



**DISCUSSION PAPER 172**

**Employment of Lay Assessors**

**PROJECT 151: THE REVIEW OF THE CRIMINAL  
PROCEDURE ACT 51 OF 1977  
(A SUB-PROJECT OF THE REVIEW OF THE  
CRIMINAL JUSTICE SYSTEM)**

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# CHAPTER 1: PROBLEM STATEMENT AND SCOPE OF REVIEW

## A Executive Summary

1.1 A little more than a century ago, Lord Hewart, the England Chief Justice, in *Rex v. Sussex Justices*, [1924] 1 KB 256, stated that “*Justice must not only be done, but must also be seen to be done*”. The importance of this dictum is reflected in many iterations of the administration of justice. None more so than in the need for every case to be adjudicated upon by a just and fair tribunal which is equipped to consider all the circumstances of the case.

1.2 Like in South Africa, history is full of instances of legal systems which, at some point, represented the needs and aspirations of a select and specialised few, mostly to the exclusion of others. With the evolution of legal systems, the use of trained legal experts in tribunals responsible for adjudicating legal disputes has become a common, logical, and accepted practice, whose primary aim is the attainment of uniformity in the application of justice principles, in particular, and the administration of justice in general. The administrators of justice ordinarily belong to a formalised and regulated guild, which is responsible for the training of members and instituting the rules of practice.

1.3 The above-mentioned arrangement is, however, often plagued by accusations of highhandedness and aloofness, which are perceived to hinder the fact-finders from fully appreciating the complexity of the issues serving before them. In the tradition of the Marxian dialectic, the administration of justice under the tutelage of legal experts is deemed to represent the more affluent sector of society to the detriment of the rest. It is in this spirit that the introduction of ordinary members of society into the matrix of the judicial fact-finding process becomes a necessary and unavoidable imperative.

1.4 Like the jury system, the use of assessors as part of the adjudication process stands out as one of the most notable examples of participatory justice within the criminal justice ecosystem. The use of assessors has, over time, become a common and defining feature of South African court practice in both the High and the Lower courts. The assessor regime in

South African criminal court practice is regulated by different pieces of legislation in respect of the High and the lower courts, namely, the Criminal Procedure Act 51, 1977 (CPA) and the Magistrates Court Act 32, 1944 (section 93*ter*)(MCA), respectively. This arrangement has resulted in the incoherent and disparate application of assessor practice in the hierarchical structure of the courts. The most glaring disparities in this regard are discernible in the appointment and qualification criteria of assessors. It is submitted that the appointment and qualification criteria outlined in the MCA are not only outdated, archaic and exclusive, but also somewhat inconsistent with the values of Constitutionalism. In contradistinction, the criteria encapsulated in the CPA are both simple and practical, and have the potential, not only to synchronise the assessor regime under one umbrella, but also to bring its values in line with the Constitution of the Republic of South Africa, 1996 (the Constitution).

1.5 Another crucial aspect of the assessor regime which requires serious attention relates to the unavailability of an assessor due to death or incapacity. In the case of the High Court, (section 147 of the CPA), the presiding judge operates under a severely limited scope within which to expedite the proceedings. Section 93*ter* of the MCA is more expansive insofar as the alternatives which are at the disposal of the magistrate in this regard. Extensive recommendations are proffered, which not only introduce a comprehensive array of practical considerations but also provide guidance on the exercise of the powers entailed in the legislation.

## **B Problem Statement**

1.6 The Constitution of the Republic of South Africa<sup>1</sup> makes provision for the right to a fair public trial before an ordinary court, which in our view, implies the appointment of lay assessors as part of the tribunal. The use of assessors in South African court practice is a long-standing practice dating back many decades, at least. The practice is applied in both the High and Lower courts, under the auspices of the Criminal Procedure Act (CPA),<sup>2</sup> and the Magistrates' Court Act (MCA),<sup>3</sup> respectively.

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<sup>1</sup> Constitution of the Republic of South Africa, 1996, section 35(3)(c).

<sup>2</sup> Criminal Procedure Act 51 of 1977.

<sup>3</sup> Magistrates' Court Act 32 of 1944.

1.7 The assessor practice is primarily premised on the need to infuse civil participation into the criminal justice system, to inculcate and foster a measure of faith and openness in the criminal justice system. In the same vein, the practice is intended to enhance the adjudication process by introducing a “fresh pair of eyes” to the fact-finding regime, by introducing perspectives which might otherwise be missed by the (legal) professional assessment of presiding officers.

1.8 However, the assessor system is characterised by the following inconsistencies and shortcomings, which form the subject of this paper, namely,

- (1) The lack of uniformity regarding the standard requirements of qualification and appointment in the High and Lower Courts.
- (2) The inherent powers and competencies of assessors.

1.9 The death or incapacity of an assessor can, sometimes, throw a spanner into the works of a trial, leading to unnecessary and intractable delays. It is imperative that the legislation surrounding the termination of the services of an assessor be improved to foster a coherent and seamless criminal justice process.

## **C The scope of review**

1.10 The review is primarily aimed at interrogating the following critical aspects, namely,

- (1) The efficacy of the current assessor regime, as encapsulated in the CPA and the MCA;
- (2) The desirability of bringing uniformity to the standard requirements for the appointment and qualification of assessors in the High and Lower Courts;
- (3) Whether the need exists to amend the provisions of the CPA to incorporate and regulate aspects of the use of assessors in the Lower Courts as part of the CPA; and
- (4) The expansion of the powers of the court in the instance of the death or incapacity of the assessor.

## 1 Introduction

1.11 In general, the appointment of assessors in court proceedings may be summarised into three crucial and interconnected functions, namely, to<sup>4</sup>

- i. Assist the court in the interpretation of the facts of the case;
- ii. Serve as experts or consultants in matters which are outside the ken and experience of the court; and
- iii. Serve as representatives of the public in the judicial process.

1.12 One of the notable and unique advantages supposedly enjoyed by assessors is their proximity, more than officials within the criminal justice bureaucracy, to public perception regarding issues of fairness and justice.<sup>5</sup>

## 2 Historical Background

1.13 The use of assessors can be traced back to ancient Roman Law, where a private individual could be elected to “speak the right” during a trial. Justinian’s *Corpus Iuris Civilis* refer to the use of assessors as a way of streamlining the judicial system and protecting the individual rights of those appearing before the court.<sup>6</sup> In England, the concept of assessors morphed, with the passage of time, into the jury system.<sup>7</sup>

1.14 The emerging advent of assessors in South African law was represented, in the relatively recent past, by the jury system. Roman-Dutch law, which was the law of the Cape Colony from the 17<sup>th</sup> century, did not recognise the jury system. The latter was introduced into the Cape in 1828 through the reception of the English law of evidence and the rules of criminal procedure.<sup>8</sup>

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<sup>4</sup> R W Moisey ‘The Role of Assessors in the Courts of Tanzania’ 3 *E. Afr. L.J.* 348 (1967) 348.

<sup>5</sup> S Machura ‘Interaction between lay assessors and professional judges in German mixed courts’ *International Review of Penal Law* 72 (2001) 452.

<sup>6</sup> V Vondenberger, Assessors, 68 *CANON L. SOC’y AM. PROC.* (2006) 196.

<sup>7</sup> *Ibid.*

<sup>8</sup> South African Law Commission Issue Paper 6 Project 73 Simplification of Criminal Procedure (Access to the Criminal Justice System) 15.

In the colony of Natal, the jury system came into operation in 1845. In the Orange Free State, the system came into operation in 1854, and, shortly thereafter, in the Transvaal.<sup>9</sup>

1.15 The jury system, which preceded the assessor system, was part of South African court practice until its eradication through the Abolition of Juries Act 34 of 1969. For various reasons, the jury system had, by this time, already fallen into disuse.<sup>10</sup> One of the main reasons for the ultimate disuse of the jury system was the reluctance to serve on the panel by members of the public. The large number of abstentions eventually encouraged the Minister of Justice to use his powers to permit the non-jury trials. Another important consideration for the abolition related to South Africa's complex race relations, which rendered jury trials at the time quite controversial.<sup>11</sup> The jury panel is, in another sense, fundamentally epitomised by the use of assessors in trials.

1.16 The use of assessors in criminal proceedings operated, at some point, side-by-side with the jury system.<sup>12</sup> Upon its introduction, this arrangement achieved a certain level of popularity with accused persons.<sup>13</sup> Its popularity was based on the notion that a lay person was expected to have a more acute understanding of the circumstances of the accused at the time of the commission of the offence than a professional jurist. The principle that in a case where the death penalty may be imposed, a verdict must be given by a court that consists of more than one member, namely, an assessor, was introduced in 1935.<sup>14</sup> Around the 1950s, the death penalty could be imposed in respect of charges of *robbery (or attempted robbery) or house-breaking (or attempted house-breaking) with the intent to commit a crime* which had the element of aggravating circumstances. The High Court adjudicating over such a case was, as a rule, obliged to sit with two assessors during the trial.

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, 17.

<sup>11</sup> *Ibid.*, 17.

<sup>12</sup> D van Zyl Smit and N-M Isakow (1985) 'Assessors and Criminal Justice, *South African Journal on Human Rights* (1985) 219.

<sup>13</sup> *Ibid.*

<sup>14</sup> South African Law Commission Issue Paper 6 Project 73 at 17.

## D The current position

### 1 Introduction

“... a legal system will not acquire legitimacy unless it reflects social reality”.<sup>15</sup>

1.17 For various reasons, many members of the South African public appear unhappy with the existing judicial system. Admittedly, some of the misgivings are rooted in the public’s understanding (or misunderstandings pertaining to the inner workings) of the legal processes, most of which fall outside the knowledge of the average citizen. Such (mis)perceptions potentially lead to the delegitimisation of the judicial system, to a point where ordinary citizens lose faith in its operation and efficacy. Some of the criticism essentially clamours for the participation of the public in judicial proceedings, which has led to calls for the reintroduction of the jury system, which, it is hoped, might, somehow, reduce the lack of faith and trust in the current arrangement.<sup>16</sup>

1.18 It is also worth noting that the pre-Constitutional legal developments referred to above largely excluded the participation of South Africans of other races from the administration of justice, either as jurors, assessors or as members of the judiciary.<sup>17</sup> The appointment of assessors in general was a somewhat welcome development, in spite of the fact that the appointment of jurors or assessors was the exclusive prerogative of white judicial officers only.<sup>18</sup>

1.19 In the same vein, whilst pre-1994 legislation, regulation and practice did not explicitly countenance the exclusion of non-white assessors, white judicial officers, nonetheless, generally appointed predominantly white (male) assessors, to the exclusion of people from other races.<sup>19</sup>

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<sup>15</sup> South African Law Commission Issue Paper 6 Project 73 at 15.

<sup>16</sup> South African Law Commission Issue Paper 6 Project 73 at 18.

<sup>17</sup> B Tshehla and MC Marunoagae, ‘Lay Participation in the South African Criminal Justice System: An Assessment of the Assessor System’, 34 *S. Afr. J. Crim. Just.* 339 (2021) 341.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

1.20 Until its abolition, the jury system had been the most visible mode of public participation in the South African legal system.<sup>20</sup> One of the main reasons advanced for its elimination was its propensity for bias, due to South Africa's obviously complex race relations and racial history.<sup>21</sup> The use of assessors was, therefore, touted as one of the most obvious and laudable methods of ensuring more inclusive public participation in the criminal justice system.<sup>22</sup>

## 1 The constitution

1.21 The Constitution provides for the participation of non-judicial officers in the adjudication of cases. In terms of section 180(c):

National legislation may provide for any matter concerning the administration of justice that is not dealt with in the Constitution, including ... the participation of people other than judicial officers in court decisions.

1.22 The participation of assessors in court proceedings and their role in court decision-making must be viewed in the context of the above constitutional imperative.

## 2 legislation

1.23 Whilst previously assessors could only be used in the High Court, South African legislation was subsequently developed to provide for the participation of assessors in the lower courts as well. The use of assessors in the lower courts is regulated by the Magistrates Court Act (the MCA), 1944,<sup>23</sup> whereas in the High Courts, it falls under the auspices of the Criminal Procedure Act (the CPA), 1977.<sup>24</sup>

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<sup>20</sup> South African Law Commission Issue Paper 6 Project 73 at 18.

<sup>21</sup> *Ibid.*

<sup>22</sup> Tshehla and Marunoagae, 'Lay Participation in the South African Criminal Justice System' 343.

<sup>23</sup> Section 93*ter*.

<sup>24</sup> Section 145.

**Section 145 of Criminal Procedure Act, 1977**

*“(1) (a) Except as provided in section 148, an accused arraigned before a superior court shall be tried by a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.*

*(b) An assessor for the purposes of this section means a person who, in the opinion of the judge who presides at a trial, has experience in the administration of justice or skill in any matter which may be considered at the trial.*

*(2) Where an attorney-general arraigns an accused before a superior court- (a) for trial and the accused pleads not guilty; or*

*(b) for sentence, or for trial and the accused pleads guilty, and a plea of not guilty is entered at the direction of the presiding judge, the presiding judge may summon not more than two assessors to assist him at the trial. [Sub-s. (2) amended by s. 2 of Act 107 of 1990 and by s. 31 of Act 105 of 1997.]*

*(3) No assessor shall hear any evidence unless he first takes an oath or, as the case may be, makes an affirmation, administered by the presiding judge, that he will, on the evidence placed before him, give a true verdict upon the issues to be tried.*

*(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that-*

*(a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217*

*(3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding judge sits with only one assessor, in which case the decision or finding of the judge shall, in the case of a difference of opinion, be the decision or finding of the court;*

*(b) if the presiding judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the judge alone shall decide upon such question, and he may for this purpose sit alone;*

*(c) the presiding judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he may for this purpose sit alone. [Sub-s. (4) substituted by s. 4 of Act 64 of 1982.]*

*(5) If an assessor is not in the full-time employment of the State, he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor”.*

**Section 147 of the Criminal Procedure Act, 1977**

*(1) If an assessor dies or, in the opinion of the presiding judge, becomes unable to act as assessor at any time during a trial, the presiding judge may direct-*

*(a) that the trial proceed before the remaining member or members of the court; or*

*(b) that the trial start de novo, and for that purpose summon an assessor in the place of the assessor who has died or has become unable to act as assessor.*

*(2) Where the presiding judge acts under subsection (1) (b), the plea already recorded shall stand.*

**Section 93ter of the Magistrates Court Act, 1944**

*“(1) The judicial officer presiding at any trial may, if he deems it expedient for the administration of justice-*

*(a) before any evidence has been led; or*

*(b) in considering a community-based punishment in respect of any person who has been convicted of any offence, summon to his assistance any one or two persons who, in his opinion, may be of assistance at the trial of the case or in the determination of a proper sentence, as the case may be, to sit with him as assessor or assessors: Provided that if an accused is standing trial in the court of a regional division on a charge of murder, whether together with other charges or accused or not, the judicial officer shall at that trial be assisted by two assessors unless such an accused requests that the trial be proceeded with without assessors, whereupon the judicial officer may in his discretion summon one or two assessors to assist him.*

*(2) (a) In considering whether summoning assessors under subsection (1) would be expedient for the administration of justice, the judicial officer shall take into account-*

*(i) the cultural and social environment from which the accused originates;*

*(ii) the educational background of the accused;*

*(iii) the nature and the seriousness of the offence of which the accused stands accused or has been convicted;*

*(iv) the extent or probable extent of the punishment to which the accused will be exposed upon conviction, or is exposed, as the case may be;*

*(v) any other matter or circumstance which he may deem to be indicative of the desirability of summoning an assessor or assessors, and he may question the accused in relation to the matters referred to in this paragraph.*

*(b) For the purposes of subsection (1) (b) a community-based punishment means-*

*(i) correctional supervision as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);*

*(ii) a punishment contemplated in section 297 (1) (a) (i) (cc) of the Criminal Procedure Act, 1977; or*

*(iii) a punishment contemplated in section 297 (1) (b) or (4) of the Criminal Procedure Act, 1977, and where the performance of community service as referred to in the said section 297 (1) (a) (i) (cc), is a condition for the suspension.*

*(3) Before the trial or the imposition of punishment, as the case may be, the said judicial officer shall administer an oath to the person or persons whom he has so called to his assistance that he or they will give a true verdict or a considered opinion, as the case may be, according to the evidence upon the issues to be tried or regarding the punishment, as the case may be, and thereupon he or they shall be a member or members of the court subject to the following provisions:*

*(a) Any matter of law arising for decision at such trial, and any question arising thereat as to whether a matter for decision is a matter of fact or a matter of law, shall be decided by the presiding judicial officer and no assessor shall have a voice in any such decision;*

*(b) the presiding judicial officer may adjourn the argument upon any such matter or question as is mentioned in paragraph (a) and may sit alone for the hearing of such argument and the decision of such matter or question;*

*(c) whenever the said judicial officer shall give a decision in terms of paragraph*

*(a) he shall give his reasons for that decision;*

*(d) upon all matters of fact the decision or finding of the majority of the members of the court shall be the decision or finding of the court, except when only one assessor sits with the presiding judicial officer in which case the decision or finding of such judicial officer shall be the decision or finding of the court if there is a difference of opinion;*

*(e) it shall be incumbent on the court to give reasons for its decision or finding on any matter made under paragraph (d);*

*(f) in the event of a conviction the question of the punishment to be inflicted shall, except in a case contemplated in subsection (1) (b), be deemed, for the purposes of paragraph (a), to be a question of law.*

*(4) If any such assessor is not a person employed in a full-time capacity in the service of the State he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him in connection with his attendance at the trial, and in respect of his services as assessor”.*

...

*(11) (a) If an assessor-*

*(i) dies;*

*(ii) in the opinion of the presiding officer becomes unable to act as an assessor;*

*(iii) is for any reason absent; or*

*(iv) has been ordered to recuse himself or herself or has recused himself or herself in terms of subsection (10), at any stage before the completion of the proceedings concerned, the presiding judicial officer may, in the interests of justice and after due consideration of the arguments put forward by the accused person and the prosecutor-*

*(aa) direct that the proceedings continue before the remaining member or members of the court;*

*(bb) direct that the proceedings start afresh; or*

*(cc) in the circumstances contemplated in subparagraph (iii), postpone the proceedings in order to obtain the assessor's presence:*

*Provided that if the accused person has legal representation and the prosecutor and the accused person consent thereto, the proceedings shall, in the circumstances contemplated in subparagraphs (i), (ii) or (iv), continue before the remaining member or members of the court.*

*(b) If, at proceedings which are continued in terms of this subsection, the judicial officer is assisted by the remaining assessor, the finding or decision of the judicial officer shall, in respect of any matter where there is a difference of opinion between the judicial officer and the assessor, be the finding or decision of the court.*

*(c) The judicial officer shall give reasons for any direction referred to in paragraph (a), and for any finding or decision referred to in paragraph (b).*

### **3 The appointment of assessors**

1.24 There are, however, significant differences in the regime which underpins appointment in respect of the two layers of courts. The MCA envisages the appointment of one or two assessors upon the application of either party to the proceedings.<sup>25</sup> Appointment in this regard is based on two phases, namely, before the presentation of evidence in the trial,<sup>26</sup> and in the course of sentencing proceedings.<sup>27</sup> For the purposes of sentencing proceedings, assessors

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<sup>25</sup> Section 34 of the MCA, 1944.

<sup>26</sup> Section 93*ter* (1)(a) of the MCA, 1944.

<sup>27</sup> Section 93*ter* (1)(b) of the MCA, 1944.

may be appointed in circumstances where the court is likely to impose a community-based sentence.<sup>28</sup>

1.25 Where an accused is charged with the offence of murder in the regional court, the court *must* sit with at least two assessors.<sup>29</sup> The court may exercise the prerogative to exclude assessors if the accused expresses a request for such exclusion.<sup>30</sup> The accused's election for the court to sit without assessors is, however, not conclusive. Due to the nature of the offence (murder), the court may still elect to sit with assessors, notwithstanding the accused's express wishes in this regard.<sup>31</sup>

1.26 In the High Court, the judge exercises discretion on whether or not to invite assessors to the trial proceedings.<sup>32</sup> The two-tier system for the appointment of assessors applies in equal measure in the High Court. In other words, the court may decide to include assessors in trial proceedings.<sup>33</sup> In practical terms, the assessor is appointed as soon as the judge establishes that the candidate possesses the requisite formal requirements to act as such.<sup>34</sup> In addition, an appointment is, in the case of the High Court, determined through the perusal of the list of applications located at the Registrar of the High Court, of persons who have indicated their wish to serve as assessors before individual judges.<sup>35</sup>

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<sup>28</sup> Section 93*ter* (1)(b) of the MCA, 1944. A community-based sentence includes, for the purposes of subsection (1) (b),  
*“(i) correctional supervision as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);*  
*(ii) a punishment contemplated in section 297 (1) (a) (i) (cc) of the Criminal Procedure Act, 1977; or*  
*(iii) a punishment contemplated in section 297 (1) (b) or (4) of the Criminal Procedure Act, 1977, and where the performance of community service as referred to in the said section 297 (1) (a) (i) (cc), is a condition for the suspension”.*

<sup>29</sup> Section 93(1)(b) of the MCA, 1944 *S v Gambushe* 1997 (1) SACR 638 (N) at 639-F.

<sup>30</sup> Section 93(1)(b) of the MCA, 1944.

<sup>31</sup> Section 93(1)(b) of the MCA, 1944.

<sup>32</sup> Section 145(1)(a) of the CPA 51, 1977.

<sup>34</sup> van Zyl Smit and Isakow 'Assessors and Criminal Justice' 221.

<sup>35</sup> *Ibid*, 223.

1.27 In both the High Court and the lower courts, the prerogative to appoint the assessor essentially lies with the presiding officer.

#### 4 The qualification requirements of assessors

1.28 In the High Court, an assessor is designated simply as a person who has experience in the administration of justice or skill in any matter considered in the trial proceedings.<sup>36</sup> The legislature does not, however, provide clarity on the meaning of “experience in the administration of justice”, or the level of experience envisaged from the prospective assessor.

1.29 In *Gambushe*, experience was described in the following terms:

... assessors who sit with a judge in criminal trials are invariably people who have *substantial previous experience* in criminal procedure and in the science of evaluation of evidence. (own emphasis)<sup>37</sup>

1.30 The above-mentioned description suggests that only lawyers qualify to be appointed as assessors<sup>38</sup> Thus, unsurprisingly, practising lawyers (attorneys and advocates), as well as retired magistrates and attorneys-general, have been known to serve as assessors.<sup>39</sup> The length of said experience nonetheless remains open to question and conjecture.<sup>40</sup>

1.31 In the lower courts, qualification is based on an array of factors, which pertain not only to the personal attributes of the *accused*, but also to issues related to the essence of the trial as well. Thus, the court is required to consider the accused’s educational background, including their “cultural and social environment”.<sup>41</sup>

1.32 In *Gambushe*, assessors were defined, in the context of s 93ter of the MCA, as a “bridge [in] the cultural gap” between magistrates and accused persons who are “largely ... uneducated

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<sup>36</sup> Section 145(1)(b) of the CPA 51, 1977.

<sup>37</sup> *S v Gambushe* 1997 (1) SACR 638 (N) at 643-D.

<sup>38</sup> Tshehla and Marunoagae, ‘Lay Participation in the South African Criminal Justice System’ 349.

<sup>39</sup> van Zyl Smit and Isakow ‘Assessors and Criminal Justice’ 222.

<sup>40</sup> *Ibid*, 221.

<sup>41</sup> Section 93ter (2)(a) of the MCA, 1944.

and intellectually unsophisticated and uneducated”.<sup>42</sup> In principle, the general tone and essence of s 93ter of the MCA enjoins the assessor, in addition, to exercise their supposed knowledge of any peculiar custom or habit which is relevant to a witness or to the community which is connected to the issues at hand.<sup>43</sup>

1.33 Admittedly, the concepts of *cultural* and *social environment* are, without further definition in the Act, somewhat nebulous and difficult to explain. Tshela and Marunoagae have attempted to interpret the intention of the Legislature in this regard. They have suggested that the term “culture” should be “broadly” defined to depict a person’s “race, tribe, language, and general way of life”.<sup>44</sup> Social environment, on the other hand, refers to the “where the accused lives, the people with whom the accused interacts and the community that he or she belongs to”.<sup>45</sup> The trial-related considerations which the court may take into account revolve around the nature and the seriousness of the offence charged.<sup>46</sup>

## 5 Types of assessor

1.34 South African court practice essentially recognises the use of assessors, *simpliciter*. In other words, the assessor is, in general, arguably not expected to possess any specialised qualities or skills. It is submitted that the provision in section 145 of the CPA, which requires the prospective assessor to have “experience in the administration of justice or skill in any matter”, is open to interpretation and may include persons who do not necessarily possess specialised qualities.

1.35 Other than obvious legal qualifications, assessors have been appointed based on qualifications related to the requirements of a particular case. Thus, persons with an accounting

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<sup>42</sup> *Gambushe* at 642-H.

<sup>43</sup> *Ibid* at 644H-I.

<sup>44</sup> Tshela and Marunoagae, ‘Lay Participation in the South African Criminal Justice System’ 353.

<sup>45</sup> *Ibid*.

<sup>46</sup> Section 93 *ter*(2)(a)(iii) of the MCA, 1944.

or psychology background have been appointed according to cases requiring their specific brand of expertise.<sup>47</sup>

## 6 Powers of the mixed court

1.36 The judgment of the court in instances where the presiding officer sits with more than one assessor is based on a majority in both the High<sup>48</sup> and the Lower<sup>49</sup> courts. However, the judgment of assessors was restricted, in both instances, to questions of fact.<sup>50</sup> Only the presiding officer is qualified to adjudicate on questions of law.<sup>51</sup>

1.37 The High Court and the Magistrates Court Rules are not expressive on the precise manner of the exercise of the powers of assessors beyond the delivery of a judgment on aspects of fact.

## E Analysis

### 1 Appointment of assessors

1.38 The Magistrates Court Rules make provision for the “number and names” of assessors who sit in a case to be decided with the “consent of the parties”.<sup>52</sup> The injunction regarding “consent”, nonetheless, becomes counterintuitive and, somewhat, irrelevant, particularly in instances where the court enjoys the legislative power to impose an assessor, notwithstanding the accused’s own election and wishes.<sup>53</sup> This position was recently affirmed by the SCA in *Director of Public Prosecutions, KwaZulu-Natal v Pillay*, where it was held that:

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<sup>47</sup> van Zyl Smit and Isakow ‘Assessors and Criminal Justice’ 222.

<sup>48</sup> Section 145 (4) (a) of the CPA 51, 1977.

<sup>49</sup> Section 93ter(3)(d) of the MCA, 1944

<sup>50</sup> Section 145 (4) (a) of the CPA 51, 1977 and Section 93ter (3)(d) of the MCA, 1944.

<sup>51</sup> Section 145 (4) (a) of the CPA 51, 1977 and Section 93ter (3)(d) of the MCA, 1944.

<sup>52</sup> Rules 59(4).

<sup>53</sup> See section 93ter (1)(b) of the MCA, 1944.)

The request [by the accused to refuse the appointment of assessors] ... [is] not dispositive. *Once it [is] made, the magistrate ha[s] a discretion to summon one or two assessors to assist them, notwithstanding the request. The fact that the court had such a discretion, effectively negated the notion of any kind of 'election' by the accused.*<sup>54</sup> (own emphasis)

1.39 Whilst the qualification requirements expostulated in section 145 of the CPA are open-ended and inclusive, the same cannot be said of those entailed in section 93*ter* MCA, in the following respects:

- (1) The competencies of the prospective assessor which impact their qualification (namely, cultural and social environment and educational background)<sup>55</sup> are essentially imputed on the accused, rather than on the assessor themselves. This yardstick is somewhat problematic, as the standard of reckoning set by the legislation is not attributed to the person required to exercise the power in question;
- (2) The qualifications referred to in (1), above, are not only definitionally nebulous, but also controversial and difficult, if not impossible to objectively qualify, and to quantify satisfactorily;<sup>56</sup> and
- (3) The qualification requirements set out in section 93*ter*, were substantially introduced to facilitate the participation of previously marginalised communities in South Africa from the mainstream justice system – hence, the reference to “cultural and social environment” and “educational background”. It is suggested that these qualification measurements are not only anachronistic in tone and essence, but also represent (other than the reservations set out in (2), above), at best, a shallow and near-sighted approach and interpretation of legal inclusivity; and, at worst, somehow fall foul of the equality clause of the Constitution,<sup>57</sup> due to their implicit reference and application only to a

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<sup>54</sup> *Director of Public Prosecutions, KwaZulu-Natal v Pillay* 2023 (2) SACR 254 (SCA par [29 – 30]

<sup>55</sup> Section 93*ter* (2)(a) of the MCA, 1944.

<sup>56</sup> A B Cohen ‘Many Forms of Culture’ *American Psychologist* (April 2009) 194 The concept of culture is “exceptionally tricky” to define. The term culture covers a wide field of application which includes, but is not limited to nationality, ethnicity, religion, socio-economic status and regional origin. Even where agreement is reached on the designation of a particular culture, objective differences, observances and practices in the “psychological processes” of the adherents of a particular cultural persuasion often emerge to shatter the illusion of a monolithic or homogenous phenomenon.

<sup>57</sup> In terms of section 9 of the Constitution:

“(1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*

particular societal demographic. These references should, if submitted, be excised as superfluous. On the other hand, the use of assessors in the High Court, in line with section 145 of the CPA, is informed by practical considerations, the essential qualifications of incumbent assessors.

1.40 It is also worth noting that the court in *Gambushe* essentially took exception to the reference of assessors in terms of section 93*ter* as assessors.<sup>58</sup> The court effectively implied that the lack of legal and procedural knowledge on the part of these appointees essentially disqualified them as assessors in the strict sense of the designation.<sup>59</sup>

1.41 In South Africa, the vast majority of accused persons require the interpretation of evidence into one or other of the native South African languages.<sup>60</sup> Thus, in *S v Manzini*, the court described the function of court interpreting as a “vital and crucial element of a fair trial”.<sup>61</sup> The importance of the function of interpreting is not only vital to the accused. The interpretation of evidence from the source language into the official language of record, and vice versa, also enables the court to follow the evidence of a witness who is not conversant with the official language of record.<sup>62</sup> However, the accuracy, veracity and reliability of the actual interpretation is often assumed (particularly in the case of a court which is not versed in the language in question).

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*(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

*(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

*(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

*(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”.*

<sup>58</sup> *Gambushe* at 643-G.

<sup>59</sup> *Ibid.*

<sup>60</sup> R Moeketsi *Discourse in a multilingual and multicultural courtroom: a court interpreter's guide* (JL Van Schaik Publishers: 1999) 123.

<sup>61</sup> *S v Manzini* 2007 (2) SACR 107 (W) at 109.

<sup>62</sup> *Geidel v Bosman* 1963 (4) SA 253 (T) at 260.

1.42 Because the interpreter is regarded, in South African court practice and jurisprudence, as an expert, courts are often loath to interfere in the function of interpreting.<sup>63</sup> In fact, the Appellate Division has warned courts to desist from usurping the function of interpreting due to the potential and preponderance for unintended consequences.<sup>64</sup> It is submitted, in spite of the Appellate Division's warning, that the presence of an assessor in court who speaks the same language as a witness, or any of the witnesses, can go a long way in strengthening the quality assurance processes of the court.

## 2 Types of assessors

1.43 Although the current arrangement (both in the High and Lower courts) does not explicitly differentiate between the types of assessors to be appointed, it is submitted that appointment according to expertise has always been in practice.<sup>65</sup>

1.44 The Child Justice Act (CJA)<sup>66</sup> does not explicitly provide for the use of assessors. Admittedly, the use of assessors in respect of children accused is implicitly provided for in the High Court in terms of section 145.<sup>67</sup>

## 3 Conclusion

1.45 The use of assessors in South African court proceedings is a relatively long-standing practice in both the High and Lower courts. However, the MCA and the CPA, which regulate the

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<sup>63</sup> *Matemane v Magistrate, Alberton* 1991 (4) SA 613 (W) at 619 *Ex Parte Paraskevopoulos* 1947 (1) SA 229 (O) at 231 *S v Lin* [2010] 1 All SA 358 (W) para 42.

<sup>64</sup> In *S v Mpopo* 1978 (2) SA 424 (A) the judge, a white man, assumed in the court *a quo* that he had proficient knowledge and understanding of isi-Xhosa, the source language (apparently) being interpreted to and from English. He thereupon drew made decisive findings and conclusions regarding aspects of the accused's evidence, without recourse to the court interpretation. On appeal, it was submitted on the accused's behalf that he had, in fact, presented evidence in *Sesotho*, and not in *isi-Xhosa*, as submitted by the court *a quo*.

It should be noted, in passing, however, that reference to the race of the presiding officer in this regard is not necessarily suggestive of qualification through race or race affiliation.

<sup>65</sup> "Expertise", in this regard, is regarded in the generic, rather than in the technical sense. To this extent, educational qualification would not, strictly speaking, provide qualification as an expert.

<sup>66</sup> 75, 2008.

<sup>67</sup> 51, 1977.

use of assessors in the hierarchical arrangement of courts, is marked by notable differences and inconsistencies. Some of the provisions in the MCA (particularly on qualification), in contrast to those in the CPA, are not only nebulous but also difficult to quantify in practice.

1.46 It is submitted that the architecture and the regulations which inform the use of assessors require structural changes which will enhance, not only the workings of the assessor system, but will also inject a measure of public confidence in the system.<sup>68</sup>

## F Recommendations

### Appointment of assessors

(1) The Constitution<sup>69</sup> provides for:

“National legislation ... which includes training programmes for judicial officers...”.

Against this background,

It is submitted that assessors should be provided with the necessary training in relation to,

It is, nonetheless, worth emphasising that the above-mentioned training should not only be reserved for assessors but must be applied across the board. Contrary to expectation, the role of the assessor is not as crisply delineated as would be expected, either by legislation or by the Rules of court. It is submitted, for this reason, that for all their grounding in the “ordinary” substantive and procedural aspects of the law, the legally-trained assessor might, somehow, fail to appreciate some of the delicate nuances which are inherent in the role of assessorship, and which differ somewhat from the ordinary role of the presiding officer.

(3) Any prospective amendment to the role of assessors, whether in the MCA, CPA or CJA, should provide for the express inclusion of assessors as part of the court panel, in cases involving children, especially in respect of offences referred to in Schedule 3 of the CJA.

(4) Section 145 of the CPA should be amended as follows, namely,

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<sup>68</sup> Whilst the aspects dealt with herein form part of Chapter 21 of the CPA, they do not affect any of the issues dealt with in sections 144, 146 and 149 and the Constitutionality or otherwise thereof.

<sup>69</sup> Section 180(a).

*“(1) (a) Subject to any other applicable law, an accused arraigned before a magistrates’ court, regional court, or superior court shall be tried by a magistrate, or regional magistrate, or a judge of that court sitting with or without assessors in accordance with the provisions set out hereunder.*

*(b) An assessor for the purposes of this section means a person who, in the opinion of the magistrate, regional magistrate or judge who presides at a trial, has experience in the administration of justice or skill or knowledge in any matter which may be considered at the trial.*

*(2) A judge, magistrate or regional magistrate in which the accused was tried and convicted, may, if he or she deems it necessary, summon not more than two assessors to assist him or her during the sentencing proceedings.*

*(3) No assessor shall hear any evidence unless he first takes an oath or, as the case may be, makes an affirmation, administered by the presiding magistrate, regional magistrate or judge, that he will, on the evidence placed before him, give a true verdict upon the issues to be tried.*

*(4) An assessor who takes an oath or makes an affirmation under subsection (3) shall be a member of the court: Provided that-*

*(a) subject to the provisions of paragraphs (b) and (c) of this proviso and of section 217 (3) (b), the decision or finding of the majority of the members of the court upon any question of fact or upon the question referred to in the said paragraph (b) shall be the decision or finding of the court, except when the presiding magistrate, regional magistrate or judge sits with only one assessor, in which case the decision or finding of the presiding magistrate, regional magistrate or judge shall, in the case of a difference of opinion, be the decision or finding of the court;*

*(b) if the presiding magistrate, regional magistrate or judge is of the opinion that it would be in the interests of the administration of justice that the assessor or the assessors assisting him or her do not take part in any decision upon the question whether evidence of any confession or other statement made by an accused is admissible as evidence against him, the presiding magistrate, regional magistrate or judge alone shall decide upon such question, and he may for this purpose sit alone;*

*(c) the presiding magistrate, regional magistrate or judge alone shall decide upon any other question of law or upon any question whether any matter constitutes a question of law or a question of fact, and he may for this purpose sit alone. [Sub-s. (4) substituted by s. 4 of Act 64 of 1982.]*

*(5) If an assessor is not in the full-time employment of the State, he shall be entitled to such compensation as the Minister, in consultation with the Minister of Finance, may determine in respect of expenses incurred by him or her in connection with his or her attendance and participation at the trial”.*

### **The death or incapacity of an assessor**

(5) It is recommended that section 147 of the CPA, which deals with the procedure to be followed when an assessor dies or becomes incapacitated, should be amended as follows:

(1) If an assessor dies or, in the opinion of the presiding judge or magistrate, becomes unable to act as assessor at any time during a trial, the presiding judge or magistrate may direct that the trial—

- (a) proceeds before the remaining member or members of the court;
- (b) proceeds from the point at which it was interrupted by the death or unavailability of the assessor; or
- (c) starts *de novo*, only if it is not practicable for the trial to proceed in terms of paragraph (a) or (b).

(2) In making a decision under subsection (1), the presiding judge or magistrate must consider all relevant circumstances, including but not limited to—

- (a) the potential for memory loss among witnesses who have already testified;
- (b) the time that has passed since the commencement of the trial;
- (c) the potential prejudice to either the prosecution or the accused if the trial commences *de novo*; and
- (d) the impact of a *de novo* trial on the accused's right to have his or her trial begin and conclude without unreasonable delay.

(3) For the purposes of subsection (1)(b) and (c), the presiding judge must summon a new assessor in place of the assessor who has died or has become unable to act as assessor: Provided that, in the case of subsection (1)(b), —

- (a) the new assessor is satisfied that the demeanour of the witnesses, with respect to material aspects of their evidence, can be determined from the record of the proceedings;<sup>70</sup>
- (b) the witnesses who have already testified and whose testimony is crucial to prove or disprove the guilt or innocence of the accused are available to be resummoned for further examination, cross-examination or re-examination; and
- (c) the record of the proceedings is complete and legible.

(4) Where the trial proceeds under subsection (1)(b), any witness who has already testified may be resummoned for further examination, cross-examination, or re-examination by—

- (a) the court, if deemed necessary in the interests of justice; or
- (b) the prosecutor or the accused, with leave of the court.

(5) The record of proceedings of the trial referred to in subsection (3)(c) is admissible as evidence in the continued proceedings.

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<sup>70</sup> This provision implies that the succeeding magistrate or judge must study the record of proceedings to ascertain that the demeanour of the witnesses can be determined from the record.

(6) Where the presiding judge or magistrate acts under subsection (1)(c), the plea already recorded shall stand.

(7) The presiding judge or magistrate must explicitly state in his or her judgment the reasons for any direction given under subsection (1).

(6) The Child Justice Act (CJA)<sup>71</sup> regulates proceedings against children. Trial proceedings involving children are regulated by Chapter 9 of the CJA. However, the CJA in its current form does not provide for the use of assessors. It is submitted that assessors should play an important and decisive role of safeguarding the rights of the child in criminal proceedings, in line with the Constitution.<sup>72</sup>

To this extent, it is recommended that sub-section (5) of section 63 of the CJA as set out below, be substituted with a provision relating to the use of assessors in the trial proceedings involving children as follows:

### **Section 63 - Child justice courts and conduct of trials involving children**

(1) (a) Any child whose matter has been referred to the child justice court in terms of section 49 (2), must appear before a court with the requisite jurisdiction to be dealt with in terms of this Chapter.

(b) A child justice court must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions as set out in this Chapter and Chapter 10.

(2) Where a child and an adult are charged together in the same trial in respect of the same set of facts in terms of sections 155, 156 and 157 of the Criminal Procedure Act, a court must apply the provisions of-

(a) this Act in respect of the child; and

(b) the Criminal Procedure Act in respect of the adult.

(3) Before plea in a child justice court, the presiding officer must, in the prescribed manner-

(a) inform the child of the nature of the allegations against him or her;

(b) inform the child of his or her rights; and

(c) explain to the child the further procedures to be followed in terms of this Act.

(4) A child justice court must, during the proceedings, ensure that the best interests of the child are upheld, and to this end-

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<sup>71</sup> 75 of 2008.

<sup>72</sup> In terms of section 28: "A child's best interests are of paramount importance in every matter concerning the child".

(a) may elicit additional information from any person involved in the proceedings; and

(b) must, during all stages of the trial, especially during cross-examination of a child, ensure that the proceedings are fair and not unduly hostile and are appropriate to the age and understanding of the child.

(5) The process of assessors as contained in section 145 of the Criminal Procedure Act 51 of 1977, shall apply, *mutatis mutandis*, to the proceedings of this Act.

(6) No person may be present at any sitting of a child justice court, unless his or her presence is necessary in connection with the proceedings of the child justice court or the presiding officer has granted him or her permission to be present.

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