

3 Readings: Conduct in court

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Conduct in Court

A red-faced judge convened court after a long lunch. The first case involved a man charged with drunk driving who claimed that it simply wasn't true. "I am as sober as you are, your honour," the man claimed. The judge replied, "Clerk, please enter a guilty plea. The defendant is sentenced to 30 days."

1. Introduction

It can be very frightening or frustrating for an accused or a litigant in a civil trial to appear before a magistrate who appears to be disinterested, or who displays an obvious prejudice, or who fails to take control of the proceedings. The public have placed their trust in the judiciary to ensure that justice is served.

Magistrates are expected to adopt the attitude that all parties in court are equal before the law¹ and deserve to be treated with respect. They must also acknowledge that their behaviour sets the tone for the proceedings and that they are in control of the proceedings. They should also understand that other court officials and witnesses take their cue from the tone that they set.

The public confidence in the judicial system is undermined when magistrates conduct themselves in a manner that lacks dignity and integrity. If the public lacks confidence in the courts, then the courts lose their legitimacy and power. It is in the Magistrates' Courts in particular, which deal with the majority of cases, that the battle for legitimacy and respect will be lost or won.² Louis D. Brandeis, a US Supreme Court Justice from 1856 to 1941, said, "If we require respect for the law, we must first make the law respectable."³

2. Core concepts

Article 1 of the Code of Conduct⁴ says that magistrates are required to act with integrity at all times. The following are the elements of judicial integrity that should be displayed in the courtroom:

- Dignity.
- Respect.
- Courtesy.
- Patience.
- Self-control.
- Impartiality.
- Competence.
- Diligence.
- Allegiance to the Constitution.

2.1 Dignity

The Oxford English Dictionary (5th ed) defines “dignity” as “a calm and serious manner... showing suitable formality or indicating that one deserves respect.” Articles 3 and 4 of the Code prescribe that a magistrate must execute his or her official duties with dignity.

2.2 Respect and courtesy

“Judicial Ethics in South Africa Guidelines for Judges” provides that a judicial officer “should always act courteously and respect the dignity of all who have business” in the court.⁵

2.3 Patience and self-control

There are frequent occasions when a magistrate may find that counsel or litigants are trying his or her patience. As a magistrate, one is dealing with people who, whether they are lawyers or litigants, will naturally at times be rude, irritating, long-winded or boring.

Blackstone’s Handbook for Magistrates, an English publication, advises that in these situations when the magistrate feels that he or she is losing patience, “It may be wise to walk up and down the corridor three times to dissipate anger, or (first taking care to be quite out of earshot), laugh off the ill effects.”⁶ As quaint as this advice may be, it is wholly inappropriate in the South African context. Most of our courts are overcrowded and the corridors are full of litigants, attorneys and awaiting trial prisoners. It is therefore unlikely that a stroll down these corridors will bring any reprieve.

Therefore, the magistrate will have to find a different way of remaining calm and patient. It is always important to remember that he or she is in charge of proceedings. Magistrates therefore cannot afford to lose their temper in an inappropriate manner. If they do, they set the tone for other people in the court to behave in the same way.

2.4 Impartiality

There is a duty on all magistrates to apply the law impartially and without favour or prejudice.⁷ The test for bias is whether the reasonable and informed person in the position of the litigant would apprehend that the magistrate will not act impartially.⁸ A magistrate’s demeanour and conduct in court can create a reasonable apprehension of bias. For example, in *S v Herbst*,⁹ the accused applied for the recusal of the presiding magistrate, one of the alleged grounds being that when he had finished giving evidence, the magistrate turned his head towards the prosecutor, smiled and winked. Although the court could not make a specific finding on this allegation as the facts were in dispute, it did say that, “Such an action ... could only have served to enhance the impression of possible bias which a reasonable layman could well have had”.¹⁰

In *S v Roberts*¹¹ in the middle of the witness's testimony for the accused, the magistrate shouted, "Just hold right there, please stop," switched off the microphone and jumped up exclaiming, "Right, that's it, that is it," and then walked out of the courtroom.¹² On the magistrate's return, he conducted himself in a manner that displayed irritation with the proceedings. The court held on review that:

"There can be no doubt that the magistrate's conduct, bearing and utterances... would have provided the reasonable person in the appellant's position with eminently reasonable grounds to think that the court might be biased."¹³

In *Roberts* the magistrate had also engaged in *ex parte* communications with the prosecutor. The court held:

"That [in order for] justice ... publicly [to] be seen to be done necessitates, as an elementary requirement, [one] to avoid the appearance that justice is being administered in secret, [and] that the presiding judicial officer should have no communication whatever with either party except in the presence of the other... That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more [the magistrate's recusal]."¹⁴

2.5 Competence

Sachs J said that,

*"If respect for the judiciary is to be regarded as integral to the maintenance of the rule of law, as ... it should be, such respect will be spontaneous, enduring and real to the degree that it is earned, rather than to the extent to which it is commanded."*¹⁵

In order to earn the respect and confidence of the public, judicial officers must display competence in their field. No one would respect a doctor or any other professional who is incompetent. In the case of the judiciary, this is just as important.

It is the nature of litigation that a magistrate has opposing parties before him or her, whose aim it is to persuade the court that their application of the law to the facts is correct. The magistrate's job is to make an educated assessment of the merits of each party's argument.

South African courts have held that Justice College strives to ensure that magistrates are competent through,

*"ongoing training ... in legal procedure, substantive areas of law, ethical issues, social context and other challenges to a dynamic and professionally developing magistracy."*¹⁶

It is, furthermore, essential for magistrates to keep up with changes in the law and maintain professional competence.

2.6 Diligence

Magistrates have a duty to carry out their tasks with diligence. Diligence means adhering to office hours, starting court on time and ensuring that matters proceed as quickly as possible and without undue delays.¹⁷ The right of the public to have “their trial begin and conclude without unreasonable delay” is entrenched in section 35(3)(d) of the Constitution.

Diligence also requires that magistrates apply their mind to the matter before them. This means ensuring that they understand the legal issues relevant to a particular matter, reading the papers thoroughly and listening attentively to the parties in court.

2.7 Allegiance to the Constitution

When magistrates take their Oath of Office, they swear to, “uphold and protect the Constitution and the human rights entrenched in it.”¹⁸ Therefore, in court, magistrates must avoid and, where necessary, disassociate themselves “from comments or conduct by any person subject to their control which are racist, sexist or otherwise manifest in violation of the equality guaranteed by the Constitution.”¹⁹ It is also the magistrate’s duty to ensure that any person in the court who conducts themselves in a manner which violates any other party’s human rights is dealt with appropriately and warned against such conduct.

3. The role of the magistrate in court

In the leading case of *R v Hepworth*, Curlewis J held that, “A [judicial officer] is an administrator of justice, he is not merely a figure head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”²⁰ Thus the judicial officer has two roles: to control proceedings and to ensure that justice is done.

3.1 Controlling proceedings

Most judicial proceedings by their nature are acrimonious. Justice can only be served if each party has an opportunity to put their argument to the court in an atmosphere that is controlled and regulated. The Code of Conduct states that it is the duty of the magistrate to take control of the proceedings and maintain “good order in his or her court.”²¹

The two most important aspects of taking control of proceedings are firstly, ensuring that all who have business in the court show due respect for the court and the law, and secondly, that they behave in a manner that is courteous and respectful to each other.²² The fact that it is a crime to “scandalise the court”, in most common law countries²³ is indicative of the importance of maintaining public confidence in, and respect for, the judiciary and the law.

Taking control of proceedings includes ensuring that the right to equality before the law is upheld at all times: this means that any person who makes comments that are sexist, racist, or in any other way, in violation of the Constitutional principle of equality before the law²⁴ must be dealt with appropriately and warned against such conduct.

3.2 Seeing that justice is done: adversarial v inquisitorial system

One problem that arises regularly and has sometimes been held to warrant recusal is the issue of the magistrate descending into the arena of conflict. The issue is whether this is appropriate, and if so, under what circumstances. The theoretical intricacies of the adversarial and inquisitorial systems are at the basis of this dilemma. This discussion is beyond the scope of this course, but a brief overview is necessary.

South African law follows the adversarial system. Under this system the “role of the judicial officer is to remain essentially passive and ensure that each party plays according to the rules.”²⁵ The parties are responsible for gathering evidence, which they present to the presiding officer, who makes a decision on the facts and arguments placed by counsel. The logic behind the adversarial system is that, by remaining at arm’s length from the conflict, the magistrate is in a better position to assess the facts objectively and remain impartial.²⁶

In the inquisitorial system on the other hand, the judicial officer has a more active role. He or she examines witnesses and makes his or her own investigations.²⁷

The problem with the adversarial system is that when one of the parties is unrepresented the parties are not on an equal footing and so the objective of establishing the truth through the process of a fair trial may be defeated.²⁸ In such a situation our courts have held that it would be appropriate and indeed necessary for justice to be done, that the, “judge should... assist [the accused] to put his defence adequately, if necessary by the judge himself questioning prosecution witnesses as well as the accused and his witnesses.”²⁹

The presiding officer may also have to descend into the arena where one party is represented by incompetent counsel. For example, in *S v Ngcobo*³⁰, where the judge questioned with the accused himself as to certain pertinent facts, it was held that in the circumstances:

“[H]e only did so to ensure [that] ...justice was being done between the prosecution and the accused. ... [The record] shows that he did not lightly undertake such questioning and he only did so when it became apparent that the prosecutrix was unequal to doing so. It is unfortunate that a judicial tribunal is compelled in such circumstances to take such steps, and that it ought to be sparingly done goes without saying. But in some instances, like the present, it may be unavoidable if justice is to be done.”³¹

The difficult issue, however, is where to draw the line. In *S v Rall* the court held that:

“Much depends of course on the circumstances of the trial itself as to whether, when, to what extent, and in what form or manner such questioning should be indulged in by a [presiding officer]. While it is difficult and undesirable to define precisely the limits within which judicial questioning should be confined, it is possible, I think, to indicate some ... broad limitations ... that should generally be observed.”³²

The guidelines or limitations set in *Rall* are as follows:

1. A judicial officer must always ensure that justice is done and seen to be done.
2. Any line of questioning of witnesses or the parties which may preclude the judicial officer from objectively assessing the evidence and facts before him or her should be avoided.
3. A judicial officer should also avoid any line of questioning that may intimidate or unduly influence the parties or their witnesses and thus affect their credibility or demeanour.³³

4. Concluding remarks

In conducting proceedings magistrates should always bear the following in mind:

- They must take control of proceedings and set the tone for all that appear in their court.
- They must ensure that justice is done and in so doing they may have to deviate from the strict adherence to the principles of the adversarial system.
- Magistrates are the “coal-face of justice”, and for many people in South Africa the magistrate will be the only representative of the justice system that they will ever encounter.³⁴
- “If we require respect for the law, we must first make the law respectable.”³⁵
- The public will “judge the judge” by his or her level of professionalism.
- The perception or judgement will be based on the presiding officer’s manner, appearance and decorum, *and*
- This perception will also be based on his or her competence in dealing with the parties, the law and the submissions of those who appear before him or her.

Footnotes

- ¹ The Constitution of the Republic of South Africa Act 108 of 1996 s 9(1). (referred to as the Constitution)
- ² I Mahomed " Address by the Chief Justice I Mahomed to the Second Annual General Conference of the Judicial Officer's Association of South Africa in Pretoria on 26 June 1998" (1998) vol 1 no. 2 *The Judicial Officer* 47 - 48.
- ³ Louis D. Brandeis, available at <<http://www.koti.mbnet.fi/neptuna/quotes>>.
- ⁴ Code of Conduct for Magistrates (Regulation 54A promulgated in terms of s 16 Magistrates Act 90 of 1993).
- ⁵ Committee of senior judges chaired by Mr Justice of Appeal Louis Harms " Proposals for a mechanism for dealing with complaints against judges, a code of ethics for judges" (2000) 117 SALJ 277 art4.
- ⁶ Neil McKittrick and Pauline M. Callow " Blackstone's Handbook for Magistrates" (1997) 185.
- ⁷ Magistrates' Courts Act 32 of 1944 (Oath of Office) s 9(2)(a); the Constitution ss 34 and 165(2).
- ⁸ *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 47 (CC) at para48.
- ⁹ 1980 (3) SA 1026 (E).
- ¹⁰ *Ibid* at 1035.
- ¹¹ 1999 (4) SA 915 (SCA).
- ¹² *Ibid* at para14.
- ¹³ *Ibid* at para37.
- ¹⁴ *Ibid* at para23.
- ¹⁵ *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) at para78.
- ¹⁶ *S v Bresler and Another* 2002 (4) SA 524 (T) at 538.
- ¹⁷ See also *S v Davids*, *S v Dladla* 1989 (4) SA 172 (N).
- ¹⁸ Magistrates' Courts Act (n7) s 9(2)(a).
- ¹⁹ Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n5) art4; see also Canadian Judicial Council *Ethical Principles for Judges* (1998) art5.
- ²⁰ *R v Hepworth* 1928 AD 265 at 277.
- ²¹ Code of Conduct for Magistrates (n4) at art12.
- ²² Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n5) at art8.
- ²³ See *S v Mamabolo (E TV and Others Intervening)* (n15) at para423.
- ²⁴ Committee of senior judges chaired by Mr Justice of Appeal Louis Harms (n5) at art4.
- ²⁵ South African Law Commission, Project 73, Fifth Interim Report on Simplification of Criminal Procedure " A More Inquisitorial Approach to Criminal Procedure - Police Questioning, Defence Disclosure, The Role of Judicial Officers and Judicial Management of Trials" August 2002 at para2.11.
- ²⁶ See also SALC, Project 73 (n24); *S v Sigwhala* 1967 SA 566 (A) at 568.
- ²⁷ L B Curzon *Dictionary of Law* 4th ed (1995) 196.
- ²⁸ SALC, Project 73 (n25) at para2.13.
- ²⁹ *S v Rall* 1982 (1) SA 828 (A) at 831.
- ³⁰ 1999 (3) BCLR 298.
- ³¹ *Ibid* at 304; see also *R v Hepworth* (n20); *S v Sigwhala* (n26) and *S v Rall* (n29).
- ³² *S v Rall* (n29) at 831.
- ³³ *Ibid* at 831-832.
- ³⁴ Mahomed (n2) at 48.
- ³⁵ Louis D Brandeis (n3).