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- > A comparison of three decades of South African Police Service culture
- > The unfair assessment of 'flight risk' in bail hearings
- > Determining the age of criminal capacity
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Editorial policy

South African Crime Quarterly is an inter-disciplinary peer-reviewed journal that promotes professional discourse and the publication of research on the subjects of crime, criminal justice, crime prevention and related matters, including state and non-state responses to crime and violence. South Africa is the primary focus of the journal but articles on the above-mentioned subjects that reflect research and analysis from other African countries are considered for publication, if they are of relevance to South Africa.

SACQ is an applied policy journal. Its audience includes policymakers, criminal justice practitioners and civil society researchers and analysts, including academics. The purpose of the journal is to inform and influence policymaking on violence prevention, crime reduction and criminal justice. All articles submitted to SACQ are double-blind peer-reviewed before publication.

Policy on the use of racial classifications in articles published in *South African Crime Quarterly*

Racial classifications have continued to be widely used in South Africa post-apartheid. Justifications for the use of racial descriptors usually relate to the need to ensure and monitor societal transformation. However, in the research and policy community racial descriptors are often used because they are believed to enable readers and peers to understand the phenomenon they are considering. We seem unable to make sense of our society, and discussions about our society, without reference to race.

South African Crime Quarterly (SACQ) seeks to challenge the use of race to make meaning, because this reinforces a racialised understanding of our society. We also seek to resist the lazy use of racial categories and descriptors that lock us into categories of identity that we have rejected and yet continue to use without critical engagement post-apartheid.

Through adopting this policy SACQ seeks to signal its commitment to challenging the racialisation of our society, and racism in all its forms.

We are aware that in some instances using racial categories is necessary, appropriate and relevant; for example, in an article that assesses and addresses racial transformation policies, such as affirmative action. In this case, the subject of the article is directly related to race. However, when race or racial inequality or injustice is not the subject of the article, SACQ will not allow the use of racial categories. We are aware that some readers might find this confusing at first and may request information about the race of research subjects or participants. However, we deliberately seek to foster such a response in order to disrupt racialised thinking and meaning-making.

Politics, democracy and the machinery of the state

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August 2016 will be remembered as a month in which South African politics underwent an historic shift. On 3 August 15 million of South Africa's 26 million registered voters cast their ballots in the country's local government elections. The result has been a shift in power, perhaps unlike any since the end of apartheid in 1994.

When the votes had been counted and the two-week coalition negotiations had been concluded, the African National Congress (ANC) had lost majority control of the country's political capital, Tshwane, its economic powerhouse, Johannesburg, and the metro named after its most iconic leader, Nelson Mandela Bay. Cape Town and the Western Cape remained firmly under Democratic Alliance (DA) control. This came after the DA, the Congress of the People (COPE), the United Democratic Movement (UDM), the African Christian Democratic Party (ACDP) and the Freedom Front Plus (FF+) announced that they had formed a coalition across metros to keep the ANC out of power.

But it was the newcomers, the Economic Freedom Fighters (EFF), that sealed the fate of the ANC when they announced that they would vote with the DA-led opposition coalition, while opting out of any formal agreement with them. Considering the distance between the EFF's socialist-revolutionary and the DA's neo-liberal ideologies, the EFF couldn't have played its (limited) cards any more shrewdly.

Despite these changes, it remains unclear whether the election results indicate a voting swing towards opposition parties, or a pulling away from – and so a vote against – the ANC. It is believed that 3 million ANC voters stayed away from the polls, severely eroding the ANC's urban support. In Johannesburg, where the ANC's provincial and municipal leadership has been popular, their ousting has been interpreted by some as a sign that residents are fed up with the ANC's national leadership. Under President Jacob Zuma, 'Brand ANC' has been muddied and bloodied, taking the ANC in Gauteng down with it.

Together, the message from opposition parties, and the electorate that ushered them in (whether through abstinence or votes), was that the ANC and Zuma's 'arrogance' had gone too far. There was a vote against Nkandla, the Guptas, the abuses at the SABC, Prasa, SAA and the broader corruption of the state. According to the Afrobarometer, trust in Zuma dropped from 62% in 2011 to just 34% in 2015. It is now probably even lower.

By most accounts the election was a logistical success. Many would argue that it was also a victory for democracy – South Africans had a chance to see that their vote could shift power in a significant way. More than 63 000 candidates were up for election, representing 204 political parties. Figures released by the Independent Electoral Commission (IEC), which coordinates elections, suggest that

96% of voters believed the elections were free and fair, and 92% trusted the IEC's independence. And yet these figures hide something important. In the seven months preceding the election, at least 20 people were killed in what appear to be politically motivated assassinations. Many of these seem to have been the result of intra-ANC tensions. Factions within the ruling party appear to have clashed in their attempts to secure key positions and so access municipal budgets – and the patronage power linked to them. In this issue of *SACQ*, anthropologist and long-time monitor of violence in KwaZulu-Natal (KZN), Mary de Haas, offers a unique insider's analysis of the apparently politically motivated killings in KZN.

At the time of going to press in late August, another major storm was brewing in South African politics. Social media quickly branded the scandal #SarsWars, a reference to Finance Minister Pravin Gordhan's former position as head of the SA Revenue Service and a play on the famous movie franchise, *Star Wars*. The scandal has seen the police's elite investigations unit, the Hawks, summon Gordhan to their offices, apparently to be warned of his imminent arrest. While the summons related to a secret SARS investigation unit established under Gordhan's watch, legal commentators and Gordhan's counsel apparently believed that he had not breached any law and had no case to answer. In response, ANC stalwarts, including George Bizos, Trevor Manuel and Siphosiso Pityana, called for the president to intervene, while Pityana went as far as calling on Zuma to step down. The National Prosecuting Authority (NPA) confirmed, at the time of going to press, that it had received a docket on the matter from the Hawks, but said no decision had been taken to prosecute or not.

Against this background, the unorthodox Hawks engagement with Gordhan in late August 2016 is believed by many to signal an abuse of the criminal justice system (the Hawks and NPA) to overcome the last barrier to a Zuma-linked coalition of politicians and business people, intent on plundering the state purse. One of the people accused of enabling this abuse is National Director of Public Prosecutions, Advocate Shaun Abrahams. We are thus very pleased to include in this issue an intimate and honest discussion between ISS Executive Director Anton du Plessis, ISS researcher Otilia Maunganidze and Abrahams, conducted in July 2016. Here Abrahams answers some tough questions about his appointment and his vision for the NPA, and denies any political meddling on his or his colleagues' part.

While post-election shifts in power at the municipal level will be unlikely to shape these alleged national machinations in the criminal justice system, where opposition parties rule major metros they have gained immense financial power and responsibility. For instance, one of the first actions of incoming Tshwane mayor Solly Msimanga (DA) was to ban blue light police escorts for all but the president. Msimanga can enforce this with the Tshwane metro police, as the DA mayor of Johannesburg, Herman Mashaba, can do with the Johannesburg metro police. Part of the DA's campaign in Nelson Mandela Bay included promises to show an impact on crime and disorder through its control of municipal law enforcement.

Analysis by the ISS and Cornerstone Economic Research suggests that, having previously controlled over 82% of a R287 billion local government budget, the August 2016 elections reduced the ANC's control to only 41.73%. In hung councils (where there was no outright winner) coalition budgetary control has surged from 2.63% in 2011 to 41.31% in 2016. Similar figures apply to overall capital expenditure budgets, which total R57 billion nationwide. These shifts are huge. Will the opposition and coalition governments be able to improve service delivery, including that of their municipal law enforcers – perhaps the most visible face of local government? Time will tell.

Other articles in this issue explore some of the more technical aspects of criminal justice in South Africa. For instance, it is common to hear South Africans complain that the day following the arrest of a criminally accused person, the accused is 'back on the street'. This, in part, reflects a misunderstanding about how bail works in South Africa, and the basic right of all accused to be granted bail. In this issue, Jameelah Omar explores whether the right to bail is granted to some and denied to others based on their economic status. With a focus on asset ownership and verifiable address, she suggests poor people are the unintended victims of discriminatory judgements.

In their contribution, Ursula Ehmke et al. question the reliability and accuracy of blood alcohol concentration results presented in South African courts, in cases where the driver is suspected of having been under the influence of alcohol. Having analysed samples from the Pretoria Forensic Chemistry Laboratory, they reveal an average delay of approximately five months between sample acquisition and laboratory analysis, with potentially detrimental effects on the course of justice. The authors call for urgent intervention in the ways in which samples are acquired, stored and analysed. With traffic enforcement a local competency in most of the country's major cities, but with forensic laboratories nationally managed, this will be another area to watch with interest in opposition-run metros.

To mark the five-year review of the Child Justice Act, Marelize Schoeman asks whether the procedural mechanisms currently in place to determine the age of criminal capacity in South Africa, are adequate and in children's best interests. Finally, Elrena van der Spuy reviews Don Pinock's new book, *Gang town*. Noting that Pinock is perhaps 'the most academically informed and practically qualified person in the Western Cape to write on youth gangs', she discusses his contribution in relation to what is a rich literature on gangs, identity, youth and exclusion in South Africa.

Lastly, as we prepare to bid farewell to SACQ's Editor of nine years, Chandré Gould at the end of this year, I am very pleased to announce that we have welcomed three new members to the SACQ Board. They are: Dr Hema Hargovan, an academic and an Advocate of the High Court of South Africa, currently lecturing in the School of Built Environment and Development Studies at the University of KwaZulu-Natal; Nwabisa Jama-Shai, a Senior Researcher at the South African Medical Research Council's (MRC) Gender and Health Research Unit; and Nomfundo Mogapi, a clinical psychologist heading up the Trauma and Transition programme (TTP) at the Centre for the Study of Violence and Reconciliation (CSVR). We are thrilled to have them on our team.

I hope you enjoy the issue.

Andrew Faul
(Editor)

Combating drunken driving

Questioning the validity of blood alcohol concentration analysis

Ursula Ehmke-Engelbrecht, Lorraine du Toit-Prinsloo, Christelle Deyssel, Joyce Jordaan and Gert Saayman*

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The reliability and accuracy of blood alcohol concentration results presented in South African courts in respect of possible driving under the influence (DUI) cases, have in recent years been subjected to intense scrutiny and severe criticism. Research has shown that multiple factors may negatively affect the reliability of results obtained from the analysis of such samples – including inappropriate or non-standardised sample management. In particular, long delays between sample acquisition and analysis may compromise the validity of results. Such delays may also negatively affect the outcome of both criminal and civil legal proceedings in possible DUI cases. A retrospective descriptive study was conducted on records from the Pretoria Forensic Chemistry Laboratory (PFCL) regarding the relevant dates pertaining to blood samples from deceased persons that were received for analysis. The parameters included the dates of sample acquisition at medico-legal mortuaries, delays in submission of samples to the laboratory, and dates of actual analyses. In addition, the expiration dates of sample collection kits were recorded. Our results show that numerous expired kits were utilised and that there was an average delay of approximately five months between sample acquisition and laboratory analysis. This delay period varied greatly but appears to correlate with geographical distances of medico-legal mortuaries from the PFCL. In order to optimise and facilitate the administration of justice in both criminal and civil cases of alleged DUI, these shortcomings should be urgently addressed. It is argued that the implementation of prescribed measures and standard operating procedures in sample management, together with interventions such as accreditation of laboratories and improved resourcing of medico-legal and toxicology laboratories, is urgently required.

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In South Africa, criminal prosecutions of people driving while under the influence of alcohol (DUI) have in recent years received much attention. Defence attorneys often dispute the validity of the reported blood alcohol concentration (BAC) or breath alcohol concentration (BrAC) values of drivers accused of being under the influence of alcohol. Anecdotal evidence also suggests that insurance companies have become stricter in their approach to payouts in respect of damages suffered in cases where drivers may have been under the influence of alcohol, or where BAC values had exceeded the stipulated statutory limit.¹ In South Africa the specified legal limit for driving a motor vehicle is 0.05 g of ethyl alcohol per 100 ml of blood. Therefore, as little as 0.01 g per 100 ml increase in BAC value above the legal limit may result in criminal prosecution or the repudiation of an insurance claim for damages. Accordingly, defence attorneys in cases of criminal prosecution, or those litigating in respect of insurance claims, will often challenge the validity of reported BAC values on the basis that, for example, the sample may not have been properly obtained, was inappropriately stored or inaccurately analysed. In criminal cases the burden rests on the state or prosecution to show that the reported BAC value was accurate and a true reflection of the amount of alcohol in the blood of the driver at the time of the accident. The submission of reports prepared by experts in the employ of the state are deemed to be presumptive proof of the contents thereof, in terms of Section 212 of the Criminal Procedure Act. However, the defence or respondent may argue that there is a reasonable likelihood that the reported BAC value is not reliable, on the basis that a significant change in BAC value of the sample had set in since the time of the accident, or that the sample had not been properly analysed.

If the driver of a motor vehicle that has been involved in an accident is fatally injured, s/he will undergo a medico-legal autopsy, and

in most cases a blood sample will be retained by the forensic medical practitioner in order to determine the BAC. The literature indicates that there are indeed a number of factors that may negatively affect the reliability of using such post-mortem blood samples for purposes of establishing the probable BAC at the time of the relevant incident. These include, for example, developments such as post-mortem autolysis and decomposition of the body, obtaining the blood sample from an inappropriate site in the body, use of inappropriate containers for sample collection and/or storage, contamination of samples, temperature variations during transit or storage of the sample, and undue delays in sample analysis.²

The failure to conduct timely analyses of blood samples may compromise DUI investigations and criminal prosecution, and may undermine the constitutional rights of accused individuals. Furthermore, it may result in long delays in settling disputes or claims for insurance payouts and in settling the estates of deceased individuals, potentially causing great financial hardship to dependants or beneficiaries. However, perhaps the greatest risk associated with delays in analysing blood samples lies in the fact that changes in the concentration of alcohol or drugs in such specimens may make the measured and/or reported values inaccurate and unreliable. The effects of long periods and variable conditions of storage on measured BAC have not been fully established, but many authors have warned against long retention periods of samples as this may cause substantial alterations (increase or decreases) in BAC.³ Long delays in the analysis of biological fluid samples such as blood may result in sample degradation or alteration due to the thermolability of substances, actions of micro-organisms, evaporation and haemolysis.⁴ Although specific steps may be taken in an attempt to minimise such risks, such as refrigeration of samples and the addition of chemical preservatives to the specimen, there is

no guarantee that these measures will prevent negative outcomes. The best approach would be to ensure that rapid and effective sample analysis takes place as soon as possible after acquisition. Multiple studies have shown that long retention of samples can result in variable results, even if samples are refrigerated or have been chemically preserved with substances such as sodium fluoride.⁵ Clearly this could have profound effects on criminal and civil legal proceedings.

In 2015 it was reported that 44 526 DUI cases were withdrawn from South African courts in the 2012/2013 financial year, for a variety of reasons – but a substantial number of these related to inadequacies in the maintenance and operation of technical equipment (including breathalyser apparatus), inadequate or inappropriate sample retention and storage, as well as invalid sample analysis.⁶

Blood samples for alcohol analysis in post-mortem and DUI cases are submitted to the Forensic Chemistry Laboratories (FCL), which are run by the National Department of Health (NDoH). Until recently, there were only three such laboratories in South Africa, situated in Pretoria, Johannesburg and Cape Town. A fourth was opened in Durban in 2015. These laboratories receive large numbers of samples derived from fatal outcome cases (medico-legal autopsies), as well as from drivers stopped at roadblocks and accident scenes.

This study aimed to investigate sample management in respect of collection of blood and fluid samples during medico-legal post-mortem examinations, the subsequent storage periods before submission thereof to toxicology laboratories, and the time lapse from the collection of the sample to the analysis thereof. Our findings suggest that samples are being poorly managed and that it would be beneficial to introduce remedial and preventative measures in the form of prescribed protocols

and procedures, in order to minimise risks associated with sample degradation, before analysis.

Materials and methods

A retrospective descriptive study was carried out on toxicology records from the database at the Pretoria Forensic Chemistry Laboratory (PFCL), pertaining to blood samples received for analysis from 55 medico-legal mortuaries in KwaZulu-Natal, Mpumalanga, Limpopo and northern Gauteng over a period of six consecutive months, from 1 July 2012 to 31 December 2012. All blood samples received by the PFCL were included in the study.

The following data and information were evaluated for each specimen: date of sample acquisition (i.e. date of autopsy), date of sample transfer to the PFCL, and date of sample analysis at the PFCL. In addition, the date of manufacture and the manufacturer's stipulated expiration date of the container kits for blood alcohol samples were recorded. A review was also undertaken of the geographic distribution of the mortuaries in each of the provinces, and their respective distances from the PFCL. Data were collected by the first author.

The data were entered into a Microsoft® Office Excel® 2007 spreadsheet and transferred to the IBM® SPSS® Statistics (IBM Corporation, Armonk, New York, US) program as well as the SAS/STAT® Software (SAS Institute Inc., Cary, North Carolina, US), and analysed in conjunction with a statistician. Approval to perform the study was obtained from the relevant authorities, including the head of the FCL and the Research Ethics Committee of the Faculty of Health Sciences at the University of Pretoria, prior to the commencement of the study.

Results

The PFCL received a total of 39 429 samples for 2012. These included 23 862 DUI samples,

5 968 post-mortem blood alcohol samples, 3 649 toxicology samples and 1 320 other samples (which include food and liquor samples). For the designated study period (1 July to 31 December 2012), a total of 3 010 post-mortem samples were received. Of these, 253 samples had to be excluded from the study due to incomplete paperwork (e.g. the date of the post-mortem was not completed on the collection form). A total of 2 757 samples were thus included in the study. Most of the study samples (43.2%, n=1 191) were received from KwaZulu-Natal, followed by northern Gauteng (30.1%, n = 831), Limpopo (14.9%, n = 410) and Mpumalanga (11.8%, n = 325).

Dates of sample acquisition and delivery

Table 1 indicates by province in which the mortuary is situated, the average number of days between sample collection and delivery to the PFCL, the average number of days between delivery at PFCL to analysis, and the total number of days from sample collection to analysis. From the data it appears that there were substantial variations between provinces in delays between collection and delivery, but that the period between receipt of sample and analysis was fairly constant for all samples, being approximately 102–118 days.

Grouping of mortuaries according to geographical distance from the PFCL

The 55 submitting mortuaries were further divided into eight groups according to their distance (divided into 100 km ranges) from the PFCL, as set out in Table 2. Mortuaries situated within 100 km of the laboratory (five mortuaries) handed in their samples within, on average, seven days of collection or autopsy (SD = 23.93). Of the 55 mortuaries, 38% (n = 21) delivered their samples to the laboratory, on average, within 30 days. Four (7%) mortuaries handed in their samples, on average, more than 120 days after sample collection (with one mortuary taking 587 days to submit the samples). It seemed clear that greater geographical separation from the PFCL resulted in longer delays in sample delivery, although it was also noted that smaller mortuaries (where fewer autopsies were performed) also tended to have longer delay periods before delivery of samples. In general, the closer the distance to the PFCL, the shorter the time between sample collection and delivery at the PFCL (Table 2).

Expiry dates on sample collection kits

The manufacturer of the blood alcohol collection kits has set an expiration date of two years after the date of production of the kit.

Table 1: Number of days between collection, delivery and analysis per province

Province	Mean number of days between collection and delivery date (m±SD)	Mean number of days between delivery and analysis (m±SD)	Mean number of days between collection and analysis (m±SD)
Northern Gauteng	5.17 ± 6.85	102.13 ± 34.17	107.42 ± 34.65
KwaZulu-Natal	93.06 ± 160.77	118.52 ± 35.35	213.32 ± 165.18
Limpopo	34.99 ± 43.44	102.38 ± 32.98	138.05 ± 58.37
Mpumalanga	43.69 ± 106.72	102.73 ± 30.23	147.52 ± 114.76
Combined averages	52.11 ± 119.31	109.12 ± 34.96	161.20 ± 126.85

Table 2: Mortuary grouping according to distance from Pretoria and the number of days between collection, delivery and analysis for each distance category

Distance from Pretoria FCL	Number of mortuaries	Mean number of days between collection and delivery date (m±SD)	Mean number of days between delivery and analysis (m±SD)	Mean number of days between collection and analysis (m±SD)
0–99 km	5 mortuaries (Northern Gauteng – 3, Mpumalanga – 2)	7.14 ± 23.93	102.45 ± 33.91	109.69 ± 40.94
100–199 km	8 mortuaries (Mpumalanga – 6; Limpopo – 2)	24.18 ± 80.18	97.20 ± 29.00	121.46 ± 85.36
200–299 km	11 mortuaries (Mpumalanga – 6; Limpopo – 5)	46.58 ± 93.72	110.00 ± 34.04	157.97 ± 107.60
300–399 km	7 mortuaries (Mpumalanga – 3, Limpopo – 3; KwaZulu-Natal – 1)	50.82 ± 45.43	90.63 ± 30.22	141.45 ± 50.82
400–499 km	10 mortuaries (KwaZulu-Natal – 6, Mpumalanga – 2; Limpopo – 2)	44.16 ± 35.40	101.50 ± 25.66	148.94 ± 46.61
500–599 km	2 mortuaries (KwaZulu-Natal)	61.73 ± 37.93	95.93 ± 27.55	158.43 ± 53.89
600–699 km	10 mortuaries (KwaZulu-Natal)	99.08 ± 168.47	120.56 ± 35.79	222.27 ± 172.77
700–799 km	2 mortuaries (KwaZulu-Natal)	40.27 ± 53.94	105.30 ± 28.02	146.01 ± 63.61

These dates are printed on the containers (Figure 1). In 197 (7%) of the 3 010 cases reviewed, no expiration date was stated or recorded in the records reviewed at the PFCL. In 688 (23%) cases, expired kits had been used to collect the blood sample, with most of these kits having expired nine years prior to sample collection (the rest of the expiration dates ranged from one to seven years prior to sample collection). In 305 (10%) cases kits were used that were valid at the time of sample collection but they had expired either before they were submitted to the PFCL or before they were analysed.

Figure 1: Manufacturing and expiration date as listed on a standard blood alcohol collection kit



Discussion

From the data collected in this study, it appears that there are at least three serious concerns in post-mortem blood alcohol sample management. These are: 1) the long delays in getting samples to the PFCL; 2) the long delays between receipt of sample and the analysis thereof; and 3) the use of expired kits for sample storage. To the best of our knowledge, this is the first study to clearly and definitively illustrate the delay between sample collection and analysis.

The study suggests that delays of between four and six months between sample collection (autopsy) and sample analysis are not unusual. Unfortunately, for a variety of reasons, a very large national backlog has developed in the analysis of all these samples. According to the NDoH, in November 2014 the country faced a backlog of 69 476 samples.⁷ The PFCL receives post-mortem samples from medico-legal mortuaries in KwaZulu-Natal, Limpopo, Mpumalanga and the northern part of Gauteng, thus serving over half the country's population (approximately 27 million people).⁸ While it will be important for future research to establish the extent to which such delays have an impact on the actual BAC at the time of autopsy (if at all), the preliminary conclusion is that the current system hampers rather than supports the prosecution of people suspected of DUI offences.

There are currently no prescribed minimum periods for the completion of sample analyses in South Africa. Internationally, accepted norms and procedures in respect of post-mortem sample acquisition and analysis have evolved in the forensic medical and scientific fields. Following standardised operational procedures (SOPs) and accrediting laboratories according to national and international standards will help to authoritatively validate results in DUI investigations. While a lack of such

accreditation does not mean results produced in a laboratory are necessarily inaccurate or unreliable, accreditation does provide some measure of quality assurance. It is for this reason that appropriate quality controls and audit mechanisms should be put in place in respect of sample acquisition, storage and analysis.⁹ Medical practitioners and scientists who render professional services in this domain, or who are called to testify as experts in legal proceedings, are obliged to divulge all relevant information that may have an impact on the validity of results, without regard for the interests of the parties involved. It is their duty to draw attention to conditions or developments that may lead to inaccurate analyses or results being served before the courts.

In addition to delays in processing time, the fact that 253 samples (8.4%) had to be excluded from the study due to incomplete paperwork is of further concern. It is worrying that in some cases the forensic medical practitioner and/or forensic officer responsible for completing the required information did not appreciate the importance of providing all pertinent information.

Our results indicate that in approximately a third of cases reviewed, expired kits were used to collect samples for blood alcohol analysis (with many kits having expired nine years prior to sample collection). These specially designed kits comprise a protective polystyrene box that houses a glass sample bottle containing sodium fluoride (preservative) and potassium oxalate (anticoagulant) with numbered tamper-proof seals to ensure the integrity of the sample during transit to the FCL. While our study could not determine why expired kits had been used, the potential for legal proceedings to be prejudiced or undermined by such use is obvious. Future research should seek to establish whether the use of expired kits does indeed compromise the integrity of the sample and whether the relatively short expiry period

specified by the manufacturer is an undue limitation in the use of such kits.

It seems clear to the authors that the results presented here represent the proverbial 'tip of the iceberg' as far as forensic toxicology results from state mortuaries and laboratories are concerned. These problems cannot be placed at the door of a single agency, service or group of individuals. Multiple, in-depth studies may be required to adequately identify the scale and nature of these problems. In the meantime, efforts should be made to fast-track the implementation of appropriate and valid preventative and remedial measures. These may include introducing prescribed SOPs regarding sample management (collection, storage, despatch, container validation, time limits for analysis, etc.), ensuring that there is greater decentralisation of forensic toxicology analytical services, accrediting laboratories and introducing effective laboratory information management systems (LIMS). And yet, such measures may come to nothing if there remains a shortage of trained analysts working in forensic toxicology, and if the management and resourcing of medico-legal mortuaries in South Africa are not improved.

From time to time, media reports suggest that police officers intentionally tamper with blood samples, for example by subjecting them to extreme heat in the boots of cars and microwave irradiation.¹⁰ If true, the implementation of stricter protocols for the management and despatch of these samples might help to prevent such conduct.

In 2015 the government asked whether the legal limit for driving with alcohol in the blood should be lowered to a zero value. Based on our findings, a better way to address the problem of DUI may be to optimise the administration of existing legislation and ensure that there are fewer 'loopholes' – or valid defences – for culprits.¹¹

It should be reiterated that this study addressed only the management of blood samples retained from deceased individuals: the results are not necessarily a reflection of the management of samples obtained from living drivers suspected of DUI. Separate studies will be required to shed more light in this regard. Furthermore, this study did not seek to identify all possible causes or reasons for delays in the delivery of samples to laboratories. Clearly, a multiplicity of factors may play a role, including, for example, the efficiency of mortuary management, whether use is made of shared transport services, and the decision to aggregate samples until adequate numbers are accumulated to 'justify' sample despatch. It would seem obvious that greater geographical distances would serve as a deterrent to immediate or rapid sample transfer (perhaps more so when bureaucratic restrictions for inter-provincial travel are considered).

Conclusion

Long delays in analysing blood samples collected at medico-legal mortuaries, as well as the use of expired containers for such samples, have the potential to seriously undermine the administration of justice in South Africa, as such shortcomings provide a basis upon which those who are indeed guilty of driving while intoxicated may escape successful prosecution. More structured studies are required to assess and address the problems related to forensic toxicology service delivery in South Africa. By doing so we may pre-empt the opportunistic defences sometimes presented on behalf of those who bring this scourge to our roads.



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Notes

- 1 Personal communication with insurance companies in July 2014.
- 2 WH Anderson, Collection and storage of specimens for alcohol analysis, in JC Garriott (ed.), *Garriott's medicolegal aspects of alcohol* (5th edition), Tucson: Lawyers & Judges

- Publishing Company, 2008, 275–283; AT Kelly and A Mozayani, An overview of alcohol testing and interpretation in the 21st century, *Journal of Pharmacy Practice*, 25, 2012, 30–36; CL Winek Jr., CL Winek and WW Wahba, The role of trauma in postmortem blood alcohol determination, *Forensic Science International*, 74, 1995, 213–214; GA Brown, D Neylan, WJ Reynolds and KW Smalldon, The stability of ethanol in stored blood: Part I. Important variables and interpretation of results, *Analytica Chimica Acta*, 66, 1973, 271–283; T Meyer, PK Monge and J Sakshaug, Storage of blood samples containing alcohol, *Acta Pharmacologica et Toxicologica*, 45, 1979, 282–286; Randall Chang, Wanda Smith, Elisabeth Walkin, and Philip Reynolds, The stability of ethyl alcohol in forensic blood specimens, *Journal of Analytical Toxicology*, 8, 1984, 66–67; NK Shajani, BA Image and EB Chu, The stability of ethanol in stored forensic blood samples, *Canadian Society of Forensic Science Journal*, 22, 1989, 335–339; CL Winek and LJ Paul, Effect of short-term storage conditions on alcohol concentrations in blood from living human subjects, *Clinical Chemistry*, 29, 1983, 1959–1960.
- 3 Brown et al., The stability of ethanol in stored blood; Meyer et al., Storage of blood samples containing alcohol; Chang et al., The stability of ethyl alcohol in forensic blood specimens; Shajani, Image and Chu, The stability of ethanol in stored forensic blood samples; Winek and Paul, Effect of short-term storage conditions on alcohol concentrations in blood from living human subjects; AW Jones, Are changes in blood-ethanol concentrations during storage analytically significant? Importance of method imprecision, *Clinical Chemistry and Laboratory Medicine*, 45:10, 2007, 1299–1304; BL Glendening and TC Waugh, The stability of ordinary blood alcohol samples held at various periods of time under different conditions, *Journal of Forensic Science*, 10, 1965, 192–200; T Winek, CL Winek and WW Wahba, The effect of storage at various temperatures on blood alcohol concentration, *Forensic Science International*, 78, 1996, 179–185.
- 4 J Chang and SE Kollman, The effect of temperature on the formation of ethanol by *Candida albicans* in blood, *Journal of Forensic Science*, 34, 1989, 105–109; P Blume and DJ Lakatua, The effect of microbial contamination of the blood sample on the determination of ethanol levels in serum, *American Journal of Clinical Pathology*, 60:5, 1973, 700–702; G Hoiseth, L Kristoffersen, B Larssen, M Arnestad, N Hermansen and J Mørland, In vitro formation of ethanol in autopsy samples containing fluoride ions, *International Journal of Legal Medicine*, 122:1, 2008, 63–66; LA Ferrari, JM Triszcz and L Giannuzzi, Kinetics of ethanol degradation in forensic blood samples, *Forensic Science International*, 161, 2006, 144–150; KM Dubowski, RH Gadsden Sr. and A Poklis, The stability of ethanol in human whole blood controls: an interlaboratory evaluation, *Journal of Analytical Toxicology*, 21, 1997, 486–491; D Yajima et al., Ethanol production by *Candida albicans* in postmortem human blood samples: effects of blood glucose level and dilution, *Forensic Science International*, 164, 2006, 116–121; GL Dick and HM Stone, Alcohol loss arising from microbial contamination of drivers' blood specimens, *Forensic Science International*, 34, 1987, 17–27; MA Clark and JW Jones, Studies on putrefactive ethanol production: I. Lack of spontaneous ethanol production in intact human bodies, *Journal of Forensic Science*, 27, 1982, 366–371;
- CL O'Neal and A Poklis, Postmortem production of ethanol and factors that influence interpretation, *American Journal of Forensic Medicine and Pathology*, 17, 1996, 8–20.
- 5 Ibid.
- 6 Wilmot James, The state of forensic chemistry laboratories in SA, 5 February 2015, <http://www.politicsweb.co.za/party/the-state-of-forensic-chemistry-laboratories-in-sa> (accessed 21 February 2015).
- 7 Ibid.
- 8 Statistics South Africa, Mid-year population estimates 2014, 2014, <http://beta2.statssa.gov.za/publications/P0302/P03022014.pdf> (accessed 3 March 2015).
- 9 GR Jones and L Liddicoat, Quality assurance, in Garriott, 269–274.
- 10 Maygene de Wee, Bloedmonsters 'in mikrogolfoond gekook', *Die Burger*, 11 December 2015, 6, <http://www.pressreader.com/south-africa/die-burger/20151211> (accessed 21 January 2016); J Witten, Yengeni cop found guilty, *IOL News*, 30 November 2009, <http://www.iol.co.za/news/south-africa/yengeni-cop-found-guilty-1.466252> (accessed 21 January 2016); S Hofstated and P Joubert, Drunk-drive botch-up, *Times Live*, 5 January 2014, <http://www.timeslive.co.za/local/2014/01/05/drunken-drive-botch-up1> (accessed 21 January 2016).
- 11 Government Gazette, General Notice: Notice 77 of 2015, Department of Transport, National Road Traffic Act 1996 (Act no. 93 of 1996) publication for comments: National Road Traffic Amendment Bill, 28 January 2015, www.gov.za/sites/www.gov.za/files/38429_gen77.pdf

'Darker shades of blue'

A comparison of three decades of South African Police Service culture

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Research on police has emphasised that police culture reflects the identities and sensitivities of police officials. Recently, a 'contemporary police culture' school of thought has emerged, challenging the traditional view that police character is homogenous and universal. Supporters of this philosophy argue that developments in policing have dramatically changed police culture, making traditional characterisations antiquated and irrelevant. This article contributes to this debate by exploring three core elements of early police organisational culture models – solidarity, isolation and cynicism – among a representative sample of South African Police Service (SAPS) officials with 10, 20 and 30 years' experience.

Research on police has long recognised the importance of police culture in shaping officials' attitudes to work. In the decades since the early ethnographic work of William Westley,¹ a range of police ethnographies have been conducted, predominantly in the United States and United Kingdom.² These have noted, among others, feelings and perceptions of isolation, solidarity and cynicism among police officials, as well as a sense of mission, conservatism, pragmatism, machismo, racism and sexism. These have been understood as attributes developed by police to cope with the challenges of the job.

These traits have been cited so frequently that one might think them a ubiquitous element of police culture. However, recently a 'contemporary police culture' school of thought has arisen, challenging the prevailing traditional portrayals of homogeneity and universality. Its proponents argue that new developments in police and policing have dramatically changed, and that traditional characterisations therefore do not reflect contemporary police culture or police actions. What is more likely, however, is that while certain aspects of police culture have changed, others remain firmly entrenched. Using a survey carried out among n=173 South African Police Service (SAPS) officials, this article aims to contribute to this debate. It specifically explores whether attitudes relating to solidarity,

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isolation and cynicism vary by the number of years of service in the SAPS.

Coping themes of solidarity, isolation and cynicism in traditional police culture

Academic portrayals of police and policing have historically presented police attitudes as characterised by cynicism and feelings of isolation from the public. With the introduction of community policing in the 1980s (1990s in South Africa) it was hoped that police culture would evolve more positively.³

Police culture is shaped by at least two key aspects of the job: the police occupational setting and the police organisational setting.⁴ *Culture* can be defined as a pattern of basic assumptions shared by a group and taught to new members as the correct way to perceive, think and feel in relation to certain problems.⁵ Schraeder, Tears and Jordan note that *organisational culture* describes shared beliefs and expectations about organisational life within an organisation.⁶ *Police occupational and organisational culture* is operationalised as the work-related principles and moral standards that are shared by most police officials within a particular sovereignty. The most definitive element of the occupational setting is the risk of physical harm to officials, and their potential to use force against others.⁷

The second key aspect of the job is the hierarchical structure and related internal oversight of officials.⁸ In this setting, officials face erratic and disciplinarian managers. Police officials are expected to enforce the law while respecting both the law and the organisation's rules. Transgressions can be harshly punished. Novice police quickly realise that they are more likely to receive managerial attention for their mistakes than for their accomplishments.⁹ As a result, they stop taking initiative in their work.

Police are expected to be competent and are quickly found to be at fault when they are not.

The police organisational environment is also one that supports vague task affinity. Empirical enquiries suggest the three primary roles expected of police officials are preservation of the peace, execution of the law, and the provision of public assistance.¹⁰ The potential for harm to police officials, and for their use of force, as well as critical management and role ambiguities, can generate pressure and angst among police, and as such impede police work. Solidarity, isolation and cynicism have been identified as three coping strategies that police adopt in response to their work.¹¹

One of the most powerful attitudinal elements of police culture is the sense of solidarity shared by its members.¹² Solidarity in the police context can be described as the glue that holds police culture together.¹³ It sustains police group identity, marks group boundaries and shields police from external oversight.¹⁴ Police solidarity is a product of conflicts with and antagonisms towards diverse community and public groups that challenge police authority, such as community members, courts, the media, politicians, and top-ranking police officials.¹⁵ Moreover, the danger of police work (real or perceived) encourages strong loyalties in an 'all for one and one for all' sense of camaraderie, and a military sense of combat-readiness and general spiritedness. Powerful loyalties emerge in the commonly shared and perilous effort to control dangerous crimes.

A great deal of police research over the past 45 years has documented the likelihood of police to feel isolated from their friends, the public, the legal system and even their own families.¹⁶ This is both a result of their unique, often fraught public position in society, and because the work does not correlate with the standard working week.¹⁷ As a result, some police choose to socialise with other police or pass time alone.¹⁸

In 1967 Arthur Niederhoffer wrote of the cynicism he had observed during his career in the New York City Police Department. He believed the average officer's state of mind was characterised by hostility and bitterness, levelled at all around him, including the police system.¹⁹ Left unimpeded, police cynicism contributes to alienation, job dissatisfaction and corruption. Gauges of police cynicism tap the argot of police culture, a language nuanced with vexation towards overseers, police toil and the establishment. Cynicism appears early on from language and attitude sculpting in college training, partly because of a desire among newcomers to emulate experienced officials in an effort to shed their status as novices.²⁰

Research on themes of solidarity, isolation, and cynicism

The Police Culture Solidarity, Isolation, and Cynicism Questionnaire [PCSIQ] study, a longitudinal, four-stage, repeated measure study among a representative sample of all new SAPS recruits, was conducted between 2005 and 2010. First administered during basic training in January 2005, the study established that SAPS cadets entered the organisation (Van Maanen and Manning's *choice*-stage of police culture socialisation) with predispositions to the solidarity, isolation and cynicism found in the literature.²¹ These sentiments were either maintained or strengthened during academy training (Van Maanen and Manning's *admittance*-stage of police culture socialisation) and field training (Van Maanen and Manning's *encounter*-stage of police culture socialisation). Over the next nine years of police service (Van Maanen and Manning's *metamorphosis*-stage of police culture socialisation) these attitudes were fortified and reinforced.²²

Steyn, Bell and De Vries made use of the same survey instrument to compare the attitudes of new SAPS recruits with those of recruits at the Justice Institute of British Columbia (JIBC) Police

Academy. The study found that both new SAPS and JIBC police recruits had a shared affinity for police solidarity, but that while most SAPS recruits showed characteristics of isolation and cynicism, only half the JIBC recruits did.²³

These findings support the view that the SAPS, like other police agencies, recruits individuals whose values and attitudes align with the organisation's culture, and that these predispositions are cyclically fortified and reinforced by police culture.

Research objective and questions

Extending the findings of the PCSIQ study, which showed the presence of the stated attitudes during the first 10 years of SAPS officials' careers, this research asked: do SAPS officials' attitudes align with the themes of solidarity, cynicism and isolation, and do they vary among officials with 10, 20 and 30 years of service?

Research methodology

A cross-sectional, quasi-experimental, three-group post-test research design was employed.

Outcome variables

Attitudes refer to cognitive evaluations (favourable or unfavourable) of statements made on a 30-item questionnaire, developed by Jéan Steyn in 2004, measuring solidarity, isolation and cynicism among police officials.²⁴ The study made use of the PCSIQ, developed by Jéan Steyn in 2004.²⁵ The PCSIQ is a composite measure consisting of three subscales, with 10 items per scale.

Police culture solidarity coping theme subscale items

- [01] Policing should be one of the highest paid careers
- [02] It is my duty to rid the country of its bad elements
- [03] Police officials are careful of how they behave in public

- [04] You don't understand what it is to be a police official until you are a police official
- [05] Police officials have to look out for each other
- [06] Members of the public, media and politicians are quick to criticise the police but seldom recognise the good that police members do
- [07] What does not kill a police official makes him or her stronger
- [08] Most members of the public don't really know what is going on 'out there'
- [09] A good police official takes nothing at face value
- [10] To be a police official is not just another job, it is a 'higher calling'

Police culture isolation coping theme subscale items

- [11] I tend to socialise less with my friends outside of the police since I have become a police official
- [12] I prefer socialising with my colleagues to socialising with non-members
- [13] I don't really talk in-depth to people outside of the police about my work
- [14] Being a police official made me realise how uncooperative and non-supportive the courts are
- [15] My husband/wife, boyfriend/girlfriend tends not to understand what being a police official is all about
- [16] Shift work and special duties influence my socialising with friends outside the police
- [17] I feel like I belong with my work colleagues more every day, and less with people that I have to police
- [18] As a police official, I am being watched critically by members of the community, even in my social life

- [19] I can be more open with my work colleagues than with members of the public
- [20] Generals do not really know what is happening at grass-roots level

Police culture cynicism coping theme subscale items

- [21] Most people lie when answering questions posed by police officials
- [22] Most people do not hesitate to go out of their way to help someone in trouble
- [23] Most people are untrustworthy and dishonest
- [24] Most people would steal if they knew they would not get caught
- [25] Most people respect the authority of police officials
- [26] Most people lack the proper level of respect for police officials
- [27] Police officials will never trust members of the community enough to work together effectively
- [28] Most members of the community are open to the opinions and suggestions of police officials
- [29] Members of the community will not trust police officials enough to work together effectively
- [30] The community does not support the police and the police do not trust the public

Each item was scored using a Likert scale between 1 and 4 (strongly disagree 1, disagree 2, agree 3, strongly agree 4). The higher the score, the greater the presence of a particular police culture attitudinal theme. Items 22, 25 and 28 on the PCSICQ are reverse stated to control for manipulation, and as a result, counter scored (strongly disagree 4, disagree 3, agree 2, strongly agree 1).

A pilot study was conducted in December 2004 among 100 SAPS functional police officials stationed in the city of Durban, South Africa. Factor analysis identified nine factors, of which four met the latent root criterion (also known as the eigenvalue-one criterion or the Kaiser criterion).

The factor analysis showed statistically significant loadings (with >0.70 communality) for items 30, 24, 21, 29, 27 and 30 on Factor 1. Items 21, 23 and 24 could be grouped into respondents' viewpoints apropos the truthfulness and trustworthiness of the populace, whereas items 27, 29 and 30 gauged participants' beliefs about the effects of these traits on police–community interactions. The relational direction between the Factor 1 loadings signified that respondents who viewed the public as commonly deceitful and untrustworthy correspondingly felt that the police and the public could not work well together.

Items 25, 29 and 30 were loaded with statistical significance on Factor 2. Item 25 was a determinant of how respondents felt about citizens' respect for the police, and items 29 and 30 measured the respondents' attitudes regarding the relationship between the police and the public. The respondents who thought that the public did not respect the police also felt that the police and the public did not trust one another.

Factor 3 reflected high loadings (with >0.70 communality) from measures 12, 11, 2, 5 and 6. These items showed that the respondents believed that police officials should look out for one another. Respondents who supported a collective purpose (i.e., rid the country of its bad elements) and viewed outsiders as critics of the police, likewise believed that police officials had to look after one another and preferred to mingle more with police colleagues and less with outsiders.

Measures 23, 16, 28, 24 and 14 loaded statistically significantly on Factor 4. These items measured the extent to which respondents socialised with others outside the police and their justifications for this. Respondents who indicated that they had socialised less with outsiders since joining the police were also of the opinion that this was due to unsupportive courts, shift work and special duties. They believed that even though members of the public were open to the opinions and suggestions of police officials, the former were not to be trusted and were generally dishonest.

In general, the factor analyses revealed that several of the items did not load on any of the four factors (with eigenvalues >1.0), and that some of the items loaded statistically significantly on more than one factor, thus emphasising the multi-dimensional and amorphous nature of the constructs. The critical question is whether each item, based on the literature, is valid as a measure of a dimension of the solidarity, isolation and cynicism commonly associated with police culture. This article argues that they are.

The Pearson product moment correlation coefficient (r), between solidarity, isolation and cynicism indicate positive linear relationships:

- Solidarity and isolation, $r = .963$, $p < .001$
- Solidarity and cynicism, $r = .627$, $p = .006$
- Isolation and cynicism, $r = .644$, $p = .003$

The reliability coefficient (*Cronbach alpha*) of the PCSICQ is 0.77, which indicates strong internal consistency.

Sampling

The study randomly selected three of the nine provinces – Gauteng, KwaZulu-Natal and Limpopo. It selected police officials based on those recognised by the SAPS as having 10, 20 and 30 years of service. Participants were

members of the SAPS – South Africa's sole national police service. A police official is an individual, irrespective of rank, appointed in terms of the South African Police Service Act.²⁶

Administration of the survey

Approval for the study was granted by the SAPS Head Office Strategic Management Component (SMC). The SAPS SMC and the SAPS Head Office Human Resource Division (HRD) supplied an official list of police officials who had received 10, 20 and 30 years' SAPS service medals (1994 until April 2015) in each of the three provinces. A telephone directory list was obtained from the SAPS web page and each identified police official was telephoned. Using English, each individual was validated, the purpose of the telephone call and the study explained, and the voluntary and confidential nature of participation clarified. The questionnaire was administered to willing participants via email.

Data analysis

Analyses were conducted in six steps. First, the socio-demographic characteristics of the sample were calculated, disaggregated by the three sub-groups: 10 years of service, 20 years of service, and 30 years of service. Second, analyses tested for statistically significant differences based on province, gender, age, race, marital status and education level. Third, total and percentage outcome scores for each of the three attitudes: solidarity, isolation and cynicism were compared across the three sub-groups stratified by province. Fourth, Mann-Whitney tests comparing mean differences for each attitude (solidarity, isolation and cynicism) in the three sub-groups were conducted, using Statistical Package for the Social Sciences

(SPSS) software, in two sub-steps:

(1) comparing participants with 10 years of service and 20 years of service and (2) comparing participants with 20 and 30 years of service. Fifth, average scores for individual items were computed using Mann-Whitney U tests and Kruskal-Wallis H-tests for two sub-steps: (1) comparing participants with 10 years of service and 20 years of service and (2) comparing participants with 20 and 30 years of service. Finally, a factorial Analysis of Variance (ANOVA) test was run to test for interaction effects on the three theme variables, using race, gender and years of service as factors.

Results

Table 1 indicates that the study sample represents the population of SAPS officials from the provinces of Gauteng, KwaZulu-Natal and Limpopo, who overall received 10, 20, and 30 year service medals from the organisation in 2015.

Table 2 depicts the variance between the years of service sub-groups in relation to gender, age, race, marital status and educational level. Despite their diversity, attitudes across the samples remained strikingly similar.

Outcome scores

An inclusive mean score of 24 (60%) or higher per participant on a particular theme (for example, solidarity [items 1–10]), with the minimum score being 10 and maximum 40, was selected as a measure of inclusion.

Table 3 reveals that police officials, irrespective of years of service and province, showed a propensity towards the attitudes of solidarity, isolation and cynicism (with an overall mean score of 29.08 [above the predetermined 24] and mean score percentage of 72.71% [above 60%] on the 30-item PCSICQ).

Table 1: Study sample comparative to population

Province	Years of SAPS service	Population (according to SAPS Head Office Human Resource Division)	Study sample	Study sample representation of population by percentage
KwaZulu-Natal	10	83	18	21.68%
	20	164	36	21.95%
	30	78	23	29.48%
Subtotal		325	77	23.69%
Limpopo	10	10	4	40.00%
	20	150	38	25.33%
	30	3	0	00.00%
Subtotal		163	42	25.76%
Gauteng	10	69	32	46.37%
	20	43	15	34.88%
	30	19	7	36.84%
Sub-total		131	54	41.22%
Grand total		619	173	27.94%

Table 2: Socio-demographics of study sample

Socio-demographic category		10 years of service		20 years of service		30 years of service	
		N	%	N	%	N	%
Gender	Female	26	48.14	13	14.60	6	20.00
	Male	28	51.85	76	85.39	24	80.00
Age	Mean	39	–	46	–	55	–
	Mode	35	–	45	–	55	–
	Minimum	28	–	38	–	48	–
	Maximum	38	–	60	–	60	–
Race	Black	51	94.44	69	77.52	19	63.33
	Coloured	2	3.70	2	2.24	1	3.33
	Indian	0	0	7	7.86	8	26.66
	White	1	1.85	11	12.35	2	6.66
Marital status	Married	21	38.88	75	84.26	24	80.00
	Single	26	48.14	6	6.74	2	6.66
	Divorced	4	7.40	6	6.74	2	6.66
	Widowed	3	5.55	2	2.24	2	6.66
Education level	Less than Grade 12	5	9.25	10	11.23	4	13.33
	Grade 12	31	57.40	53	59.55	11	36.66
	Grade 12 + 1 year	2	3.70	0	0	0	0
	Grade 12 + 2 years	11	20.37	16	17.97	12	40.00
	Grade 12 + 3 years	5	9.25	10	11.23	3	10.00
	Grade 12 + 4 years	0	0	0	0	0	0
	Grade 12 + 5 years	0	0	0	0	0	0

Note: 'N' denotes 'number', and '%' reflects 'percentage'.

Table 3: Mean scores and mean percentages when comparing responses

Province	Years of service	Solidarity mean score	Solidarity mean score %	Isolation mean score	Isolation mean score %	Cynicism mean score	Cynicism mean score %	Totals
Gauteng	10	31.19	77.97	30.97	77.42	26.19	65.47	88.34 / 73.62%
KwaZulu-Natal		33.44	83.61	32.67	81.67	25.56	63.89	91.67 / 76.39%
Limpopo		29.25	73.13	29.00	72.50	*22.75	*56.88	81.00 / 67.50%
Gauteng	20	32.06	80.16	31.69	79.22	26.13	65.31	89.88 / 74.90%
KwaZulu-Natal		32.53	81.32	31.86	79.65	25.42	63.54	89.81 / 74.84%
Limpopo		30.42	76.05	30.11	75.26	24.82	62.04	85.34 / 71.12%
Gauteng	30	30.57	76.43	30.43	76.07	24.57	61.43	85.57 / 71.31%
KwaZulu-Natal		30.48	76.20	30.30	75.76	25.70	64.24	86.48 / 72.07%
*Limpopo		0.0	0.0	0.0	0.0	0.0	0.0	00.00 / 00.00%

Note: ‘*’ designate group of participants that did not meet the required cut-off mean score.

Figure 1: Mean score comparison of SAPS officials’ attitudes in support of police culture coping solidarity, isolation and cynicism, by years of service

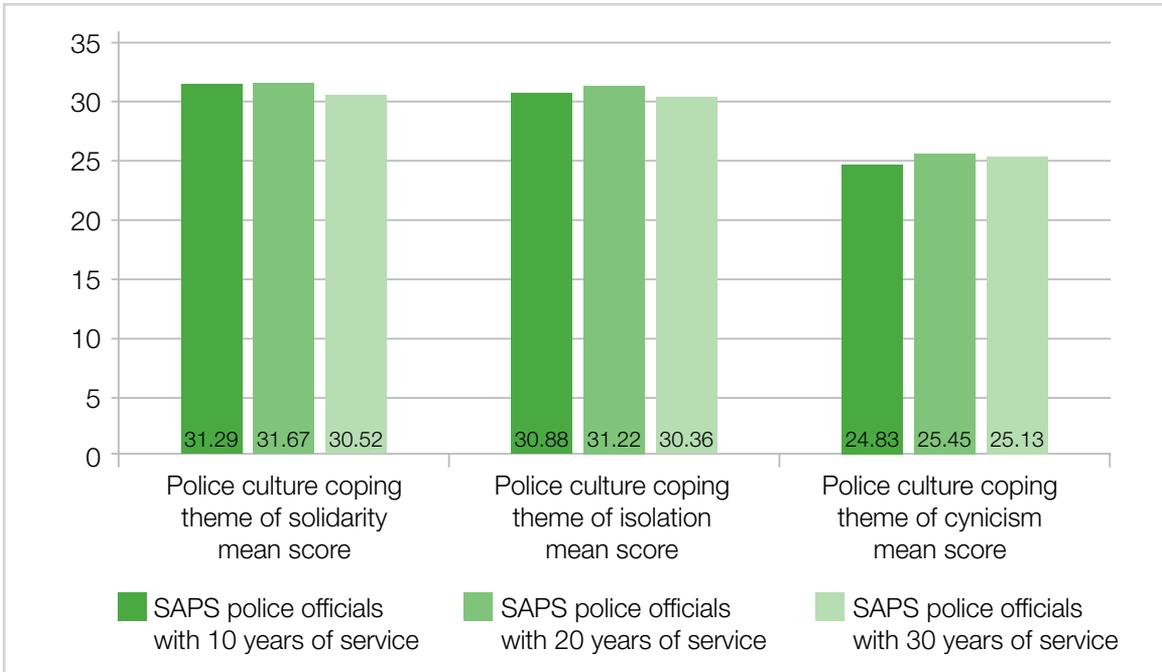


Figure 1 shows that solidarity was the most pronounced attitudinal trait (mean score 31.24 and mean score percentage 78.10%), followed by isolation (30.87 and 77.19%) and cynicism

(25.14 and 62.85%). It reveals almost no variation in attitude by years of service. This is confirmed by the Mann-Whitney U test (tables 4 and 5), which found no statistical significance.

Table 4: Mann-Whitney U test and tests of effect results between the SAPS official 10-year service categorical variable and the SAPS official 20-year service categorical variable

Source	Type III sum of squares	df	Mean square	F	p-value
Corrected model	32.023 ^a	1	32.023	.502	.480
Intercept	1055451.856	1	1055451.856	16.545.804	.000
Years code	32.023	1	32.023	.502	.480
Error	9058.137	142	63.790	–	–
Total	1131807.000	144	–	–	–
Corrected total	9090.160	143	–	–	–
Police culture coping theme		F-value		p-value	Partial eta squared
Solidarity		.187		.666	.001
Isolation		.314		.576	.002
Cynicism		.473		.493	.003
Total		.502		.480	.004
<i>Note: 'a' indicates R squared = .004 (Adjusted R squared = -.003). 'Key' to the eta squared results:</i>					
Effect size	Use	Small	Medium	Large	
η^2	Anova	0.01	0.06	0.14	

Table 5: Mann-Whitney U test and tests of effect results between the SAPS official 20-year service categorical variable and the SAPS official 30-year service categorical variable

Source	Type III sum of squares	df	Mean square	F	p-value
Corrected model	62.500 ^a	1	62.500	1.020	.315
Intercept	682776.900	1	682776.900	11141.263	.000
Years code	62.500	1	62.500	1.020	.315
Error	7231.467	118	61.284	–	–
Total	926394.000	120	–	–	–
Corrected total	7293.967	119	–	–	–
Police culture coping theme		F-value		p-value	Partial eta squared
Solidarity		2.433		.121	.020
Isolation		1.370		.244	.011
Cynicism		.036		.849	.000
Total		1.020		.315	.009
<i>Note: 'a' indicates R squared = .009 (Adjusted R squared = -.000). 'Key' to the eta squared results:</i>					
Effect size	Use	Small	Medium	Large	
η^2	Anova	0.01	0.06	0.14	

SAPS officials with 20 years of service were more likely than those with 30 years of service to agree and strongly agree with the following items: (1) police officials should be better

paid (p=0.027), (15) partners/spouses do not understand what being a police official is all about (p=0.024), and (23) most people are untrustworthy and dishonest (p=.047). SAPS

officials with 10 years of service were more likely than those with 20 years of service to agree and strongly agree with the following items: (17) police officials belong more with work colleagues and less with people they have to police, with every passing day ($p=.025$), and (21) most people lie when answering questions posed by police officials ($p=.025$). SAPS officials with 20 years of service were more likely than those with 10 years of service to agree and strongly agree with item 30: the community does not support the police and the police do not trust the public ($p=.016$).

Besides the statistically significant differences stated above, SAPS officials with 10, 20 and 30 years of service, as indicated in Table 6, consider their work as follows: taking place in a dangerous and uncertain environment, highly skilled and with moral purpose, and only suitable for unique individuals with characteristics such as toughness and suspiciousness. Groups outside of the police have very little understanding of police work, as reflected in unsatisfactory monetary compensation, cockeyed criticism and ill-considered prescriptions. These police officials isolate themselves from outsiders (friends, family members/important others, community, courts and top-ranking officials), in favour of their colleagues. They believe most people lie when answering questions asked by police officials would steal if they knew they would not be caught, are untrustworthy and dishonest, not perturbed by the cries for help of others, unlikely to praise police, and resistant to the opinions and advice of police officials.

Discussion and conclusion

This study contributes to the literature on police culture and socialisation by offering analysis of rigorously collected data from a middle-income country in the global South.

The study asked: do SAPS officials' attitudes align with the themes of solidarity, cynicism and

isolation, and do they vary among officials with 10, 20 and 30 years of service? It found that SAPS officials held such attitudes, irrespective of years of service. The findings agree with a previous 10-year longitudinal study that revealed the same attitudes found in this study.²⁷ They support the view that police organisations recruit individuals aligned with the organisation's culture, and that cultural attitudes reach a relative peak through socialisation. The findings do not support the views of those who believe that police culture has changed significantly due to developments in police and policing.²⁸ There is no doubt that novelties in the police occupational and organisational environments have changed some aspects of traditional police culture, but others have endured. The findings also provide an alternative view to Crank's notion that police culture cynicism attains maximum potency between the fourth and fifth year of a police officer's career, and suggests that the upper limit is only reached around the 20-year mark (15 years longer than originally thought).²⁹

The findings suggest that solidarity, isolation and cynicism are standard coping strategies among South African police officials, as they have been shown to be elsewhere. The notion that community-oriented policing challenges these attitudes seems, based on this study, unfounded. Encouraging interaction between police and the public increases dissonance (catch-22 policing), and police officials attempt to reduce the associated anxiety through solidarity, isolation and cynicism. That said, this study does not assume a direct relationship between attitude and overt behaviour, nor does it draw conclusions about the SAPS as a whole. Further analyses should be conducted to elucidate non-socio-demographic factors that shape these attitudes, such as actual SAPS member practices and on-the-job experiences.



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Table 6: Percentage of SAPS officials (10, 20 and 30 years of service) that agreed and strongly agreed with each item of the PCSICQ

Police culture coping theme of solidarity		
1	Policing should be one of the highest-paid careers	90.79
2	It is my duty to rid the country of its bad elements	97.70
3	Police officials are careful of how they behave in public	87.34
4	You don't understand what it is like being a police official until you are one	88.50
5	Police officials have to look out for one another	97.69
6	Members of the public, the media and politicians are quick to criticise the police, but seldom recognise the good that SAPS members do	98.84
7	What does not kill a police official makes him/her stronger	92.52
8	Most members of the public don't know what is going on 'out there'	88.49
9	A good police official takes nothing at face value	98.84
10	To be a police official is not just another job; it is a 'higher calling'	96.55
Police culture coping theme of isolation		
11	I socialise less with my friends outside of the police since I have become a police official	77.01
12	I prefer socialising with my colleagues to socialising with non-members	79.43
13	I don't really talk in-depth to people outside of the SAPS about my work	75.28
14	Being a police official made me realise how uncooperative and non-supportive the courts are	72.40
15	My partner/spouse tends not to understand what being a police official is all about	54.59
16	Shift work and special duties influence my socialising with friends outside the SAPS	78.15
17	I feel like I belong with my work colleagues more every day, and less with people that I have to police	74.71
18	As a police official, I am being watched critically by members of the community, even in my social life	92.51
19	I can be more open with my work colleagues than with members of the public	82.17
20	Generals do not really know what is happening at grass-roots level	79.30
Police culture coping theme of cynicism		
21	Most people lie when answering questions posed by police officials	86.77
22	Most people do not hesitate to go out of their way to help someone in trouble	60.91
23	Most people are untrustworthy and dishonest	71.26
24	Most people would steal if they knew they would not get caught	77.00
25	Most people respect the authority of police officials	48.27
26	Most people lack the proper level of respect for police officials	68.38
27	Police officials will never trust members of the community enough to work together effectively	55.74
28	Most members of the community are open to the opinions and suggestions of police officials	60.91
29	Members of the community will not trust police officials enough to work together effectively	62.06
30	The community does not support the police and the police do not trust the public	57.46

Notes

- 1 William A Westley, Violence and the police, *American Journal of Sociology*, 59, 1953, 34–41.
- 2 Michael Banton, *The policeman in the community*, New York: Tavistock Publications, 1964; Arthur Niederhoffer, *Behind the shield: the police in urban society*, New York: Doubleday, 1967; Maurice Punch, *The secret social service: the British police*, London: Edward Arnold, 1979, 102–117; Michael K Brown, *Working the street*, Russell Sage Foundation, 1981; Simon Holdaway and BH Blackwell, *Inside the British police: a force at work*, Oxford: Basil Blackwell, 1983; Michael Brogden, Tony Jefferson and Sandra Walklate, *Introducing policework*, London: Unwin Hyman, 1988; Clifford Shearing and Richard V Ericson, Culture as figurative action, *British Journal of Sociology*, 42, 1991, 481–506; Elizabeth W McNulty, Generating common sense knowledge among police officers, *Symbolic Interaction*, 17, 1994, 281–94; Roy R Roberg, John P Crank and Jack Kuykendall, *Police & society*, Los Angeles: Roxbury CA, 2000.
- 3 Megan O'Neill, Monique Marks and Anne-Marie Singh (eds), *Police occupational culture: new debates and directions*, Amsterdam: Elsevier, 2007; David H Bayley, *Model of community policing: the Singapore story*, New York: DIANE Publishing, 1989; David Alan Sklansky, Police and democracy, *Michigan Law Review*, 103, 2005, 1699–1830; Bethan Loftus, Police occupational culture: classic themes, altered times, *Policing & Society*, 20, 2010, 1–20; Tom Cockcroft, Police culture and transformational leadership: outlining the contours of a troubled relationship, *Policing: A Journal of Policy and Practice*, 8, 2014, 5–13; Michael E Meyer, Jean Steyn and Nirmla Gopal, Exploring the public parameter of police integrity, *Policing: An International Journal of Police Strategies & Management*, 36, 2013, 140–156; Peter Moir and Henk Eijkman (eds), *Policing Australia: old issues, new perspectives*, Melbourne: MacMillan, 1992; Mollie Weatheritt, Community policing now, in Peter Willmott (ed.), *Policing and the community*, London: Policy Studies Institute, 1987, 7–20; John Alderson, Community policing, in Joseph A Schafer et al. (eds), *The future of policing: a practical guide for police managers and leaders*, New York: McGraw-Hill, 1983; Herman Goldstein, Improving policing: a problem-oriented approach, *Crime & Delinquency*, 25, 1979, 236–258; Clifford Shearing and Michael Brogden, *Policing for a new South Africa*, London and New York: Routledge, 1993; Janet Chan, *Changing police culture: policing in a multicultural society*, Cambridge: Cambridge University Press, 1997.
- 4 Eugene A Paoline III, Taking stock: toward a richer understanding of police culture, *Journal of Criminal Justice*, 31, 2003, 199–214.
- 5 Edgar H Schein, *Organizational culture and leadership*, California: Jossey-Bass, 2004.
- 6 Mike Schraeder, Rachel S Tears and Mark H Jordan, Organizational culture in public sector organisations: promoting change through training and leading by example, *Leadership and Organizational Development Journal*, 26:6, 2005, 492–502.
- 7 Ibid.
- 8 Jean Steyn and Ian de Vries, Exploring the impact of the SAPS basic training institutes in changing the deviant police culture attitudes of new recruits, *Acta Criminologica*, 20:1, 2007, 1–34.
- 9 Ibid.
- 10 Paoline, Taking stock, 6.
- 11 Steyn and De Vries, Exploring the impact of the SAPS basic training institutes in changing the deviant police culture attitudes of new recruits, 8.
- 12 Paul E Willis, *Common culture: symbolic work at play in the everyday cultures of the young*, Boulder: Westview, 1990.
- 13 John P Crank, *Understanding police culture*, Florida: Anderson, 2004; Janet Chan, Fair cop: learning the art of policing, University of Toronto, 2003; Jerome H Skolnick and James J Fyfe, *Above the law: police and the excessive use of force*, New York: The Free Press, 1993; The Christopher Commission, *Report of the Independent Commission on the Los Angeles Police Department*, 1991; Peter K Manning, *Police work*, Cambridge: MIT Press, 1977.
- 14 Crank, *Understanding police culture*, 13; Chan, Fair cop, 13.
- 15 Lewis Coser, *The functions of social conflict*, New York: The Free Press, 1956.
- 16 DS Drummond, *Police culture*, Beverly Hills: Sage, 1976; Jerome Skolnick, *Justice without trial*, New York: John Wiley and Sons, 1966.
- 17 Skolnick, *Justice without trial*, 16.
- 18 Brian F Kingshott and Johan Prinsloo, The universality of the police canteen culture, *Acta Criminologica*, 17:1, 2004, 1–16.
- 19 Arthur Niederhoffer, *Behind the shield*, New York: Doubleday Anchor Books, 1967.
- 20 MG Wilt and JD Bannon, Cynicism or realism: a critique of Niederhoffer's research into police attitudes, *Journal of Police Science and Administration*, 4, 1976, 38–46.
- 21 Jean Steyn, Recruiting newcomers to the South African Police Service for the organisation's culture, *Acta Criminologica*, 18, 2005, 82–100.
- 22 Jean Steyn, 'Darker shades of blue': a ten-year gender comparison of police culture attitudes in the South African Police Service, *African Journal of Public Affairs*, 8, 2015, 166–189; John Van Maanen, Police socialization: a longitudinal examination of job attitudes in an urban police department, *Administrative Science Quarterly*, 20, 1975, 207–228; Peter K Manning, *The police occupational culture in Anglo-American societies*, New York: Garland, 1989.
- 23 Jean Steyn, Nick Bell and Ian de Vries, Predisposed police culture attitudes: South African Police Service versus Justice Institute of British Columbia newcomers, *Acta Criminologica*, 28:1, 2015, 88–111.
- 24 Jean Steyn, The development of police culture attitudes among SAPS recruits, unpublished PhD thesis, Tshwane University of Technology, 2006, 344.
- 25 Ibid., 27.
- 26 South African Police Service Act 1995 (Act 68 of 1995), Pretoria: Government Printer, 1995.
- 27 Steyn, 'Darker shades of blue', 23.
- 28 Tom Cockcroft, *Police culture: themes and concepts*, London: Routledge, 2013; O'Neill, Marks and Singh (eds), *Police occupational culture*, 3; Sklansky, Police and democracy, 1699–1830.
- 29 Crank, *Understanding police culture*, 13.

Penalised for poverty

The unfair assessment of 'flight risk' in bail hearings

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The purpose of bail must be evaluated in light of the purpose of pre-trial detention. Bail is not intended as a punitive measure. The Criminal Procedure Act of 1977 contains various elements that guide a court in determining whether it is in the interests of justice to grant bail. Unfortunately, courts have been known to deny bail by giving undue weight to some factors and ignoring others, including the denial of bail on the basis that a lack of sufficient assets owned by accused persons means that they are likely to be flight risks. Additionally, the denial of bail on the basis of a lack of a verifiable fixed residential address has also affected the assessment of potential to abscond trial. Both of these issues: ownership of assets and a fixed residential address, while distinct factors, stem from a similar indicator – that of the economic standing of the accused. This is arguably discriminatory in terms of relevant constitutional rights.

A well-known Anatole France quote reads, 'The poor have to labour in the face of the majestic equality of the law, which forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread'. France's point was that an indigent accused is destined to suffer at the hands of the criminal justice system more than a wealthy accused. Despite assistance provided to an accused, structural inequalities exist in almost every aspect of South African life. This includes the criminal justice system, where legal representation is more difficult to obtain, and the value of the legal representation may differ, based on the amount an accused

is able to pay for it.¹ In the context of bail, an accused who is able to demonstrate close ties to a community and family, who has permanent employment, and who owns assets, is less likely to be deemed a potential flight risk than an accused without these. Section 60(6) of the Criminal Procedure Act 1977 (Act 51 of 1977, or the CPA) attempts to balance this by considering the extent to which an accused can afford to forfeit the bail amount and the means and travel documents that would enable him or her to leave the country. The latter two considerations will, in most cases, affect a wealthier accused rather than a poorer one. This article considers the South African courts' approach to establishing whether an accused person is a 'flight risk'. It argues that this process can prejudice an indigent accused.

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My interest in this issue was sparked in 2013 while conducting research in the Johannesburg and Randburg magistrate's courts.² Building on that work, I have more recently observed 37 first appearance bail decisions in two magistrate's courts in Cape Town.³ In this article I draw on these anecdotal observations, and review judgments from high courts (matters appealed from magistrate's courts), to argue that bail inquiries are not always fairly assessed.

Legislative ambit

It has been more than 15 years since the important Constitutional Court judgement in *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat*, which pronounced on the constitutionality of some of the bail provisions contained in section 60 of the CPA.⁴ This textual review of bail in South Africa's criminal procedure was an important one in outlining the legal framework within which the application of bail should operate. Although section 60 of the CPA was generally constitutionally endorsed, each provision was not individually tested. Rather, the court took the view that the factors were merely a codification of the common law position in terms of the judicial approach to the granting or denial of bail.⁵ The practical impact of these provisions are yet to be appraised with respect to their equal and fair application. Prior to the amendment of bail in the CPA, the statutory provisions were largely restricted to the procedural requirements for bail. No guidance was provided to a court regarding what it ought to consider in determining whether bail should be granted.

Section 12 of the Constitution protects everyone's right 'not to be deprived of freedom arbitrarily or without just cause'.⁶ In terms of section 35 of the Constitution, which deals specifically with the rights of accused, arrested and detained persons, all accused persons have the right to be presumed innocent until proven guilty.⁷ Section 35(1)(f), in particular, enshrines the right 'to be released from detention if the interests of justice

permit, subject to reasonable conditions'. It is in this light that the purpose of bail under the criminal justice system must be understood, and the bail process is governed primarily in chapter 9 of the CPA.⁸ The purpose of bail must also be considered in light of the purpose of pre-trial detention, which is to ensure that an accused presents himself at court for trial. Sections 58 to 70 of this chapter deal with a number of aspects relating to the system of bail, including the effect of bail (section 58), the procedure of applying for bail and the factors to be considered by the court (section 60), conditions of bail that a court may set (sections 62 and 63), failure of accused released on bail to appear for trial (section 67), and cancellation of bail (section 68). Section 50(6) requires specific mention. Although it falls outside of the bail chapter, section 50 generally contains the procedure after arrest and subsection (6) contains the procedures relating to bail.

The provision of particular relevance is section 60. Section 60(1)(a) elaborates on the section 35 right to be released where the interests of justice permit, and states as follows:

An accused who is in custody in respect of an offence shall, subject to the provisions of section 50(6), be entitled to be released on bail at any stage preceding his or her conviction in respect of such offence, *if the court is satisfied that the interests of justice so permit.* (own emphasis)

There is nothing to criticise in this provision. In fact, it is a progressive section that clearly aims to give effect to the relevant constitutional rights. The essential question is, therefore, in what circumstances and on what basis does a court determine that the interests of justice permit the release of a person on bail?

When do the interests of justice permit release?

A value judgement by a court is required to determine whether there are factors that

constitute release, based on the dictates of the 'interests of justice'.⁹ Such a value judgement must include an analysis of three categories of interests, which may or may not conflict with each other. The court must balance the rights of the accused to be presumed innocent and to not be deprived of his or her liberty without just cause, with the rights of society in general to safety and security. Both the rights of the accused and those of society must be balanced alongside the interests of the criminal justice system to ensure that the investigation and prosecution of criminal matters are not impeded.¹⁰ This is illustrated in the following bail judgement:

The common law and the Constitution demand an equilibrium between the importance of freedom and the broad interest of justice. The primary objective of the criminal process regarding the phase before the trial is to bring the accused before a court, and there to confront him or her with the allegations of the prosecution. For that reason the court gives its support, where necessary, to steps aimed at preventing flight, obstruction of the police investigation, interference with State witnesses or concealment/destruction of real evidence. The courts have done this by means of bail conditions and criteria which have been thrashed out judicially over the years.¹¹

Section 35(1)(f) (read with the general limitations clause in section 36) of the Constitution, which includes the caveat that release is contingent on the interests of justice, implicitly recognises that the continued detention of a person suspected of having committed an offence may be a justifiable limitation on an accused's right to liberty.¹² Section 60(4) of the CPA sets out the grounds on which a court must establish if release should not be permitted:

(a) Where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any

particular person or will commit a Schedule 1 offence; or

(b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or

(c) where there is the likelihood that the accused, if he or she were released on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or

(d) where there is the likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system; or

(e) where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

These are factors that the court must take into account when determining if the interests of justice permit the release of the accused. Thus, where there is no likelihood that the accused poses a potential danger to individuals or their community, and there is no reason to believe the accused will interfere with witnesses, abscond from trial or otherwise impede the administration of justice, there is no justifiable limitation on the accused's freedom. The court should make use of these factors as guidelines, and be flexible to give effect to fairness and justice.¹³ In other words, the factors contained in section 60(4) are not a closed list that excludes other potentially relevant considerations.¹⁴ Ideally, these factors should be balanced against each other, and one factor being present should not automatically result in a denial of bail.

None of the above is cause for alarm. In fact, the list of grounds contains important considerations that indisputably relate to the interests of justice. Subsections (5) to (8A) include more detail about what must be considered for each of the grounds above. Section 60(4)(b) (and the

expanded considerations under subsection (6)) is also, unlike the other factors of section 60(4), intrinsically connected to the primary purpose of pre-trial detention, which is to ensure that the accused will stand trial. Thus, whether the accused is a likely 'flight risk' is a relevant factor when determining if the granting of bail is in the interests of justice. Section 60(6) is the most relevant for the purposes of this article because it expands on the factors that can assist in assessing the possibility that an accused will evade trial.

Does a lack of assets make one a flight risk?

Bail may be legitimately refused if there is a likelihood that the accused will attempt to evade his or her trial.¹⁵ Which factors are considered in assessing the risk of absconding trial, and how they are weighed up, are relevant in determining whether the bail provisions are being fairly implemented. In this regard, this article specifically considers two of these factors, namely section 60(6)(a) and (b): 'the emotional, family, community or occupational ties of the accused to the place at which he or she is to be tried' and 'the assets held by the accused and where such assets are situated'. The argument is tendered here that the factors in section 60 that relate to whether the accused is a flight risk, namely familial and community, relate (albeit not exclusively) to the existence of a verified fixed address and ownership of assets, and are subject to criticism for their potentially prejudicial effect on economically vulnerable and poor people.

Establishing proof of residential address is required before bail will be considered by the court.¹⁶ The failure to have established this by the time of the accused's first appearance in the district magistrate's courts where bail hearings ordinarily take place, can result in bail hearings being postponed for up to seven days under section 50(6)(d)(i) of the CPA. This makes sense,

because if an accused were to be released on bail the absence of a known address would make it difficult, if not impossible, to find him or her again.¹⁷ This seems to be how the matter is decided in practice. Between the Cape Town and Wynberg magistrate's courts, 16 of the 37 cases observed were postponed in terms of section 50(6)(d)(i), pending verification of a permanent residential address by the South African Police Service (SAPS). In five separate cases, bail was denied on the basis of the SAPS being unable to locate the address provided by the accused as a residential address. In all of these cases the bail hearing had been postponed at least once before.

Where a fixed address is not present, a court will be less likely to believe that an accused's trial attendance is secure.¹⁸ It would be onerous for the state to attempt to contact or monitor an accused for the purposes of a trial where no fixed address is verified. However, the mere possibility that one or more of the factors in section 60(4) may arise, is not sufficient.¹⁹ A finding of a probability of a section 60(4) factor is necessary before it can be declared that the interests of justice permit bail to be denied.²⁰ Moreover, the court in *S v Pineiro* held that any concerns relating to section 60(4) factors could be dealt with by attaching relevant bail conditions in terms of section 60(12).²¹ Therefore it is argued that there must be something more that renders a person a flight risk in order for bail to be denied in the interests of justice. The absence of a fixed address cannot be the sole basis for that assessment.

Courts have also emphasised that a lack of sufficient assets owned by accused persons may be viewed as an indicator of possible flight. In seven of the cases observed in the Cape Town courts a lack of assets was deemed an indicator of the likelihood of flight. In three of these cases, although the accused were employed, they were still deemed 'likely

to abscond'.²² None of the seven cases considered the use of conditions to ameliorate the risk of flight.

The court in the case of *S v Mazibuko and Another* considered the assets owned by the accused, as submitted into evidence, to show that they were not flight risks:²³

As far as their personal circumstances are concerned, the appellants stated in their affidavits that they were self-employed, earning R7 000 and R6 000 per month respectively, that they had permanent residences, in the case of the first appellant that he owned an immovable property, that they both owned vehicles and household possessions, and that they had dependants. However, the evidence of Pillay, which was not contradicted, cast serious doubt on the truthfulness of these assertions. Firstly, he stated that the first appellant had told him that he was unemployed. Secondly, despite being requested to do so, the second appellant was unable to supply Pillay with the registration number of the vehicle which he allegedly owned and used in his taxi business. Pillay was therefore unable to verify that the second appellant in fact owned a motor vehicle. Thirdly, Pillay established that the first appellant did not in fact own the property he claimed to own.

The court goes on to say:

In the circumstances, I am by no means satisfied that the appellants made out a case that they were not flight risks, let alone a case that there was an exceptionally good chance that they would stand trial.²⁴

Although this case deals with schedule 6 offences, where the person applying for bail must show that exceptional circumstances exist for the bail to be granted, the reasoning of the court is nonetheless relevant to cases outside of

schedule 5 or 6 to which bail applies. The court considered the employment status and asset ownership relevant and important to whether the accused were flight risks.²⁵ The court in *S v Porthen* held that showing that an accused does not fit any of the section 60(4) factors, which would include that the accused is not a flight risk, can be an exceptional circumstance in the context of the facts.²⁶ In that light, the court's assessment of 'flight risk' factors is appropriate and relevant outside of schedule 6 situations.

In *S v Masoanganye and Another*, the facts were based on three accused, where one of them was tried separately. The accused tried separately was granted bail, but the other two co-accused were not. The Appeal Court criticised the court *a quo* for focusing primarily on a lack of assets by the accused in question, saying:

On a conspectus of the judgment as a whole it seems that what the learned judge had in mind was that the appellants could produce further evidence concerning their assets — the only matter that she dealt with in her judgment. Her judgment boils down to this: *she was not satisfied that the appellants were not a flight risk because they did not have sufficient assets*. Ahmed, who had sufficient assets, was held not to be a flight risk for that reason only.²⁷ (own emphasis)

The court in the 1997 case of *S v Letoana* said that 'to take into account the minimal assets possessed by an accused as a factor for refusing bail is tantamount to imposing a penalty for poverty'.²⁸ This was said in the context of an accused who resided with his parents and was still at high school. In this case, the detective investigating the matter had testified at the bail hearing that: '*Ek is nie seker nie, as hy miskien ... nie terug hof toe kom nie, sal ek nie weet waar om hom op te spoor nie,*'²⁹ which

loosely translates as ‘I’m not sure, if he does not return to court I would not know where to find him.’ He further testified as to the amount of clothing that the accused had at his parents’ house, and that it could easily be removed if the accused decided to abscond. The appeal judge stated that there were various reasons that pointed to the granting of bail to be in the interests of justice, namely that at the time of the accident the appellant was 20 years old, he was a scholar at Landula High School in Standard 10, he lived with his parents, he was not in possession of a passport, and he had no previous convictions.³⁰ The basis of denying bail in the trial court was based on an assessment of danger to the accused himself, but arguably largely focused on the testimony of the detective as well as the magistrate’s view that the accused ‘has no real assets of value, no fixed property, and only a bed and his clothing’.³¹ The appeal judge overturned the denial of bail, stating that a number of factors should be considered together.

As the court in *Letaoana* said, the assets held by the accused outside the country may be relevant to a consideration of the practical possibility that they would have somewhere to go should they evade trial. As argued above, a single factor that points to the possibility of a flight risk is not sufficient to deny bail in the interests of justice. There must be some other factor(s) that point to such a likelihood, such as the ownership of property, which would support other considerations. The argument is even more poignant in the case of a lack of assets. Unless there is some reason to believe that the accused will abscond, a lack of ownership of assets is a discriminatory basis for denying bail. Even if it is accepted that the lack of assets in section 60(6) is sufficient to deem an accused a flight risk, the bail inquiry requires that the accused’s likelihood of absconding trial would still have to be evaluated in terms of section 60(9) of the CPA, balancing the interests of

justice with the right of the accused to personal liberty. The court in *Prokureur-Generaal* stated the following in this respect:

Even when it is found that grounds justifying detention in the interest of justice exist, then such grounds are merely provisional grounds justifying refusal of the application. Subsection 60(9) specifically provides that the ‘matter’ must be determined ‘by weighing the interests of justice against the right of the accused to his or her personal freedom’. To a certain extent, the provisions of s 60(9) are confusing, but they make sense if one reads the words ‘prima facie’ into the introductory sentence of s 60(4) so that the sentence would read as follows:

‘(4) The refusal to grant bail and the detention of an accused in custody shall be prima facie in the interests of justice where one or more of the following grounds are established.’³²

It seems from the cases (both those observed and the reported judgements) described herein, however few, that the number and value of assets an accused owns is a relevant consideration for magistrates in assessing whether the interests of justice permit release. The extent of the primacy of this one factor as it is applied in courts gives rise to the need to refocus the purpose of bail and the impact of the factors evaluated. While it may not be necessary or desirable to remove ownership of assets from the list of factors that point to whether an accused is a flight risk or not, more thought must be given to the interplay of the various factors.

There are other ways of mitigating the lack of a fixed permanent address or no ownership of assets. Section 60(2B)(a) and (b) and section 60(12) of the CPA provide the possibility of imposing alternative bail conditions that can be used to minimise the risk of the accused absconding.³³ For example, requiring an accused to report at a police station, daily, bi-weekly or

weekly, as the case requires, can ensure that the accused can be located. Commentators in foreign states with similar concerns have proposed the use of state-run hostels, which would allow an accused without a residence to be released on bail without the risk of absconding.³⁴

The undue weight given to the above issues, especially an accused's lack of a fixed residential address, is arguably an infringement of the right to equality and to equal treatment before the law.³⁵ Given South Africa's history, it is no accident that most poor people are black.³⁶ As such, an economically vulnerable group is impacted by the black-letter enforcement of the provisions of the CPA. Due to the apartheid state having forced people to move into informal settlements without adequate urban planning or streets and street names, an argument can be tendered that it amounts to discrimination on one of the grounds listed in section 9 of the Constitution, namely race.³⁷ There is also clear discrimination on an unlisted ground, namely poverty.³⁸ While some wealthy persons may not have a fixed address, this would be for reasons of travel and residency, and in most cases its prejudice could be easily restricted by other factors such as employment and willingness to surrender travel documents.

Judging from the discussions observed in court relating to addresses in informal settlements, the concern is less aimed at the accused moving around and more at the SAPS's difficulties accessing the areas and obstacles to verifying addresses. Courts' failure to interpret and conduct a bail assessment in a manner that reflects the reality of South Africa is to ignore the need for justice and fairness in what remains a very unequal society. The use of bail conditions is a clear way to ameliorate the competing interests of risk of absconding with fairness to the accused, a method which should be better used in future bail hearings.



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Notes

- 1 Legal representation is available at state expense where the accused cannot afford it. Due to resource constraints, Legal Aid South Africa is not able to extend uncapped legal services to every indigent accused. For example, each accused is generally only entitled to one bail hearing. In most cases, an accused who has a Legal Aid attorney appointed will not meet the attorney until very shortly before the bail hearing or the trial, as relevant to the type of matter.
- 2 The observations in Gauteng were noted in the course of a project relating to remand detention, which formed part of the Rule of Law programme at the Centre for Applied Legal Studies.
- 3 Court was attended on 20 and 21 July 2016 and 4, 12 and 15 August 2015. The observations were in the district courts, in the courtroom in which bail for minor offences is often assessed immediately. The notes of these observations are on record with the author.
- 4 *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* 1999 (2) SACR 51 (CC).
- 5 *Ibid.*, 40. J Chaskalson and Y de Jong, Bail, in C Gould (ed.), *Criminal (in)justice*, Pretoria: Institute for Security Studies, 2009, 88.
- 6 Constitution of the Republic of South Africa, 1996, Pretoria: Government Printer, 1996.
- 7 Constitution, Section 35(3)(h).
- 8 Criminal Procedure Act 1977 (Act 51 of 1977), Pretoria: Government Printer, 1977.
- 9 A Kruger, Bail application of accused in court, in *Hiemstra's criminal procedure*, Durban: LexisNexis, 2008, 10–1.
- 10 *S v Dlamini*, 11.
- 11 Kruger, Bail application of accused in court, 9–1.
- 12 *S v Dlamini*, 49.
- 13 *S v Branco* 2002 (1) SACR 531 (W), 533; *S v Petersen* 2008 (2) SACR 355 (C), 55.
- 14 Chaskalson and De Jong, Bail, 89.
- 15 Criminal Procedure Act, Section 60(4)(b).
- 16 Angelique Serrao, Show proof of address and you get bail, *IOL News*, 24 July 2013, <http://www.iol.co.za/news/crime-courts/show-proof-of-address-and-you-get-bail-1551803> (accessed 26 May 2016).
- 17 'Ongoing investigation' in practice includes the verification of the residential address of the accused. The court in *S v Kok* 2003 (2) SACR 5 (SCA), para 15, held that an 'ongoing investigation' was not sufficient reason to refuse bail.
- 18 *S v Diale and Another* 2013 (2) SACR 85 (GNP), 18.
- 19 *Hiemstra's criminal procedure*, 9–11.
- 20 *S v Swanepoel* 1991 (1) SACR 311 (O), 313d-f.
- 21 *S v Pineiro* 1992 (1) SACR 577 (NM), 681.
- 22 The accused in these cases were employed in various menial jobs, including as a petrol attendant and a car guard at a private butchery. One of the accused was a casual gardener employed once a week.
- 23 *S v Mazibuko and Another* 2010 (1) SACR, 29.

- 24 Ibid., 32.
- 25 The court may have been considering the evidence presented of falsehoods by the accused in relation to employment and assets as relevant to their credibility, but this is not made clear in the judgement.
- 26 *S v Porthen* 2004 (2) SACR 242 (C), 256.
- 27 *S v Masoanganye and Another* 2012 (1) SACR 292 (SCA), para 18.
- 28 *S v Letaoana* 1997 (11) BCLR 1581 (W), 1594.
- 29 Ibid., 1591.
- 30 Ibid., 1593.
- 31 Ibid., 1594.
- 32 *Prokureur-Generaal, Vrystaat v Ramokhosi* 1997 (1) SACR 127 (O), 139.
- 33 C Ballard, A statute of liberty? The right to bail and a case for legislative reform, *SACJ*, 25, 2012, 35.
- 34 Anthea Hucklesby, Bail or jail? The practical operation of the Bail Act 1976, *Journal of Law and Society*, 23:2; 1996, 228.
J Richards, The contribution of Correctional Services to the bail process, *bail or remand: proceedings of a conference*, vol. 29, 1988, 87.
- 35 Section 9(1) read with section 9(3) and 9(5) of the Constitution.
- 36 'Black' is used here in the broad sense as contained in the Employment Equity Act 1998 (Act 55 of 1998) to include African, Indian and Coloured designated groups, unless the context indicates otherwise.
- 37 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 41.
- 38 In the case of *August and Another v Electoral Commission and others* [1999] JOL 4701 (CC), it was argued that accused persons who remained in detention because they could not afford to pay the amount set for bail (sometimes as little as R600) faced unfair discrimination on the grounds of poverty.

Determining the age of criminal capacity

Acting in the best interest of children in conflict with the law

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Section 8 of the Child Justice Act determines that the minister of justice and constitutional development must submit a report to Parliament no later than five years after the operationalisation of the act to review the minimum age of criminal capacity. With that in mind, this article aims to explore if current procedural mechanisms used to assess the criminal capacity of children in conflict with the law are in their best interest. This article will examine criminal capacity procedural mechanisms that could hamper the best interests of children in conflict with the law.

The Child Justice Act 2008 (Act 75 of 2008, hereafter the 'Child Justice Act') is celebrating its fifth year since becoming operational on 1 April 2010.¹ This is significant, since section 8 of the act determines that the minister of justice and constitutional development must submit a report to Parliament to review the minimum age of criminal capacity no later than five years after the operationalisation of the act.² The decision taken in 2008 to set the minimum age of criminal capacity at 10 years was contentious to begin with, since it is lower than the recommended minimum age of 12 years proposed in General Comment No. 10.³ The decision was also opposed by civil society organisations that made submissions to Parliament advocating for a higher minimum age of criminal capacity.⁴ Even though these initial attempts to secure a

higher minimum age of criminal capacity were unsuccessful, a compromise was reached to review the minimum age no later than five years after the act became operational.⁵ At face value, the debate about the age of criminal capacity is limited to establishing an age at which children are believed to have the ability and maturity to appreciate the nature and impact of their actions, and the ability to assume responsibility for them. In reality the debate is more complex, since any decision is moot if the procedural mechanisms and available infrastructures are inadequate to deal with the implementation of the decision.

The Child Justice Act is regarded as an extension of the Constitution of the Republic of South Africa, Act 108 of 1996, and is also seen as a regional and international human rights instrument.⁶ It is grounded in the principle that the best interest of the child is paramount in all actions concerning children.⁷ With that in mind, this article aims to explore if current procedural

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mechanisms to assess the criminal capacity of children in conflict with the law are indeed in their best interest.

The review of the age of criminal capacity creates an ideal opportunity to also review if, and to what extent, the current criminal capacity assessment process upholds the rights of children in conflict with the law. As such, the article aims to stimulate critical discourse about the procedural mechanisms and practices associated with criminal capacity assessments.

The article begins with a discussion of the Child Justice Act's stipulations regarding age categorisation and the determination of criminal capacity. Critical issues that should be taken into consideration during the review of the minimum age of criminal capacity are highlighted. Assessment procedures for determining the criminal capacity of children between 10 and 14 years are described. The article concludes with a review of key challenges to the implementation of these procedural mechanisms, and how they serve the principle of upholding the best interest of children in conflict with the law.

Child Justice Act: age demarcation for criminal capacity

The age of criminal capacity refers to the age at which it is presumed that a child has the cognitive ability and maturity to distinguish between right and wrong and to understand the consequences of his or her actions. Within a child justice context, the minimum age of criminal capacity therefore delineates the age at which it is presumed that a child who commits a crime could be held responsible for his or her actions.

The special needs of child offenders are recognised in the Child Justice Act; hence it represents a rights-based approach to dealing with children under the age of 18 who come into conflict with the law.⁹ In order to act in the best interest of child offenders, the act distinguishes between three age categories, namely:

- A child who is between the age of 14 and 18 years at the time of the alleged offence is presumed to have criminal capacity (*doli capax*) and is dealt with in terms of section 5 of the Child Justice Act.
- A child who is under the age of 10 years at the time of the alleged offence is presumed not to have criminal capacity (*doli incapax*) and cannot be prosecuted, but must be dealt with in terms of section 9 of the Child Justice Act.
- A child who is 10 years or older but under the age of 14 years at the time of the alleged offence is also presumed to lack criminal capacity (*doli incapax*), unless the state proves that he or she has criminal capacity in accordance with section 11 of the Child Justice Act.

With regard to children between the age of 10 and 14 years, the Child Justice Act creates a rebuttable assumption for incapacity, where the burden of evidence lies with the state.⁹ The matter relating to criminal capacity must be proven beyond reasonable doubt.¹⁰ It can therefore be argued that, in the eyes of the law, children between the age of 10 and 14 years lack criminal capacity and that criminal capacity should only be evident in exceptional cases. These exceptional cases only exist in instances where a child is found to be more mature than other children of the same age group. The test for criminal capacity, according to section 11(1) of the Child Justice Act, requires a consideration of whether a particular child could firstly distinguish between right and wrong, and secondly act in accordance with this appreciation.

The rationale behind the rebuttable assumption for incapacity is founded in the recognition of the pluralistic nature of South African society and the resulting difference in children's level of maturity and development. It is argued that differences in upbringing, physical care, socio-economic circumstances and socialisation, among other factors, have an impact on the maturity and life

experience of children.¹¹ The advantage of this system is that it creates a structure whereby protection from prosecution is automatically given to children under the age of 14 years.¹² In addition to the protection from prosecution, the intention is also for these children to benefit from needs-directed rehabilitative services, including counselling or therapy, accredited programmes and/or support services from accredited service providers.¹³

As mentioned, the South African minimum age of criminal capacity, 10 years, is lower than the recommended minimum age of 12 years proposed in the United Nations Convention on the Rights of the Child (UNCRC) General Comment No. 10.¹⁴ In addition, the Committee on the Rights of the Child (the UN committee responsible for monitoring the implementation of the UNCRC) furthermore raised concerns about the practice of using a rebuttable assumption in the determination of criminal capacity. Their primary concern is that in these systems the decision about a child's criminal capacity lies with the court, and may result in discriminatory practices if court officials who don't have the necessary qualifications or experience are the ones making such decisions.¹⁵ Even though procedural mechanisms to redress this concern are included in the Child Justice Act, in practice logistical and operational challenges discussed later in the article are seen to potentially deny child offenders the benefit of these services as intended by the act.

Criminal capacity assessment procedures

Each child who is alleged to have committed an offence must be assessed by a probation officer, except in instances where the assessment has been dispensed with in accordance with section 41(3) or 47(5) of the Child Justice Act.¹⁶ The assessment must be undertaken at the earliest opportunity, but if the child has been arrested it must take place within 48 hours.¹⁷

In the case of children between the age of 10 and 14 the purpose of the probation officer's assessment report is to provide an opinion as to whether a child is believed to have criminal capacity, and also to determine if additional expert evidence is required to assess the criminal capacity of such a child.¹⁸ The probation officer is therefore obligated to raise an opinion as to whether a child has criminal capacity; in other words, if the child is deemed to have had the ability to differentiate between right and wrong at the time of the alleged offence and to act in accordance with this appreciation.¹⁹

The state's burden of proof in determining criminal capacity is not exclusively the task of the probation officer, and the court is permitted to request additional information. In this regard section 11(3) of the Child Justice Act stipulates that the inquiry magistrate may order a report by a suitably qualified person, which *must* include an assessment of the cognitive, moral, emotional, psychological and social development of the child. The prosecutor or child's legal representative may also request such an evaluation.²⁰ In accordance with section 97(3) it was determined that a psychiatrist and clinical psychologist are deemed to be suitably competent to conduct criminal capacity evaluations.²¹

Contrary to the evaluation by psychiatrists and clinical psychologists, probation officers are not obligated to include an assessment of a child's cognitive, moral, emotional, psychological and social development in their reports.²² It is therefore questionable whether probation officers' reports are adequate to determine criminal capacity beyond reasonable doubt, when these reports lack in-depth analysis of the child's psychosocial development and functioning. It should also be noted that in accordance with section 40(1) of the Child Justice Act, an estimation of criminal capacity is only one of many issues that probation officers

are required to make recommendations on in their assessment report. Concerns regarding the probationer officer's role in criminal capacity assessments will be discussed in more detail later in this article.

An amendment in the Judicial Matters Amendment Act 2014 (Act 14 of 2014) further complicates matters, since it imposes an obligation on inquiry magistrates and the child justice court to consider a child's cognitive, moral, emotional, psychological and social development when making a decision about his or her criminal capacity.²³ It is anticipated that this change to the Child Justice Act will result in an increase in the number of orders for criminal capacity evaluations, which could, as discussed below, contribute to an overburdening of mental health professionals who already struggle to cope with the number of referrals they receive.

Criminal capacity assessment concerns and challenges

This article set out to determine if current mechanisms used to assess children's criminal capacity are in their best interest. It is clear from the discussion of the age demarcation and criminal capacity assessment process that the issue of criminal capacity is complex, making it difficult to balance the best interest of child offenders with judicial expectations and operational imperatives. Henceforth, some of these challenges will be discussed.

Criminal capacity versus the law

Translating aspects relating to a child's psycho-social development and functioning into legal requirements to determine criminal capacity is a challenge in itself.²⁴ A legal obligation exists in the Child Justice Act to prove beyond reasonable doubt whether a child has criminal capacity or not. This requires a precise answer and does not make provision for opinions that imply degrees of capacity. Pillay and Willows are of the opinion that:

Law makers would ideally wish for a precise way of establishing the absolute existence or absence of such capacity, and to then situate the presence of such capacity at a uniform chronological age. However, the psychology and mental health fields need to honestly declare that such a requirement is beyond their theoretical and research ability.²⁵

Walker posits that a person's ability to appreciate the wrongfulness of his or her actions presupposes the ability to appreciate the difference between right and wrong, and that some people may perhaps only be capable of drawing this distinction in particular instances, but not in others.²⁶ Hence, it is proposed that the assessment of criminal capacity should be 'conduct specific'.²⁷ In explanation, Walker refers to *S v Dyk* (1969(1) SA 601(C)), where Justice Corbett set aside the conviction of an 11-year-old child who was the third accused in a case of housebreaking. The child's role was to watch the property before the housebreaking and to keep watch while accused one and two committed the crime. Corbett argued that even though the child might appreciate the wrongfulness of housebreaking, he might not appreciate the wrongfulness of his role when the crime was committed.²⁸ In this regard Walker critiques the criminal capacity procedural mechanism employed in the Child Justice Act, stating that:

As a result of his or her intellectual immaturity, a child who is quite capable of appreciating that certain types of conduct are considered wrong in general, abstract terms, might nevertheless be incapable of engaging in the complex, abstract reasoning necessary to enable him or her to apply this generalised knowledge to his or her own conduct, at the time and in the particular circumstances in which he or she engaged in that conduct. The danger

inherent in applying a vague, generalised right and wrong test is that, in an instance like this, such a child could well be found criminally responsible.²⁹

In contrast to the purpose of the Criminal Procedure Act 1977 (Act 51 of 1977), namely to make provision for procedures and related matters in criminal proceedings, the Child Justice Act aims to introduce a less rigid criminal justice process, suitable for children in conflict with the law. This is achieved by, among other things, procedural mechanisms to ensure that the individual needs and circumstances of children in conflict with the law are assessed.³⁰ Although the Child Justice Act aims to act in a 'case and conduct' specific manner, putting these provisions into practice remains a challenge.

Operational challenges

Inadequate infrastructure and a lack of capacity to implement the Child Justice Act have been recognised as challenges since the Child Justice Act became operational.³¹ The shortage of suitably qualified professionals to conduct criminal capacity assessments is exacerbated by the Department of Social Development's lack of funding to appoint additional staff members.³²

In addition to performing multiple tasks in the implementation of the act, probation officers are also obligated to express an opinion about the criminal capacity of children between the age of 10 and 14 years.³³ Complaints about the quality of probation officers' reports are well documented.³⁴ The quality of the reports can, among other factors, be ascribed to the fact that the probation officers only have a short period in which to conduct assessments.³⁵ A lack of training and suitable assessment instruments were also mentioned as reasons why probation officer reports are viewed as not meeting the requirements of the court.³⁶

It should also be noted that probation officers'

reports are based on their subjective opinions, by any psychometric testing. It can therefore be presumed that the attitude and experience of the probation officer will have a direct impact on the quality of the report and the views expressed in the report. As a result, some magistrates prefer to request an external professional evaluation of the child's criminal capacity, even though it is expensive and time-consuming to conduct.³⁷

The lack of available psychologists and psychiatrists to conduct criminal capacity assessments has been found to delay the conclusion of cases.³⁸ Procedurally, psychologists or psychiatrists must furnish the court with an evaluation report within 30 days after the date of the order.³⁹ Because of a shortage of mental health practitioners, this is often not achieved. Attempts to make use of psychologists and psychiatrists in the private sector have proven unsuccessful, due to a lack of funds to pay for consultations.⁴⁰ The lack of suitably qualified health professionals can result in assessments being done long after the alleged crime was committed. This makes it difficult to accurately determine if a child had criminal capacity at the time a crime was committed. Concerns have also been raised about the absence of valid and reliable assessment measures to determine criminal capacity, since few psychometric tests have been developed or adapted for use in South Africa's unequal and multicultural society.⁴¹

One-dimensional focus of criminal capacity assessments

As mentioned, section 11(3) of the Child Justice Act requires that an assessment for criminal capacity should include an evaluation of the cognitive, moral, emotional, psychological and social development of the child. Such an assessment can only be achieved through an in-depth evaluation of the child's psycho-social development and functioning.⁴² The

complex relationship between biological and environmental factors that could influence the criminal capacity of a child is well recorded. Research has highlighted that assessing a child's criminal capacity should not be limited to isolated elements in the child's development and/or functioning, such as cognitive ability or emotional maturity alone. It requires a holistic evaluation of predisposing risk factors and a clinical analysis of how the comorbidity of these factors influences the child's ability to distinguish between right and wrong and to act in accordance with this appreciation.⁴³ Currently, only three categories of professions are deemed to be suitably qualified to conduct criminal capacity assessments, namely probation officers, clinical psychologists and psychiatrists. None of these professions has expertise in all of the areas of evaluation stipulated in section 11(3) of the Child Justice Act. Although not previously recognised, it is now acknowledged that there is a need to follow a more holistic approach by broadening the categories of suitable professions to evaluate different aspects of a child's development. In the Government Gazette No. 39751, published in February 2016, a request was made for the recommendation of other professions that could be considered as competent to conduct criminal capacity assessments.⁴⁴ The broadening of these categories would allow for a more holistic assessment of children, and help address the operational challenges associated with a shortage of people capable of conducting criminal capacity assessments.

This article proposes that in order to act in the best interest of child offenders, criminal capacity assessments should be done by a multi-professional team. Depending on the child's specific needs, such a team could include, among other professionals, social workers, clinical psychologists, occupational therapists, psychiatrists and criminologists.

Conclusion

The implementation of the Child Justice Act unequivocally contributed to improving the rights of children in conflict with the law. Nonetheless, it is clear that the complexities associated with criminal capacity assessments require critical deliberation to ensure that these assessments adhere to the best interest principle. Fundamentally, the question motivating any amendment to the age of criminal capacity should be: what would we like to achieve with the act? In this regard the Child Rights International Network (CRIN) advocates for separating the concept of responsibility from that of criminalisation, thereby moving away from a retributive to a rehabilitative paradigm in child justice.⁴⁵ Child justice in South Africa took a big step in this direction by explicitly including restorative justice principles and methods in the Child Justice Act. This allows the state to hold child offenders accountable for their actions, while offering them the opportunity to reform without being exposed to the criminal justice system.

It is furthermore proposed that greater emphasis should be placed on regulating the nature of services delivered to children under the age of 10 years, and those under the age of 14 years who are assumed not to have criminal capacity. The fact that these children are alleged to have committed an offence should be a red flag that warrants early intervention to prevent future anti-social behaviour. At present these children are dealt with in accordance with section 9 of the act, whereby the probation officer has the discretion to make recommendations regarding the nature of interventions required, if any. Currently no records or monitoring systems exist to report on the nature and extent of services to this vulnerable group. The question can therefore be asked: are these children indeed allotted the care intended by the act, or is their protection only limited to their not being prosecuted?

It is anticipated that there will be challenges with the implementation of legislation aimed at bringing about such a radical change in the child justice system. It is acknowledged that the implementation of the act may require a pragmatic and incremental strategy; aimed at bringing about a criminal justice system for children in conflict with the law.⁴⁶ That said, we should be sensitive to avoid making decisions for pragmatic reasons alone. This article proposes that instead of following a purely pragmatic approach, the restorative and rehabilitative intention of the Child Justice Act should be explored in more detail.

The review of the age of criminal capacity creates the ideal opportunity and obligation to ensure that the choices made are in the best interest of children in conflict with the law. The majority of challenges mentioned in this article are not new. It is recommended that challenges should not only be recorded in the Department of Justice and Constitutional Development's annual reports on the implementation of the Child Justice Act, but that feedback should also be given in succeeding reports on how these challenges were addressed. As Badenhorst aptly states, even though challenges will be part of the process, the true measure of success lies in the way these challenges are dealt with and how they are eliminated.⁴⁷



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Notes

- 1 Child Justice Act 2008 (Act 75 of 2008), Pretoria: Government Printer, 2008 (hereafter the 'Child Justice Act').
- 2 Ibid., section 8.
- 3 Ibid., section 7; UN Committee on the Rights of the Child, General comment no. 10: children's rights in juvenile justice, 2007.
- 4 Child Justice Alliance, Child Justice Bill [B49-2007]: Summary of public submissions, 14 March 2008, http://www.childjustice.org.za/parl_reports/2008Mar14.pdf (accessed 19 April 2016); Child Justice Alliance, Report of the Workshop on Criminal Capacity of Children, 4 May 2011, <http://www.childjustice.org.za/publications/CriminalCapacityWorkshopRpt.pdf> (accessed 19 April 2016); Department of Justice and Constitutional Development, Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery, MP, Address at the National Workshop on the Review of the Minimum Age of Criminal Capacity, 20 February 2015, http://www.justice.gov.za/m_speeches/2015/20150220_CrimCap.html (accessed 4 March 2016).
- 5 Child Justice Act, section 8.
- 6 Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), Pretoria: Government Printer, 1996; Organization of African Unity, African Charter on the Rights and Welfare of the Child, 1999. International human rights instruments include the United Nations (UN) Convention on the Rights of the Child, 1990; the UN Guidelines for the Prevention of Juvenile Delinquency, 1990; and the UN Standard Minimum Rules for the Administration of Juvenile Justice, 1986.
- 7 UN Convention on the Rights of the Child, Article 3(1).
- 8 Child Justice Act, section 2.
- 9 Ibid., section 7 (a).
- 10 Ibid., section 11(1).
- 11 South African Law Commission, *Project 106 Juvenile Justice Report*, 2000, 27.
- 12 Ibid., 28, proposes that the presumption of incapacity, a rebuttable assumption for incapacity activated by a child's age, acts as a 'protective mantle' with the onus of evidence shifting to the state.
- 13 Refer to Child Justice Act, sections 9(3), 53, 56, 69.
- 14 UN Committee on the Rights of the Child, General comment no. 10.
- 15 Ibid.
- 16 Child Justice Act, Preamble, section 5(2).
- 17 Ibid., section 20.
- 18 Ibid., sections 35(g) and 11(3).
- 19 Ann Skelton and Charmain Badenhorst, *The criminal capacity of children in South Africa: international developments and considerations for a review*, Child Justice Alliance, Community Law Centre, University of the Western Cape, 2011, 24. Also refer to Maryna Human, An exploration of the criminologist's role in establishing the criminal capacity of children in conflict with the law, unpublished MA dissertation, University of South Africa, 2015, who raised concerns about the practices used to assess the criminal capacity of children in conflict with the law.
- 20 Child Justice Act, section 11(3).
- 21 Government Gazette No. 39751, 26 February 2016.
- 22 Child Justice Act, section 35.
- 23 Judicial Matters Amendment 2014 (Act 14 of 2014), Pretoria: Government Printer, 2014.
- 24 Child Justice Act, section 11(3). This indicates that the cognitive, moral, emotional, psychological and social development of a child should be assessed to prove criminal capacity.
- 25 Anthony Pillay and Clive Willows, Assessing the criminal capacity of children: a challenge to the capacity of mental health professionals, *Journal of Child and Adolescent Mental Health*, 27:2, 2015, 91.
- 26 Shelley Walker, The requirements for criminal capacity in section 11(1) of the Child Justice Act, 2008: a step in the wrong direction?, *SACJ*, 1, 2011, 3–41.
- 27 Ibid., 36.

- 28 Ibid., 36–37. The cases of *Roxa v Mtshayi* (1975(3) SA 761(A) at 766 A-B), *v Pietersen* (1983(4) SA 904(E)) and *S v Ngobese* (2002 (1) SACR 562(W) at 564F-J) are also discussed to highlight the importance of conducting specific assessments in determining the criminal capacity of a child.
- 29 Ibid., 38.
- 30 Child Justice Act, Preamble.
- 31 Department of Justice and Constitutional Development, Annual report on the implementation of the Child Justice Act, 2008 (Act 75 of 2008); Department of Justice and Constitutional Development, 2nd Annual report on the intersectoral implementation of the Child Justice Act, 75 of 2008 April 2011–March 2012; Department of Justice and Constitutional Development, Annual departmental report on the implementation of the Child Justice Act, 2008 (Act 75 of 2008), 1 April 2013 to 31 March 2014.
- 32 Ibid.
- 33 Refer to Child Justice Act, sections 5(1) & (2), 9, 13, 28(1)(c), Chapter 5, sections 43(2)(i), 44(c), 57, 61(3), 62(3) & (4), 71(2) & (3), 72(2)(a), 79(1).
- 34 Maryna Human, An exploration of the criminologist's role in establishing the criminal capacity of children in conflict with the law, MA dissertation, Unisa, 2016; Skelton and Badenhorst, *The criminal capacity of children in South Africa*, 50; T Gxubane, Agents of restorative justice? Probation officers in the child justice system, *SA Crime Quarterly*, 25, 2008, 11–16, 13.
- 35 Human, An exploration of the criminologist's role, 93–94. It is stated that the probation officers do not have enough time to compile a detailed report to meet the requirements of section 11(3) of the Child Justice Act.
- 36 Skelton and Badenhorst, *The criminal capacity of children in South Africa*, 50; Human, An exploration of the criminologist's role, 99; Gxubane, Agents of restorative justice?, 13; Human, An exploration of the criminologist's role, 94–98; Government Gazette No. 39751, 26 February 2016. The amendment of section 11(3) imposes an obligation on the inquiry magistrate of the Child Justice Court to consider the cognitive, moral, emotional, psychological and social development of a child when making a decision regarding the criminal capacity of a child.
- 37 Skelton and Badenhorst, *The criminal capacity of children in South Africa*, 26; Parliamentary Monitoring Group, Child Justice Act implementation: Intersectoral Committee, Young in Prison, Child Justice Alliance inputs, 23 October 2013, <https://pmg.org.za/committee-meeting/16626/> (accessed 4 May 2016).
- 38 Child Justice Act, section 97(3). Psychiatrists and clinical psychologists may be ordered to conduct the evaluation of criminal capacity of a child. Also refer to the Child Justice Act implementation; Human, An exploration of the criminologist's role, 102.
- 39 Child Justice Act, section 11(4).
- 40 National Council of Provinces Committee, Child Justice Workshop, 27 May 2015, <https://pmg.org.za/committee-meeting/20975/> (accessed 5 May 2016). Pillay and Willows, Assessing the criminal capacity of children, 94, indicate that the shortage of mental health specialists in South Africa is due to the over-extended resources of the state mental health services and the lack of interest in forensic mental health work among state-employed mental health professionals.
- 41 Pillay and Willows, Assessing the criminal capacity of children, 93; Department of Justice and Constitutional Development, Address by the Deputy Minister of Justice and Constitutional Development, the Hon John Jeffery; Human, An exploration of the criminologist's role, 93–94; CD Foxcroft, Ethical issues related to psychological testing in Africa: what I have learned (so far), in WJ Lonner et al. (eds), *Online readings in psychology and culture*, Center for Cross-Cultural Research, Western Washington University, 2002, <http://www.wvu.edu/culture/foxcroft.htm> (accessed 6 May 2016).
- 42 Pillay and Willows, Assessing the criminal capacity of children, 91–101.
- 43 For a discussion about risk factors for delinquency, see Child Welfare Information Gateway, Long-term consequences of child abuse and neglect, July 2013, https://www.childwelfare.gov/pubPDFs/long_term_consequences.pdf (accessed 14 March 2016); CL Esposito, The influence of cumulative risk factors on the cognitive abilities of low-income, African American preschool children, unpublished MA dissertation, Eastern Michigan University, Michigan, 2014, <http://commons.emich.edu/cgi/viewcontent.cgi?article=1962&context=theses> (accessed 14 March 2016); M Shader, *Risk factors for delinquency: an overview*, United States Department of Justice, 2000, <https://www.ncjrs.gov/pdffiles1/ojdp/frd030127.pdf> (accessed 6 May 2016); GA Wasserman et al., Risk and protective factors of child delinquency, Child Delinquency Bulletin Series, 2003, <https://www.ncjrs.gov/pdffiles1/ojdp/193409.pdf> (accessed 14 March 2016).
- 44 Government Gazette No. 39751, 26 February 2016.
- 45 Child Rights International Network, *Stop making children criminals*, 2013, https://www.crin.org/sites/default/files/crin_policy_paper_-_stop_making_children_criminals.pdf (accessed 9 October 2015).
- 46 Child Justice Act, Preamble.
- 47 Charmain Badenhorst, *Overview of the implementation of the Child Justice Act, 2008. Good intentions, questionable outcomes*, Child Justice Alliance, 2011, 35, <http://www.childjustice.org.za/publications/ImplementationCJA.pdf> (accessed 7 May 2016).

The killing fields of KZN

Local government elections, violence and democracy in 2016

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This article explores the intersections between party interests, democratic accountability and violence in KwaZulu-Natal. It begins with an overview of the legacy of violence in the province before detailing how changes in the African National Congress (ANC) since the 2007 Polokwane conference are inextricably linked to internecine violence and protest action. It focuses on the powerful eThekweni Metro region, including intra-party violence in the Glebelands hostel ward. These events provide a crucial context to the violence preceding the August 2016 local government elections. The article calls for renewed debate about how to counter the failure of local government.

In KwaZulu-Natal (KZN), the province dubbed the 'killing fields' in the early 1990s, all post-1994 elections have been marked by intimidation and violence. In the past decade intra-party conflict, especially over the nomination of local government ward candidates, has increased. In 2011 the conflict within the African National Congress (ANC) went beyond individual competition and was symptomatic of increasing factionalism within the party itself.

This article explores the legacy and current manifestations of violence in the province, and includes a focus on the powerful eThekweni Metro region and the intra-party violence in

the Glebelands hostel ward. Crucially, it also contextualises the violence that preceded the August 2016 local government elections.

Political violence 1994–2015

The violence that engulfed KZN in the 1980s and early 1990s continued for several years after the 1994 elections, with an estimated 4 000 deaths between May 1994 and December 1998.¹ Most of the violence occurred between the ANC and the Inkatha Freedom Party (IFP), but in the Richmond area in particular many deaths were linked to internecine ANC violence before and after it expelled warlord Sifiso Nkabinde in 1997.²

Elections have since been periods of tension, requiring the presence of state security in volatile areas. The first local government elections in November 1995 were delayed in KZN until May 1996, and necessitated the deployment of the

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South African National Defence Force (SANDF).³ Inter-party conflict has diminished since then, but still occurs.⁴

Violence is not limited to election periods. For example, between 2010 and 2012 at least 41 politically linked individuals were killed in the province.⁵ The murders were most common in the KwaMashu and Umlazi hostels in Durban, and in Umtshezi in Estcourt in the Midlands.

In early 2011 the New Freedom Party (NFP), headed by Zanele Magwaza-Msibi, broke away from the IFP. According to NFP figures, about 60% of the victims of violence during this period were NFP supporters.⁶

An IFP-supporting hostel in KwaMashu was another site of violence. Here the victims were IFP and NFP supporters, as well as ANC supporters.⁷

In Umtshezi, victims included supporters of the IFP, the NFP and the ANC, some killed by members of their own parties.⁸

However, it is not always possible to clearly delineate political violence. For example, in Umtshezi political violence overlaps with taxi industry conflicts, while in KwaMashu it can be difficult to separate political killings from other, criminally motivated murders. The distinction becomes particularly difficult to make when political office-bearers have business interests, such as in the taxi industry. In addition, the use of 'hitmen' means that even where assassins are caught, it can be difficult to ascertain who hired them, or why.

Trouble in the ANC: 2007–2015

Paulus Zulu and Adam Habib have pointed to increased factionalism and polarisation in the ANC since the party's 2007 Polokwane conference.⁹

Interviews I conducted with long-standing ANC members at the time revealed serious tensions and a climate of threat and intimidation

within ANC branches in KZN in the run-up to Polokwane.¹⁰ Those interviewed were adamant that provincial party lists at the Polokwane conference had been tampered with to exclude members not overtly supportive of now President Jacob Zuma, but that this had been reported to the ANC national office. Fears of increased violence were repeatedly expressed.¹¹

The election of Zuma to national office in 2008 played a pivotal role in shaping provincial and municipal politics, and in struggles related to the national leadership of the party and government.

In KZN, Zulu ethnicity has long been entwined with politics.¹² It is likely that Zuma's leadership contributed to the province's increased support for the ANC in the 2009 elections, despite its slight decline in support nationally.¹³ ANC membership in KZN is higher than in other provinces.¹⁴

The 2011 local government elections in KZN were marked by conflict over nominations and allegations of manipulation of party lists. Threats and intimidation were rife. Protests continued after the elections, and led to the establishment of an inquiry headed by Nkosazana Dlamini Zuma, which found that 11 councillors had been fraudulently elected. One of them, Zandile Gumede, was to play a prominent role in factional struggles in eThekweni. Despite promises by national leadership that individuals elected in this way would be dismissed, it appears that only one by-election was ever held.¹⁵

After the 2014 elections, the then KZN premier, Zweli Mkhize, was deployed as ANC treasurer-general. His position as premier was filled by the then party chairperson, Senzo Mchunu. By then there were two clear factions in the party, one owing allegiance to Senzo Mchunu and the other to Willies Mchunu (no relation). The Senzo faction reportedly supported Deputy President Cyril Ramaphosa, while the faction behind Willies Mchunu supported Zuma.¹⁶

The years 2014 and 2015 were marked by tensions between these factions.¹⁷ However, the struggles were also noticeable in other numerically powerful regions such as uMsunduzi (Pietermaritzburg) and the Musa Dladla region around Richards Bay. Tensions increased following the July 2015 revenge killing of one of the premier's bodyguards, after Senzo Mchunu's faction was accused of orchestrating the death of regional chairperson and uMhlatuze municipality Mayor Thulani Mashaba. Mashaba had been accused of removing the municipality's previous mayor, Elphas Mbatha.¹⁸

A close associate of Willies Mchunu, Sihle Zikalala, was elected ANC KZN chairperson in November 2015 after an election in which the results were contested. This created two centres of power, one held by the premier and the other by the regional chairperson. The following month key Zikalala backer Zandile Gumede beat incumbent mayor James Nxumalo to become the party's eThekweni regional chairperson.¹⁹

Allegations of fraud and manipulation were made, leading to factions taking control of local municipalities. In the Harry Gwala region, Thabiso Zulu, former ANC Youth League (ANCYL) leader and regional secretary, alleged that the 2008 conference to elect ANCYL leadership in the region was manipulated by a powerful grouping.²⁰ Zulu alleged that this faction siphoned off millions of rands of local and district municipality funds and engaged in various other corrupt acts. Despite documentation confirming this, and an audit report allegedly revealing almost R400 million in irregular or unauthorised expenditure over two years, no action was taken against the three men behind the faction. At the time of writing, this case was under investigation by the Special Investigations Unit (SIU) and the South African Police Service (SAPS).

The man who blew the whistle on the alleged looting referred to by Zulu, the then speaker

of the Sisonke District Municipality, Mandla Ngcobo, has since been persecuted. After he approached the high court in an attempt to stop an irregular payment involving millions of rands to a security company, the ANC instituted party and municipal disciplinary charges against him for bringing the party into disrepute. Ngcobo is no longer speaker and was not re-nominated as councillor. At the time of writing, in August 2016, he and Thabiso Zulu claimed to be living in fear of their lives.²¹

The politics of eThekweni Metro, 2007–2015

In 2008 Sbusiso Sibiya was elected regional secretary of the party's biggest and most influential power bloc. This is an important position, given that the metro has 110 branches and a massive budget – R39 billion in the 2015/16 financial year with a projected increase to a record R41.7 billion in the draft 2016/17 budget.²² A person in this position has the power to make decisions about the deployment of party members to key positions.

When he was elected Sibiya had a reputation for taking a strong stand against corruption. According to political journalist Siphso Khumalo, it was well known that the region's ANC chairperson, John Mchunu, who held the reins of power until his death in 2010, and Sibiya did not like each other. Mchunu had dispensed patronage using the metro's resources, and allegedly played a pivotal role in using the region's voting power to build support for Zuma ahead of Polokwane.²³

On 11 July 2011 Sibiya was assassinated as he arrived back at his Inanda home after a meeting. His close associate, councillor Wiseman Mshibe, had been similarly gunned down at his Durban home in March that year. The assassination of Sibiya took place ahead of crucial regional and provincial ANC conferences, and his supporters believed that

he had stood in the way of those who sought to use tenders to gain personal wealth.²⁴

A former taxi operator turned construction company owner was charged with Sibiya's murder. However, in March 2014 charges against him were withdrawn following the death of the only 'substantial witness'.²⁵ There has also been no conviction in the Mshibe case.

Allegations of corruption in eThekweni were supported by forensic audit findings. A report by Ngubane & Associates highlighted irregularities in procurement and irregular expenditure of over R500 million for 2008/09. The MEC for local government (COGTA) appointed Manase & Associates to do a follow-up forensic audit for the period ending January 2012.

The findings of the Manase report were damning, confirming grossly irregular procurement procedures and blatant conflict of interest transactions. It documented a cavalier disregard for proper procedures in awarding contracts, especially in the construction industry, and alleged a 'manipulation' of contracts in favour of certain service providers (including a prominent ANC member) at meetings chaired by senior Housing Department employees.²⁶

Despite the municipality supposedly increasing controls over irregular expenditure, reports for the first three quarters of the 2013/14 financial year showed that over a quarter of contracts awarded, amounting to R1.722 billion, had used the same loophole that previously allowed contracts to be unfairly awarded.²⁷

This corruption has affected poor communities and increased tensions. Poor communities have accused councillors of dispensing houses and public works employment opportunities to their supporters.²⁸

The Glebelands hostel is an extreme example of the malaise affecting local government in KZN. Here at least 60 people have been killed in politically linked violence since March 2014.

Case study: Glebelands hostel²⁹

During colonial and apartheid times single sex hostels were built to house many hundreds of thousands of workers in what were defined as 'white' areas, especially in cities and on mines. These workers were barred from settling in urban areas with their families through increasingly repressive influx control legislation.

Lying just outside the entrance to southern Durban's Umlazi township is Glebelands hostel. Like all other Durban hostels, this one has been administered by the municipality since the late 1990s.

The population of the hostel is estimated to be between 15 000 and 20 000, most housed in approximately 48 four-storey blocks, many with shared rooms and communal bathrooms and kitchens. However, there are also newer smaller blocks let as family accommodation and, according to a government representative, the total number of blocks is now 72 (although according to some counts there are more).³⁰

Historically the complex has been an ANC support base. During the intense conflict in the townships in the early 1990s, IFP-supporting residents of Umlazi Section T hostels attempted to attack Glebelands hostel on more than one occasion. The nature of the conflict changed in the late 1990s when dozens of residents were murdered in intra-ANC conflict. Between the late 1990s and 2013 the hostel was largely free of political violence, except for a brief period in 2008 when there were attacks on, and evictions of, people who joined the Congress of the People Party (COPE). Most COPE supporters subsequently returned to the ANC.³¹

Local leadership within the complex was provided by elected block committees with executive structures. Similar structures have long been a feature of hostel life, where they have played a role in room allocation.³²

The recent troubles began in June 2013, when a large group of hostel residents blockaded streets around the complex to protest against councillor Robert Mzobe, who replaced councillor Vusi Zweni who joined COPE in 2009. They alleged that '[Mzobe] did not consult with them on developments in the area and was a dictator'. He was accused of dividing and failing to show respect for the community, and irregularly allocating RDP houses. The leader of the protest, Themba Pina, accused him of refusing to help residents he had 'personal vendettas' against. Mzobe denied the allegations.³³

According to residents who were tasked to approach Mzobe, they were treated disrespectfully and refused an audience. At an ANC branch meeting a vote of no confidence was passed in the councillor and he was asked to stand down, but did not.

In April 2014 a reputed warlord from another hostel, Bongani Hlope, moved to Glebelands. Hlope was allegedly seen at ANC meetings, linked to a faction supporting the councillor. He and his associates were accused of embarking on a reign of terror during which hundreds of residents, including women and children, were evicted from their rooms.

The arrival of Hlope and his associates coincided not only with forced evictions but also with increased murders. Many victims were shot dead, some execution style. By the end of 2015, 55 people, including Hlope himself, had been killed.

A detailed analysis of the deaths and displacements by independent human rights activist Vanessa Burger shows that the overwhelming majority of the victims were linked to block structures in some way, as officials, close associates, wives or girlfriends. At least four of those murdered – Themba Pina, Sandile Mteshane, Thulani Kathi and William Mtembu – had been among the dissatisfied ANC members who had brought the vote of no confidence in Mzobe. Two other residents who had indicated their willingness to stand as candidates in the local government elections were also among those who died.

The rooms of those who had been evicted were re-allocated by those who had evicted them, and money was allegedly extorted from the new residents. Cases of eviction, theft and assault were opened, but victims stopped laying charges when no one was arrested.

Tensions were exacerbated when rumours of a hit list emerged.³⁴

From the outset the police were accused of being complicit with the ANC faction supporting the councillor. The first casualty at the hands of the police was Zinakile Fica, who died while being tortured by the Umlazi police on 13 March 2014.³⁵ A further 10 cases of torture, most involving tubing (near-suffocation with a plastic bag) have been documented by Burger.³⁶ In addition, a number of residents were maliciously arrested, only for charges to be subsequently withdrawn.³⁷

Since the onset of the violence, and in our interaction with the police, Burger and I have requested regular patrols and for the investigation of cases to be undertaken by detectives from elsewhere in the province.

We have also made police management aware of the vulnerability of specific residents who had been threatened. One of them, Siphon Ndovela, was a witness to a murder in which he alleged Hlope was implicated. Ndovela was subsequently shot dead outside the Umlazi court. A second vulnerable resident, Richard Nzama, who had also complained of a cover-up in an attempted murder case, was arrested in July 2015, charged with attempted murder, and brutally tortured. The charges against him were withdrawn in November 2015.³⁸

The response of provincial and municipal government to this violence has been to dismantle the elected block structures and allocate R10 million for fencing and mast lighting.³⁹ In the meantime, street lights at a main hostel entrance are frequently out of order, and overgrown vegetation poses a security risk. Serious water leakages recur regularly.

The provincial government's official stance on the violence, articulated in the media, has been inconsistent. Initially, while acknowledging intra-party tensions, it blamed what was happening on the sale of beds (which was used to justify the dismantling of the block structures). However, in July 2016 the coordinator of a peace committee appointed by the premier blamed old grudges, 'taxes' and disputes

involving women as the reasons for the killings, and denied that the sale of beds or ethnicity played a part.

In December 2015 the national office of the public protector intervened, following an official complaint by the Commonwealth Legal Education Association. Over the festive season police from elsewhere in the country were deployed to the area. When they were withdrawn in late January, the killings resumed.⁴⁰

A multi-pronged investigation by the public protector was underway at the time of writing. The office of Premier Willie Mchunu (formerly MEC for policing) initiated 'peace talks' between the 'factions', but they have been shrouded in secrecy, with participants warned against divulging the content of the talks to other residents or outsiders. A peace agreement was signed between the two parties on Sunday 24 July 2016. However, a climate of fear prevails.⁴¹

A task team of provincial detectives was set up in June 2015 to investigate some of the cases, but by August 2016 there had been no convictions for any of the murders committed since April 2014. The toll is currently standing at over 60.

It has become clear that the Glebelands hostel violence is intertwined with municipal and provincial politics.

Violence in 2016

The election-related violence in KZN, which began in early 2016, took place in a context of inter-party tensions in a few contested areas, and of serious intra-party tensions over the ANC leadership and 2016 election nominations processes.

During the first seven months of 2016, 20 politically motivated deaths occurred in the province. Three of those killed – Nompumelelo Zondi, Phosithe Mbatha and Anna Madonsela – were NFP supporters, and three – Alson Mzwakhe Nkosi, Siyanda Mnguni and Thokozane Majola – were IFP supporters. Fourteen were affiliated to the ANC.

There were also a number of attempted murders in which people were injured. In the contested IFP area of Msinga there was an attempt on the life of NFP KZN Chairperson Vikizitha Mlotshwa in April. Jeffrey Ngobese, the ANC candidate for nearby Muden, also came under fire in March while travelling on the road to Greytown. Subsequently Ngobese and other party members claimed they came under attack from IFP supporters while canvassing. A standoff between the Economic Freedom Fighters (EFF) and ANC during the EFF's provincial manifesto launch at Esikhawini (Richards Bay) was averted by a strong police presence.⁴²

Provincial politics, nominations and protests

In May 2016 Senzo Mchunu was replaced by Willie Mchunu as premier. A re-shuffling of the provincial executive took place, and various MECs were replaced. One position was given to Provincial Chairperson Sihle Zikalala and another to South African Communist Party (SACP) Provincial Secretary Themba Mthembu. Staff changes were also made in the premier's office.⁴³

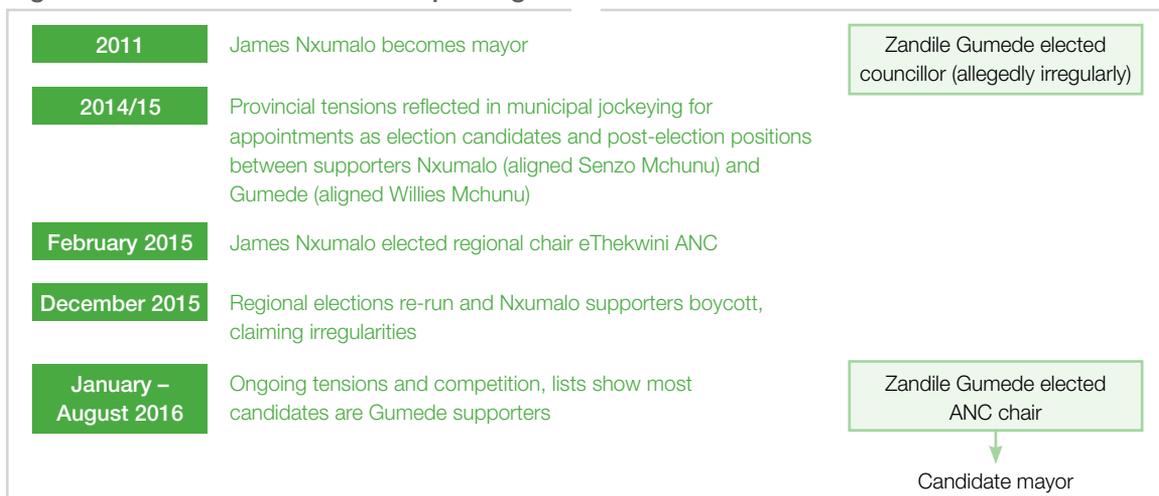
In early 2016 there were widespread allegations within the ANC and its alliance partners of irregularities at branch level, and interference

by party officials at other levels in the lists of preferred candidates. In the Harry Gwala region there were complaints that the outcome of the selection meeting had been influenced by 'ghost delegates' who were not bone fide members, and that a call for the process to be reconvened had been ignored. Most regions in the province were affected, with various parts of the province, especially around Pietermaritzburg, subjected to nomination-linked protests.⁴⁴

The degree of violence associated with the process varied, from the exchanging of blows at a meeting in Kokstad to the burning of a prospective candidate's home in iFafa (South Coast), and the burning of the home and car of a councillor at kwaDukuza (North Coast). There was extensive damage to government property in, among others, Folweni, south of Durban, where a group torched and looted municipal buildings and other property.

The dissatisfaction over nominations saw the burning of vehicles, the stoning of police, and the blockading of main roads from northern Durban township areas in June, resulting in severe traffic disruptions. By far the greatest property damage occurred in the iSithebe industrial area near Mandeni, where, in March, several factories were set on fire and subsequently had to close.⁴⁵

Figure 1: eThekweni ANC leadership and governance



Deaths and intra-ANC tensions, January to August 2016

On 24 January 2016, SACP supporter Phillip Dlamini and another man were shot dead in Ntshanga, and four others were injured at an SACP meeting in the ward of current eThekweni Mayor James Nxumalo. Following the shootings the mayor called for the two ANC factions to hold a joint rally to deal with their internal differences, but the municipal leadership allegedly rejected the offer.⁴⁶

January also saw the beginning of a chain of events in Pietermaritzburg, some apparently linked to continuing factional battles there. It started with the killing of traffic officer Joe Dlamini. After his death, a hit list with 15 names surfaced, with Dlamini's name at the top. Other names included the Pietermaritzburg municipal manager, the mayor, two councillors, and the regional secretary of the Umkhonto we Sizwe (MK) veterans' association. Five were members of the SACP. Jeffrey Mpulo, number nine on the list, survived what he claims was an assassination attempt. All were alleged to be supporters of Senzo Mchunu.⁴⁷ Municipal Manager Mxolisi Nkosi, whose name was also on the hit list, was suspended from his job in February 2016, despite being responsible for the municipality receiving its first clean audit in years. He had also taken a very strong stand against corruption.⁴⁸

From the end of May 2016 there was a spate of further killings in Pietermaritzburg:

- On 31 May, Simon Mncwabe, who had just resigned as the chief financial officer of the nearby Mpofana (Mooi River) municipality, was shot dead when dropping his children at school in Edendale. Mncwabe had taken over a municipality under administration and had resigned just before he was murdered, after receiving death threats.
- The following day (1 June), former Edendale branch chairperson Nathi Hlongwa was shot

dead at his home after attending a party meeting.

- Two women, Badelile Tshapa and Phetheni Ngubane, died after being shot on their way home from an ANC meeting on the evening of 8 June 2016. ANC sources claimed the killings were internal.
- On 13 July, Pietermaritzburg Ward 22 ANC Chairperson Nonhlanhla Khumalo and her daughters narrowly missed being struck by at least seven bullets fired at and into their Edendale house.⁴⁹
- There were two deaths in Newcastle, that of youth leader Wandile Ngubeni in May, and candidate councillor Thembi Mbongo in early July. Like that of Councillor Thami Nyembe in KwaNongoma in May, the deaths are believed to be intra-party.
- Durban Councillor Zodwa Sibiyi, who was gunned down at her Glebelands home in April 2016, had been an outspoken critic of corruption. Her fellow hostel resident, Mduduzi Qwabe, shot dead in March, had reportedly been on the local hit list.⁵⁰
- On 18 July, two ANC councillor candidates were shot dead: Khanyisile Ngobese-Sibisi in the Ladysmith area and Bongani Skhosana at his home in Harding. The murders were described by a SAPS spokesperson as 'planned hits'.⁵¹

As the August 2016 municipal elections approached, the ANC in KZN remained bitterly divided along factional lines, with followers of the displaced premier said to be 'plotting revenge'. Nominations lists in the eThekweni metro showed that the supporters of James Nxumalo had been removed or relegated to low positions on the party lists, with virtually all candidates being supporters of Zandile Gumede, who herself feared for her life.⁵²

Conclusions

The narrative presented here illustrates what Habib has described as the 'factional rather than cadre deployment' characterisation of the period since Polokwane, including the run-up to the August 2016 municipal elections.⁵³ While members of opposition parties – the IFP and the NFP – also died in the run-up to the elections, this period saw an unprecedented number of ANC members shot dead, apparently in internecine violence. The elections themselves proceeded peacefully, but what will the post-election period bring? The simmering discontent over the party's 2015 provincial elections, fueled by the subsequent reshuffle of the provincial government, has culminated in a court case aimed at unseating the present provincial leadership. The threat of further intra-party violence remains.

The examples provided illustrate Zulu's argument that citizen participation in government is 'limited to the ritualistic periodic vote every five years', with the interim period dominated by an elite demonstrating 'more party loyalty and personal gratification than service to the citizens who put them there in the first place'.⁵⁴ Service delivery protests are a symptom of government failure. Yet the governing party's conduct in the run-up to the August 2016 elections did not suggest that it planned to address the causes of discontent. To do so it would need to empower communities by involving them in development, rooting out corruption, and fixing a criminal justice system that allows most murderers to escape justice.

In KZN, democracy has failed poor people. There is a need to change policy and practice to ensure citizen participation and the accountability of elected officials.



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Notes

- 1 M de Haas, Violence in KZN and the culture of impunity, Paper given at World Summit of Human Rights Defenders to mark 50th anniversary of the Universal Declaration of Human Rights, Paris, 7–11 December 1998.
- 2 Truth and Reconciliation Commission, Truth and Reconciliation Commission of South Africa Report, 3, 1998, 299–303; M de Haas, Violence, in *South African human rights yearbook*, 8, 1997, <http://reference.sabinet.co.za/document/EJC34819>.
- 3 J Bodenstein, Elections, in R Louw et al. (eds), *South African human rights yearbook 1996*, 7, Durban: Centre for Socio-Legal Studies, 1998, 85–86; M de Haas, 'Violence', in Louw et al., *South African human rights yearbook*, 272–293.
- 4 See, for example, The Violence Monitor, Elections overview 2009, www.violencemonitor.com/?p=8 (accessed 22 July 2016).
- 5 Figures cited in L Medley, Political violence claims 41 lives, *Daily News*, 20 November 2012.
- 6 Regarding the leadership of the National Freedom Party (NFP) and its structure, see NFP, The National Freedom Party's national structure, www.nfp.org.za/16.National-Freedom-Party-Matopma;-Structure-Leadership.htm (accessed 7 July 2016); and *The Witness*, Evil forces aiming to eliminate NFP, 24 July 2012, which cites Magwaza Msibi about the killings of members.
- 7 See SAPA, Accused councillor, son freed, *Daily News*, 5 December 2013, about the dropping of charges against an NFP councillor accused of killing an Inkatha Freedom Party (IFP) supporter, and numerous other press reports, incorporated into records kept by the author at the time.
- 8 For example, see *Daily News*, Killing ratchets up KZN tension, 20 August 2016, about the murder of an African National Congress (ANC) councillor in the area; *The Witness*, Internal strife within IFP claims its third victim, 2 September 2010.
- 9 Paulus Zulu, *A nation in crisis: an appeal for morality*, Cape Town: Tafelberg, 2013, 124–125, 127. Adam Habib, *South Africa's suspended revolution: hopes and prospects*, Johannesburg: Wits University Press, 2013, 12, 87, 128.
- 10 Personal communication between author and sources in the party during December 2007 and January 2008.
- 11 The Violence Monitor, How real is the threat of post Polokwane violence, 2008, www.violencemonitor.com/?p=272, (accessed 29 July 2016).
- 12 Mary de Haas and Paulus Zulu, Ethnicity and federalism: the case of KwaZulu/Natal, *Journal of Southern African Studies*, 20:3, September 1994, 433–446.
- 13 Kate Lefko-Everett, Neeta Misa-Dexter and Justin Sylvester, Idasa 2009 Election response, NGO Pulse, [www.ngopulse.org/sites/default/files/Election%20Response%202009\(3\).pdf](http://www.ngopulse.org/sites/default/files/Election%20Response%202009(3).pdf) (accessed 27 July 2016).
- 14 *Weekend Witness*, ANC membership dips by a quarter, 10 October 2015; *City Press*, The ANC's membership in 2010, 2012 and 2015, 10 October 2015.
- 15 See, e.g., Bongani Hans, Candidates' race turns ugly, *The Witness*, 15 December 2010; Bongani Hans, Cops open fire at ANC meeting, *The Witness*, 14 February 2015, re: conflict over party lists; Mayibongwe Maqhina, KZN ANC must redo elections, *The Witness*, 3 January 2013; *City Press*, ANC

- battles report riots, 2 June 2013, re: reaction to the DLamini-Zuma inquiry.
- 16 SAPA, Mkhize urges support for KZN premier, *The Citizen*, 17 October 2013; Mayibongwe Maqhina, Premier speaks of his political journey, *Daily News*, 30 May 2016, which quotes Willie Mchunu referring to his supporters urging him to remain in politics. Regarding support for Ramaphosa see Govan Whittles, Senzo Mchunu recall could leave KZN ANC-led alliance in tatters, *Mail & Guardian*, 24 May 2016, <http://mg.co.za/article/2016-05-24-senzo-mchunu-recall-leaves-kzn-anc-led-alliance-in-tatters> (accessed 22 July 2016).
 - 17 Nathi Olifant, Fault line grows ahead of ANC's KZN forum, *The Times*, 4 November 2015.
 - 18 Mayibongwe Maqhina, Mchunu bodyguard gunned down, *Daily News*, 21 July 2015; Lungani Zungu, Sacked ANC mayor to take party to court, *Sunday Tribune*, 8 May 2016.
 - 19 Genevieve Quintal, Sihle Zikalala elected new chairperson at dramatic #ANCKZN conference, *Times Live*, 8 November 2015; Amanda Khoza, Zandile Gumede elected new eThekweni regional chairperson, *News 24*, 13 December 2015.
 - 20 Thabiso Zulu, Final push against looters and their sycophants, sent to community newspaper *Mountain Echo* for publication. The author is in possession of the manuscript and has had numerous communications with Zulu about it between June and August 2016.
 - 21 Ibid.; Jeff Wicks, R400m irregular or unauthorised expenditure, *The Witness*, 12 May 2015; Sibongakonke Shoba, ANC 'discipline' for official who blew corruption whistle, *Sunday Times*, 25 January 2016; Personal communication between the author, Zulu and Ngcobo during meetings in 2015 and 2016; the author, who has seen copies of highly incriminating documentation.
 - 22 eThekweni Municipality, Draft budget, www.durban.gov.za/Resource_Centre/Press_Releases/Pages/2015-2016_Draft-Budget2015-2016-Draft-Budget-Tabled.asp (accessed 25 July 2016); *eThekweni Municipality Metro*, City draft budget tabled, 1 April 2016 – 14 April 2016.
 - 23 Siphokhumalo, Another murder amidst party tensions, *The Mercury*, 13 September 2011.
 - 24 Ibid.; *Daily News*, Sibiya seen as a risk by some, 12 September 2011; *The Mercury*, Big guns face arrest for Sibiya murder, 13 September 2011.
 - 25 *The Witness*, More arrests imminent, 13 September 2011; *Daily News*, Sibiya murder arrest, 12 September 2011; *The Mercury*, Shock as charge against accused in Sibiya murder case withdrawn, 18 March 2014.
 - 26 *The Weekend Witness*, Further sanctions are unlikely, 27 July 2013; *City Press*, Manase: Mpisane rakes in millions, 28 July 2013; Manase and Associates Chartered Accountants, *Forensic investigation report eThekweni Metropolitan Municipality*, KwaZulu-Natal Provincial Government of Co-operative Governance and Traditional Affairs, 25 January 2012, see, for example, 90, 215, 277–278, 306, 381 regarding the grossly irregular award to DKH, a construction company.
 - 27 *The Mercury*, Irregular spending stands at R113m, 26 June 2015; *The Mercury*, Plunder of city coffers uncovered, 22 May 2015; *Daily News*, R212m irregularly spent in city, 12 February 2016.
 - 28 Perceptions of and complaints about councillors surface in conversations with people living in such areas and in newspaper reports. Regarding alleged collusion between councillors and/or politicians and police see, for example, The Violence Monitor, Human Rights Day 2010: What rights for people in KwaShembe (Clermont), Macambini/Mangete and Kennedy Road, 21 March 2010, <http://www.violencemonitor.com/?p=41> (accessed 25 July 2016); and The Violence Monitor, Countdown to elections 2014: stop no go areas now, 11 July 2013, <http://www.violencemonitor.com/?p=186> (accessed 25 July 2016).
 - 29 Note that, unless otherwise indicated, all information relating to events in Glebelands comes from the meticulous documentation of what has been happening since March 2015 by human rights defender Vanessa Burger, whose research has included a great deal of participant observation as well as the taking of many statements and affidavits. The author has copies of all this documentation, including a database of attacks, evictions and deaths from March 2015 to the present. The author has worked closely with Burger and has also interacted on many occasions with residents. Reporters have also interviewed residents, and in January 2016 *Daily News* reporter Chris Ndaliso wrote a series of articles based on his interviews, for example *Daily News*, Witness a murder and you're next, 18 January 2016; see also *Mail & Guardian*, Glebelands: fingers pointed at untouchable serial killer, 5–11 June 2015.
 - 30 Information about the number of blocks from residents and various press reports, including *The Mercury*, Reasons given for Glebelands killings, 18 July 2016, which cites a government representative as giving a figure of 72 blocks, which would include new, smaller units. However, according to Burger, who did a physical count of the blocks, there are a total of 90 in the complex.
 - 31 PM Zulu, Hostels in the greater Durban region: a case study of the KwaMashu and Umlazi hostels, unpublished research report, 1992, 26; see also PM Zulu, Durban hostels and political violence: case studies of KwaMashu and Umlazi, *Transformation*, 1993. Information about the violence in the 1990s is from research done then by the author, regarding Congress of the People (COPE) conflict, from reports to the author from residents at the time, correspondence between the author and the South African Police Service (SAPS) and press reports.
 - 32 Zulu, Hostels in the greater Durban region, 16.
 - 33 *Daily News*, Streets blockaded near Glebelands, 21 June 2013.
 - 34 Many residents reported seeing or hearing about the hit list, but no copy was given to them. As told to Burger beforehand, some of those named were subsequently killed. When confronted at a meeting at the public protector's Durban office on 10 March 2016, representatives of the municipality conceded that Hlope had indeed handed them a list of residents not wanted at Glebelands, as had been alleged by residents.
 - 35 Regarding the death of Fica, there are sworn statements by two men arrested with him who were also assaulted, and a second post-mortem was performed by a top independent pathologist. The reluctance to report cases was reported to the author and/or Burger. The author and Burger have been in regular contact with SAPS management since March 2014. All references to police draw on correspondence and meetings, including a meeting between Maj. Gen Chiliza, Cluster Commander Umlazi, Burger and the author on 21 May 2015,

- and a meeting between members of a newly appointed task team, hostel residents and the author at the SAPS Durban headquarters on 2 June 2016. Much of the correspondence with the SAPS was copied to the then provincial MEC for policing Willie Mchunu and some was sent to the national commissioner of the SAPS.
- 36 Most of the torture victims received medical assistance and J88s, including in some cases a thorough examination by an expert in the use of 'tubing'.
- 37 Full details of the arrests and, where known, case numbers, and subsequent withdrawal of charges were recorded by Burger in a database. Some were followed up with the police by the author, who also assisted with legal representation for one of those arrested who was a key witness in the death of Fica.
- 38 Ndovela was with a man who was shot dead in February 2015 and he informed the Umlazi SAPS investigator that he had seen Hlope driving the *bakkie* in which the men were transported to shoot the victim. He also identified the killers, who were subsequently charged. He told Burger that the investigator had told him that the information about Hlope was not relevant and he could leave it out of his statement. Burger and the author arranged with the branch commander at Umlazi SAPS for Ndovela to make a supplementary statement on the afternoon of the day on which he was killed. The men who had been charged were subsequently acquitted. See The Violence Monitor, Assassination at Umlazi Court: policing heads must roll, 18 May 2015, <http://www.violencemonitor.com/?p=260> (accessed 25 July 2016). Regarding the torture of Nzama, see The Violence Monitor, Holding the constitution in contempt: police torture in a constitutional democracy, www.violencemonitor.com/?holding%20the%20constitution%20in%20contempt, (accessed 25 July 2016). Burger and, on one occasion, the author, was present in court during all the remand hearings of Nzama.
- 39 *Daily News*, ANC handling hostel violence, 19 September 2014; *Daily News*, Plan to curb Glebelands hostel violence, 29 September 2014; *eThekwinini Metro*, Calm returns to Glebe, 31 October – 13 November 2014; *The Mercury*, Reasons given for Glebelands killings, 18 July 2016.
- 40 This complaint was facilitated by Prof. David McQuoid-Mason, former head of the Department of Law at the University of Natal, who is currently chairperson of the Commonwealth Legal Education Association.
- 41 Mbuso Mkhize, Glebelands Hostel peace agreement signed, SABC, 24 July 2016, www.sabc./news/a/cc97f1004d9d0ae98139becfebe468/Glebelands-peace-agreement-signed-20162407 (accessed 4 August 2016); *East Coast Radio*, Peace agreement signed at Glebelands hostel, 25 July 2016, <https://www.ecr.co.za/news-sport/news/peace-agreement-signed-glebelands-hostel/> (accessed 4 August 2016).
- 42 *Daily News*, NFP chairman dodges assassins' fire, 18 April 2016; correspondence between author and SAPS at Muden and Greytown about attacks on Ngobese, April 2016; *Sunday Tribune*, Bullets fly at EFF rally, 29 May 2016; *City Press*, Separated by a thin blue line, 29 May 2016.
- 43 *Daily News*, Premier not fazed by midterm, 26 May 2016; *The Witness*, Mchunu's aides axed, 7 June 2016; *The Witness*, Shuffle not the solution, 8 June 2016; *Daily News*, Premier speaks of his political journey, 30 May 2016; *City Press*, Is Willie just a KZN seat filler?, 29 May 2016.
- 44 *The Witness*, Presence of ghost delegate disrupts ANC's Harry Gwala conference, 3 May 2016; *The Witness*, Final push in protests: Edendale France and Payipini in uproar, 1 June 2016; *The Witness*, Flames over Majola: protests in Edendale's Ward 12 over imposed councillor, 22 July 2016.
- 45 *Daily News*, Councillor flees protestors, 23 February 2016; *The Mercury*, ANC nomination anger leads to riot looting, 1 March 2016; *Daily News*, Durban burns, 6 June 2016; *The Times*, ANC nomination list furore, 7 June 2016; *Daily News*, iSthebe violence continues, 10 March 2016; *The Mercury*, Buthelezi tells of his heartbreak, 6 July 2016 (about the factory closures in iSithebe).
- 46 *The Mercury*, Mayor not at meeting, 26 January 2016; *Daily News*, Puzzle over fatal shooting, 26 January 2016; *The Mercury*, Mayor's call for factions to meet rejected, 27 January 2016.
- 47 *The Witness*, Hit list handed to cops, 29 January 2016; *Sunday Tribune*, Mayor's name is on hit list, 31 January 2016; *The Witness*, Hit list man believes shots fired at house were for him, 12 April 2016. The author was sent a copy of the list.
- 48 *The Mercury*, Shock as municipal manager is probed, 25 February 2016; *The Witness*, Allegations of conspiracy, 12 April 2016; *The Mercury*, PMB graft probe fails to uncover any wrongdoing, 7 July 2016.
- 49 *The Mercury*, Dad gunned down in front of daughters, 2 June 2016; *The Daily News*, ANC branch official shot dead, 3 June 2016; *The Times*, KZN killings spark fear, 10 June 2016; *The Witness*, Back to the dark old days, 10 June 2016; *Daily News*, Officer's careless membership claims could lead to civil war: EFF, 11 July 2016; *Daily News*, Accused ANC killer granted bail: state slated for irresponsibility, 15 July 2016; *The Witness*, Put a stop to this madness, 15 July 2016.
- 50 *Daily News*, Playing dead to survive shooting, 12 May 2016; *Daily News*, Killing spurs peace bid, 15 May 2016; *City Press*, Manipulation of lists killed Mbongo, 10 July 2016. Information on Glebelands killings, including that of councillor Sibiya, was obtained from Burger; see also *Daily News*, Councillor killed at Glebelands, 18 April 2016.
- 51 *Daily News*, Two more die in poll violence, 19 July 2016; *Sunday Tribune*, Slaughtered in front of their children and families, 24 July 2016, about the killing of candidates.
- 52 *The Mercury*, Loyal cadres repaid, 2 June 2016; *The Witness*, ANC list is start of a new battle, 30 June 2016; *The Witness*, Axed mayors replaced by loyalists, 20 June 2016; *The Mercury*, City ANC leader fears for her life, 20 June 2016.
- 53 Habib, *South Africa's suspended revolution*, 67.
- 54 Zulu, *A nation in crisis*, 67.

Book review

Don Pinnock, *Gang town*

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Gang town, so promises the back leaf, 'tells a tale of two cities'. The front cover juxtaposes the two cities – Cape Town and gang town. The outline of Table Mountain beckons in the distance. Superimposed onto that world heritage emblem of the city is the body of a young man. A crude tattoo is visible on his naked torso. The arms of the body are stretched outward. The hands clasp a handgun. The torso, the tattoo and handgun signify 'the gangster'. He hails from gang town. The gangster subject is not without agency. The body is tilted in anticipation of the deadly velocity of the gun. But that agency, we know, is painfully circumscribed by the debilitating conditions of social exclusion that characterise gang town. So it is with anticipation that one turns to Pinnock's account of the interplay between structure and agency and gangs.

In *Gang town*, Don Pinnock once again brings his skills as journalist, photographer, criminologist and youth justice activist to bear on a field of study, which he, as much as anyone in South Africa, has helped establish. The style of the book reflects Pinnock's long career as a journalist. At the same time his strong foothold in academia has enabled him to produce a work that displays a grasp of much of the strictly academic studies that have appeared since his own seminal book on gangs, *Brotherhoods*, was published in 1984.¹ Later, in *Gang rituals*

and rites of passage (1997) he explored the role that Cape Flats gangs played in providing poorly educated, young coloured males with a sense of belonging and purpose in an environment characterised by family dislocation, poverty and violence.² And, after a 20-year hiatus, *Gang town* could perhaps be viewed as completing a gang trilogy, a summation and updating of Pinnock's work on this topic.

The South African literature on gangs is relatively well established. Historical inquiries, sociologically orientated explorations of both street and prison gangs, and more recent political analyses of the links between local gangs and global organised crime networks

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have assembled, by South African standards, a respectable body of 'gang' studies. For example, historians such as Charles van Onselen, Gary Kynoch and Clive Glaser contributed much to our understanding of the emergence of defence-type gangs on the streets of urban townships on the Reef from the first half of the 20th century onwards.³ As work in the 1980s by Nicholas Haysom, WJ Schurink and especially Charles van Onselen has made clear, neighbourhood gangs in South Africa have become inextricably linked to the formation of the so-called 'number' gangs in the country's prison system.⁴ One of the best ethnographic explorations of gangs is Jonny Steinberg's *The number*, in which the life of one man from the Cape Flats is traced from early street crime to membership of a number gang in prison, and the abiding consequences upon his release from incarceration.⁵ In light of all this literature, it is striking that gang development in this country, both within and outside of the prison system, has so closely paralleled similar phenomena elsewhere in the urbanised world. Prison gangs are almost ubiquitous in the United States (US) and Latin America, the places where the most relevant studies have been undertaken. And increasingly their links with gangs on the outside have proliferated.

In 2008 the Danish anthropologist Steffen Jensen produced perhaps the best ethnographic study of conditions in a Cape Flats township – Heideveld – and the operation of gangs in the area.⁶ It followed a useful study by Elaine Salo of life in the sub-economic flats of Manenberg and the pivotal role of women in sustaining a quasi-respectable lifestyle there.⁷ Jensen's work remains a landmark study, marred only by his recourse to an often arcane cultural studies vocabulary. Political scientists Andre Standing (2008) and Derica Lambrechts (2012) extended this literature to the study of transnational organised crime and illicit markets, a shift that local observers such as Wilfried

Schärf and Clare Vale had begun to stress, and which local media had not been slow to pick up on.⁸ Thus the focus on gangs as subcultural entities was supplemented by structural analyses of the interrelationship between global syndicates and local crime groupings, and changes in the form and functions of locally based associative groupings.

Thus, when Pinnock began to write the work under review, he had nearly 20 years of new academic work, together with a plethora of policy documents and press reports, to draw on. To all this often tedious material he could add his years of involvement in work with youth at risk and many hours of activism as a co-founder of the Usiko Trust, as well as his involvement with the transformation of the old Constantia Porter Reformatory into what has become known as the Chrysalis Academy. The author may perhaps justifiably claim to be the most academically informed and practically qualified person in the Western Cape to write on youth gangs in the area.

The result is a highly informative but perhaps over-ambitious book. The first chapter plunges once again into community life in District Six, with the implementation of the Group Areas Act in the 1960s. As the author puts it:

The ultimate losers in this type of claustrophobic atmosphere were the working class families. Torn from the areas they knew and scattered across the Cape Flats, the emotional brutality dealt out to them in the name of rational urban planning was incalculable. The only defence the youth had was to build something coherent out of the one thing they had left – each other. Between windblown tenements on the dusty sand, gangs blossomed. The city urban managers now had a major problem on their hands – violent crime. (p. 40)

In the second chapter Pinnock pursues a conceptual agenda around gangs. It has proved

notoriously difficult to develop a consensus on an acceptable definition of the term. What sense is there to make of gangs as a sociological and legal construct? How narrow or how wide should we stretch its definition? Do stereotypical notions of gangs still hold in a context where the organised criminal economy has gained so much traction, and where there is an increasing overlap between licit and illicit economic activities? 'Gangs' take many different forms. There are corner kids, brotherhoods, warrior gangs and fully fledged merchant gangs. Each has a different structure and function. And the interlinkages between these types are complex, especially in the current global and local contexts in which these criminal associations operate. Particularly welcome is the author's discussion of youth gangs in Khayelitsha on which little work, apart from Pharie Sefali's useful overview, has appeared to date.⁹ Perhaps one must accept, as Jensen seems to do, that no one term will ever capture the fluid, ephemeral nature of many street gangs, and rather focus on how some gangs achieve an institutionalised, multi-generational existence.

Chapter 3 emphasises the nature of *adolescence* – a critical phase of the human life cycle for understanding why impoverished young males cohere into something more than a mere friendship group. The topic was of course central to work by the Chicago School in the 1920s, culminating in Thrasher's monumental study of that city's gangs. Pinnock's new book echoes some of the author's earlier writings, but he draws on a body of recent scholarship on the developmental trajectories through which many youngsters travel. Contemporary research relating to 'pathways' to criminal careers, 'life persistent' deviance, the kinds of factors that make for 'resilience' and 'desistance' – is harnessed here.

It is no surprise that Pinnock devotes Chapter 4 to the context of family life in the shaping of

deviant young men. The influence of female-headed households in poor communities has for decades been one of the stock themes of much Western social science. Who can forget the outcry raised by the Moynihan Report in the US in the 1960s, which took account of the malaise affecting black families in inner city areas?¹⁰ It is an ongoing topic, and of much relevance to certain areas of the Cape Flats. The consequences of an absent father for parent-child role modelling are briefly considered. Second, the absence of fathers puts considerable strain on others (mothers in particular, but also relatives and other caretakers) who take on the burden of raising children. How do such strains impact on the newly born, the toddler and adolescent?

It is in thinking through these consequences for child development that Pinnock draws on new research emanating from 'biological' criminology and evolutionary psychology. Here, Pinnock departs from a long-standing reluctance in criminology to engage the non-social. The reluctance to engage with biosocial explanations for criminal behaviour is widespread, but such reluctance may be even more accentuated in contexts such as South Africa, where environmental stresses are acute and social inequalities brutal. A current hot topic among geneticists is what is termed 'epigenetics' – crudely put, the argument that the standard model of DNA-based transmission of the genetic heritage of an offspring is inadequate in accounting for the appearance of heritable traits whose causes arise after the conception of the foetus. The details are technical but the potential consequences are easy to understand. Malnutrition, substance abuse and stress experienced in mothers as 'incubators' of the unborn may lead to children who suffer from physical stunting, tendencies to deviance and mental disorders, among them schizophrenia. The toxic stress to which mothers in poor neighbourhoods are exposed alters the

efficiency of the embryonic development, with the unexpected related outcome that these alterations may themselves become heritable. As a consequence of maternal behaviour, male children may be primed for 'threat detection' and create hyper-alert organisms conditioned to respond in particularly aggressive ways. But the implications are far from new. When Morgan and Posel claim that '[t]he fact that an adverse socioeconomic environment is almost entirely mediated by caregiver/parental behaviour has profound implications: caregivers are the critical nexus between young brains/minds society is sculpting and society at large', (p. 13), one can only cry: welcome to standard criminology!¹¹

Chapter 5 'steps out of the door' (p. 184) and into the surroundings. The chapter's title is 'Toxic neighbourhoods'. It is in this reviewer's opinion the least satisfactory part of the book. One cannot quarrel with the author's concept of 'socially disorganised communities' (p. 185) – it is a standard social science conceptual cliché. There are slums, sink estates, *favelas*, *barrios*, ghettos and other terms that worldwide designate the poorest, most undesirable areas of our cities. The question is what, if anything, makes areas on the Cape Flats, as the title *Gang town* implies, so extraordinarily gang-ridden and subject to a kind of violence that goes beyond run-of-the-mill 'altercations', so well explicated in a book like *Homicide*?¹² Pinnock's answers – a kind of culture of violence, availability of firearms, widespread drug usage and low quality unsuitable school education – in a sense explain everything, but leave us wondering precisely what the key variables are.

The author presents some sensible recommendations in the final chapter. They are very sweeping, and, given current political structures, budgetary constraints and a cultural and institutional conservatism, their acceptance by policymakers and bureaucratic elites seems

unlikely. Major changes to education, as Pinnock suggests, face constitutional, fiscal and union obstacles. The same applies to reform of drug and policing practice. Nevertheless, they may help provoke the kind of debates that are the forerunners to the needed reforms.

In a book of such a wide sweep, academics are always going to be able to find points about which to carp. For example, both Jensen (p. 43) and Standing point out that, in the latter's words, 'there are several reasons why the link between forced removals and gang formation is not as clear-cut as many may believe' (p. 13), and that rural coloured migrants to Cape Town may have made up the bulk of those who were to be labelled gangsters. Then there is Pinnock's adoption of the fashionable idea of 'neoliberalism' (p. 48). To his credit he does not conjure it up on almost every page, as Samara's (2011) crime and gang book does.¹³ Yet it remains problematic that undefined concepts such as neoliberalism are uncritically inserted as apparent explanatory devices. The concept does not provide us with a workable and reasonably objective analysis of contemporary political economy in an age in which gangs increasingly intersect with trans-border groups and syndicates. Further, while one welcomes Pinnock's venture into recent developments in biology, he ignores the fact that this debate predates the new advances in the field of 'epigenetics'. Finally, there is much to be said about, and for Pinnock to provide a personal account of, the work of the Chrysalis Academy, and some indication how it differs from the notorious Porter Reformatory, on whose premises the Academy now stands. On second thoughts, given that Pinnock has just finished a 300-page book, the request is perhaps rather unfair.



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<http://www.issafrika.org/sacq.php>

Notes

- 1 D Pinnock, *The Brotherhoods: street gangs and state control in Cape Town*, Cape Town: David Philip, 1982.
- 2 D Pinnock, *Gang rituals and rites of passage*, Cape Town: African Sun Press with the Institute of Criminology, University of Cape Town (UCT), 1997.
- 3 C Van Onselen, *Studies in the social and economic history of the Witwatersrand, 1886-1914. New Nineveh*, Johannesburg: Raven Press, 1982; G Kynoch, *We are fighting for the world: A history of the Marashea gangs in South Africa, 1947-1999*, Athens: Ohio University Press, 2005; C Glaser, *BoTstosi: the youth gangs of Soweto, 1935-1976*, Cape Town: David Philip, 2000.
- 4 N Haysom, *Towards an understanding of prison gangs*, UCT, Institute of Criminology, 1981; W J Schurink, The world of the Wetslaners: an analysis of some organisational features in South African prisons, *Acta Criminologica*, 2:2, 1989, 60–70; C Van Onselen, *Studies in the social and economic history of the Witwatersrand, 1886-1914. New Nineveh*, Johannesburg: Raven Press, 1982; See also J M Lotter, Prison gangs in South Africa: A description, *SA Journal of Sociology*, 19:2, 1988, 67–75.
- 5 J Steinberg, *The number: one man's search for identity in the Cape underworld and prison gangs*, Cape Town: Jonathan Ball Publishers, 2005.
- 6 S Jensen, *Gangs, politics and dignity in Cape Town*, Oxford: James Currey, 2008.
- 7 E Salo, Mans is ma soe: ideologies of masculinity and ganging practices in Manenberg, South Africa, in D Donham and E Bay (eds), *Representations of violence in Africa*, Charlottesville: University of Virginia Press, 2007.
- 8 A Standing, *Organised crime: a study from the Cape Flats*, Pretoria: Institute of Security Studies, 2006; D Lambrechts, The impact of organised crime on state social control: organised criminal groups and local governance on the Cape Flats, Cape Town, South Africa, *Journal of Southern African Studies*, 38:4, 2012, 787–807; W Schärf and C Vale, The firm – organised crime comes of age during the transition to democracy, *Social Dynamics: A Journal of African Studies* 22:2, 1996, 30–36.
- 9 P Sefali, *Gang violence in Khayelitsha*, Safety and Violence Initiative, University of Cape Town, 2014.
- 10 DP Moynihan, *The Negro family: the case for national action*, Washington, DC: Office of Policy Planning and Research, US Department of Labor, 1965.
- 11 B Morgan and D Posel, *Humanities meets biology*, HUMA: University of Cape Town, Unpublished manuscript, 2015.
- 12 M Daly and M Wilson, *Homicide*, New York: Aldine De Gruyter, 1988.
- 13 TR Samara, *Cape Town after apartheid: crime and governance in the divided city*, Minneapolis, MN: University of Minnesota Press, 2011

On the record

Interview with Shaun Abrahams, National Director of Public Prosecutions

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Executive Director of the Institute for Security Studies, Anton du Plessis, and Senior Researcher, Ottilia Maunganidze, sat down with the National Prosecuting Authority's (NPA) National Director of Public Prosecutions, Shaun Abrahams, to discuss life, presidents, politics and prosecutions in South Africa. Du Plessis and Abrahams have known each other for many years.

Anton du Plessis (ADP): Who is the real Shaun Abrahams?

Shaun Abrahams (SA): Simply, the guy next door. I come from humble beginnings. I had very strict parents from whom I received a hiding on numerous occasions while growing up. The morals and values my parents instilled in me as a child and young man, are morals and values that I espouse to this very day. I recall back in 2002 when I left Pietermaritzburg as a young prosecutor to take up a position in Pretoria, my mom handed me a card, wishing me well. In the card she inter alia wrote, 'My son, God has given you an ability to assist people. Please use this gift for the betterment of all people and don't ever forget where you come from.' I still have that card. I am the same person that you met many years ago.

ADP: What motivates you to get up in the morning, get in your car and drive to the NPA?

SA: I love this job. I'm living my dream. My dream might be a nightmare to many others but it remains a dream to me. I could never see myself doing anything else but being a prosecutor, and I now I lead this all-important institution. Many people don't know that my oath of office lies on the corner of my desk.

Every single day when I arrive at work, before I start working, I recommit myself by taking my oath. I know the responsibility of leading this institution, giving guidance to many experienced prosecutors and leaders. Delivering justice to the people of this country is a very onerous responsibility.

ADP: I've known you for many years. Of all the people I've known you are probably one of the top three workaholics, and that was before you got this job. Do you still work insane hours?

SA: It's much worse now! Most mornings I'm awake at any time from around two o'clock onwards. I do some work at home before going to the office, where I arrive at any time from 5:30 onwards. I ordinarily work late most nights. By way of an example, a week ago I arrived home at three o'clock in the morning and the day before that I arrived at home just after midnight. Of course not every day is like that. There are days when I get home fairly early at around six o'clock or seven o'clock, which is a highlight for me and which affords me the opportunity to spend time with my family.

ADP: That's important. Having known previous NDPPs I think people need to understand the commitment that it takes, so I'm glad you

shared that. I thought you would miss litigation. Do you plan to litigate like previous NDPPs have done?

SA: I envisage a situation where I would like my deputy national directors and me to argue matters in the Constitutional Court and the Supreme Court of Appeal. But is it appropriate for the NDPP, who is the final arbiter in the NPA, to actually lead a prosecution or argument? If a matter merits it I certainly would like to do so. I miss litigating tremendously.

Otilia Maunganidze (OM): Without necessarily going into court, how are you as the NDPP leading right now without litigating?

SA: It's much easier and less stressful. I have tremendously experienced deputy national directors of public prosecutions. Of course we give directives to try and finalise matters speedily and efficiently, and in that way enhance the justice system. We want all matters to be concluded as speedily as possible. The challenge is that we have no investigative powers. We're also not responsible for case flow management, that's the responsibility of the presiding officers in the various courts. The constitutional mandate to investigate lies with the police.

I remind prosecutors daily that whenever they receive a telephone call or when a docket arrives with a single statement, they are obligated to provide the requisite guidance, as the decisions we make as prosecutors affect people's lives, their careers and that of their families. So we try and push our prosecutors to always do the right thing and not to forget the constitutionally enshrined principles and the rights of accused persons and victims of crime. In this sense we strive to deliver a more victim-centred service to society.

The NPA is represented on the National Efficiency Enhancement Committee (NEEC), which is chaired by the chief justice at national

level, and we are similarly represented at provincial level by the directors of public prosecutions in the Provincial Efficiency Enhancement Committee (PEEC), where issues of service delivery in the justice system are discussed, and we try to address the challenges to deliver a more efficient justice system to our citizens. The only thing that's really in our control, is prosecution. We guide investigations and issue directives. We don't determine the trial dates. That responsibility lies with the judiciary. We are, however, in control of proceedings from the moment we put charges to the accused and we present the available evidence.

I don't agree with the system. I've always asked, 'Is case flow management working?' The chief justice issues norms and standards, which means that all courts are supposed to sit four hours and 30 minutes. Notwithstanding this, some courts sit less than two hours. I have previously stated that we need a strong chief justice, strong judge presidents, strong regional court presidents and strong chief magistrates to maintain the norms and standards and to get the best out of the criminal justice system and all its role players. So everybody must be held accountable, even judicial officers.

ADP: Research into the number of cases finalised by the NPA with a verdict shows that they have declined by 10 000 in the last two years, from 329 000 to 319 000 (e.g. Jean Redpath, *Failing to prosecute*, 2012). At the same time the arrests being made by the police have increased by 900 000 annually over the last decade. So what we've seen is a decrease in the number finalised in court and an increase in the number of arrests. What's this about?

SA: It is all interlinked. I think we must look at it in the following light: The way the NPA measures performance is different from the way the police measure performance. There have been engagements between the police and the NPA to find a middle way for the measurement of

performance. The result is tragic. For example, the police will arrest 10 people for various crimes; let's say murder, rape, robbery. That's one case for the NPA. But the police will either measure the number of people that they have arrested or the charges that are proffered. It will always be difficult to equate the two or to find a way of measuring performance that takes a systematic approach, but I'm certain we can find one. I know that government at the highest levels wants to find a way to show citizens how government initiatives effectively fight crime.

I must say that investigations have also deteriorated over time. We are working hard on that with our stakeholders. Ultimately we are going to prosecute those cases so we must provide the requisite assistance.

ADP: The perverse performance indicator problems have been here for a while. We see an increase in the number of cases from the police with poor investigations, which decreases the chance of successful prosecution. But could it be that the reduction in cases prosecuted is not just a consequence of bad investigation but of a more rigorous screening by prosecutors?

SA: True. We've put in place screening mechanisms at all levels. In the lower courts, we have teams that screen the dockets to ensure that the investigations are properly done. Historically, we have also taken all dockets in which either witnesses could not be traced or the matters were removed from the court roll for other reasons, and we screen them. If these dockets have merits, we place them back on the court roll and provide a better quality of service. We don't want to lose cases but at the same time you shouldn't take matters to court when the interest of justice dictates that you should not and/or where there is no prospect of a successful prosecution.

ADP: The problem with the NPA in the last couple of years is that it has been at the

centre of a political storm relating to the decisions being taken, from the highest to the lowest levels. Is the politicisation of the NPA demoralising prosecutors?

SA: It is a myth that the institution is being utilised as a political tool to advance somebody's ends or goals. Of course, I cannot say that the NPA has never been utilised for political reasons before, that much is clear from cases that come to play now, especially matters that we have taken to the Constitutional Court.

I remember when I was appointed, the president said to me, 'Shaun, I'm appointing you because I want to give back to the NPA, I want to give them one of their own to lead them. I've tried people from the outside, they have failed. I've never tried someone from the inside. I've looked at your CV; I have looked at many other people's CV. I have interviewed you; I have interviewed a number of other people. You may lack the management experience that some of the deputy nationals and directors of Public Prosecution have. But your experience outweighs theirs by far. I want to give the NPA someone that knows the institution and how to turn it around, to show citizens the government's initiatives to fight crime.'

Of course, since my appointment the president has never asked me to do anything for him or on his behalf or on anybody's behalf. And it is a fallacy to suggest that I have been appointed to protect him or to use the NPA as a political tool. We decided to prosecute [former prosecutor] Glynnis Breytenbach, that trial is currently going on. The media is silent about it. Now of course prosecutors are deeply disheartened when they have to explain to their families, friends, loved ones, people in the community why the NPA is portrayed as a political tool. Of course there has been a history of political abuse, and to turn the tide against that history is difficult. We want the work of the institution to speak for itself. I have made it clear that I will not succumb to

public sentiment. I will not be pressurised by anybody into making any decision. I have never been a populist. I have walked the hard yards. I have made and will continue to make tough decisions. I will do what's right; I will do what's in the best interest of the NPA. I will consider the views of interested parties and that of the community. I accept that we can do more in so far as our engagement with the community is concerned to change the public perception of the NPA. But it's very difficult when positive news is not reported in the media.

ADP: You are concerned about the public perception of the NPA ...

SA: I'm deeply concerned about it. It hurts me tremendously when people have a negative perception of the NPA when hard-working prosecutors work night and day to keep this country safe, to deliver services to our communities. It really is a thankless job.

ADP: The NPA has appealed the Pretoria High Court's recent setting aside of then acting NDPP Mokotedi Mpshe's decision to drop charges against President Zuma in 2009. Most legal commentators think that the chance of the NPA's succeeding in the Constitutional Court is extremely low; you obviously disagree with that ...

SA: Completely.

OM: Why?

SA: Firstly, how can a court make a finding that the acting national director should have approached the court for the court to decide on the egregious nature of the conduct concerned? Why should the NPA approach the court at all for the court to decide whether it should prosecute a case? How can the NPA ask the court to assist it to exercise its own discretion and constitutionally enshrined powers? That cannot be correct. It has to be the head of the institution that must decide who must be prosecuted. If he or she is wrong

then it must be taken on review. But the court does not give guidance in so far as with which matters and under which circumstances the NPA should approach the court.

The question is: should the NPA approach the court to decide on the nature of the conduct before it decides whether or not it should prosecute? It's for the accused person to raise improprieties. In this matter, those representations were made, and after [former acting NDPP] Mokotedi Mpshe considered the presentations, listened to the tapes and read the docket, and having been briefed by the prosecution team, he decided that the conduct was so egregious that it had impacted the entire prosecutorial process. Now the prosecutorial process does not only start when you receive the docket, the prosecutorial process starts when you are contacted to give guidance on an investigation. In this matter, [former deputy NDPP Leonard] McCarthy was the head of the DSO [Directorate for Special Operations] and issued the Section 28 certificate that commenced the investigation into the matter. He was in charge of the entire investigation. The court got it wrong, I say this respectfully of course, in so far as the weight attached to the Browse Mole report. The purpose of us highlighting the Browse Mole report was to show Leonard McCarthy's conduct and the extremes he was prepared to go to, to besmirch Mr Zuma. You can't look at that in isolation. You must look at it holistically from the commencement of the investigation. Of course that is not an argument that was advanced and Advocate Mpshe should in all probability have advanced that, but he did not. We feel that the issue around the review of prosecution is not settled law.

I am really happy to consider the merits of the matter and to apply my mind to it should this become an eventuality. I am yet to make a decision on the merits of the matter as I

am currently bound by the processes and I would like these to be concluded. You would understand and appreciate that we can go directly to the Constitutional Court because the issues affect the powers of the national director and the NPA. We decide on matters on a regular basis. Any interested party who has locus standi can take us on review. We want the court to give clarity on my powers and the powers of the NPA so that we can continue with the constitutional mandate. We are concerned; I say this with the greatest respect, that the court wanted to usurp the constitutional powers of the NPA.

ADP: It's a very important point because they are quite separate. What happens if the Constitutional Court rules against you?

SA: I will be pleased if the Constitutional Court gives clarity and finality to the matter so that we can move forward as an institution. We must look at it in the following light: when the Constitutional Court was approached to decide on the powers of the public prosecutor, the public welcomed it. I wish that the public and the media could see this in the same light. This is about the powers of the NPA, the powers of the national director, and relates to the separation of powers. We need clarity on these issues. I see it as fulfilling my constitutional responsibilities and my oath of office to see this matter brought to finality as soon as possible, whether we win or lose, and to provide clarity around what my powers are and what the powers of the NPA are, as well as principles around the review process.

OM: One of the interesting things you did when you took over as NDPP was to restructure. Has the restructuring worked?

SA: Immediately after my appointment, I was mindful of the challenges facing the institution and the problems at the top. I had to make certain tough decisions and many people in the

institution feel it is in a much better place than it was before. Of course not everyone was happy.

I think we are doing better: the prosecution rates have increased for the Special Commercial Crimes Unit (SCCU), the Sexual Offences Unit (SOCA), and sexual offences in general. Overall we've done better as an institution, even though we may have received fewer cases.

ADP: Was it a smart move to appoint Advocate Jiba to head the NPS [National Prosecutions Service], considering the controversy around her? I know you said public perception can't drive your decisions, but I don't think the public has an understanding of why you did that.

SA: Immediately after my appointment I consulted with all deputy national directors, all directors of public prosecutions, special directors, and other senior members of the NPA. I wanted their views, among other things, on whether there should be changes. Ninety to ninety-five per cent of my directors of public prosecutions and special directors had recommended that Nomgcobo Jiba be assigned the responsibility to head the NPS. Nomgcobo is a very hard worker, is very decisive and she is a leader. I was very mindful of the history and stigma attached to her, largely attributed by the media. She has not disappointed me and has vindicated my decision, which I am extremely pleased about.

OM: Can you talk a little more about the roles that specialised units play in the NPA?

SA: I would like to start by speaking about the Priority Crimes Litigation Unit (PCLU). I grew up in that unit, and I led it for some months. Its mandate is to manage investigations and prosecutions of crimes impacting the country's security. It has specified crimes that fall within its mandate, including international crimes, terrorism, conventional arms control issues and TRC [Truth and Reconciliation Commission] matters. The Missing Persons Task Team

(MPTT) also falls within that unit. I have taken certain high-profile matters and assigned them to the unit specifically because I wanted its head to have oversight over those matters and to report to me. Because those matters impact on public perceptions of the NPA I wanted direct oversight over them, not to interfere in any way, although I can intervene in any matter, contrary to general belief, where policy is not being adhered to. This is to ensure that there is no manipulation, that nobody points fingers and says there is political and/or other interference. They must point fingers at me, I'm the head of the institution. The buck stops with me so I will take the responsibility for that.

Dr Torie Pretorius SC heads the unit. He is someone I trust implicitly. I am tremendously pleased with the leadership he has shown to date. I have recently indicated that I will provide the requisite resources to both the PCLU and the MPTT so that they can work efficiently. We are in a building phase.

OM: My primary area of interest is international criminal justice; how will the changes impact the work that the PCRU is doing in terms of international crimes?

SA: The challenge the PCLU has always faced is a lack of resources. Right now, every prosecutor in the PCLU has one or more matters in court. There was always the issue of these investigations dragging on and prosecutions not being conducted speedily. We now have sufficient resources for matters to go to court. So I can see the turnaround already by the mere fact that we have so many of our prosecutors in court. I have even gone as far as to place the Marikana matter under the head of the PCLU's direction and seconded experienced officials from other offices to provide assistance, because this is a very serious matter. I want direct oversight of the head of the PCLU in this matter because of the impact it has on society and the rule of law.

OM: Beyond the people housed at the NPA's head office, what else can the special units do?

SA: We want to decentralise. We will have prosecutors at head office to deal with specific matters, but we want the regions to also have the expertise. So when we invite people for international law training, we expect the people who are trained to lead prosecutions in their regions and we second them to head office to deal with these matters. We want to have a broad pool of prosecutors to choose from and we want to enhance expertise.

Early this year, I hosted a conference on organised crime. I felt that stakeholders weren't doing enough, in so far as their respective constitutional mandates and responsibilities go, to work together and in synergy to fight organised crime, serious economic offences and corruption. I don't want to take away the powers of the directors of public prosecutions but I have given them time to get their structures in place. I want to see results and if I don't see results I'm going to establish a special unit on organised crime. It's all about efficiency.

This has been the Sexual Offence and Community Affairs (SOCA) Unit's best year ever. In early 2000 when SOCA first started, they commissioned a work-study around sexual violence. At that stage, the successful prosecution rate was extremely low. They have now achieved over 70%. They have done tremendously well. This has shown us that the system has worked, the concept has worked and we are grateful to Mama Thoko Majokweni for her good work and to Pierre Smith and other leaders of SOCA for creating the structure. Of course a lot of work still has to be done. I'm willing to revisit SOCA's mandate. SOCA does not have a prosecutorial mandate. Why can't a special director take responsibility for all sexually related offences? Won't it enhance efficiency and streamline the entire process? We are going to work on that.

The SCCU again has done tremendously well under the leadership of Lawrence Mrwebi. They improved their results in the last financial year. I also want to revisit their mandate and resources to see how we can enhance the unit to fight serious economic offences and corruption. It's a priority for me.

ADP: Do you have a mentor? And if so, what role does he or she play?

SA: You bring tears to my eyes when you raise this question. I don't know whether to say I have or I had. My very first mentor was a man called Tim McNally SC, who was the former attorney general of Natal, who gave me my first opportunity as a prosecutor. But if you speak of a mentor, his name is Anton Ackermann SC. Anton was a father, a friend and a mentor. I have never met a person who took the time to selflessly mentor another person the way Anton mentored me. The role he played in my life has contributed greatly to the leader and the person I am today. It was indeed a critical role in my career. During a recent discussion I told him that the flaws I have as a lawyer should never be attributed to him but I will be forever grateful for what he has done in my life and career. A few months ago, Anton had tears in his eyes and he inter alia said to me, 'My son, it pains me when the media lambasts you or when you are criticised, because I know you and I know what you stand for and I know the lawyer you are.'

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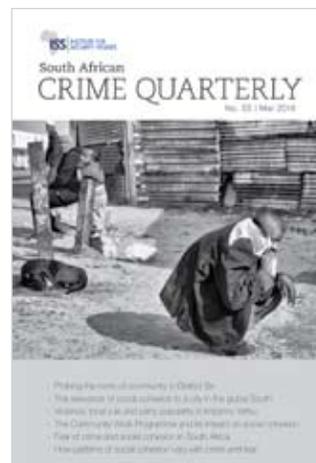
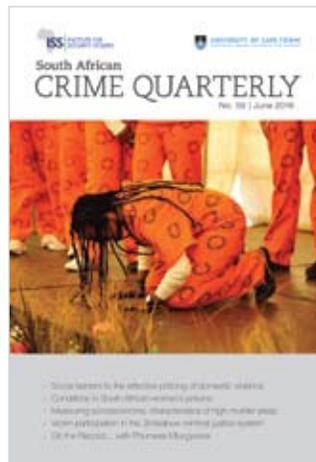
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Previous issues

A range of topics are covered in SACQ 56, from women prisoners' views on the conditions in which they were detained, to the socioeconomic characteristics of areas with high levels of murder, and private prosecutions in Zimbabwe. Two pieces explore challenges to policing in Khayelitsha in Cape Town. These are a discussion of social barriers to the policing of domestic violence, and an interview with the Social Justice Coalition's General Secretary, Phumeza Mlungwana.

SACQ 55 is a special edition on social cohesion, guest edited by Vanessa Barolsky. The issue explores the role of social cohesion in understanding and addressing violence in South Africa. Articles present a complex picture that does not support a hypothesis that social cohesion reduces violence, as articulated in international literature. Rather, violence in South African can be an organising principle of social cohesion.



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