate's in this country, and their justifiable need to eradicate the enormous case backlogs which confront them. (*Samuels p5/10, para 8*) but held that "where there is a paucity of evidence with which to determine an appropriate sentence… the magistrate [must call] for a pre-sentence report to enable him to explore all the of the available sentencing options, and to choose the one that best suits the interests of the case" (*Samuels p5/10 para 8*).

1.4 Direct Imprisonment

The Supreme Court of Appeal held that while it was not clear why neither the High Court nor the Magistrates Court were of the view that direct imprisonment was the only sentencing option that was appropriate, it appeared to have been as a result of an over-emphasis on the prevalence of violent crime executed with unlicensed firearms, coupled with the value of the deterrent effect on him and others from committing similar crimes. (*Samuels v S (supra) p 6/10 para 11*).

The Supreme Court of Appeal found that it was proper to take these factors into account in sentencing. However, it held that before they could operate adversely against an individual accused, it would have to at least be shown that there was some link between the accused and the violent crime referred to. The SCA found that in the case before them there was no such link – the gun was unarmed, and none of the evidence led to an inference that the accused was a violent criminal. The

SCA therefore concluded that the accused had been “sacrificed on the altar of general deterrence” and found that “the prevalence of violent crime was [not] a factor … to be taken into account against the appellant personally.”(*Samuels (supra) p 6/10 para 11-12; p7 para 13).*

1.5 Correctional Supervision

The SCA noted that neither the Magistrate’s Court, nor the High Court, had considered correctional supervision as an option. The SCA found that were it not for the 11 year delay between sentencing and the final appeal, this may well have been the appropriate sanction. However, the court held that “…the extraordinary passage of time encountered here renders [correctional supervision] inappropriate... [as]…it would hardly serve the interests of justice for the matter to be remitted to the trial court 11 years after the appellant’s conviction for him to be sentenced afresh.”(*Samuels v S (supra) p 6/10 para 10*).

The SCA noted further that “in the last 11 years whilst his appeal to this court has been pending, the appellant has managed to avoid any further brush with the law. And as his counsel points out in all of that time he also has had to endure the mental anguish that is conjured up by the threat of imprisonment.” (*Samuels v S (supra) p7/10 at para 6)*

The court therefore excluded correctional supervision as a sentencing option(*Samuels v S (supra) p6/10 para 10*).

1.5 Fine

The maximum possible sentence for the accused was that of imprisonment for a period not exceeding three years or a fine not exceeding R12 000 or both. The SCA concluded that “Both the public interest and the need to do justice to the appellant would be well served by the imposition of a fine (*Samuels v S (supra) at p7/10 at para 16*).”

This was a sentencing option that had also not been considered by the courts a quo. The SCA speculated that this “may have been on account of the fact that the appellant was then in casual employment and perhaps it was thought that such a sentence would not have served any meaningful purpose (*Samuels v S (supra) at p7 para 16*).” The SCA noted however that there was authority to the effect that a court could direct that a fine be paid in installments, and that this was a useful way to give a humble wage earner an opportunity to escape imprisonment.(*Samuels v S (supra) at p 7 para 16*)

The SCA found that a fine of R 6 000, paid over 6 months would be “sufficiently severe as to represent real punishment”. Ordinarily, the court would have coupled it “with a wholly suspended sentence of imprisonment to enhance its deterrent value. But on account of the passage of time and his maintaining a clean slate during that period” the court found that “the suspended sentence had been rendered largely

superfluous." The court concluded that "a suspended sentence as well therefore falls to be excluded as a sentencing option."(*Samuels v S (supra) p 8/10 para 17*).

The outcome of the case was thus that the appeal succeeded and the sentence imposed by the magistrate was replaced with that of a fine of R 6000 payable over 6 months, or 6 months imprisonment.

2. S v Matyiti 695/09 [2010] ZASCA 127 (30 September 2010)

2.1 Introduction and Judicial history

The same bench, sitting on the same day as the *Samuels v S* case (supra), found that the High Court had been too lenient in sentencing the respondent who was a 27 year old repeat offender who had acted as the ringleader of a gang of three in committing the crimes he had been convicted of.

The respondent had been convicted of vicious, violent and senseless rape, murder and robbery. The crimes took place in two separate incidents separate by 5 days. The first four pages of the SCA's judgement details the cruelty and horror of the respondent's behaviour.

The nature of the offences brought the case under the ambit of section 51 of the Criminal Law Amendment Act 105 of 1997. Section 51 provides for a minimum sentence of life imprisonment for each of the counts of rape and murder, unless "substantial and compelling" circumstances are present *(S v Matyiti (supra) at p 5/16 para 9*).

The respondent chose not to testify, nor was any evidence led in mitigation on his behalf (*S v Matyiti (supra) at p 6/16 para 12*.) Neither did the victims testify in aggravation, nor did they submit victim impact statements. The court found this to be unfortunate, as the impact of the crime on the victim was a significant factor to take into account in sentencing,which they had not had the benefit of.(*S v Matyiti (supra) at p 8/16 para 16*).

The court a quo sentenced the respondent to 25 years imprisonment for each of the charges of rape and murder, and 13 years for each of the two counts of robbery. The sentences were ordered to run concurrently- meaning that at maximum the respondent would only serve a total of 25 years.

This meant that the court a quo must have found 'substantial and compelling' circumstances to justify the departure from the prescribed minimum sentence.
The transcript showed that the court a quo had imposed the sentence on the basis of the respondents age (27), and the fact that he had pleaded guilty and had expressed remorse.*(S v Matyiti (supra) p 5/16,para 9)* The court a quo had incorrectly found that the respondents previous conviction was irrelevant to the case before him (*S v Matyiti (supra) at p 6/16 para 10*).

The court a quo had also found that the rape victim “had sustained no injuries” The SCA held that although it was true that the victim had sustained no physical injuries, the judge had “fundamentally misconstrued the act of rape itself and its profound psychological, emotional and symbolic significance for the victim” by finding that no injuries were sustained.(*S v Matyiti (supra) at p 6 para 10)*

2.2 Plea of guilt as mitigating factor:

It is a well known principle of sentencing that a guilty plea in circumstances where the case against the accused is a very good one, does not serve as a mitigating factor. It is rather regarded as a neutral one. In *Matyiki’s* case (supra), the evidence linking the respondent to the crimes was overwhelming. “In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification at an identification parade.” (*S v Matyiti (supra) at p 7/16 para 13*).

The court held that the plea of guilt was not a relevant factor in determining an appropriate sentence.

2.3 Remorse

The accused’s ‘remorse’ was nothing more than an apology expressed by his legal representative from the bar.

The Supreme Court of Appeal pointed out the “chasm between regret and remorse,” explaining the difference as follows:

> “Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.”(*S v Matyiti (supra) at p 7/16 para 13*).

The court concluded that there was no indication that any of this was explored in this case, and thus that remorse could not count as a mitigating factor (*S v Matyiti (supra) at p 7/16 para 13*).

2.4 Age

The SCA was critical of the fact that the court a quo made reference to the appellant's 'relative youthfulness" without elaborating on what that meant (*S v Matyiti (supra) p 7/16 para 14*). The SCA agreed that ordinarily youth is a mitigating factor, but held that ultimately, the enquiry should be whether " the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness*."(S v Matyiti (supra) p 7/16 para 14).*

The court found that at the age of 27, the accused's age could not be assumed to be a mitigating factor. As the accused had declined to testify, the court could not draw any conclusions about his level of maturity or other relevant factors. Accordingly, his age was a neutral factor (*S v Matyiti (supra) p 7/16 para 14).*

2.5 Prescribed minimum sentencing legislation

The Supreme Court of Appeal held that where minimum sentencing legislation applies, it must be the starting point for the presiding officer. It stressed that parliament had ordained the minimum sentences that must be imposed unless substantial and compelling circumstances are found to be present. When sentencing an accused, the magistrate does not have a blank slate on which to deliberate. He starts with the minimum sentence and then considers whether 'substantial and compelling factors' justifying a departure from the norm are present (*S v Matyiti (supra) at p 9-10/16 para 18).*

Yet, the court noted, all too frequently are sentencing courts willing "to deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons [such as] speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations…"(*S v Matyiti p 12/16 para 23*). The court held that these factors were obviously not intended to qualify as substantial and compelling circumstances for the purposes of the prescribed minimum sentence legislation.

The SCA held further that a failure to apply the will of parliament ultimately subverts the constitutional order. It held that "Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer [are] foundational to the rule of law which lies at the heart of our constitutional order."(*S v Matyiti (supra) p 12/16 para 23).*

2.5 Sentence increased

The court therefore imposed the prescribed minimum sentence on him – life imprisonment for each of the offences of rape and murder.

3. S v Saziso Notice Mtshali case no cc 147/09, High Court, Durban

3.1 Introduction

The Accused pleaded guilty and was convicted of the murder of her eight year old daughter, and her three year old son. After conviction, the presiding officer requested a probation officer's report and adjourned the trial for this purpose. As it turned out, the probation officers report was not very useful to the court; but the expert witnesses who were called by the defence and the prosecution certainly were.

3.2 Facts

The facts of this case are particularly bleak:

The Accused was a 26 year old a single mother who lived with her grandmother in a rural area. Her mother was dead, and her father had deserted her family when she was very young. She was educated only until standard nine, and was not formally employed. She and her grandmother took care of the two children. The accused and her children were financially dependent on her grandmother. The father of the children was absent and provided minimal assistance in the form of clothing from time to time.

In 2009 she and her children were invited to visit the children's father during the July school holidays. He lived in Umlazi. On 29 June 2009, they left home for the visit. When they arrived the father rejected them, saying that they were not welcome at his home. He assaulted the appellant severely in front of the two children. His brother intervened, and persuaded the father to allow them to stay the night. He agreed reluctantly, and in the morning again ordered them to go. He told them that he did not ever want to see them again. He gave the accused R120 for travel expenses. This amount would not have covered her fare home.

She then left with the two children and found some shelter in a bush where they remained for the day. The children were distressed, to the degree that the eldest child said that perhaps it would be better that they all died. They then prayed and comforted each other – a severely assaulted and humiliated mother and her two terrified children.

When the children eventually fell asleep, she decided to end their lives, because she saw no future for them. She strangled the children in their sleep and then took tablets which she thought would fatally poison her. She survived, and woke up to her children's dead bodies. She covered them with a sheet and went to the nearest police station to report what she had done. She was then arrested.

None of the main facts were disputed.

3.3 Expert Witnesses

The advocate acting pro bono for the appellant called an expert witness to testify as to the state of the accused, and the circumstances under which the crime was committed.

The court summarises his testimony as follows:

> "In summary then it is Professor Schlebusch's view that the Accused's behavioural response to the situation she found herself in, namely to try to kill herself and then kill her children, was most likely the result of psychological decompensation, in other words an inability to cope with her situation, which would have been exacerbated by her feelings of hopelessness / abandonment, the traumatic stress she had experienced, physical and verbal abuse (abused woman's syndrome) and depression she experienced consequent to her dysfunctional relationship with the deceased's father and the resulting situation in which she found herself with her two children. Her normal adaptive resources would have failed her in that she was psychologically overwhelmed resulting in what the witness termed behavioural dyscontrol. She then emphatically believed that the only solution for her and her children was to die."(*S v Saziso Notice Mtshali (supra) at para 9).*

In response the prosecution called their expert. In the main, the two experts, both of whom were extremely impressive agreed with each other.

Professor Pillay's main conclusion then was that:

> "[The Accused] appears to have experienced behavioural dyscontrol resulting from the overwhelming stress experienced and her limited problem-solving ability (due to her intellectual function), which led to her psychologically and behaviourally decompensating and engaging in the extended suicidal behaviour." His recommendation then is treatment for her dysthymia and dissociative trance disorder and in addition, given her intellectual level of function, ongoing adult supervision." *(S v Saziso Notice Mtshali (supra) at para* 15).

The court accepted that the evidence showed that the accused's crime was not planned or premeditated. Judge Penzhorn found that in the light of the expert testimony, it was clear that there were "substantial and compelling circumstances justifying the imposition of a lesser sentence [than that prescribed by law]." *(S v Saziso Notice Mtshali (supra) at para 17*).These he listed as being: "The particular circumstances leading up to the killing of the deceased as described in the evidence; the Accused's diminished responsibility in that she was in a depressed and emotional state; the fact that she did what she did out of love for her children [and

that she was] a first offender and not prone to violence." *(S v Saziso Notice Mtshali (supra) at para 17).*

The court then had to grapple with what the appropriate sentence to impose would be in what he described as a 'very unique and tragic situation.'*(S v Saziso Notice Mtshali (supra) at para 19).*

The court did not underplay the enormity of the accused's crime, saying that "she took the lives of two innocent little children" (*S v Saziso Notice Mtshali (supra*) at para 18) The court acknowledged that "murder in any form remains a serious crime which usually calls for severe punishment. Circumstances, however, vary and the punishment must ultimately fit the true nature and seriousness of the crime." (*S v Saziso Notice Mtshali (supra) at para 18*)

The main issue for the court to decide was whether the "crimes committed by the Accused are such that they demand that she be removed from society and imprisoned or whether some other punishment would be appropriate which does not include imprisonment."(*S v Saziso Notice Mtshali (supra) at para 19)*

The court accepted the experts' testimony that the accused had killed her children in the genuinely held belief that this was the best for her children. The court held further that there would be "no purpose…in sending her to prison" as this was not a case "which is clamant for retribution" The court accepted that the accused is not a danger to society and that that was another reason why it was not necessary to imprison her thereby remove her from the community. The court discounted the role of deterrence, holding that the situation was very unusual and highly unlikely to recur."(*S v Saziso Notice Mtshali (supra) at para 19).*

The court concluded that a suspended sentence of imprisonment together with a correctional supervision order coupled with conditions specifically appropriate to the Accused's situation would on the one hand be fair to the Accused and on the other satisfy society's demand that crimes of this nature be suitably punished. The judge ordered that the accused be sentenced to ten (10) years imprisonment wholly suspended for five (5) years on condition that the Accused is not convicted of a crime involving an assault and in respect of which she is sentenced to an unsuspended term of imprisonment without the option of a fine.He also sentenced her to correctional supervision for a period of three (3) years on various conditions.

Conclusion

What becomes clear from these cases is that sentencing is more of an art than a science. It does not lend itself to the application of rigid rules and formulae, but rather requires the presiding judicial officer to be exquisitely sensitive to the nuances of the case. In particular, the judicial officer must be sure to individualise the sentencing of the accused, taking into account the accused, the crime, the victim and the public interest. The presiding officer must also consider "a broad range of sentencing options from which an appropriate option can be selected that best fits

the unique circumstances of the case before court."(*S v Matyiti (supra) p 8/16 para 16).*

In order for the presiding officer to do this, he must be flexible and he must have a full understanding of the accused's case. Not only of the evidence that led to his conviction, but also the personal circumstances of the accused, the nature of the crime and the impact of the crime on the victim and society. Only with this information, can the presiding officer select the appropriate sentencing to serve the public interest.As the court noted in the case of *Samuels v S*: "The interests of society are never well served by too harsh or too lenient a sentence. A balance is to be struck."(*Samuels v S (supra) p 6/10, para 9).*

Nicci WhitearNel
UKZN Pietermaritzburg

Matters of Interest to Magistrates

THE CODE OF CONDUCT FOR MEMBERS OF NATIONAL PROSECUTING AUTHORITY

PREAMBLE

Section 22(6)(a) of the *National Prosecuting Authority Act, 1998 (Act No. 32 of 1998)* (hereinafter referred to as 'the Act'), provides for a Code of Conduct to be framed by the National Director of Public Prosecutions, which should be complied with by all members of the Prosecuting Authority.

In framing this Code, the Minister, Deputy National Directors of Public Prosecutions and Directors of Public Prosecutions were consulted as prescribed by the Act. Due account was taken, *inter alia,* of the values and principles enshrined in the *Constitution of the Republic of South Africa, 1996* ("the Constitution"), the aims to be achieved as set out in the Act, the *"United Nations Guidelines on the Role of Prosecutors"* as well as the *"Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors"* developed by the International

Association of Prosecutors as tabled at the **17th** session of the UN Commission on Crime Prevention and Criminal Justice.

This Code acknowledges the crucial role of prosecutors in the administration of criminal justice. It emphasises the essential need for prosecutions to be fair and effective and for prosecutors to act without fear, favour or prejudice.

Furthermore, it serves to inform the public of what is expected of prosecutors and is aimed at ensuring public confidence in the integrity of the criminal justice process.

Above all, this Code requires all prosecutors to respect human dignity and human rights, and to perform their professional duties with full recognition of the supremacy of the Constitution and the rule of law.

CODE OF CONDUCT

A. PROFESSIONAL CONDUCT

Prosecutors must-

(a) be individuals of integrity whose conduct is objective, honest and sincere;

(b) respect, protect and uphold justice, human dignity and fundamental rights as entrenched in the Constitution;

(c) protect the public interest;

(d) strive to be and to be seen to be consistent, independent and impartial:

(e) conduct themselves professionally, with courtesy and respect to all and in accordance with the law and the recognised standards and ethics of their profession;

(f) strive to be well-informed and to keep abreast of relevant legal developments; and

(g) at all times maintain the honour and dignity of their profession and dress and act in a manner befitting their status and upholding the decorum of the court.

B. INDEPENDENCE

The prosecutorial discretion to institute and to stop criminal proceedings should be exercised independently, in accordance with the Prosecution Policy and the Policy Directives, and be free from political, public and judicial interference.

C. IMPARTIALITY

Prosecutors should perform their duties without fear, favour or prejudice. In particular, they should-

(a) carry out their functions impartially and not become personally, as opposed to professionally, involved in any matter;

(b) avoid taking decisions or involving themselves in matters where a conflict of interest exists or might possibly exist;

(c) take into consideration the public interest as distinct from media or partisan interests and concerns, however vociferously these may be presented;

(d) avoid participation in political or other activities which may prejudice or be perceived to prejudice their independence and impartiality;

(e) not seek or receive gifts, donations, favours or sponsorships that may compromise, or may be perceived to compromise, their professional integrity;

(f) act with objectivity and pay due attention to the constitutional right to equality;

(g) take into account all relevant circumstances and ensure that reasonable enquiries are made about evidence, irrespective of whether these enquiries are to the advantage or disadvantage of the alleged offender;

(h) be sensitive to the needs of victims and do justice between the victim, the accused and the community, according to the law and the dictates of fairness and equity; and

(i) assist the court to arrive at a just verdict and, in the event of a Conviction, an appropriate sentence based on the evidence presented.

D. ROLE IN ADMINISTRATION OF JUSTICE

1. Prosecutors should perform their duties fairly, consistently and expeditiously and-

(a) perform their duties fearlessly and vigorously in accordance with the highest standards of the legal profession;

(b) where legally authorised to participate or assist in the investigation of crime, they should do so objectively, impartially and professionally, also insisting that the investigating agencies respect legal precepts and fundamental human rights;

(c) give due consideration to declining to prosecute, discontinuing criminal proceedings conditionally or unconditionally or diverting criminal cases from the formal justice system, particularly those involving young persons, with due respect for the rights of suspects and victims, where such action is appropriate;

(d) in the institution of criminal proceedings, proceed when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and not continue a prosecution in the absence of such evidence; and

(e) throughout the course of the proceedings the case should be firmly but fairly and objectively prosecuted.

2. Prosecutors should, furthermore-

(a) preserve professional confidentiality;

(b) refrain from making inappropriate media statements and other public communications or comments about criminal cases which are still pending or cases in which the time for appeal has not expired;

(c) consider the views, legitimate interests and possible concerns of victims and witnesses when their personal interests are, or might be, affected, and endeavour to ensure that victims and witnesses are informed of their rights, especially with reference to the possibility, if any, of victim compensation and witness protection;

(d) if requested by interested parties, supply reasons for the exercise of prosecutorial discretion, unless the individual rights of persons such as victims, witnesses or accused persons might be prejudiced, or where it might not be in the public interest to do so;

(e) in the case of child victims and child witnesses, always ensure that their best interests are taken into account;

(f) safeguard the rights of accused persons, in line with the law and applicable international instruments as required in a fair trial;

(g) as soon as is reasonably possible, disclose to the accused person relevant prejudicial and beneficial information, in accordance with the law or the requirements of a fair trial;

(h) examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained;

(i) refuse to use evidence which is reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the accused person’s human rights and particularly methods which constitute torture or cruel treatment;

(j) take the necessary steps to ensure that suitable action be taken against those responsible for using illegal methods in obtaining such evidence;

(k) save in exceptional circumstances, not discuss pending cases with the presiding officer, in the absence or without the consent or knowledge, of the defence; and

(l) if during the preparation for a trial or the conducting of criminal proceedings or functions incidental thereto, a prosecutor is of the opinion that information has been disclosed of the commission of an offence which has not been investigated or

prosecuted, he or she must without delay in writing inform and disclose to the South African Police the particulars thereof

E. CO-OPERATION

In order to ensure the fairness and effectiveness of the prosecution process, prosecutors should-
(a) co-operate with the police, the courts, the legal profession, defence counsel, and any relevant government agencies, whether national or international;

(b) in their professional dealings, at all times conduct themselves in a dignified manner commensurate with their position; and

(c) render assistance to the prosecution services and colleagues of other jurisdictions in accordance with the law and in a spirit of mutual co-operation.

F. ENFORCEMENT

All prosecutors should respect and comply with the terms of this Code and report any instances of unprofessional conduct by colleagues (and also, as the case may be, other court officials) to the relevant supervising authority who should consider the appropriate steps to be taken, and do so.
2. In the event of transgressions, appropriate disciplinary steps may be taken in terms of the Public Service Regulations and NPA Act No 32 of 1998.

Notes ***to Code of Conduct***

1. Deputy Directors of Public Prosecutions and prosecutors, being civil servants, are also expected to comply with the Code of Conduct for the Public Service.

2. References in this Code to prosecutors include members of the National Prosecuting Authority as defined in the Act and every person acting under a temporary delegation to prosecute, unless the context indicates otherwise.

3. A copy of this Code should be handed to all prosecutors at the time of their taking the oath or making an affirmation as prescribed in section 32(2) of the Act or as soon as possible thereafter, and signed for to denote acceptance thereof.

4. This Code is a public document which will be published in the Government Gazette. Changes may become necessary from time to time and will be similarly gazetted. The Code is available from offices of the National Prosecuting Authority.

A Last Thought

An enlightened and just penal policy requires consideration of a broad range of sentencing options, from which an appropriate option can be selected that best fits the unique circumstances of the case before court. To that should be added, it also needs to be victim-centred, Internationally the concerns of victims have been recognised and sought to be addressed through a number of declarations, the most important of which is the UN Declaration of the Basic Principles of Justice for Victims of Cnme and Abuse of Power.

The declaration is based on the philosophy that adequate recognition should be given to victims, and that they should be treated with respect in the criminal justice system. In South Africa victim empowerment is based on restorative justice. Restorative justice seeks to emphasise that a crime is more than the breaking of the law or offending against the State—it is an injury or wrong done to another person. The Service Charter for Victims of Crime in South Africa seeks to accommodate victims more effectively in the criminal justice system. As in any true participatory democracy its underlying philosophy is to give meaningful content to the rights of all citizens, particularly victims of sexual abuse, by reaffirming one of our founding democratic values, namely human dignity. It enables us, as well, to vindicate our collective sense of humanity and humanness.

The charter seeks to give to victims the right to participate in and proffer information during the sentencing phase. The victim is thus afforded a more prominent role in the sentencing process by providing the court with a description of the physical and psychological harm suffered, as also the social and economic effect that the crime had and, in future, is likely to have. By giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim.

Per Ponnan JA in *S v Matyityi 2011 (1) SACR 40 at par 16*