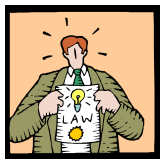
e-MANTSHI

A KZNJETCOM Newsletter

APRIL 2010: **Issue 51**

Welcome to the Fifty first issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The *Older Persons Act*, 2006 (Act No 13 of 2006) has come into operation on 1 April 2010. The notice to this effect was published in Government Gazette No 33075 of 1 April 2010.The Regulations which were promulgated in terms of the Act and which were published in the same Gazette make it an offence not to adhere to a direction in terms of the provisions of the Regulations and makes such offence punishable with a fine or to imprisonment not exceeding one year or to both such fine and such imprisonment.

2. In terms of section 36 of the *Administrative Adjudication of Road Traffic Offences Act,* 1998 (Act No. 46 of 1998), 1 April 2010 has been determined as the date on which sections 19A and 19B of the said Act shall come into operation in the areas of City of Tshwane and Johannesburg Metropolitan Municipalities established in terms of section 12 of the *Municipal Structures Act,* 1998 (Act No. 117 of 1998), read with section 2 (2) of the *Cross-boundary Municipalities Repeal and Related Matters Act,* 2006 (Act No. 23 of 2005).This notice was published in Government Gazette No 33084 26 March 2010. In terms of Government Gazette No. 33114 16 April 2010 sections 17, 18, 19, 19A, 19B, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34 and 35 of Act 46 of 1998 shall come into operation in the areas of City of Cape

Town, eThekwini, Ekurhuleni and Nelson Mandela Bay Metropolitan Municipalities on 1 July 2010 and on 1 November 2010 in the remainder of the Republic of South Africa.

3. The determination of persons or category or class of persons competent to conduct the evaluation of criminal capacity of a child and the allowances and remuneration for them in terms of the *Child Justice Act* (75/2008) has been published in Government Gazette No 33092 of 1 April 2010

4. Directives in terms of section 97(4) of the *Child Justice Act* (75/2008) by the National Director of Public Prosecutions have been published in Government Gazette No 33067 of 31 March 2010. The regulations relating to the *Child Justice Act* has also been published in the same Gazette on 31 March 2010.

5. The sections of *The Childrens Act,* 2005 (Act No 38 of 2005) which have not yet been put into operation and the *Children's Amendment Act,* 2007 (Act 41 of 2007) have come into operation on 1 April 2010. The notice in this regard was published in Government Gazette No 33076 of 1 April 2010. The Regulations regarding children were also published in the same Gazette. Regulations relating to Children's Courts and International Child Abduction were published in Government Gazette No 33067 dated 31 March 2010.

6. An issue paper on Electronic Evidence in Criminal and Civil Proceedings: Admissibility and Related Issues has been published by the South African Law Reform Commission for public comment. The Issue Paper has attempted to draw attention to issues for law reform with regard to matters relating to admissibility of electronic evidence in criminal and civil proceedings. In relation to the longer term objectives of the project, this preliminary research paper has set out to identify shortcomings in the evidential provisions of the *Electronic Communications and Transactions (ECT) Act* 25 of 2002 and to define a possible scope for further investigation.
   The Issue Paper is available on the Commission's website at the following address: http://salawreform.justice.gov.za/ipapers.htm.
   The closing date for comment on this Issue Paper is **30 June 2010**. Written comments and representations are invited and can be addressed to:
   The Secretary
   S A Law Reform Commission
   Private Bag X668
   Pretoria 0001
   Telephone: (012)392-9540
   Fax: (012)320-0936
   E-mail: nesingh@justice.gov.za
   Respondents are not restricted to the issues and questions raised in this Issue Paper and are welcome to draw other relevant matters to the Commission's attention.

Recent Court Cases

1) S v IO 2010(1) SACR 342 CPD

Though the overlooking of the provisions of Section 28(1) (g) of the Constitution relating to sentencing of juveniles constitutes an irregularity, they are not absolute when assessed in the light of other relevant considerations.

The appellant, a juvenile under the age of 18 years at the time of the commission of the offences, had been convicted in a High Court with a co-accused on two counts of murder, three counts of attempted murder and the unlawful possession of firearms and ammunition. The appellant had been sentenced to an effective term of 25 years' imprisonment and his co-accused to an effective term of 35 years' imprisonment. The co-accused had successfully appealed to a full court against his sentence and the sentence was reduced to 25 years. The appellant also appealed to a full court against the sentence imposed upon him, contending essentially that the trial court's judgment on sentence did not contain any reference to the provisions of s 28 of the Constitution of the Republic of South Africa 1996, which, together with international instruments from which it had originated, had brought about significant changes to the sentencing regime concerning the incarceration of juveniles and, furthermore, did not manifest that such changes had been given any recognition or implemented.

Held, that, from a careful perusal of the trial court's judgment on sentence, it appeared that there was absolutely no reference therein to the imperative provisions of s 28 of the Constitution, nor was there any trace therein of an informed and nuanced weighing of all the interlinking factors of relevance to the sentencing process, and indicative of a changed judicial mindset consonant with an awareness of or an application of the provisions of the Constitution regarding the sentencing of juveniles. (Paragraph [151 at 347c - e)

Held, further, that in the circumstances it had to be concluded that the trial judge had committed a misdirection and that the full court was at large to consider what an appropriate sentence would be. (Paragraph [15] at347e - f)

Held, further, that the provisions of the Constitution relating to the sentencing of juveniles were not absolute, but subject to limitation in appropriate circumstances, such as where a presiding officer was satisfied that imprisonment was justifiable by 'the seriousness of the offence, the protection of the community and the severity of the impact of the offence on the victim'. (Paragraph [17] at 347h - i)

Held, further, that, if regard were had to the appellant's personal circumstances; the seriousness of and the circumstances of the commission of the crimes of which he has been convicted — it was clearly a gang-related revenge killing; and the interests of the community, the need for long-term incarceration trumped the imperative provisions of s 28 of the Constitution. (Paragraph [17] at 3471 348a)

Held, further, accordingly, that the imposition of long-term imprisonment was called for in the appellant's case. The only question was what the duration thereof should be, bearing in mind that the provisions of s 28(1) (g) required that it should be for the shortest appropriate period of time.(Paragraph [171 at 348a -b)

Held, further, that, bearing in mind that those factors which justified the appellant being treated more leniently than his co-accused, such as that he was younger; was of a personality type making him more susceptible of yielding to peer pressure; and was found to be more suitable for rehabilitation, still prevailed, it appeared to be self-evident that the appellant's period of imprisonment needed to be less than the effective period of 25 years imposed on his co-accused on appeal to this court. (Paragraph [18] at 348b c)

Held, accordingly, that the appropriate period of imprisonment for the appellant was an effective period of 18 years. (Paragraph [19] at 348d - e)
Appeal allowed and sentence altered accordingly.

2) S v Mukwevho 2010 (1) SACR 349 GSJ

In a case where an accused was charged for possession of a semi-automatic firearm it is necessary that all elements of the offence be proved, including that the firearm is a semi-automatic firearm.

The appellant had been convicted in a regional magistrates' court of the unlawful possession of a firearm in contravention of s 3 read with various provisions of the Firearms Control Act 60 of 2000, and further read with s 250 of the Criminal Procedure Act 51 of 1977, read with s 51 of the Criminal Law Amendment Act 105 of 1997. He was also convicted of the unlawful possession of ammunition for such firearm in contravention of s 90 of Act 60 of 2000. No alternative charges had been laid. It was alleged that the firearm in question was a '9 mm Parabellum Calibre Norinco Model 201 C Semi-automatic'; the possession of a semi-automatic firearm rendering the appellant liable to be sentenced to a minimum sentence of 15 years' imprisonment in terms of s 51(2) (a) (i) of the Criminal Law Amendment Act 105 of 1997, read with Part II of Schedule 2 thereof. The appellant was indeed sentenced to the prescribed sentence of 15 years' imprisonment. In pleading not guilty to the charges the appellant elected to exercise his constitutional right to remain silent and furthermore gave no evidence whatsoever in respect of either conviction or sentence. In evidence at the trial the police witnesses had stated that the firearm which had been found in the appellant's possession was a 'Lorinco 201 C' semi-

automatic pistol whereas the charge-sheet referred to a Norinco semi-automatic. In an appeal to a High Court against the conviction only,

Held, that, in order to attract the prescribed minimum sentence, all the necessary elements had to be proven at the stage of conviction, including the fact that the weapon in question was a semi-automatic one. In this case, questions arose not only whether the appellant had been in unlicensed possession of a firearm and ammunition, but also whether the firearm was the one described in the charge and whether it was a semi-automatic one. (Paragraph [51 at 354f -h)

Held, further, that the documents in which the police had recorded the details of the firearm found in the possession of the appellant had not been produced in evidence, and no explanation for their absence had been given: in the absence of a suitable explanation these documents should have been produced in order for the defence to cross-examine, to test the veracity and accuracy of the information allegedly recorded therein, more especially as there were differences between the evidence by two policemen of what was recorded in those documents. (Paragraph [61 at 354h -i and 355a - b)

Held, further, as to whether the firearm was a Norinco or a Lorinco semiautomatic, that the State was bound by the charge, and any variance between what was alleged and what was proven could result in the setting aside of the conviction. The critical test was one of prejudice. (Paragraph [8] at 355d -e)

Held, further, that there had to be sufficient quantum of proof before it could be found that an accused person had committed the crime in question - proof beyond reasonable doubt; and the court's sense of unease was acute when there was the prospect of lengthy periods of imprisonment, such as 15 years in the present case. In view of the fact that counsel for the defence, from the earliest opportunity, had made it clear that the chain of evidence was being contested, the conviction, in all the circumstances, could not stand. It was not in accordance with justice. (Paragraph [9] at 356e - g)

Held, further, that the fact that the firearm in question was a 'semi-automatic' one (and, by definition in s 1, 'self-loading but not capable of discharging more than one shot with a single depression of the trigger') was not merely part of the narrative or description of facts in the charge-sheet: it constituted an essential element of the alleged offence. The semi-automatic feature of the firearm was an essential element of the alleged offence precisely by reason of the fact that it was the possession of this very type of firearm that brought a severe minimum sentence into operation. Moreover, it was not good enough to prove that an accused person possessed a firearm which so happened to be a semi-automatic one: it had to be proven, at least by necessary inference, that the accused person must have known (dolus) or ought to have been aware of the relevant facts (culpa) which give rise to that prescribed minimum sentence for such possession - and assumed the risks that attached thereto. (Paragraph [11] at 357e - h)

Held, further, that, even if it was accepted that it had been proved that he was in

possession of a firearm, there was nothing to justify the necessary inference that the appellant must have been aware or ought to have been aware of the fact that it was a semi-automatic. (Paragraph [11] at 358c - d)

Held, further, as to the question whether the appellant could be convicted of a competent alternative verdict in terms of s 270 of Act 51 of 1977, that, as the prosecutor, the appellant's counsel and the court a quo all seemed to have understood that the case was an 'all-or-nothing' one, it was not difficult to imagine that, notwithstanding the fact that the appellant had enjoyed the benefit of legal representation, he might have conducted his defence differently and indeed might not have relied upon his constitutional right to remain silent (s 35(3)(h) of the Constitution, 1996) if he had been made aware of the precise nature of any alternative verdict which the State might have sought, and that, by conducting a different line of defence, he might have avoided a compulsory minimum sentence of 15 years' imprisonment. (Paragraph [121 at 359h—360a and 360b - d)

Semble: It will be desirable, especially where the State seeks a conviction on a charge of possession of a particular type or genus of firearm as a 'standalone' count (i.e. not with other more serious counts such as murder, rape or robbery where such a firearm is used as an instrument of such offence), to set out in the charge sheet itself such alternative and competent verdicts which it might seek. (Paragraph [121 at 360d - e)
Appeal upheld and conviction set aside.

3) S v Dembe 2010(1) SACR 360 NCK

Contraventions of section 10(1) (b) or (d) of the Choice on Termination of Pregnancy Act 92 of 1996 are deserving of direct imprisonment.

A person should not be charged with performing an unlawful abortion on a woman in contravention of s 10(1) (a), read with s 2(1) (a), of the Choice on Termination of Pregnancy Act 92 of 1996 and an attempted contravention of those sections where the abortion or the attempted abortion occurred after the first 12 weeks of pregnancy. Section 10(1) (a), read with s 2(1) (a), relates to the termination of a pregnancy upon request of a woman during the first 12 weeks of the gestation period of her pregnancy. (Paragraph [11] at 365a—b)
In assessing an appropriate sentence upon a conviction of unlawfully terminating a pregnancy in contravention of s 10(1), read with s 2(1), of the Choice on Termination of Pregnancy Act, the requirement of the Act of a safe termination of pregnancy being carried out by a qualified person under certain conditions at an approved medical facility as stipulated in the Act should be emphasised. The adverse consequences emanating from unqualified, unsupervised and unlawful terminations of pregnancy are self-evident.

In the premises contraventions of 5 10(1) (b) or (d) are deserving of direct imprisonment and no other sentence would be proper in the circumstances. To hold otherwise would detract from the gravity of these offences.
(Paragraph [191 at 367f - h)
The appellant had been convicted of one count of contravening s 10(1)(b), read with s 2(1)(c) of the Act, one count of contravening s 10(1)(d), read with s 3(1), of the Act, one count of attempting to contravene s 10(1)(b), read with s 2(1)(b), and one count of attempting to contravene s 10(1)(d), read with s 3(1), of the Act. On appeal the court took counts 1 and 2 together for the purpose of sentence and imposed a sentence of three years' imprisonment, of which 18 months were conditionally suspended for five years.
Counts 3 and 4 were likewise taken together for the purpose of sentence and a sentence of three years' imprisonment, of which 18 months were conditionally suspended for five years, was imposed. (Paragraph [22.31 at 368f - h)

4) Minister of Safety and Security v Sekhoto and Another 2010(1) SACR 388 FB

In determining the lawfulness of an arrest without a warrant it should be investigated whether the rights of the person being arrested have been infringed.

The Constitution of the Republic of South Africa, 1996, provides that a court, when interpreting legislation (e.g. s 40 of the Criminal Procedure Act 51 of 1977), must promote the spirit, purport and objects of the Bill of Rights. A person's right not to be deprived of freedom arbitrarily or without just cause is a basic right (s 12(l) (a) of the Constitution). Section 205(3) of the Constitution makes it clear that members of the police service must protect and secure the inhabitants of the Republic and uphold and enforce the law (including the Constitution). Rather than a weighing up of the interests of the community against the rights of citizens, the investigation should turn on the question whether the rights of persons have been infringed in the circumstances of the particular case. An arrest should be considered in the light of the circumstances of the specific case. As stated by the Constitutional Court, 'the constitutionality of an arrest will almost invariably be heavily dependent upon its factual circumstances'. (Paragraph [271 at 397h - 398b)

In assessing the lawfulness of an arrest made without a warrant the enquiry entails the following:
(a) Were the jurisdictional facts required by s 40 present? The jurisdictional facts are: (1) The arrestor must be a peace officer. (2) The arrestor must entertain a suspicion. (3) It must be that the arrestee committed an offence referred to in Schedule 1 (other than escaping). (4) That suspicion must rest on reasonable grounds.
(b) Was the purpose of the arrest to bring the arrested person before court? Or: (i) To frighten or harass such person; (ii) to prove to colleagues that the arrestor is not a racist; (iii) to punish the plaintiff by means of arrest; (iv) to force the arrestee to

abandon the right to silence in s 35(3) (i) of the Constitution. If the arrest was made for any of these reasons, or for another purpose not falling within the jurisdictional ambit of s 40, the arrest will for that reason alone be unlawful.
(c) The lawfulness of an arrest is fact-specific.
(d) Did the arrestor appreciate that an arresting officer has a discretion whether to arrest without a warrant or not, and did the arrestor consider and apply that discretion? An arresting officer must investigate explanations offered by the suspect.
(e) Were there grounds for infringing upon the constitutional rights as to security of the person, which every person has under s 12 of the Constitution? If a suspect: (i) does not present a danger to society; (ii) will not abscond; (iii) will not harm him/herself or others; (iv) is not in danger of being harmed by others; (v) may be able and be keen to disprove the police allegations, arrest will ordinarily not be the appropriate way of ensuring the suspect's presence in court.
(f) Did the arrestor consider other means of bringing the suspect before court? Section 38 of the Criminal Procedure Act refers to means of securing attendance of the accused in court, and refers to arrest, summons, written notice and indictment.
(g) The need for further investigation after the suspect has been arrested is a subsidiary factor which can be borne in mind. Although arrest should be made for the purpose of assuring the accused's presence in court, and not for some ulterior motive, one must not lose sight of the fact that the effect of arrest is detention for up to 48 hours before bringing the accused before court (s 50 of Act 51 of 1977). The legislature contemplated that further investigations subsequent to arrest could lead to the arrestee's release or prosecution. An arrest without a warrant is not unlawful merely because the arrestor intends to make further investigations before deciding to release the arrestee or to proceed with a prosecution contemplated by s 50(1) of Act 51 of 1977. However, if obtaining information from the arrestee is the main purpose, s 205 of the Criminal Procedure Act 51 of 1977 should be used, not an arrest without a warrant.
(h) The fact that two or more persons are involved in the criminal activity being investigated is a relevant factor. When members of a gang or syndicate or racketeering enterprise are sought because of a suspicion against them, it can be important, from a crime investigation point of view, that they be arrested simultaneously, also if they are at separate places, so as not to be able to communicate with each other, which communication could prejudice the investigation. Evidence may be destroyed or alibis fabricated. The fact that persons are arrested on related charges is a relevant consideration in assessing the lawfulness of the arrest.
(i) The possibility that exhibits can be destroyed or hidden is a relevant factor. (Paragraph [28] at 398b399j)
There is not an onus on a person to prove a constitutional right: the duty is on the court to enforce such right. Courts have the duty to enforce constitutional rights, as provided in s 39(2) of the Constitution. The arrestor must show that constitutional rights were not infringed by the arrest. That entails, at the stage before arrest, to make enquiries whether arrest is necessary and whether the arrest will infringe upon the arrestees' constitutional rights. There is a duty on the arrestor to adduce such evidence and such evidence forms part of the onus on the arrestor to prove lawfulness of the arrest. (Paragraph [33] at 401f - h)

5) S v Steyn 2010(1) SACR 411 SCA

When the defence of private defence is raised the court must take all factors into account to determine whether the person had acted reasonably in defence of herself.

The appellant shot and killed her former husband when he threatened her with a knife. The husband had for years abused her, both mentally and physically, and had assaulted her earlier that evening. The appellant's plea to a charge of murder that she had acted lawfully in self-defence was rejected, and she was convicted of culpable homicide. Taking into account the weighty mitigating circumstances, the High Court sentenced the appellant to three years' imprisonment, wholly suspended on certain conditions. She appealed to the Supreme Court of Appeal solely against her conviction.

Held, that the appellant relied on 'private defence', which recognised that persons may lawfully use such force as may be necessary to repel unlawful attacks upon them, which have either commenced or were imminent and which threatened their lives or bodily integrity. (Paragraph [16] at 41 6f - g)

Held, further, that the court's initial inquiry was to determine the lawfulness or otherwise of the accused's conduct and that, if found to be lawful, an acquittal should follow. At the same time, however, it was clear from its judgment that the court a quo specifically turned its attention to the question of the lawfulness of the appellant's conduct and, in considering that issue, the courts often do measure the conduct of the alleged offender against that of a reasonable person on the basis that reasonable conduct was usually acceptable in the eyes of society and, consequently, lawful. In the light of the circumstances of the present case where the facts were known, it was unnecessary to decide whether the court a quo misdirected itself in the manner suggested, as this court could itself determine the lawfulness of the appellant's conduct on those facts. (Paragraph [18] at 417b - d)

Held, further, that every case had to be determined in the light of its own particular circumstances and it was impossible to devise a precise test to determine the legality or otherwise of the actions of a person who relied upon private defence. There had to be a reasonable balance between the attack and the defensive attack. The proper consideration was whether, taking all the factors into account, the defender acted reasonably in the manner in which he defended himself or his property. Factors relevant to the decision in this regard included the following: (a) The relationship between the parties; (b) their respective ages, genders and physical strengths; (c) the location of the incident; (d) the nature, severity and persistence of the attack; (e) the nature of any weapon used in the attack; (f) the nature and severity of any injury or harm likely to be sustained in the attack; (g) the means available to avert the attack; (h) the nature of the means used to offer defence; and (i) the nature and extent of the harm likely to be caused by the defence. (Paragraph [19] at 417d - h)

Held, further, that the appellant had been obliged to act in circumstances of stress in which her physical integrity and indeed her life itself were under threat. Adopting a robust approach, the appellant did not act unlawfully. She found herself in a position of great danger in which her life was under direct threat. There can be no doubt that in those circumstances she was entitled to use deadly force to defend herself. Had she not done so, it might well have cost her her life. In those circumstances her instinctive reaction, as she described it, of shooting at the deceased, who was seemingly hell bent on killing her, was reasonable, and the court a quo erred in finding otherwise. (Paragraph [24] at 419b - d)

Held, accordingly, that the appellant's plea of 'self-defence' ought to have been upheld. Appeal succeeded and the conviction and sentence were set aside. (Paragraph [25] at 419d - e)

From The Legal Journals

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(Electronic copies of any of the above articles can be requested from gvanrooyen@justice.gov.za)

Contributions from the Law School

UNOPPOSED APPLICATIONS FOR EVICTION; THE REQUIREMENTS OF SECTIONS 4(6) AND 4(7) OF THE PIE ACT; AND THE ONUS OF PROOF

Introduction

According to its preamble, one of the objects of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 18 of 1998 (the "PIE Act") is to give effect to the constitutional right to housing by regulating the eviction of unlawful occupiers.

In order to achieve this object, the PIE Act provides that an unlawful occupier may only be evicted by a private landowner if, *inter alia*, the substantive requirements set out in subsections 4(6) and 4(7) of the Act are satisfied.

These subsections draw a distinction between those unlawful occupiers who have occupied the land for less than six months (s 4(6)) and those unlawful occupiers who have occupied the land for more than six months (s 4(7)).

If the unlawful occupier has occupied the land for less than six months, section 4(6) provides that a court may grant an eviction order if it is of the opinion that it is just and equitable to do so and after considering all the "relevant circumstances". The relevant circumstances that must be taken into account include the rights and needs of the elderly, children, disabled person and households headed by woman.

If the unlawful occupier has occupied the land for more than six months, section 4(7) provides that a court may grant an eviction order if it is of the opinion that it is just and equitable to do so and after considering all the "relevant circumstances". The relevant circumstances that must be taken into account include, in addition to those listed above, whether alternative land has been made available or can reasonably be made available by a municipality, organ of state or landowner for the relocation of

the unlawful occupier and his or her dependants. The circumstances expressly listed in section 4(7) do not apply, however, when the land is sold in a sale of execution pursuant to a mortgage.

These substantive requirements give rise to a number of difficult questions. Amongst these is whether the relevant circumstances expressly listed in subsections 4(6) and 4(7) must be taken into account by the court whenever it has to determine whether an eviction is just and equitable, and, if so, who has the onus of adducing evidence in respect of these circumstances, particularly in those cases in which the unlawful occupier does not defend the matter?

These questions have been considered by the Supreme Court of Appeal in its recent judgment in *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] ZASCA 28 (25 March 2010).

The facts

The facts of this case were as follows. The appellants were a group of people who occupied a block of flats situated in Yeoville in Johannesburg and owned by the respondent. According to the respondent, the appellants had originally occupied the building in terms of oral agreements of lease. The building had, however, become run down and the respondent decided to renovate it. He, consequently, terminated all of the leases and gave the appellants three months in which to vacate the building. Unfortunately, none of them did so by the due date and the respondent applied for an eviction order in the South Gauteng High Court. The appellants failed to oppose these proceedings and the eviction order was granted. The appellants then applied for recission of the eviction order. After this application was dismissed, the appellants appealed against this decision to the Supreme Court of Appeal.

The judgment

Introduction

The Supreme Court of Appeal (per Theron AJA; Mpati P, Van Heerden, Mhlantla and Shongwe JJA concurring) upheld the appeal and rescinded the eviction order. In arriving at this conclusion, the SCA began by explaining that an application for recision will be granted where the applicant can show “good cause”. In order to show “good cause”, the SCA explained further, the applicant must: (a) give a reasonable explanation for his or her default; and (b) show that he or she has a *bona fide* defence to the plaintiff’s claim which *prima facie* has some prospect of success (at para 4).

The applicant must give a reasonable explanation for his or her default

Insofar as the first requirement was concerned, the SCA began by explaining that after the eviction papers were served on the appellants, they approached a non-governmental organization called the Inner City Resources Centre (ICRC) for assistance. Having approach the ICRC, the SCA explained further, the appellants

genuinely, but mistakenly, believed that the ICRC would represent them in court. They did not realize, the SCA went on to explain, that the ICRC was not in a position to provide them with legal representation itself and that it had been unable to secure legal representation for them from any other non-governmental organizations it had approached. Given these facts, the SCA concluded, it was clear that the appellants were not in wilful default (paras 5-7).

The applicant must have a bona fide defence to the plaintiff's claim

Insofar as the second requirement was concerned, the SCA began by explaining that the appellants relied on two grounds to show that they did have a *bona fide* defence. First, they argued that even though the eviction application was not opposed in the High Court, there was enough evidence before the court to have alerted it to the fact that the appellants would be rendered homeless if they were evicted. This meant, they argued further, that in terms of sections 4(6) and 4(7) of the PIE Act they could only be evicted if it was just and equitable to do so. Second, they argued that where an eviction order may result in the occupiers of property being homeless, the municipality must be joined and the failure to do so rendered decision to grant the eviction order premature (at para 9).

Having set out the appellant's arguments, the SCA turned to consider the provisions of the PIE Act. In this respect, the SCA began by explaining that one of the primary objectives of the PIE Act is to ensure that evictions take place in a manner that is consistent with the values set out in the Constitution. In order to achieve this objective, the SCA explained further, sections 4(6) and 4(7) provide that an unlawful occupier may only be evicted by a private landowner if it is just and equitable to do so, after considering the rights and needs of the elderly, children, disabled person, households headed by women and, in those cases to which section 4(7) applies, whether alternative land is available for relocation of an occupier (at para 10).

In *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), the SCA went on to explain, the Constitutional Court held that there is a duty on the courts, in eviction matters, to have regard to the relevant circumstances listed in sections 4(6) and 4(7) and they cannot discharge this duty if the necessary information has not been placed before them. This means, the Constitutional Court held further, that while it is "incumbent on the interested parties to make all relevant information available", the courts themselves are obliged to ensure that they are fully informed before undertaking the task entrusted to them by the PIE Act. The courts are, consequently, entitled to go beyond the facts established on the papers before them and, if necessary, the court might even be "obliged to procure ways of establishing the true state of affairs, so as to enable it properly to 'have regard' to the relevant circumstances" (at para 11).

In light of the Constitutional Court's judgment in the *Port Elizabeth Municipality* case, the SCA then explained, it is quite clear that while a court is not restricted to the circumstances listed in subsections 4(6) and 4(7), it must take those circumstances into account whenever it has to determine whether to grant an eviction order in terms of section 4 of PIE (at para 13). This means, the SCA explained further, that

when it comes to section 4 of the PIE Act, the courts are under a duty to act proactively and have the authority to call for further evidence; to carry out investigations; and to make special protective orders. Section 4, the SCA concluded, “obliges the courts to be innovative and, in some instances, to depart from the conventional approach” (at para 12).

After setting out these principles, the SCA turned to apply them to the facts. In this respect, the SCA began by explaining that while the respondent alleged in his founding affidavit that the building was old, dilapidated and overcrowded and that the appellants were paying relatively low rents, he did not place any evidence before the court relating to the needs of the elderly, children, disabled persons or households headed by women.

In addition, the SCA explained further, the municipality had not been joined as an interested party and consequently no evidence was placed before the court relating to the availability of alternative land. This meant the SCA explained further, that the High Court was not in a position to have regard to the circumstances listed in sections 4(6) and 4(7) as the necessary information had not been placed before it. The High Court had accordingly failed to comply with the provisions of section 4 of the PIE Act when it granted the eviction order (at para 14).

Although the information placed before the High Court was insufficient for it to discharge its obligations under section 4 of the PIE Act, the SCA went on to explain, it should nevertheless have altered the High Court to the fact that appellants were poor and that the prospect of homelessness, if they were to be evicted, was very real. The High Court should, therefore, have been proactive and taken steps to ensure that it was appraised of all the relevant information in order to enable it to make a just and equitable decision. The fact that the High Court did not take any such step, the SCA concluded, meant that it had failed to fulfill the obligations imposed upon it (at para 15)

Comment

A number of important principles may be derived from this judgment. Amongst these are the following;

First, the relevant circumstances listed in sections 4(6) and 4(7) of the PIE Act are peremptory and not discretionary. In other words, the courts are obliged to take these circumstances into account when determining whether an eviction will be just and equitable, even in an unopposed matter.

Second, while it is incumbent on the interested parties to make all relevant information available to the courts, there is, strictly speaking, no onus on any of the interested parties to adduce evidence with respect to the relevant circumstances.

Third, given that there is no onus on any of the interested parties to adduce evidence with respect to the relevant circumstances; section 4 of the PIE Act provides that the courts themselves are obliged to ensure that they are fully informed

about the relevant circumstances.

Fourth, when it comes to discharging the obligation imposed upon them by section 4 of the PIE Act, the courts must be proactive and use their powers to carry out investigations; to call for further evidence; and to make special protective orders. In some cases they may be obliged "to depart from the conventional approach".

Fifth, one of the proactive steps a court may take is to join the municipality as an interested party and then request it to submit a report on the extent to which alternative or emergency accommodation is available. In *The Occupiers of Shorts Retreat v Daisy Dear Investments* [2009] ZASCA 80 (3 July 2009), the SCA held that a court may *mero motu* raise the question of joinder and decline to hear the matter until the municipality has been joined (at para 11).

Sixth, in *The Occupiers of Shorts Retreat* case, the SCA also held that once a municipality has been joined, a court may order the municipality to refer the matter for mediation and settlement in terms of section 7 of the PIE Act before the eviction order is issued. This would be a particularly appropriate step, the SCA held further, in those cases where a large number of people are involved (para 9).

Finally, it is important to contrast the approach adopted in this judgment with the approach adopted by the SCA in its earlier judgment in *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA).

In this case, the SCA held that provided the procedural requirements set out in section 4 of the PIE Act have been met, a landowner is entitled to approach a court on the basis of ownership and the defendant's unlawful occupation, in other words on the basis of the *rei vindicatio*. Unless the unlawful occupier opposes and discloses circumstances relevant to the eviction order, the SCA held further, the owner will be entitled to an order for eviction. This is because, the SCA concluded, the relevant circumstances are usually facts that fall within the exclusive knowledge of the occupier and it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties (at para 19).

In light of the judgment in *The Occupiers, Shulana Court*, however, it is submitted that these findings have now been overruled. The fact that these findings have now been overruled, it is submitted further, has important implications for the common law right to evict. These implications are as follows:

(a) First, that the defendant is not obliged to raise the application of the PIE Act in his or her pleadings by alleging that he or she is an unlawful occupier. Instead, the application of the PIE Act will be triggered by the mere fact that the defendant is an unlawful occupier and a natural person, even in those cases where the application is unopposed.

(b) Second, that in those cases where the application of the PIE Act has been triggered, the landowner may no longer rely solely on the fact that he or she is the owner of the land and that the defendant is in occupation. In other words, an eviction

order may no longer be granted simply on the common law grounds for an eviction.

(c) Third, that the provisions of the PIE Act do not function simply as a defence to the *rei vindicatio*. Instead, the provisions of the PIE Act are the starting point when it comes to an eviction in respect of an unlawful occupier who is a natural person.

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Matters of Interest to Magistrates

ISS TODAY: 13 Apr 2010: Very Expensive Milk and Cookies

A recent report in the South African media (*Rapport* 24 January 2010) related the story of a 23-year old man, Morgan Matlala, who entered the premises of the Department of Agriculture in Silverton, Pretoria, in search of food. Here he was accosted by security guards while he was enjoying milk and cookies belonging to the Department. The value of the milk and cookies was estimated to be R50. For this heinous crime, Matlala was arrested, charged and taken into custody. The court set bail at an amount that Matlala could not afford and he consequently spent four months in prison awaiting trial before he pleaded guilty to housebreaking and theft and was sentenced to five years' imprisonment suspended for five years. The four months in prison cost the taxpayer an estimated R24 000 at a cost of R200 per day per prisoner. There are also other costs that should be added to this such as court time, time spent by the police to investigate the crime, the magistrate's time, legal representation and so forth. The true cost of the milk and cookies is thus substantially higher than R24 000.

The case of Morgan Matlala is cause for deep concern as it not only points out how the poor are victimised by the criminal justice system, but also how officials fail to use the mechanisms available in law to avoid unnecessary prosecution and detention. There is no doubt that Morgan Matlala must take responsibility for his actions, but he did spend four months in prison without being convicted of anything, except that he was poor and could not afford the bail set by the court. The fact that the court set bail indicated that he was not regarded as a threat to society or as a threat to witnesses or evidence. His detention was unnecessary and without purpose.

For the past 15 years there have been numerous reports in the media about prison overcrowding and that a major contributing factor to this is unaffordable bail. There is probably not a South African who is not well aware of the fact that our prisons are overcrowded. Successive Inspecting Judges of Prisons have pleaded with magistrates and other officials to avoid the unnecessary imprisonment of suspects and especially the granting of unaffordable bail. Bail over R1000 is often not within the means of arrested persons.

The law provides a range of options that could have prevented the four-month detention of Morgan Matlala, but these were apparently ignored by the court and other officials in question. In the first place the court should not have set bail at an amount that he could not afford. The court should have made proper enquiries as to what he can afford and if he was destitute, released him on warning. Secondly, assuming that the first option failed, the Head of Prison could have made an application under section 63A of the Criminal Procedure Act, requesting the court that Matlala be released on a warning to appear in court or that the amount of bail is lowered as he could not afford the bail amount set by the court. Thirdly, given that this was not a violent or a high-value property offence, his case could have been conditionally withdrawn by the prosecution after first appearance. Such a conditional withdrawal may have required a counter performance, such as the performance of community service, as happened recently with Springbok rugby player Ricky January in connection with a drunk driving charge. January now has to perform 20 hours of community service. Fourthly, if the prosecution did want to divert the case, he could have been offered a plea and sentence agreement (plea bargain) at an early stage shortly after arrest. It is unfortunately the case that plea and sentence agreements are rarely used.

The sentence imposed also makes one wonder why the courts are so vindictive against the poor. It is not known if Matlala was a first offender, but if he were to repeat his crime, namely housebreaking and theft of milk and cookies to the value of R50, he will face five years in prison. If released on parole after two and a half years, his stint in prison will have costed the tax payer an estimated R182 600. (If the Department of Agriculture, however, puts out milk and cookies to the value of R50 every night for Morgan Matlala for the next two and half years, the cost would be a mere R27 400; a saving of R155 200 to the tax payer.)

There are also big differences between how the rich and the poor are sentenced, and this can be quantified. Let us compare Matlala’s sentence of five years if he commits the same crime again, with that of former advisor to President Jacob Zuma, Schabir Shaik. The latter was convicted of fraud and corruption involving more than R500 000 and sentenced to 15 years’ imprisonment. Matlala will have to spend 37 days in prison for every R1 stolen of the total of R50, whereas Mr. Shaik will spend 0.01095 days in prison for every R1 involved (of the total of R500 000). If Matlala were sentenced in the same manner as Shaik, his sentence would have been half a day in prison and as the minimum term of imprisonment is four days, he would not have been sentenced to imprisonment at all. If Shaik, on the other hand, was sentenced in accordance with Matlala’s five year sentence (37 days for every R1), his sentence should have been 50 000 years. Things are clearly not proportional.

The above evidently belongs in the domain of the absurd, but it does point to serious problems. Poor people are pulling at the short end of the stick in the criminal justice system because officials do not utilise the legislated means available to them to resolve cases speedily and in a manner that upholds and protects the dignity of all. Officials also have scant regard for the cost implications of their decisions.

It is unknown what happened to Matlala while he was awaiting trial in prison, but we do know that prisons are dangerous places, where assaults and sexual assaults are common and one can only hope that he was spared such an ordeal. Matlala's is also not an isolated case. According to the Inspecting Judge of Prison's 2008/9 Annual Report there are nearly 8500 people in prison who cannot afford the bail set by the courts. Recent research in three metropolitan courts found that half of the cases against accused are either withdrawn or struck from the roll. Their custody was without meaning or purpose, but they have to endure the pains of imprisonment and attempt to reconnect their lives once released. Magistrates, prosecutors and Heads of Prison have a duty to prevent the unnecessary detention of people and to utilise the means available to them.

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A Last Thought

"… The courts do get involved in political and public controversies and even in policy issues. Anyway, judges and magistrates must be accepted "as human beings who, like all of us, have their hopes, fears and prejudices … (and their role) … must not be exaggerated and mystified by suggestions of infallibility". As a people, we must appreciate that judicial "independence goes hand in hand with the goal of transforming the underlying attitudes and values of the judiciary". This remains crucial because SA needs what some regard as "transformative jurisprudence" which is firmly anchored on the fundamental values and principles which underpin our democratic society. Our judicial benches should be populated by women and men of unimpeachable integrity and high social standing, who will at all times adjudicate in a manner that does not take us back to the apartheid era. This will result in the public having trust in the members of the judiciary, something which we require in a constitutional democracy."

Thando NtlemezaMinistry of Justice and Constitutional Development (Business Day 9 April 2010)