African Law Review

VOLUME 1 • ISSUE 3 • 2018

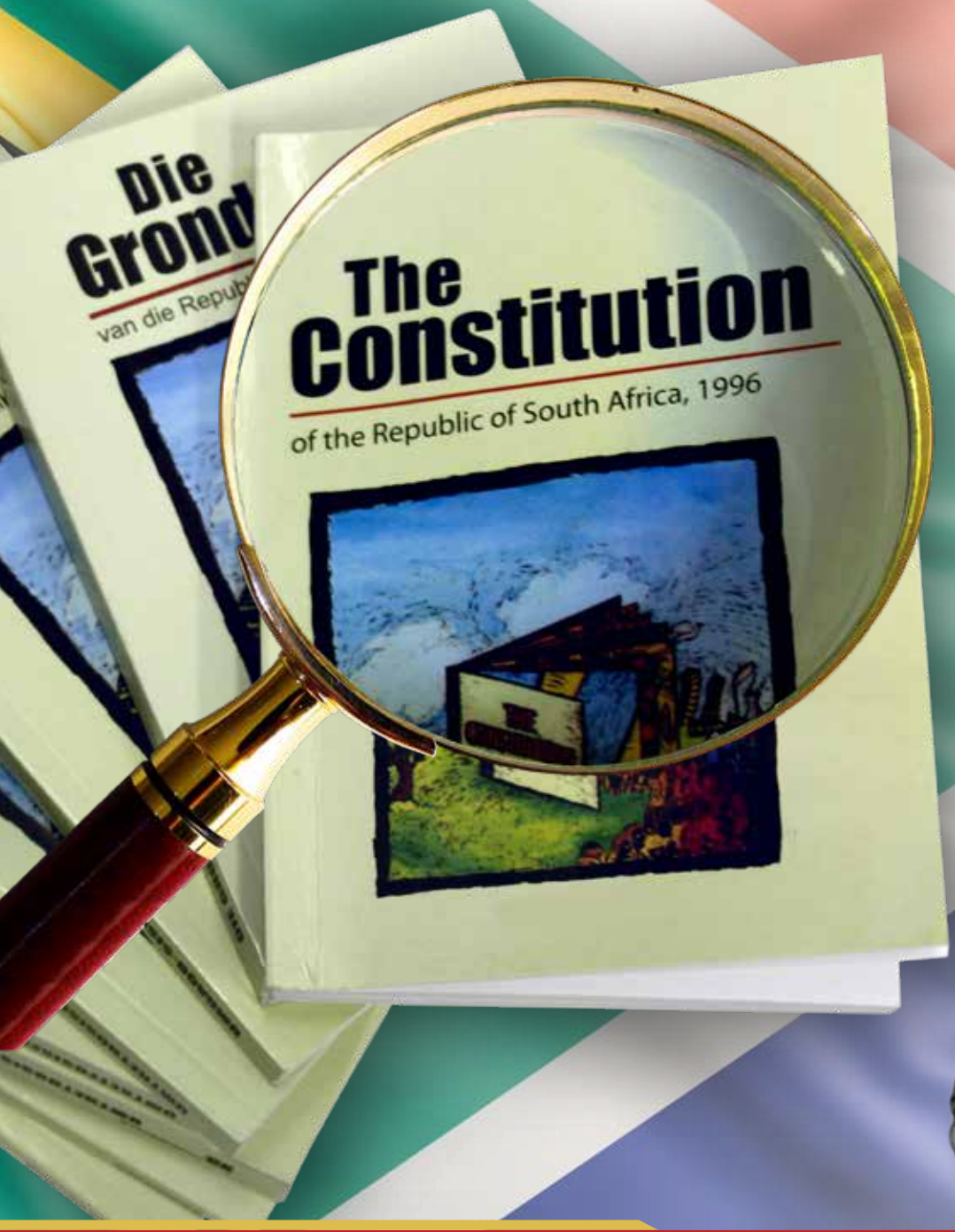
A Closer Look

Customary marriage in practice

In depth: The Prevention of Organised Crime Act

Corporal punishment To spank or not to spank?

Drunk drivers BEWARE



A tribute to the flames of democracy:

Drunken driving: Jail time or not?

By Howard Dembovsky, Justice Project South Africa, Chairperson

"Drunk drivers beware, you could spend seven days in jail before getting bail"[1].

You've got to hand it to whomever crafted that sensational headline for triggering a skewed media frenzy. As a result, wide public interest in just one of the road traffic offences the Road Traffic Management Corporation (RTMC) and Department of Transport (DoT) is seeking to have "re-classified" to Schedule 5 offences in terms of the Criminal Procedure Act, 51 of 1977 (CPA).

As Justice Minister Michael Masutha's spokesperson, Mukoni Ratshitanga correctly pointed out to the Sunday Times reporter "That proposal dates back to when Dipuo Peters was minister".

In fact, it dates back to 12 January 2016 when Ms Peters held a media briefing to announce the December 2015 to January 2016 festive season road fatalities.

At that briefing, she stated that her department would continue in its endeavour and quest to have all road traffic offences re-classified to Schedule 5 of the CPA in order to introduce "a mandatory minimum sentence for drunken driving, inconsiderate, reckless and negligent driving"[2].

At that same media briefing, RTMC Chairman Zola Majavu stated: "we want people arrested for traffic offences to spend seven days in prison awaiting bail applications, like other people facing serious offences"[3]

In April 2017, it was then Transport Minister, Joe Maswanganyi's turn to speak about "the department's long-term strategy to curb road casualties", when announcing the horrific Easter period road death toll[4].

In the 4 November 2018 Sunday Times report, the RTMC's CEO, Advocate Makhosini Msibi is quoted as having said "Above all, it must not be automatic, you must spend seven days [in jail] before you can bring the application for bail", thus echoing Mr Majavu's assertions.

Over the years, the RTMC and DoT have flip-flopped between claiming that the "strategy" arises out of road traffic offences currently constituting Schedule 3 (in 2015, 2016 and

1 Drunk drivers beware: you could spend seven days in jail before getting bail – https://www.timeslive.co.za/sunday-times/news/2018-11-04-drunk-drivers-beware-you-could-spend-seven-days-in-jail-before-getting-bail/

2 See https://sarf.org.za/wp-content/uploads/2016/08/festive_report_2015.pdf .

3 More jail time for errant motorists – https://www.iol.co.za/motoring/industry-news/more-jail-time-for-errant-motorists-1970040.

4 Guaranteed jail time on the cards for drunk drivers in South Africa – https://businesstech.co.za/news/government/171717/guaranteed-jail-time-on-the-cards-for-drunk-drivers-in-south-africa/

2017) and now Schedule 2 (latest claim) offences. They have also flip-flopped between "re-classifying" these offences to Schedule 5 and Schedule 6 of the CPA.

What's remained consistent is the RTMC's and DoT's desire to introduce minimum sentences and to force those arrested for any alleged road traffic offence to spend seven days in holding cells. This would be prior to being allowed to be brought before a lower court for a bail application to be heard.

These inconsistencies cannot be attributed to inaccurate reporting by the media.

I have been present at some of and watched other media briefings held by the DoT and the RTMC on TV and have heard these assertions first-hand.

I have also repeatedly called out these assertions for what they are: incorrect interpretation and quotation of the law and a clear attempt by the Department of Transport and RTMC to depart from the South African system of Jurisprudence and indeed, the Bill of Rights enshrined in the Constitution of the Republic of South Africa, 1996.

Now please don't take me wrong, I am not in any way opposed to the concept of introducing mandatory terms of imprisonment where the commission of a serious road traffic offence results in the death or serious injury of other, innocent road users. On the contrary, it is my view that doing so may cause some motorists to think twice before engaging in dangerous driving practises.

But as Professor James Grant of the University of the Witwatersrand's faculty of law correctly stated to the Sunday Times "The idea that you're going to curb traffic offences and solve the problem by making it harder to get bail is preposterous". He was also quoted as saying that "it is also absurd to equate speeding with murder and rape". Respectfully, I have to say that it goes much further than that. As is revealed on page 5 of the RTMC's "Revised Strategic Plan 2015 – 2020 and Revised Performance Plan 2018 -2019"[5], signed off by the latest in a string of Ministers of Transport, South Africa has seen over the past three years, Msibi states that "One of the initiatives [of the RTMC] is to **re-classify all road traffic offences** to Schedule 5 of the Criminal Procedure Act (CPA)".

Page 34 of that same document goes on to state that "Driving under the influence of alcohol is currently a **schedule 3 offence** and as such, equivalent to minor crime and action against such is not severe. The Corporation through the Department of Transport aims to **re-classify all road traffic offences** to Schedule 5 of the Criminal Procedure Act".

At least this "strategic plan" brings a little clarity to what the RTMC thinks the applicable Schedule under which driving under the influence of alcohol is contemplated in the CPA. It also clarifies which Schedule the RTMC and DoT feel this offence should be "re-classified" fall under. But that, I am afraid is where it begins and ends.

Anyone who has access to the CPA and its schedules will be able to observe that driving under the influence of alcohol or a drug having a narcotic effect (DUI) does not appear **anywhere** in Schedule 3 of the CPA. Nor does "reckless or negligent driving". Furthermore Schedule 3 applies **solely** to the specific offences listed therein, and in respect of which a fine may be paid in order to **completely avoid formal prosecution**, in line with Section 341 of the CPA.

These offences are:

- Any contravention of a by-law or regulation made by or for any council, board or committee established in terms of any law for the management of the affairs of any division, city, town, borough, village or other similar community;
- driving a vehicle at a speed exceeding a prescribed limit (speeding);
- driving a vehicle which does not bear prescribed lights, or any prescribed means of identification (number plates);
- leaving or stopping a vehicle at a place where it may not be left or stopped, or leaving a vehicle in a condition in which it may not be left;
- driving a vehicle at a place where and at a time when it may not be driven;
- driving a vehicle which is defective or any part whereof is not properly adjusted, or causing any undue noise by means of a motor vehicle;
- owning or driving a vehicle for which no valid licence is held; and/or
- driving a motor vehicle without holding a licence to drive it.

Just so it's crystal clear, the offence of DUI does not feature in Schedule 2 either, or indeed, in **any** of the eight schedules in the CPA. Equally, nowhere in the CPA are minimum sentences prescribed. Minimum sentencing guidelines are prescribed in the Criminal Law Amendment Act, 105 of 1997 (as amended).

The penalties in terms of the well over 2,000 offences[6] that are created by the National Road Traffic Act, 93 of 1996 (NRTA) read with the National Road Traffic Regulations, 2000 are prescribed in Section 89 of the NRTA.

In the case of driving under the influence of intoxicating liquor or a drug having a narcotic effect (Section 65), as well as reckless driving (Section 63), the prescribed penalty is a fine of up to R120,000 or imprisonment not exceeding six years[7]. Noticeably absent is the term "or both, a fine and imprisonment", or indeed "imprisonment without the option of a fine".

A conviction for negligent driving (also Section 63) is subject to a fine of up to R60,000 or imprisonment not exceeding three years[8]. The longest term of imprisonment prescribed in the NRTA is nine years, for contravening Section 61(1)(a), (b)(c) or (f) of the NRTA, which constitutes "hit and run"[9]. Even here, the option of a fine is included.

5 RTMC Revised Strategic Plan 2015 – 2020 and Revised Performance Plan 2018 -2019 http://pmg-assets.s3-website-eu-west-1.amazonaws.com/Road_Traffic_Management_Corporation_APP_201819.pdf

6 See Schedule 3 of the Administrative Adjudication of Road Traffic Offences Regulations, 2008.

7 See Section 89(2) of the National Road Traffic Act, 93 of 1996 as amended on 10 November 2010, with effect from 20 November 2010.

8 See Section 89(5)(b) of the National Road Traffic Act, 93 of 1996.

9 See Section 89(4)(a) of the National Road Traffic Act, 93 of 1996.

> **“Surely, common sense would dictate that if the RTMC and the DoT want to see convicted persons sentenced to a term of imprisonment exceeding six months, it would review Section 89 of the NRTA to incorporate penalties which do not include the option of a fine?**

But what the RTMC and DoT are asserting in the RTMC's strategy document doesn't stop at the re-classification of serious road traffic offences, it includes **all** road traffic offences.

Surely, common sense would dictate that if the RTMC and the DoT want to see convicted persons sentenced to a term of imprisonment exceeding six months, it would review Section 89 of the NRTA to incorporate penalties which do not include the option of a fine?

Therefore, all the DoT needs to do is remove the option of a fine from any and all penalties prescribed in Section 89 of the NRTA.

This would have the effect of mandating law enforcement officials to arrest any person who contravenes any provision of the NRTA or its regulations. This would include arresting a person for driving a motor vehicle which has a blown tail lamp and as patently absurd as it may sound, this is exactly what the RTMC's policy seeks to do.

Doing so would automatically elevate such offences to Schedule 1 of the CPA, which includes the crimes of "murder, rape, theft and fraud" the media loves to quote and would negate the need for any of the legislation which falls within the purview of the Department of Justice to be interfered with.

In the case of persons who have previously been convicted thereof, or where a person violates their bail conditions, the offence would automatically be escalated to Schedule 5 of the CPA.

As a direct consequence, it would also have the effect of negating the Administrative Adjudication of Road Traffic Offences (AARTO) Act, 46 of 1998 which the DoT appears to be determined to implement nationally as soon as it can get it past the National Council of Provinces.

Most worrisome however, is that what the RTMC seeks to do is to punish persons who stand **accused of** any road traffic offence up-front, by causing them to be detained in holding cells for seven days prior to being brought before a court for a bail hearing to commence.

Nowhere in the CPA is this concept even contemplated, let alone prescribed. On the contrary, Section 50(1) of the CPA specifically prescribes that a person who has been arrested without a warrant must be brought before the court within a maximum of 48 hours of his or her arrest, or if the court is not in operation within that period, on the first day after which the 48 hours has elapsed.

This, of course, only applies if the accused person has not been released on police bail as is prescribed in Section 59(1)(a) of the CPA, which practice is what the RTMC clearly feels should be abolished.

The purpose of Schedule 5 of the CPA is to give effect to the prescripts of Sections 58, 60(11)(b), and 60(11A) of the CPA. Notably Section 60(11)(b) of the CPA requires that "the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law. This is unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release [on bail]".

It is true that bail proceedings are often postponed, to enable the accused's legal representatives of those accused of a Schedule 5 offence to formulate arguments.

As to why the interests of justice or State formulates why they would or wouldn't permit the accused to be released on bail, does not mean the accused must spend seven days in detention before being brought before court.

It is my view that if the reckless "7 days in jail before bail" approach the RTMC is championing was to miraculously make it past the Department of Justice and Parliament, which it would have to do in order to amend the CPA, then South Africa's prison population would explode way beyond its current 137% of capacity[10], without even amending Section 89 of the NRTA.

10 See https://www.iol.co.za/news/south-africa/masutha-says-south-african-prisons-at-137-occupancy-15026418