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Klaaren, Jonathan; Marcus, Gilbert; Davis, Dennis

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THE ADMINISTRATION OF JUSTICE

DENNIS M DAVIS*
GILBERT J MARCUS†
JONATHAN E KLAAREN‡

THE JUDICIARY

Judicial impropriety (1)[1]

The facts in *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC* 2003 (5) SA 354 (SCA) were mundane. The issue was whether Davis J in the court below was correct in granting rectification of a contract. The appeal, which reversed the decision of Davis J, was heard by three judges, Marais, Cloete and Heher JJA. The decision would ordinarily not have justified publication in the law reports at all. It turned on questions of fact and refers to no authority whatsoever. It establishes no new principle of law and was despatched in a few pages by Cloete JA, who criticized the approach of the trial judge.

The decision is significant for a different reason. Marais JA wrote a separate judgment (concurred in by the other two judges). It begins portentously: 'Regrettably, it is necessary to address an issue which has nothing to do with the merits of the case but everything to do with appropriate decorum in the courts' (para 18).

The issue of decorum was Davis J's apparent failure to manage the linguistic proprieties of the courtroom in an appropriate manner. After emphasizing the importance of freedom of expression (which Marais JA conceded to be 'a valuable constitutional right') the judge held that 'it does not extend to the use of obscene language in courts of law' (para 19). This limitation was explained thus (para 20):

> 'The rot in this case started when a witness chose to use the expression "Stuff you" and it went unremarked. The expression "gatvol" was also used. Yet another witness, despite his professional standing, chose to say that he wished to "bullshit" the lessor into

* BCom LLB (Cape Town) M Phil (Cantab), Judge of the Cape High Court.
† SC BA LLB (Witwatersrand) LLB (Cantab), Member of the Johannesburg Bar.
‡ BA (Harvard) MA (Cape Town) JD (Columbia) LLB (Witwatersrand) PhD (Yale), Professor of Law, University of the Witwatersrand, Johannesburg.

[1] Mr Justice Davis played no part in this section of the chapter.

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believing in a certain state of affairs. Thereafter, the word was employed again by the witness, by counsel who appeared then, but not on appeal, for the respondent, and echoed by the trial judge. None of them has the excuse of a limited vocabulary.'

Marais JA then proffered advice (para 22):

'It is, of course, not necessary when problems of this kind crop up, to fulminate and call down fire and brimstone upon the user of such language. All that is necessary is a calm reminder to the witness that he or she is in a court of law, that the solemnity of judicial proceedings is not consistent with the use of language of that kind, and that it should not be repeated. If the witness is so inarticulate that he or she cannot readily find a less obnoxious substitute for the expression or word used, the court should assist in providing one. Where counsel are responsible for the introduction of objectionable language the response may of course be less measured; counsel are expected to know better.'

One may wonder why Marais JA did not pay more heed to his own injunction against unnecessary invocation of fire and brimstone. The Supreme Court of Appeal is a busy court. Its substantial case load encompasses matters of the highest commercial, criminal, civil and – increasingly – constitutional importance. Davis J may have erred in not rebuking (and in on occasion himself even echoing) the witnesses's inappropriately colloquial and crude use of language. Yet was the perceived impropriety of such pressing importance as to justify a separate judgment? Did that not constitute – in the secular climes of Bloemfontein – the raining down of fire and brimstone?

Adopting the 'this hurts me more than it hurts you' mode, Marais JA confessed his temptation to 'turn a blind eye' where the trial judge 'is as conscientious and industrious as Davis J' (para 21). Temptation, however, succumbed to duty. The judge considered he would be 'shirking [his] duty' if he did not say that 'the use of this kind of language should not have been countenanced'. But was a judgment, couched in the tone of a headmaster's reproof to an errant schoolboy, an appropriate discountenancing? One must be permitted to wonder. Davis J's reported judgment (2002 (6) SA 202 (C)), overturned on appeal, contained no hint of the linguistic latitude the forensic participants indulged in. Only they, any attending members of the public, and the three appellate judges who read the trial record would have been privy to the excesses. That is, until Marais JA decided to opine on them in a reportable judgment. Would there not be more appropriate ways for a senior judicial colleague to

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suggest to a junior one what he perceived to be a better way of conducting the proceedings?

Judicial impropriety (2)

In the early part of the year South Africans learned with dismay that a judge of the Cape High Court, Siraj Desai, had been arrested in India on charges of rape. Mr Justice Desai, and the alleged victim, Mrs Salomé Isaacs, were part of a South African delegation to an international conference in Mumbai, India.

Predictably, the details of the alleged assault were both vague and salacious. They received substantial coverage in the media. There were allegations, counter-allegations and denials. Both Mrs Isaacs and Mr Justice Desai are married. What later emerged as apparently common cause is that Mrs Isaacs went to the judge's room in the early hours of the morning and – though Mr Justice Desai apparently initially denied this – that intercourse took place. Mrs Isaacs alleged that she was raped. She also apparently later produced a condom with the incriminating evidence to prove her version. After press reports of the judge's apparent initial denial that any intercourse had taken place, it later emerged that his defence was consent.

Mr Justice Desai was initially refused bail. He spent several days in a Mumbai prison and was eventually allowed to return to South Africa pending his prosecution. In ensuing weeks, Mrs Isaacs withdrew the charges, culminating in an acquittal. The Indian presiding judge is reported to have stated that the allegations against Mr Justice Desai were not 'probable': 'no force', he is reported to have said, 'appears to have been applied.'

The saga spawned an intense debate, which raised a crucial issue about the relationship between private conduct and fitness for judicial office. This debate proceeds, as it must, on an acceptance that Mr Justice Desai was innocent of rape. Ordinarily, one would say that no issue therefore arises. After all, he was acquitted of wrongdoing. A dissenting view emerged from an unexpected quarter. Former Deputy Judge President of the Witwatersrand Local Division of the High Court, Mr Justice H C J Flemming, wrote to the *Sunday Times* on the issue. He stated:

> 'On February 1, the Sunday Times published prominently a letter from an advocate pleading that Judge Seraj Desai's adultery was a mere private matter. This misses important aspects.
>
> 'Firstly, many forms of "private" behaviour are so unbecoming for a judge that they cause loss of respect for the judge concerned and,

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importantly, for the Bench. The many private discussions about the Desai affair underscored that point. It is similar to a judge who is secretly a member of organisations, or who finds his friends only in the gangster community. Even if adultery is "private", there is still adequate reason to consider the appropriateness of Judge Desai resigning.

'Secondly, it is unacceptable to administer justice on the basis of "Do as I say, not as I do". In this specific case a judge, a protector of rights, breached the acknowledged rights of his own wife and those of Mark Isaacs. He has lost the right to be a credible flag bearer of the need to observe the law and good morals – as is expected of a judge.

'Thirdly, I have seen no denial of statements by the Indian police, who would hardly choose to fabricate on the point, that when the police confronted the judge, he claimed that nothing happened between him and Salomé Isaacs other than that they had had drinks. That seems to have been a lie because Desai's later statement admitted that sex did take place. The word of any judge should be beyond doubt.

'How can someone who has so lied perform the task of assessing the credibility of witnesses? Witnesses' evidence is often rejected even when the witness lied because he thought it would help or protect him, or the witness admitted some truth only after being confronted by "real evidence". (A condom held in possession would be "real evidence.")

'Assuming that there was no rape, the case for resignation is such that it is surprising that those who conferred with Judge Desai did not request resignation but only demanded that he take three months' paid leave. Until after the election? or until after the rape trial, even though an acquittal will neither determine in civil law whether there was rape, nor avoid the proprieties I have mentioned.' (*Sunday Times* 15 February 2004.)

This damning indictment is especially pointed coming from a senior retired member of the judiciary. The moral opprobrium Mr Justice Flemming imputes seems outdated. His more important charge is of untruthfulness. Did Mr Justice Desai change his version? Did he do so because Mrs Isaacs was said to have had an evidentiary condom? Had appropriate structures for inquiring into judges' conduct existed, this would have been an issue that may have merited their attention. Perhaps the Judicial Service Commission should in any event have given it its consideration.

Judicial Impropriety (3)

Most of the judges who served during the apartheid era remained silent, both on and off the Bench, in the face of palpable iniquity. Their silence has been roundly condemned by

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certain commentators (see generally 1998 *Annual Survey* 872). Judges now function in a constitutional democracy. Does this mean that they should remain silent in the face of iniquity? This question was thrown into focus when the Minister of Justice attacked Mr Justice Edwin Cameron of the Supreme Court of Appeal. The attack followed the publication in the media of a lecture the judge delivered at Harvard University in which he compared the systematic denial of AIDS as a virologically caused and treatable condition to the systematic denial of the Nazi Holocaust (*Mail and Guardian* 17 April 2003; now published as 'AIDS denial and Holocaust denial — AIDS, justice and the courts in South Africa' (2003) 120 *SALJ* 525). He charged that AIDS denialism in South Africa was 'the dead hand' inhibiting government policy on AIDS, impeding a constructive response to the pandemic.

The media attention the lecture received elicited a hostile response from the Minister of Justice, Dr Penuell Maduna, whose attack seemed to reveal that he had not read it. The minister claimed that Mr Justice Cameron had described the government's policies on the treatment of HIV/AIDS and the provision of anti-retroviral drugs as 'Hitlerian', and compared the government's policies on AIDS to the Jewish genocide under the Nazis. He added: 'I shudder to think what is going on in his mind' and that 'we must be very careful what we say if we want to preserve the independence of the judiciary ... and make sure people respect it'. The minister is also reported to have stated that those who did not feel comfortable serving the state should leave its service (*Sunday Independent* 15 June 2003) — a point somewhat misdirected since judges are not in the service of the state but constitute the third arm of constitutional government.

Since the transition to democracy, members of the executive have criticized judges but these attacks have usually been couched at the level of generality. This attack was different in that it singled out a specific judge. It did so on a mistaken premiss. Mr Justice Cameron's lecture did not compare government's policies on AIDS to the Nazi Holocaust nor was any comparison made between any member of government and Hitler. The Minister would have done well to take the precaution of reading the lecture before committing himself to an inaccurate version in public.

As may be expected, Mr Justice Cameron's treatment of the issue was scholarly, measured and meticulously researched. Referring to the Holocaust and the AIDS pandemic he wrote:

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> 'What they have most obviously in common is death and suffering on an immense scale. Yet this does not explain their hold on us. Each in differing ways seems emblematic of the last century's terrible legacy of human vulnerability and failing -- the Holocaust because of what it says about the capacity of supposedly cultivated humans to commit systematized murder on a vast scale; AIDS because of what it seems to be saying about the incapacity of supposedly cultivated humans for systematized intervention, within their means, to prevent avoidable death from disease on a massive scale in the developing world' (p 525).

No sensible discussion of the AIDS pandemic in the South African context can avoid the role of President Mbeki. Mr Justice Cameron confronted this issue by noting regretfully that President Mbeki had 'publicly countenanced and officially encouraged' AIDS denialism (at 532). That fact is, of course, indisputable. It continues to be true. 'The President's stand', Mr Justice Cameron continued, 'has caused predictable confusion and dismay amongst ordinary South Africans – with unavoidably devastating consequences in an epidemic where public education about self-protection and the necessity for behaviour change is a life-saving centrality'.

Here Mr Justice Cameron entered the heart of a controversial area of social debate – an area made more controversial by the President's flirtation with AIDS denialism. The fact that Mr Justice Cameron himself has AIDS, and has ascribed his survival to the privileges of medical treatment on anti-retroviral drugs (the focus of denialist dogma), may explain why he spoke out. The underlying question is whether it is proper for judges in a constitutional democracy to speak out on matters of public controversy. There are important issues at stake. Judges should be perceived to be independent and impartial. There is a risk that their independence may be compromised if they are perceived as having taken sides in controversial issues. Their functioning may also be affected if they are asked to recuse themselves on the basis of their public pronouncements.

These are concerns of substance, but they cannot entail that judges must always be obliged to remain silent in the face of grave untruth and iniquity. The question arose in a lively debate between Professor Ronald Dworkin and Judge Richard Posner of the United States Seventh Circuit Court of Appeals (see R Dworkin 'Philosophy and Monica Lewinsky' *New York Review of Books* Vol XIVII, 9 March 2000; R Posner and R Dworkin 'An affair of state: An exchange' *New York Review of Books* Vol XLVII,

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27 April 2000; J Frank and R Dworkin, 'Letters', *New York Review of Books* Vol XLVII, 25 May 2000).

The debate commenced when Dworkin reviewed Posner's book *An Affair of State: The Investigation, Impeachment and Trial of President Clinton*, which contained a virulently hostile and party-politically partisan account of Clinton's extramarital affair and impeachment and included vitriolic personal attacks on Clinton. Dworkin questioned Posner's ethics in writing the book: judges, he said, 'are not meant to enter political controversies'.

The gravamen of Dworkin's attack is that Posner's attack on Clinton could not 'be regarded as neutral scholarship or a matter of bipartisan consensus': it was a 'one-sided journalistic account', containing serious errors, that was 'extreme even by partisan political standards'. He also criticizes Posner for various inaccuracies, and for pronouncing Clinton guilty of various felonies for which he might be prosecuted – anticipating precisely what lay within the province of the courts. This charge turned on the Code of Conduct for United States Judges, which prohibits federal judges from commenting publicly on 'pending or impending' cases. This, Dworkin argues, is to be interpreted as 'any possible future prosecution that has been publicly debated among politicians and officials and often mentioned in the press'. Dworkin suggests that the ethical difficulties would have been 'mitigated' had Posner waited a 'decent period' and not rushed into print.

Posner was aware of the ethical constraints on his office. He raised the issue himself and concluded that although the rules preclude judges from entering political controversy, his book was permissible because the opinions he expressed were matters of consensus across the political spectrum. Posner also concedes the rule precluding a judge from commenting publicly on a pending or impending case. He argues, however, that his conduct did not violate the rule because a prosecution was only a 'remote possibility' and that if there were a prosecution it would be decided on the evidence presented and not on what was published in his book. 'If Dworkin wishes to call me "injudicious" in writing about a controversial episode so soon after its conclusion, that is a matter of opinion, to which my only reply is that I had hoped that my treatment of the controversy was sufficiently judicious to deflect such a criticism.'

Posner also defends his right to write academic books and articles as being sanctioned by the judicial Code of Conduct. He

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criticises Dworkin ('a person who "plumes" himself on his devotion to the free-speech clause of the First Amendment') for adopting a stance which would make it 'virtually impossible for a judge to write on public affairs'.

The debate is illuminating to the AIDS denialist controversy because of the common ground. It is clear that Dworkin — probably the most influential living Anglophone legal philosopher — does not suggest that judges should be silent on matters of political importance. What they should do is to 'contribute effectively to public discourse without [politically] partisan claims and without prejudgments of pending or impending trials'. He asserts that 'legal education and culture would be much poorer if judges never spoke or wrote about law outside of their formal opinions: It enhances the public's understanding of law and promotes a healthy and democratic debate about judicial philosophy, when they write about legal matters for a general audience.'

The issue, therefore, is not whether or not judges should ever have a voice outside their judicial opinions. They do, and they must. Judges frequently write for law journals. Far from attracting criticism, they are generally regarded as making a welcome contribution to the law. In a normal society — one, that is, unblighted by the spectre of dogmatic denial of the realities of AIDS — speaking out on AIDS denialism would scarcely be controversial. The reality of AIDS should be — and outside the denialist fringe, is — a matter of 'neutral scholarship' and of 'consensus' and debated within those boundaries. Without the dissident fringe, Mr Justice Cameron would most likely have been praised for his acuity in denouncing denialism and its heresies. South Africa is different in large part because of President Mbeki's flirtation with dissident views on AIDS.

To label those who deny the existence of HIV or the causal link between HIV and AIDS as 'dissident' is not merely pejorative. It accurately describes a tiny group who, in Mr Justice Cameron's words, ignore the 'mountainous and incontrovertible evidence not only that HIV exists, but that it causes AIDS and is devastating South Africa and its sub-continent'. (Cameron op cit 529.) History may judge that speaking out against AIDS denial was not 'controversial' in any of the senses relevant to judicial participation in public debate.

The AIDS pandemic poses a moral challenge of staggering dimensions in South Africa. The sheer number of infections —

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estimated to be over five million – and the inadequacy of governmental measures in response presage loss of life of unthinkable proportions. It is perhaps the rest of the judiciary who, in time to come, may be asked why they remained silent.

The Legal Profession

Legislation

The Judicial Officers (Amendment of Conditions of Service) Amendment Act 28 of 2003 amended the Magistrates' Courts Act 32 of 1944, the Magistrates Act 90 of 1993, and the Judges' Remuneration and Conditions of Employment Act 47 of 2001 as well as other legislation. One of the purposes of the legislation was to bring the remuneration of judges in a same-sex partnership in line with those judges in heterosexual partnerships.

Case law

The case discussed in 2002 *Annual Survey* 1000–1 is now reported as *Law Society of the Cape of Good Hope v Budricks* 2003 (2) SA 11 (SCA).

The case discussed in 2002 *Annual Survey* 1005 is now reported as *Louw NO & others v Coetzee & others* 2003 (3) SA 329 (SCA).

Headless advocate cut down

In an appeal from the decision of a magistrate's court to the Witwatersrand High Court in *S v Ntuli* 2003 (4) SA 258 (W), Marcus AJ wrote a brief judgment to 'provide guidance for the conduct of criminal appeals in the future'. Mailula J concurred in the judgment. The judgment was prompted by the submission of heads of argument on behalf of a client in the form of two typed pages (in double spacing!) with no reference to evidence and no reference to case law. The court directed counsel to file 'proper heads of argument containing an analysis of the facts by reference to the record of evidence and references to the relevant case' (para 2).

According to the court: 'Heads of argument serve a critical purpose. They ought to articulate the best argument available to the appellant. They ought to engage fairly with the evidence and to advance submissions in relation thereto. They ought to deal with the case law. Where this is not done and the work is left to the Judges, justice cannot be seen to be done' (para 16). The court

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concluded with its guidance: 'Where inadequate heads of argument are filed, a Court may adopt a variety of remedial measures, either on their own or in combination with each other. Thus, a Court may direct that proper heads of argument are filed. The Court may postpone the hearing of the appeal until proper heads of argument are filed. Legal practitioners who do not fulfil their duty in this regard may be deprived of the right to charge any fee. Finally, the matter may be referred to an appropriate authority for the institution of disciplinary proceedings.' (para 17).

For an appreciation of the judgment in *Ntuli*, see the chapter on Criminal Procedure.

In a separate case of lawyerly lapses, *Manase v Minister of Safety and Security & another* 2003 (1) SA 567 (CkH), the court accepted evidence that an attorney had taken an instruction from a client to issue notice and summons in a delictual claim for unlawful arrest and negligently failed to do so. As part of its order, the court directed the negligent attorney to pay half of the costs of the State and half of the costs of the plaintiff. This case is discussed further below.

Striking more off

Overturning the decision of the court a quo, the Supreme Court of Appeal in *Law Society of the Northern Province v Mamatho* 2003 (6) SA 467 (SCA) articulated a cautiously expansive reading of the jurisdiction of the courts over marginal categories of attorneys in striking-off applications. Although the court had before it the issue of the inherent jurisdiction of a High Court over these applications, the route of statutory interpretation was instead chosen. At issue was s 22(1)(d) of the Attorneys Act 53 of 1979. The Law Society's application to strike off concerned an attorney admitted in the Transvaal but who for the past several years had restricted his practice to 'the area formerly known as Venda' in compliance with an earlier court order. The attorney was practising without a fidelity fund certificate despite the statutory duty placed on him (and monitored by the Law Society of the Northern Provinces) to have such a certificate. Noting that the Act contemplated action against attorneys who may have left the country, the court interpreted the Act to provide jurisdiction over attorneys who practise or who have practised in the area of the court.

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The choice to engage with statutory interpretation and to work within the disciplining framework of the Attorneys Act is to be welcomed. While the inherent jurisdiction of the court provides an important gap-filling function, the more ordinary regulation of the legal profession remains a professional and statutory challenge.

Legal economics

In a dispute over fees between the Legal Aid Board and an attorney the Board had contracted with for a number of matters, the court sided with the Board in *MacKay v Legal Aid Board* 2003 (1) SA 271 (SE). The attorney had routinely charged fees even where he did not attend the postponements in these matters. He had either arranged with another attorney to be present or had sent his candidate attorney or had made a prior arrangement with the magistrate or with the prosecutor. Having operated a one-man firm since 1974, the attorney justified this practice as a local custom in the courts in and around Port Elizabeth. On any given day he would have scheduled several matters in several different magistrates' courts. Cases were commonly remanded ten to fifteen times before a hearing. His evidence was that a local practice had developed of postponement through the above mechanisms and that this justified his fees. In contrast, the Board cited E A L Lewis *Legal Ethics* (1982) and stated the rule that a legal representative must be present at all stages of a proceeding, including formal postponements.

In agreeing with the Board, the court did not dispute the ethics of the existing practice of arranging for postponements without attendance. The attorney, however, could not be paid for postponements where he did not in fact attend. (at 281B–D). Thus the court drew a distinction between the practice of postponements without attending and the practice of charging for these postponements. The practice of charging without attending was specifically disapproved by the court. (at 286B–F).

Significantly, the court formulated a principle of interpretation for Board contracts for legal aid. In addition to noting the scarcity of public resources and the fact that the contracts referred to and incorporated provisions of the Board's legal aid guide, the court drew upon the ethics of the legal profession, noting that the profession has shared with the state the duty to prevent substantial injustice in cases where persons are unable to provide themselves with legal representation. According to the court:

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'Legal practitioners who undertake work from the Legal Aid Board today do so in the same spirit as work undertaken *pro bono* or *pro Deo* or *pro amico*, or as *amicus curiae,* or *in forma pauperis*. I cannot believe that these traditions must be disregarded because the Constitution now imposes a duty on the State to provide legal representation. The traditions of the profession are relevant and important background to the interpretation of contracts between the board and the legal profession' (at 281I–282B).

Although it is speculation, one possible consequence of this judgment may be to make it more difficult for sole practitioners to network amongst themselves, thereby increasing the growth of attorneys dedicated to one court as well as the development of appropriately tailored Board contracts with multi-practitioner firms of attorneys.

A separate case demonstrates that perhaps the true substance of a law firm is its control over its files. In *Nel v Bester & others* 2003 (2) SA 700 (SE) the files from a failed solo practice were 'absorbed' into a slightly larger one along with the services of the practitioner. Where appropriate, the clients signed new powers of attorney. The employment relationship was 'short-lived' and upon its termination the formerly employed attorney demanded the files, citing his cession of his earlier debts in those files to a third-party bank. Viewing the clients as owners of the files, the court refused the application, noting that '[t]he interest of the client is that his matter be attended to by the attorney whom he has chosen. Such attorney would at least be seriously hampered in fulfilling his mandate were he deprived of the file in the matter' (at 702F–G).

Fidelity Fund matters

The two reported cases of *BIC Southern Africa (Pty) Ltd v Attorneys Fidelity Fund Board of Control* 2003 (6) SA 757 (W) and *Tollemache v Attorneys Fidelity Fund* 2003 (6) SA 664 (C) reflect thefts of money in similar circumstances by the same attorney. Taken together, the cases distinguish between the entrustment of the money to the attorney in the scope of his practice (as required by 26(a) of the Attorneys Act 53 of 1979) and the scope of the instruction to invest the money. Both cases give a broad reading to the first issue, holding the attorney's foreign exchange dealings to be within the scope of his practice as an attorney, given the changing nature of the profession and the particular manner in which the attorney held himself out to the public.

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In *BIC Southern Africa (Pty) Ltd* the instructions to deposit the money in an interest-bearing account were clear and the court decided in favour of liability of the Fund. In *Tollemache*, however, the Fidelity Fund successfully defended itself against a claim for compensation for money admitted to be stolen by an attorney, on the grounds that the money was not entrusted to the attorney in the terms of s 47(5)(a) of the Act. The court restricted the liability of the Fund for stolen funds to the narrow circumstances of this provision, where the funds were authorized and instructed to be placed in a separate account.

The court's decision in *Northern Province Development Corporation v Attorneys Fidelity Fund Board of Control* 2003 (2) SA 284 (T) that notice given to the Attorneys Fidelity Fund Board of Control was inadequate in terms of s 48(1) turned primarily on a factual finding of when the defrauded entity knew or should have known of the loss. Secondarily, but significantly, the court eschewed responsibility for determining whether the delay in the s 48(1) notice should be condoned. The court's decision effectively and appropriately transferred to the Fund the discretion to decide on this matter.

POLICE

Legislation

There were no legislative amendments during 2003.

Statistics

Once again, it was extremely difficult to obtain reliable police statistics for 2003. The Annual Report of the National Commissioner of the South African Police Service 2002/2003 provides little in the way of a careful analysis of crime statistics. None the less, some indication of the pattern and nature of crime in South Africa can be gleaned from this report. In dealing with crime in South Africa, the Commissioner suggests that the level of crime needs to be seen within the context of the country having experienced extremely high levels of rapid urbanization of the kind which 'should have occurred naturally over a period of at least fifty years [but] has now occurred in seventeen years since the lifting of influx control measures'. He then raises the question of vigilantism whereby 'some people may lose confidence in the official structure of law enforcement which causes them to start

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creating their own parallel structures to enforce their safety and security'.

HIV/AIDS is also seen as a problem for crime control. The Commissioner notes that the epidemic 'may already have become conducive to crime in that police officers and other officials serving the criminal justice system may also contract the disease and become demoralized and/or medically unfit to render a proper service. In addition children are orphaned and one may increasingly find the situation where children not only grow up with single parents but no parents at all in equal age parent family units.'

The Commissioner also notes that there are significant conditions which are conducive to the growth of organized crime as well as the availability of resources which are attractive to organized criminals, such as abalone, diamonds, gold, ivory, rhino horn, luxury vehicles and drugs, the existence of markets for contraband goods, especially legal firearms and drugs, the porousness of borders and the relatively easy circumvention of control at entry-exit points, the opportunity for money laundering and the sophisticated and well-developed communication and transport network with its international links.

The report documents that crimes against the person, including murder, attempted murder, rape, attempted rape, assault with intent to do grievous bodily harm, common assault, aggravated robbery and other robbery, occur at the rate of 39,9 per 100 000 of the population in South Africa during the period under review.

The following statistics provide some indication of the pattern of crime over the past decade.

The murder rates during the period 1994/1995 to 2002/2003 as per 100 000 of the population are as follows:

1994/1995	67,2
1995/1996	68,1
1996/1997	63,1
1997/1998	59,4
1998/1999	59,6
1999/2000	52,5
2000/2001	49,8
2001/2002	48,0
2002/2003	47,4

According to the Report, the decrease in the instance of murder equals 29,5 per cent. More than half the murders, being 51 per

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cent, occurred in eleven of the forty-three police areas: the Eastern Metropole (6 per cent), Western Metropole (5,6 per cent), Durban South (5 per cent), Durban North (5 per cent), Umtata (4,9 per cent), Midlands (4,8 per cent), Johannesburg (4,7 per cent), East Rand (4,6 per cent), Umhfalozi (3,6 per cent), Boland (3,5 per cent) and Marico (3,1 per cent).

Rape accounts for 5,9 per cent of the reported contact crimes and 2,9 per cent of serious crimes in South Africa. The reported rapes for the period 1994/1995–20001/2003 per 100 000 of the population are as follows:

1994/1995	115,8
1995/1996	126,2
1996/1997	127,5
1997/1998	126,0
1998/1999	117,9
1999/2000	122,9
2000/2001	121,0
2001/2002	121,8
2002/2003	115,3

According to the Report, during 2002/2003 the rape ratio reached its lowest level since 1994/1995. The incidence of rape decreased by 5,3 per cent between 2001/2002 and 2002/2003.

23,2 per cent of all rapes were reported in the Gauteng area, 18 per cent in the KwaZulu Natal area and 12,5 per cent in the Western Cape.

A further significant statistic regarding rape was that 87,8 per cent of all offenders were known to their victims before the sexual offence occurred. Of this global statistic, 41,8 per cent were acquaintances, 21,4 per cent were relatives, 10,4 per cent were known by sight and 9,4 per cent were neighbours.

Case law

In *Manase v the Minister of Safety and Security & another* 2003 (1) SA 567 (CkH) the plaintiff had been arrested for murder by an inspector in the South African Police Service ('SAPS') and subsequently detained for forty-nine days. The charges were then withdrawn against the plaintiff in the High Court. The plaintiff thereafter approached the second defendant, an attorney, with regard to a possible claim for damages against the Minister of Safety and Security.

The attorney failed in terms of s 57(1) of the South African Police Service Act 68 of 1995 ('the Act') to issue summons against

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the SAPS within twelve months after the day upon which the claimant became aware of the alleged act or omission. Furthermore, the attorney failed, in terms of s 57(2) of the Act, to provide a written notification of his client's intention to issue summons on the Minister at least one month prior to the service of the summons. The plaintiff then instructed another attorney, who issued summons nine months later than the period stipulated in s 57(1) of the Act. In addition, there was no compliance with s 57(2) of the Act.

The court was required to consider whether the failure to comply with the provisions of s 57(1) and (2) of the Act constituted an insurmountable obstacle to the prosecution of the plaintiff's case. In this regard, s 57(5) of the Act became particularly relevant to the dispute. It provides: 'Subsections (1) and (2) shall not be construed as precluding a court of law from dispensing with the requirements or prohibitions contained in those sub-sections where the interests of justice so require.'

In interpreting this provision, White J said: 'It is therefore clear that when the Legislature enacted s 57(5) it had a twofold purpose in mind in view of the provision of the interim Constitution. The first was to protect an innocent claimant against the police from being nonsuited by formalistic time periods, which are more stringent than those prescribed in the Prescription Act 68 of 1969, and often beyond the control of the claimant. The second was to protect the police against inordinate delays in bringing actions against them, which could be prejudicial due to the police being a large organization with logistical problems, and the difficulties the police could encounter in finding witnesses, and their testifying after such long delays. What was intended was that justice be done between man and man ie between the claimant and the police' (para 41).

White J found that s 57(5) had been drafted to protect the claimant's right to have a justiciable claim settled by a court of law, and thus the provisin should be applied in a generous manner. In exercising its discretion in favour of the plaintiff in terms of s 57(5), the court took account of the fact that the plaintiff had done everything in his power to ensure that summons was issued timeously and to prevent his claims from being prescribed. Non-compliance with s 57(1) and (2) had been due to the gross negligence of his attorney from whom he had inquired frequently as to progress of his case. The plaintiff had suffered considerably as a result of the negligence of the attorney.

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There had been no suggestion that the first defendant, being the Minister, would suffer any prejudice as a result of the delay. The second defendant, the attorney, was 'a man of straw' and thus 'any order granted by this court against him would simply lead to a further injustice as the plaintiff would obviously not recover anything from him' (para 48).

The case is also discussed in the chapter on the Law of Delict.

Prisons

Legislation

There were no legislative amendments during the year.

Statistics

According to the Annual Report of the Office of the Inspecting Judge for the year 2003/2004 there were, at 31 March 2004, 187 640 prisoners in prisons which could accommodate a maximum of 114 787 prisoners. The Inspecting Judge, Mr Justice J J Fagan, commented that 'four out of every 1 000 South Africans are prisoners. We are one of the worst countries in the world to make use of imprisonment. Two thirds of the world's countries have imprisonment rates of less than one and a half per thousand. The cost of keeping so many prisoners is enormous, with a total cost to the State of about R20 m per day. We have to drastically reduce the number of prisoners so that meaningful rehabilitation programmes can be implemented. For a start there is the appalling number of awaiting-trial prisoners – 53 876 out of the total of 187 640 prisoners. These prisoners remain in prison waiting to be tried with an average of about three months, some for years. About 60% of them will not be convicted' (p 5).

The Annual Report documents a disturbing increase in deaths in prison. During 1995 the natural death rate was 1,65 deaths per 1000 prisoners. As at 2003 the rate stood at 9,1 deaths per 1000 prisoners. In addition to natural deaths, 56 unnatural deaths were recorded in 2003, including 16 suicides. Of the 1683 natural deaths recorded, 389 were of awaiting-trial prisoners.

The overcrowding problem continues to escalate out of control. The report reflects the following position with respect to the ten most overcrowded prisons as at 31 March 2004:

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Prison	Built to accommodate	Actual Number of prisoners	% Overcrowded
Lusikisiki	148	422	85%
Modimolle	341	988	290%
Mount Ayliff	85	250	294%
Middledrift	411	1 325	322%
Johannesburg Med.B	1 300	4 256	327%
Mount Frere	42	142	338%
Uniondale	24	82	342%
Umtata Med.	580	2 108	363%
Durban Med.C	671	2 480	370%
Thohoyandou Female	134	517	386%

Case law

Smuts AJ was required in *Mohammed v Minister of Correctional Services & others* 2003 (6) SA 169 (SE), inter alia, to consider an application directing the Minister of Correctional Services to consider the question of the applicant's being placed on parole. The applicant stated that, upon entering prison on 9 May 1995, he had been informed that he would receive credit for good behaviour and that, being a first offender, he would only serve half of his sentence. He explained that in March 1999 he was informed by the Parole Board that, in terms of a policy directive of 23 April 1998, he would be considered for parole only after serving three quarters of his sentence, but that the credits' earned system would be retained. He claimed that this system had not been applied in practice.

In this connection he referred to the decisions in *Winckler & others v Minister of Correctional Services & another* 2001 (2) SA 747 (C) and *Combrink & another v Minister of Correctional Services & another* 2001 (3) SA 338 (D). The applicant's argument was that he enjoyed a legitimate expectation, which was raised by the Department of Correctional Services during the early stage of his imprisonment, and which was 'constitutionally and administratively enforceable', that he could be considered for parole after serving half of his sentence.

Smuts AJ found that prisoners such as the applicant 'would have a legitimate expectation that their case for placement on parole would be considered upon the happening of defined events, such as having served half their sentence, and that such

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consideration would be done in accordance with existing criteria and guidelines' (at 188H–I). In this, the court followed *Combrink's* case and rejected the approach which had been set out in *Winckler* (supra), where Moosa J at 756F–H held: 'Applicants, when they are admitted to prison, could not have had a legitimate expectation that they would qualify for release once they had served half their sentence less the credits. The only legitimate expectation that they could have had was that their case would be fairly considered and decided in accordance with whatever lawful policy was in place at the time when their case fell to be decided.'

A sentenced prisoner applied in *Thukwame v Minister of Correctional Services & others* 2003 (1) SA 51 (T) for an order declaring the provisions of the education programmes which had been created in terms of reg 109 of regulations made in terms of s 134 of the Correctional Services Act 111 of 1998 to be invalid. He contended that these education programmes limited a prisoner's right to further education in terms of s 29(1) of the Constitution of the Republic of South Africa, Act 108 of 1996, in an unreasonable and unjustifiable manner.

The applicant was a final-year extramural LLB student and had enrolled for a diploma course in information technology at a technikon. He contended that in order for him to complete his studies for the diploma he required access to the Internet, which entailed the use of a modem and suitable software for his computer. He had also sought permission to attend the practical training courses outside the prison, which permission had been refused.

The court dismissed the application. Van Loggerenberg AJ held, inter alia, that a prison is a place of incarceration, not an 'Internet café'. Therefore 'the prisoner cannot play, walk, run, move about, phone, study new scientific research, express himself etc. in ways he could have done before his imprisonment. His life, as of necessity, gets regulated by prison hours and infrastructure' (para 39). The provisions for education as contained in reg 109 sought to balance the right of prisoners to be educated with the imperative of ensuring the security, good order and administration of the prison.

In *Stanfield v Minister of Correctional Services & others* 2003 (12) BCLR 1384 (C) (since reported in 2004 (4) SA 43 (C)) the applicant applied to be placed on parole on medical grounds in terms of s 69 of the Correctional Services Act 8 of 1959 ('the Act') which provides:

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'A prisoner serving any sentence in a prison —
(a) who suffers from a dangerous, infectious or contagious disease; or
(b) whose placement on parole is expedient on the grounds of his physical condition or, in the case of a woman her advanced pregnancy,
may at any time, on the recommendation of the medical officer, be placed on parole by the Commissioner: Provided that a prisoner sentenced to imprisonment for life shall not be placed on parole without the consent of the Minister.'

The applicant had been convicted of fraud in the form of tax evasion and been sentenced to a term of imprisonment of six years. After commencing his term of imprisonment he was diagnosed as suffering from incurable and inoperable lung cancer. The medical evidence prescribed his prognosis as very poor since the cancer was 'an especially aggressive malignancy' with an average survival rate of between six to eight months with treatment.

Van Zyl J interpreted s 69 of the Act to provide the Commissioner with a discretion to place a prisoner on parole provided that it was expedient to do so on the grounds of his medical or his physical condition and where a recommendation of a medical officer had been so made. In the view of the judge the nature of his conviction and the length of the sentence of imprisonment was irrelevant to the exercise of the discretion (para 82).

Van Zyl J found that the reasoning of the Commissioner in refusing to grant parole was so flawed that the court was justified in setting it aside on review. In particular, the court found that the evidence of incurable and inoperable cancer was so compelling that the suggestion by the Commissioner that the applicant's life expectancy was 'not so short' that further imprisonment would serve no purpose could not in any way be supported (paras 105–10). Furthermore, the court found that 'it was abundantly clear . . .' that the third respondent could not reasonably have accepted that the Drakenstein prison's medical facilities would be adequately equipped to provide proper care to a person in the applicant's medical condition' (para 122). Accordingly, the court ordered that the applicant be placed on parole forthwith.

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