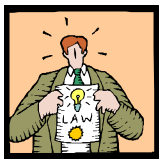
E - M A N T S H I

A KZNJETCOM Newsletter

July 2007: Issue 18

Welcome to the eighteenth 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. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments 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 *Choice on Termination of Pregnancy Amendment Bill* has been re-introduced in the National Council of Provinces on 8 June 2007. In the memorandum on the objects of the Bill the following is stated:

1. BACKGROUND

On 8 and 14 June 2007 the National Council of Provinces and the National Assembly, respectively, –

(a) noted that -

(i) on 18 August 2006 the Constitutional Court declared the Choice on Termination of Pregnancy Amendment Act (Act No. 38 of 2004) invalid, and that the order of invalidity is suspended for a period of 18 months to enable Parliament to re-enact the statute in a manner that is consistent with the Constitution;

(ii) the 18-month suspension period expires on 16 February 2008; and

(iii) the Rules do not provide specifically for Parliament to deal with legislation that has been declared invalid;

(b) resolved that -

(i) the abovementioned statute be re-enacted, in compliance with the court order;

(ii) the legislation be deemed introduced in the National Council of Provinces, as the First House;

(iii) the Act, as it now exists, be deemed as the text before Parliament, as extensive work has been done during Parliament's previous consideration of the legislation; and

(c) resolved and noted, respectively, that the Select Committee on Social Services be put in charge of the Bills before the Council.

2. OBJECTS OF BILL

The objects of the Bill are to –

(a) allow registered midwives and registered nurses, who have undergone the prescribed training, to perform terminations of pregnancy;
(b) do away with the designation by the Minister of facilities where termination of pregnancy may take place, which is a lengthy process, and to empower the Member of the Executive Council of a province responsible for health in that province to approve those facilities;
(c) allow all public and private facilities that have a 24-hour maternity service to terminate pregnancies of up to and including 12 weeks without seeking approval from the Member of the Executive Council concerned;
(d) empower the Member of the Executive Council concerned to prescribe by regulation the requirements and conditions applicable to facilities where termination of pregnancies may take place; (For the purposes of consistency, the Minister must approve the regulations before they are implemented.)
(e) require the Member of the Executive Council concerned to report annually on the number of facilities approved by him or her;
(f) require the relevant heads of provincial departments to submit certain prescribed information to the Director-General of Health; and
(g) make it an offence for any person to terminate a pregnancy unlawfully or allow a termination of a pregnancy at a facility which has not been approved.

The Bill can be accessed on the website of the Parliamentary Monitoring Group at: www.pmg.org.za .

2. Certain provisions of the *Children's Act, Act 38 of 2005* have come into operation on 1.7.07. See Government Gazette No. 30030 dated 29 June 2007. The following sections are now in operation:
sections 1 up to and including 11, 13 up to and including 21, 27, 30, 31, 35 up to and including 40, 130 up to and including 134, 305(1)(b), 305(1)(c), 305(3), 305(4), 305(5), 305(6), 305(7), 307 up to and including 311, 313, 314, 315 and the second, third, fifth, seventh and ninth items of Schedule 4.

Recent Court Cases

1. S. v. TSHALI 2007(2) SACR 23 (CPD)

Charge sheet referring to statutory sections which have been declared unconstitutional is of no force and effect – even where accused pleads guilty.

The appellant pleaded guilty and was convicted in a regional magistrate's court on a count of contravening s 5(b) of the Drugs and Drug Trafficking Act 140 of 1992, in that he had dealt in 939 kg of dagga; the dagga had been found by the police in a vehicle which he had been driving. The charge was set out on a pre-prepared form with provision for the date and place of the offence, and the nature of the prohibited substance, to be filled in. The form also made provision for an alternative charge of possession, but none of the relevant details had been filled in on this part of the form and no alternative charge had been put to the appellant at trial. In the indictment reference was made, inter alia, to s 21 of the Act. This section provided for a series of presumptions in terms of which, if a person was proved to have possessed (s 21(1)(a)), cultivated (s 21(1)(b)), or conveyed (s 21(1)(c)) dagga under defined circumstances, or to have been in control of a vehicle in which dagga had been found (s 21 (1)(d)), that person was presumed, until the contrary was proved, to have been dealing in dagga. In an appeal to a Provincial Division against the conviction and sentence,

Held, that the provisions of s 21(1)(a)(i) had been declared unconstitutional and of no force and effect by the Constitutional Court in 1995. Likewise, s 21(1)(b), (c) and (d) had also been declared unconstitutional in various decisions of the Constitutional Court and the High Court. These provisions infringed the right to be presumed innocent, as set out in s 35(3)(h) of the Constitution of the Republic of South Africa, 1996. (Paragraph [7] at 26b-d.)

Held, further, that the appellant had therefore pleaded guilty to a charge based in part upon statutory provisions which had been declared unconstitutional and of no force and effect. Such a charge was incompetent and a conviction based thereon could not, even on a plea of guilty, be sustained. (Paragraph [11] at 27f-g.)

Held, further, that the question arose whether a conviction of possession of dagga in contravention of s 4(b) of the Act could be substituted for the incompetent conviction of dealing, under the provisions of s 270 of the Criminal Procedure Act 51 of 1977. (Paragraph [12] at 27g-i.)

Held, further, that the elements of the offence of contravening s 4(b) of the Act (possession) were not necessarily included in the offence of contravening s 5(b) (dealing in). (Paragraph [13] at 27i-28b.)

Held, further, that in the present case the appellant had been charged with dealing *simpliciter*; there was no reference in the indictment to possession and the prosecution had deliberately chosen not to charge the appellant in the alternative with possession. It was not now open to the Court to substitute a conviction of

possession for the conviction of dealing. (Paragraph [14] at 28d.) Appeal upheld. Conviction and sentence set aside.

2. S. v. BROPHY AND ANOTHER 2007(2) SACR 56 (WLD)

Awaiting trial period to be taken into account when sentencing accused.

Held, that the trial Court had entirely overlooked the period spent in custody by both accused awaiting trial and sentence, which was a factor that should have been taken into account by the trial Court. (Paragraph [15] at 58i-59a.)
Held, further, that there was authority for the view that time spent in prison awaiting trial was the equivalent of a sentence of twice that length. (Paragraph [16] at 59b-c.)
Held, further, that, although there was no evidence before the Court detailing the living conditions of awaiting-trial prisoners, time spent as an unsentenced prisoner was, at the very least, equivalent to time served without remission. It could not be disputed that the lot of the awaiting-trial prisoner was harsher than that of the sentenced prisoner, in that the former could not participate in whatever programmes the prison might offer. He or she could not earn any of the privileges for which sentenced prisoners might qualify. Judicial notice could also be taken of the gross overcrowding in prisons housing awaiting-trial prisoners. Taking these factors into account, the authority to the effect that time served by an unsentenced prisoner was equal to double the time served by a sentenced one, ought to be followed. (Paragraphs [18]-[19] at 59g-60a, paraphrased.)

3. S. v. M 2007(2) SACR 60 (WLD)

Plea of not guilty not an aggravating factor for sentencing purposes.

Held, that where a plea of guilty is sought to be interpreted as indicating remorse, a Court should be astute to inquire whether or not there was genuine remorse and, if so, whether it signified deep regret for the wrong done or simply the accused's distress at being caught and visited with the consequences of his crime. *In casu*, all the Court had to go on was the plea itself, and this was an insufficiently demonstrable manifestation of genuine remorse; the admission of guilt had been made only after he had been arrested and prosecuted. Accordingly, the guilty plea was not a factor that supported a finding that substantial and compelling circumstances existed. (Paragraphs [74]-[80] at 82h-84e.)
Held, further, that s 35 of the Constitution of the Republic of South Africa, 1996, affirmed that every accused person was presumed innocent until proven guilty, was entitled to enter a plea of not guilty, and was entitled to challenge and adduce evidence. It would be cause for concern if the Courts were to penalise persons who chose to exercise these rights, and advantage those who elected not to do so. An accused's decision to plead not guilty should not be seen as an aggravating factor for sentencing purposes. Conversely, if a person's decision to plead guilty, thus not exercising these rights, was considered a mitigating factor, it would lead to his being advantaged in relation to the person who did choose to exercise his rights. To reduce the sentence of a person who chose not to exercise his rights was to increase the sentence of a person who chose the opposite course, which would surely vitiate the value of these rights. (Paragraphs [81] and [82] at 84e-85a.)

From The Legal Journals

Grant, J.	'The double life of unlawfulness: fact and law' SACJ (2007) 20 p 1.
Bennun, M.E.	'Negotiated pleas: policy and purposes' SACJ (2007) 20 p 17.
Masiloane, D.T.	'An enemy from within: a critical analysis of corruption in the South African Police Service' SACJ (2007) 20 p 46
Carnelly, M.	'Forfeiture of illegal gambling premises owned by a closed corporation: National Director of Public Prosecutions v Mohunram 2006 (1) SACR 554 (SCA)' SACJ (2007) 20 p 60.
Mbodla, N.	'The test for possession of a private firearm by a security officer whilst on duty in South African private security law: a warning voice from Kwazulu-Natal' SACJ (2007) 20 p 68.

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

Contributions from Peers

COMMENTARY ON THE ADJUSTMENT OF FINES ACT, 1991 (ACT 101 OF 1991)

1.1 The Act

The Adjustment of Fines Act, 1991 (Act 101 of 1991) which came into operation on 3 July 1991, stipulates that where any Act provides for the imposition of a fine or in the alternative for the imposition of a period of imprisonment, irrespective of whether the amount of the fine is specified in that Act or not, the maximum amount of the fine that may be imposed is to be calculated according to a determinable ratio, using the period of imprisonment referred to in that Act as basis. The ratio to be used is that for each year's imprisonment that may be imposed the fine could be R20 000.

This is based on the current ratio provided for in section 92 of the Magistrates' Court Act, 1944 (Act 32 of 1944) read with Government Notice R.1411 (GG 19435) of 30

October 1998 which, at present, allows a magistrate's court to impose a fine of not more than R60 000 or imprisonment not exceeding 3 years.

[Simplified: R60 000 to 3 years = R20 000 to 1 year].

The Justice Laws Rationalisation Act, 1996 (Act 18 of 1996) made the Adjustment of Fines Act applicable to the whole country with effect from 1 April 1997.

The Act is best understood by analyzing each subsection in turn.

1.2 Section 1(1) (a)

Section 1(1) (a) reads:

> *"(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division."*

Section 1(1) (a) mentions that the ratio to be utilized is the district court's penalty jurisdiction. The words *"… where the court is not a court of a regional division"*, dictate this and do not mean that the Act is not applicable to regional courts. (Incidentally the ratio in respect of regional courts and district courts is currently the same: R300 000 to 15 years is also in the ratio R20 000 to 1 year but should it change, the district court ratio will always apply).

How is the ratio referred to in section 1(1) (a) applied?

Section 1(1)(a) deals with legislation where a penalty clause merely provides for a fine without stipulating the maximum amount thereof but which mentions what period of imprisonment may be imposed. The ratio referred to is then applied using the period of imprisonment as the available determining factor. For example, section 89(2) of the National Road Traffic Act, 1996 (Act 93 of 1996), provides that the penalty for, amongst other offences, a contravention of sections 65(1), (2) and (5),

shall be punishable by

"*a fine or to imprisonment for a period not exceeding 6 years*".

Using the ratio mentioned, six years then converts 'a fine' to a maximum of R120 000. Section 89(4) of the same Act provides for

"*a fine or to imprisonment for a period not exceeding 9 years;*"

in respect of the offences mentioned in section 61(1).

Using the same ratio this converts to a maximum fine of R180 000.

The jurisdictional limits of lower courts must always be borne in mind with the application of this Act. In regard to the National Road Traffic Act no problem arises as section 89(7) thereof expressly authorizes a magistrate's court to impose such penalties, despite them being beyond its normal jurisdictional limit. Various Acts have such provisions but others do not.

1.3 Section 1(2)

Section 2 reads:

> *"(2) If any law (irrespective of whether such law came into operation prior to or after the commencement of this Act) provides that any person may upon conviction of an offence be sentenced to pay a fine of a prescribed maximum amount or a maximum amount which may be determined by a Minister or, in the alternative, to undergo a prescribed maximum period of imprisonment, or be sentenced to such a fine and such imprisonment, the amount of the maximum fine which may be imposed shall, notwithstanding the said penalty clause, but subject to section 4, be an amount calculated in accordance with the ratio referred to in subsection (1) (a): Provided that this provision shall not apply if the maximum amount of the fine prescribed in the law or determined by the Minister exceeds the maximum amount calculated in accordance with the ratio referred to in subsection (1) (a)."*

Section 1(2) thus provides that where the maximum amount of the fine **is** stipulated in the specific statute, whether the statute was in operation prior 3 July 1991 or has come into operation since, the same ratio is to be used to determine the maximum fine that may be imposed, ignoring (so to speak) the mentioned fine unless the mentioned fine is higher than that calculated by means of the ratio. By way of example, sections 55(2), 55(3) (a), 72(4) and 74(7) of the Criminal procedure Act provide for a fine of

"*R300 or to imprisonment for a period not exceeding three months.*"

Utilizing the ratio, the fine of R300 'converts' to R5000. [3 months being a quarter of a year, so a quarter of R20000 is R5000.]

Another example is taken from one of the penalty clauses in the Arms and Ammunition Act, 1969 (Act 75 of 1969), namely section 39(2)(d) which provides for

"*a fine not exceeding R4 000 or to imprisonment for a period not exceeding one year…*".

The R4 000 is 'ignored' and because the maximum period of imprisonment is 1 year, the maximum fine permissible is R20 000.

In ***Viljoen*** 1999(1) SACR 128 (W) this particular section was under discussion and the court held that the maximum fine for a statutory offence had to be fixed by applying the ratio R20 000 for every year of the maximum period of imprisonment prescribed for that offence.

In terms of the proviso to section 1(2) the ratio is not utilized where the maximum fine for the offence is higher than what would be calculated. For example, the various subsections to section 87 of the Diamonds Act, 1986 (Act 56 of 1986) all provide for fines already higher than the current ratio, i.e. section 87(a) reads:

"*… a fine not exceeding R250 000, or to imprisonment for a period not exceeding 10 years,*"

and as can be seen by calculating it with the ratio, the maximum fine using the Adjustment of Fines Act would only be R200 000. The higher fine is that in the Act itself so the Adjustment of Fines Act does not apply.

1.4 Section 4

Section 4 reads: "***Savings***

This Act shall not apply in respect of a provision providing-

(a) for the imposition of a fine in the case of an offence or omission which continues; or

(b) that the court may impose such fine as it may in its discretion deem fit."

Section 4 specifically provides that the Act does not to apply in the case of a penalty for an offence or omission which continues, for example, section 43(4) of the

Occupational Health and Safety Act, 1993 (Act 85 of 1993) refers to regulations that may prescribe penalties for offences and mentions:

> "*in the case of a continuous offence, not exceeding an additional fine of R200 or additional imprisonment of one day for each day on which the offence continues*".

The Act will also not apply in respect of an offence where the court is given free rein to impose any fine it deems fit (not exceeding the court's jurisdiction). Sections 17(b), (c), (d), (e) and (f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), as examples, contain such wording. Coincidentally section 64 of this latter Act also grants a magistrate's court the 'increased' jurisdiction to impose any such penalty referred to in section 17.

1.5 Section 2

Section 2 reads"

> "***Calculation of fine in case of fraction of year***
>
> *Subject to the provisions of section 281 of the Criminal Procedure Act, 1977 (Act 51 of 1977), in the application of this Act-*
>
> *(a) a reference in any law to a period of imprisonment of less than 31 days shall be construed as a reference to a period of imprisonment of one month;*
>
> *(b) the maximum amount of a fine which may be imposed as an alternative to a maximum period of imprisonment amounting to a fraction of a year, and which does not amount to a multiple of R50, shall be rounded off to an amount equal to the nearest higher multiple of R50."*

For example, 1 month is one twelfth of a year and one twelfth of R20 000 amounts to R1 666, 67, thus rounding off to the next highest multiple of R50 will give an amount of R1 700. Old legislation referring to £ (Pounds) [the currency prior 1961] can be dealt with by using the period of imprisonment referred to and the Adjustment of Fines Act, as opposed to attempting to ascertain the latest exchange rate.

1.6 Section 1(1)(b)

The only remaining section of this Act requiring comment is section 1(1) (b).
It appears to be the one perhaps least understood or applied by the courts, particularly

with the trend of the legislature, obviously aware of this specific provision, drafting penalty clauses which merely refer to

"*a fine or to imprisonment …*"

without containing the additional words

"*or to both such fine and such imprisonment*".

Section 1(1) (b) simply reads:

"*For the purposes of paragraph (a) a fine as well as imprisonment may be imposed.*"

Where a penalty provision merely provides for a fine or to imprisonment and does not contain the words:

"*... or to both such fine and such imprisonment*",

the court's sentence options would normally have been limited to the following:

(i) a fine (not exceeding the court's jurisdiction) or

(ii) a fine with an alternative of imprisonment in terms of section 287(1) of the Criminal Procedure Act, or

(iii) imprisonment (not exceeding the stated period).

[It is not necessary to discuss here the fact that the whole or part of any of these options could be suspended in terms of section 297(1) (b) of the Criminal Procedure Act.]

The court could previously not impose a fine (with or without an alternative period of imprisonment) as well as additional imprisonment even if the latter was wholly suspended.

The following case law was authority for that proposition: ***S*** 1979 (1) SA 250 (R); ***Khotle*** 1981 (3) SA 937 (C); ***Mathabela*** 1986 (4) SA 693 (T) and ***Arends*** 1988 (4) SA 792 (E).

The situation has changed since the 1991 Act because the provisions of section 1(1) (b), by providing for the imposition of a fine as well as imprisonment when section 1(1) (a) of the said Act is used to determine the extent of the maximum fine, **nullifies the effect of these judgments.**

Various authors share this view; see Snyman, *Criminal Law*, Fourth edition; Terblanche, ***Guide to Sentencing in South Africa***, and Kriegler & Kruger, ***Hiemstra, Suid-Afrikaanse Strafproses***, sixth edition.

It was thus unfortunate that the NPD took a different view of the matter in, the as yet unreported decision, ***S v Mkhize and others***, (judgment delivered on 4 March 2004), where the court held that:

> "*… the person imposing sentence must remember that though the maximum term of imprisonment is specified and the maximum fine requires to be calculated in what appears to be a fairly cumbersome method, a fine may be imposed as satisfactorily … or to the same extent …as a term of imprisonment.*"

The view of the NPD comes 13 years after the legislation became effective, despite the above interpretation being utilized around the country, including in KwaZulu-Natal.

The High Court in KZN has however not remained consistent with its principle in the above case because in the matter of ***S v Chutergan***, (an unreported judgment in August 2005) the High Court, on appeal, reduced a fine of R20000 imposed by a magistrate for speeding and driving whilst his breath alcohol limit was in excess of the legal limit, to a fine of R10 000, alternatively 2 years' imprisonment, with an additional sentence of 6 months imprisonment, wholly suspended, being added thereto.

It must be emphasised that the Adjustment of Fines Act is a tool to determine what the maximum fine allowable is and it is not to be used to determine the alternative period of imprisonment when the amount of a fine has been decided upon. In this regard various cases have set guidelines to follow, see ***Juta*** 1988 (4) SA 926 (Tk); ***Wana*** 1990 (1) SA 877 (Tk); ***Smith*** 1990 (2) SACR 363 (C) and ***Hayes*** 2001(1) SACR 546 (SE).

This Act also plays no role whatsoever during the application of section 112(1) (a) of the Criminal Procedure Act, 1977 which limits a court to imposing a fine not greater than R1500.

Basil King
21 May 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

Language policy 'on trial'

The government has to take decisive action about the language policy in South African courts, Justice Minister Brigitte Mabandla said on Tuesday.

Mabandla was responding to ANC MP Abram Moseki, who had asked her what her department was doing about language barriers in courts where witnesses could not express themselves in their own languages.

English and Afrikaans remain the languages of record in the country's courts, while other languages are translated by court interpreters.

"It's a very difficult matter but we need to take decisive action around that," she said.

Mabandla told the National Council of Provinces' select committee on justice and constitutional affairs that the issue around languages would also be discussed at a magistrates' conference in August.

The fact that only two languages continue to be used as languages of record in courts is currently a topic which also forms part of the ANC's policy discussion documents. Transformation of the judicial system will be discussed later in June at the ANC's national policy conference in Gallagher Estate.

The document proposes that people should be able to express themselves in their preferred languages and the government should promote the use of other official languages in courts.

This article was originally published on page 3 of Daily News on June 13, 2007

CENTRE FOR THE STUDY OF AIDS (CSA)
TRAINING OF MAGISTRATES ON HIV AND AIDS, HUMAN RIGHTS AND THE LAW
KWAZULU-NATAL 'PMB CLUSTER ' WORKSHOP

1. I had the opportunity to attend the workshop on the training of magistrates on HIV and Aids Human Rights and the Law held on 25 to 27 May 2007 at the Fern Hill Hotel, Howick.

2. The workshop was well attended, informative and educational. The magistrates participated in interesting and challenging discussions on

various issues. Of particular interest was the view and approach on sentencing an accused who is HIV positive.

3. I found that the information and notes on factors to be taken into consideration when sentencing an accused who is HIV positive useful. May I suggest that all magistrates attend this course due to the fact that HIV Aids is a major problem in this country?

F MOOLA Ms (ADDITIONAL MAGISTRATE: LADYSMITH)
