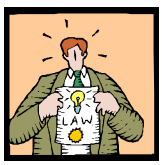
E-MANTSHI

A KZNJETCOM Newsletter

MARCH 2007: Issue 13

Welcome to the thirteenth issue of our KwaZulu-Natal Magistrate's newsletter. Since the inception of the newsletter in April 2006 we have received positive feedback on the contents. One example is an e-mail recently received from Ray Samson, Chief Prosecutor, Southern KZN which reads as follows: "*Just seen the new insert on the Justice Forum website for the e-Mantshi. Excellent. I normally get them from Ron every month but this makes it that little bit easier. And I find them informative and useful.*" Your kind comments are appreciated. Further comments and articles for publication in forthcoming issues are welcome – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. A *Judicial Service Commission Amendment Bill* was published on 21 February 2007 with the aim of amending the Judicial Service Commission Act, 1994 so as to make provision for structures and procedures relating to oversight of judicial conduct; to make provision for the establishment and maintenance of a register of judges' financial interests; to make provision for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges. The Bill can be accessed on the website www.pmg.org.za under New Bills/Policy documents (Password: doj885).

Recent Court Cases

1. S. v. OOSTHUIZEN 2007(1) SACR 321 (SCA)

Magistrate should have considered section 276(1) (i) Act 51 of 1977 in sentencing accused.

On appeal against confirmation by the High Court of his sentence of three years'

imprisonment, one of which was conditionally suspended, for assault with intent to do grievous bodily harm, the appellant submitted that the magistrate erred in failing to consider as an appropriate sentence in his case a period of correctional supervision in terms of s 276(1) (*i*) of the Criminal Procedure Act 51 of 1977. It appeared from the record that, in imposing sentence, the magistrate found, on the basis of the appellant's two previous convictions for housebreaking with intent to assault and assault, which were taken together for purposes of sentence and for which he was sentenced to a fine, alternatively, imprisonment, that he had 'a preponderance of violence'.

Held, that the magistrate's finding that the appellant had preponderance to violence' was a material misdirection. The offences of which the appellant had previously been convicted took place a long time ago (he was convicted some nine years previously) and they appear to have been interrelated. His conclusion that the appellant had a 'preponderance of violence' was unfounded. (Paragraph [10] at 324*h*.)

Held, further, that, in the circumstances of the appellant's case, the magistrate had rightly discounted a non-custodial sentence. However, he had erred in not considering the kind of custodial sentence provided for in terms of s 276(1) (i) of the Act. The Court below, in confirming the sentence imposed by the magistrate, itself erred by not considering the provisions and advantages of s 276(1) (*i*) of the Act. (Paragraph [11] at 324i-325*d*.)

Held, further, that in the circumstances of the appellant's case, a sentence of imprisonment in terms of s 276(1) (i) was appropriate. (Paragraph [12] at 325*d*.)

Held, further, that the magistrate's misdirection as to the appellants' 'preponderance of violence', plus his failure to consider a sentence in terms of s 276(1) (*i)*, justified interference on appeal. (Paragraph [12]) at 325*e-f*.)

Held, accordingly, that the appeal had to succeed and the appellant's sentence replaced with one of 18 months' imprisonment in terms of s 276(1) (*i*) of the Criminal Procedure Act. (Paragraph [13] at 325*f-g*.)

2. National Director of Public Prosecutions v. Van Staden & Others 2007(1) SACR 338 (SCA)

A motor vehicle used in the commission of the offence of driving under the influence of intoxicating liquor is liable to forfeiture in terms of the Prevention of Organised Crime Act, 121 of 1998.

The appellant appealed against the refusal by a Local Division of several applications for orders for preservation of motor vehicles, in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998, in anticipation of future applications for forfeiture of the vehicles, as 'instrumentalities' in the commission of the offences of driving under the influence of intoxicating liquor, or with excessive alcohol in the driver's blood, in contravention, respectively, of s 65(1) and s 65(2) of the National Road Traffic Act 92 of 1996.

Held, that, although the Prevention of Organised Crime Act was aimed at organised crime, it also applied to cases of individual wrongdoing. (Paragraph [1] at 340*e*-341*a*.)

Held, further, that, in order for a deprivation of property in terms of the Act not to be

'arbitrary' and therefore unconstitutional, the property had to be proximate to the commission of the crime and deprivation of the property had to be proportional to the ends sought to be achieved by the deprivation. In the case of drunken driving, those ends were remedial, rather than punitive. (Paragraphs [4] and [7]-[8] at 341*h*-342*d* and 343*b*-*h*.)
Held, further, that an application for a preservation order would be refused where it appeared that it would be unconstitutional for a forfeiture order eventually to be made. (Paragraph [9] at 343*h* -344*c*.)
Held, further, that the motor vehicle concerned was indeed an 'instrumentality' of the offence of driving under the influence of intoxicating liquor, or with excessive alcohol in the driver's blood, and was thus liable to be forfeited under the provisions of ch 6 of the Act. (Paragraph [15] at 346 *d*-*e.*)
Held, further, that it did not automatically follow that the motor vehicles in the present case fell to be forfeited or a preservation order made in respect of them. That depended on whether, on the facts, the requirements of proximity and proportionality had been met. Because that determination had yet to be made, it was appropriate that the matters be remitted to the Court *a quo* for reconsideration. (Paragraph [16] at 346*e*-*g*.) Appeal upheld.

3. JACOBS v. AFRICAN BANK BPK 2006(5) SA 21 (TPD)

When granting an administration order the full amount of the judgment obtained should be included when determining the total amount of all debts due.

In determining whether or not an administration order in terms of s 74 of the Magistrates' Courts Act 32 of 1944 should be granted, the full amount of the judgment obtained, and not merely the monthly instalment payable in terms of an emoluments attachment order, should be included when determining what the 'total amount of all his debts due' is. The question is not whether the instalments which are not in arrears could be considered due but rather whether the principal debt, in terms of which the down payment is made in instalments, is due. (At 24F-G, 25B/C and 27F.)
Held, that, *in casu*, where the monthly payment of R1 167,32 which the second appellant had to pay the respondent in terms of an emoluments attachment order in order to discharge the total judgment debt of R30 249,70 (causing the total debts due to be R51 151,46), the appeal could not succeed. The magistrate was thus correct in her decision to refuse the granting of an administration order insofar as the total amount of debts owed by the appellants exceeded the jurisdictional limit of R50 000 (being the amount currently determined by the Minister in the Government Gazette as the amount contemplated in s 74(1)*b*)). (At 29B-C.)

4. Lewis v S [2007] SCA 3 (RSA)

Intent is a vital element of contempt *in facie curiae* (cell phone ringing in court)

Appellant was convicted by the WLD of contempt of court and sentenced to one month imprisonment for having allowed his cell phone to go off in court, while the court was in session, and for answering it as he was leaving the court.

The SCA, per Streicher JA, with Harms ADP and Jafta JA concurring, set aside the conviction. It was held that:-

1. cell phones going off when they should not be on, is a common occurrence;
2. in this case the court *a quo* could not have been satisfied that the appellant acted with the required intent;
3. the appellant's conduct would only have constituted the offence of contempt of court if he left his cell phone on and answered it while leaving the courtroom with the intention of interfering with the administration of justice or of violating the dignity and authority of the court.

From The Legal Journals

1. Letsebe, L

"Defending Judicial Decisions"
De Rebus January/February 2007 p 71.

2. Bohler – Muller, N.

"The Promise of Equality Courts"
SAJHR – 2006, v 23(3), p 380.

3. Davel C.J. & Mungar U.

"Aids Orphans and Children's Rights"
THRHR – 2007, Vol. 70(1), p 65.

4. Neetling J. and Potgieter J.M.

"Wrongfulness and negligence in the law of delict: a Babylonian confusion?"
THRHR – 2007, Vol. 70(1), p 120.

5. Ferreira, S.

"Intercountry adoptions – De Gree v. Webb"
THRHR – 2007, Vol. 70(1), P 146.

(If you would like a copy of any of the above articles please send your request to gvanrooyen@justice.gov.za)

Contributions from Peers

OBSERVATIONS ON THE ARTICLES BY L RADYN IN e-MANTSHI (December 2006: Issue 10) CONCERNING SECTION 75 OF ACT 51 OF 1977

The correct *practical application* of section 75 of the CPA can only be achieved if organs of state, through legislative and other measures, assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and *effectiveness* in accordance with the constitutional imperative that they are bound to obey. Being *"effective"* means "*being able to do that which produces the desired result".*

Court and case flow management is described in the Practical Guide referred to in the articles by Mr. Radyn as "*a simple phrase adopted to propagate a collection of principles and practices associated with constituting, supporting and managing both the criminal courts and those cases which flow through them.*" To enable the organs of state to assist and protect the courts *to ensure their effectiveness*, such organs of state have section 75 as a legislative measure at their disposal to produce that desired result. But applying that section incorrectly will result in *mismanagement* of the court and rendering case management *ineffective.* The desired result, as a general rule, in the proper context of section 75 is firstly, that the accused must be summarily tried in the court which has jurisdiction; secondly, that such a court must be a court of first instance. If an accused person (and this ought to be the exception) appears in a court which does not have jurisdiction to try the case the accused must at the request of the prosecutor be referred for summary trial in a court which has jurisdiction. Mr. Heuer correctly answers the question: when must the prosecutor make that request?
Mr. Radyn's contention, effectively, is that the exception has become the rule in practice and is, therefore, hindering case flow management. That contention, in my view, is correct and unassailable if measured against the further desired result of attaining the *effective* protection of the constitutional right of every accused person to a fair trial, which includes the right to have their trial begin and conclude without unreasonable delay, for, if there is no justifiable reason for bringing an accused person before the wrong court in the first instance, that right will be violated. The more so where the practice of bringing accused persons before the wrong court in the first instance has become entrenched as the general rule.

Mr. Radyn contends that prosecutors should "vigorously be prodded by magistrates" to exercise their discretion in terms of section 75 speedily so as to enable the correct application of section 75 (1) (a), thereby reinstating the rule as a general practice. Do magistrates have the authority to do so? If they do, it might not be necessary to elaborate thereon if it is accepted that prosecutors are applying the section incorrectly and that its correct application is not a matter for discretion by a prosecutor at all, but a legal obligation: the duty to attain the desired results. If it is still necessary to answer the question, my response is Yes, they do for the simple

reason that the court is obliged to hold an officer of the court accountable for not performing that legal obligation and a failure by the court to do that is mismanagement of the court.

The prosecuting authority and the law enforcement agencies being the sole initiators of criminal proceedings are the very organs of state referred to above. Apart from avoiding unreasonable delay by the correct application of section 75 as herein contended, they also have the constitutional obligation to ensure the accessibility of these accused persons to the courts of competent jurisdiction by way of summary trial. It is my contention that, in the present context, the only legislative measure that constitutes a legitimate departure from the application of the general rule in section 75 is section 50 (6) (c) of the CPA, which requires the bail application of a person who is charged with an offence referred to in schedule 6 to be considered by a magistrate's court (i.e. a district court). There is no provision which expressly precludes a regional court from considering a bail application of a person who is charged with an offence other than an offence referred to in schedule 6 and, moreover, the proviso to section 50 (6) (c) makes it obligatory for a regional court to consider a bail application of a person who is charged with an offence referred to in schedule 6 on a case by case basis in certain circumstances. Those circumstances are:

1. expediency, or
2. necessity

for the administration of justice if the Director of Public Prosecutions so deems it.

Is the current situation as outlined above not such that the DPP cannot but deem it both expedient and necessary for the administration of justice to direct that these cases (schedule 6 bail applications) also be considered by a regional court where the district court roll is so congested that the court cannot cope or where the prosecutor in the district court does not have the knowledge and experience to deal with schedule 6 bail applications? I say it cannot reasonably be deemed otherwise.

One last and important consideration: It seems obvious from the provisions of section 342A (6) of the CPA that a district court does not have the authority to institute the investigation contemplated in section 342A (1) and (2) and to issue any order contemplated in subsection (3) in cases it is seized with but does not have jurisdiction to try (e.g. rape), where there is an unreasonable delay in the institution or continuance of criminal proceedings. Surely it is not for the district court presiding officer to intervene on notice of motion to the High Court, on behalf of the accused, in an attempt to obtain relief? I contend that after the conclusion of the bail proceedings in such matters, the district court does not have the jurisdiction to even entertain, let alone grant, an application for a postponement for further investigation: the prosecutor must do her duty and request that the accused be referred to a court having jurisdiction to try the case in accordance with section 75 (2) (a) of the CPA. All other matters must be summarily tried in a court which has jurisdiction (i.e. a court of first instance) in accordance with the general rule provided for in section 75 (1) (a) and (c) of Act 51 1977.

R E Laue
Senior Magistrate: Durban
6 February 2007

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

SA sentencing law challenged

Karyn Maughan
February 25 2007 at 05:16PM

A Port Elizabeth lawyer who was sentenced to 15 years in jail for fraud has been given the green light to challenge South African sentencing law on an international stage.

South Africa's controversial Minimum Sentencing Act could, in May this year, face international scrutiny by the African Commission on Human and Peoples' Rights in Ghana - despite the efforts of the South African government to quash the unprecedented legal bid brought by David Price.

In a potentially embarrassing claim against the South African government, father-of-five Price is arguing that his sentence, as implemented by the act, constituted "inhumane and degrading treatment" and was "inhumane". He is also seeking reparations from the government.

Price was 56 when he was released on parole from St Albans Medium B prison last year, after serving seven years of his sentence.

In his fight to have his sentence reduced, Price was told by judges in the Eastern Cape high and Bloemfontein supreme courts that they would have opted to sentence him to an effective eight-year jail term for his part in a multimillion-rand insurance-related cheque fraud, were it not for the Minimum Sentencing Act.

Under this act, courts can only deviate from prescribed sentences for certain serious crimes if they find there are "substantial and compelling circumstances" that justify a lesser sentence.

In Price's case, neither the high or supreme courts could find that such circumstances existed - so he was given a sentence equivalent to that given for murder.

After failing to challenge his "disproportionate" sentence in the constitutional court, which dismissed his application without hearing any argument about it, Price - supported by an anonymous benefactor - became the first South African to ask the International Human Rights Committee in Switzerland to intervene.

According to Price's attorney, Alwyn Griebenow, the committee instructed his client to approach the African Commission on Human and Peoples' Rights - which he did, with strong opposition from the South African government.

Price's legal team told the African Commission that his sentence violated Articles 5 and 6 of the African Charter on Human and Peoples' Rights, in that it violated his rights to dignity and amounted to "arbitrary detention".

They further questioned whether the mandatory sentences imposed under the Minimum Sentences Act had resulted in any noticeable drop in South Africa's massive crime problem. "An excessive measure which fails to meet its goal breaches the principle of proportionality," they argued.

The South African government argued that Price's complaints should not be argued more fully before the African Commission. The state said Price was trying to use the commission as an appeal forum - a mandate that, it contended, the commission did not have.

The commission disagreed.

It found that Price's case should be heard.

Griebenow said on Saturday his client was struggling to find the funds needed to take his case to Ghana. "It is obviously a very important case that could have huge implications for many people."

- **This article was originally published on page 2 of Sunday Independent on February 25, 2007**

'SA needs a new sentencing regime'

Monica Laganparsad
March 01 2007 at 01:30PM

Minimum sentencing was introduced into legislation nearly 10 years ago as a deterrent against violent and serious crimes, but a recent study has shown that it has created havoc in the criminal justice system.

The study, on the impact of minimum sentencing in South Africa and other related issues to minimum sentencing, was the focus of a two-day conference which started in Midrand yesterday.

The Minimum Sentencing Act was initially introduced as a temporary measure and is reviewed every two years.

In 2005 the relevant Act was extended by the president and the new review is scheduled for April 2007.

'Courts have become more congested'

Ahead of the review, The Open Society Foundation launched the conference to present the research commissioned to investigate the effects and impact of minimum sentencing on prisons.

The study by Michael O'Donovan and Jean Redpath on the impact of minimum sentencing states that it has not helped to reduce crime; instead, the courts have become more congested.

It found cases took longer to finalise, partly due to the fact that accused persons facing minimum sentences were unaware of their situation.

"As a result, the time between the commission of the offence and sentence is increasing. In the high and regional courts, where all serious cases - including minimum sentencing cases - are heard, the average is 25-27 months.

"In some instances, four or more years may pass between the offence and sentence. Longer case cycles mean fewer convictions each year," said the study.

'Prisons operating beyond capacity'

While lengthy sentences for violent criminals have assisted the regional courts to expand its jurisdiction in handing down sentences of 15 years, it has resulted in prisons operating beyond capacity.

However, the study said that this was not because more criminals were imprisoned, but because fewer people were being jailed for longer periods.

"The only way prisons will be able to cope with overcrowding is through periodic 'special remission' mass releases of prisoners before their parole date. Conditions of overcrowding are brutal and not conducive to preparing prisoners for re-entry into society."

The study also found public confidence in the criminal justice system was declining.

The researchers found the current minimum sentencing legislation should not be renewed due to a negligible impact on crime levels and its contribution to congestion in courts.

"SA urgently needs a new sentencing regime that takes into account the capacity to enforce prison sentences and alternative punishments for less serious offences. However, sentencing reform alone is insufficient to solve the crisis in the courts and prisons. Scarce resources should rather be directed to crime prevention, instead of imprisonment."