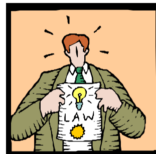
E -M A NT S H I

A KZNJETCOM Newsletter

August 2007 : Issue 19

Welcome to the nineteenth issue of our KwaZulu-Natal Magistrate's 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. A Proclamation was published in Government Gazette No. 30033 on 2 July 2007 in which section 1 to 16 and 36 of the *Administrative Adjudication of Road Traffic Offences Act*, 1998 (Act No. 46 of 1998) was put into operation. The relevant sections deal with the establishment of the Road Traffic Infringement Agency. The objects of the Act are set out in section 2 of the Act as follows:

- "The objects of this Act are, despite the Criminal Procedure Act, 1977 (Act No. 51 of 1977)-
    - (a) to encourage compliance with the national and provincial laws and municipal by-laws relating to road traffic and to promote road traffic safety;
    - (b) to encourage the payment of penalties imposed for infringements and to allow alleged minor infringers to make representations;
    - (c) to establish a procedure for the effective and expeditious adjudication of infringements;
    - (d) to alleviate the burden on the courts of trying offenders for infringements;
    - (e) to penalise drivers and operators who are guilty of infringements or offences through the imposition of demerit points leading to the suspension and cancellation of driving licences, professional driving permits or operator cards;
    - (f) to reward law-abiding behaviour by reducing demerit points where they have been incurred if infringements or offences are not committed over specified periods;
    - (g) to establish an agency to support the law enforcement and judicial authorities and to undertake the administrative adjudication process;

and to strengthen co-operation between the prosecuting and law enforcement authorities by establishing a board to govern the agency."

2. A Draft Refugees Amendment Bill 2007 has been published for public comment in Government Gazette No. 29976 of 7 June 2007 The draft bill seeks to amend the *Refugees Act 1998* (Act No. 130 of 1998). Two of the proposed amendments relate directly to magistrates:

   - The first is an inclusion of a definition of "court" as meaning "a Magistrate's Court".
   - An amendment to section 29 of Act 130 of 1998 is proposed as follows:

     (a) by the substitution for subsection (1) of the following subsection:

     "(1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a **[judge of the High Court of the provincial division]** court in whose area of jurisdiction the person is detained, designated by the **[Judge President**] Chief Magistrate of that **[division]** court for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days."; and

     (b) by the substitution for subsection (2) of the following subsection:

     "(2) The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time, taking into consideration the principle of family unity and the bests interest of the child.".

Written submissions should have reached the Department of Home Affairs by 4 July 2007.

Recent Court Cases

Nederduitse Hervormde Kerk (Gemeente van Ruskoppies Dwaalboom) v Kotsedi
[2007] JOL 20054 (LCC)

Probation officers report mandatory when considering eviction in terms of section 9 of Extension of Security of Tenure Act, Act 62 of 1997.

The respondent had been employed by the applicant until he was dismissed for absenteeism and unruly behaviour. Thereafter the applicant applied for his eviction

from its property in terms of sections 9(2)(a) and (c) of the Extension of Security of Tenure Act 62 of 1997 (the Act). A magistrate granted the eviction but ordered the applicant to provide the respondent with alternative accommodation. The matter came before the high court on automatic review.

Held, that the magistrate had failed to request a probation officer's report, which is mandatory in terms of section 9(3) of the Act. The high court was therefore unable to confirm the eviction order. The magistrate also failed to determine the date on which the respondent was to vacate the land as is required by sub-sections 12(1) (a) and (b). The undated eviction order was set aside.

S v SAIDI
[2007] JOL 20084 (C)

Magistrate to ensure that casual interpreter is sworn-in and has linguistic competence.

The accused was a Burundian who had been charged with raping an eight-year-old girl. The court had used the services of a casual interpreter to interpret from the language of the accused into English and vice versa. The accused denied that he knew the complainant, or that he had had sex with her, and had therefore placed virtually all the elements of the offence in dispute. The evidence that the complainant gave at the trial differed substantially from the statement she had made to the police. The accused was convicted as charged and the regional court submitted the matter to the high court for sentencing in terms of section 52(1) of the Criminal Law Amendment Act 105 of 1997. Before imposing sentence, it is the duty of the high court to satisfy itself that the proceedings had been conducted in accordance with justice.

Held that there was no indication on the record of proceedings that the casual interpreter was sworn in before the commencement of proceedings, nor whether an enquiry was held to establish the interpreter's linguistic competence as is required by section 6(2) of the Magistrate's Court Act 32 of 1944. Such a failure has a potential for grave consequences. The testimony of a witness who gives his evidence through an unsworn interpreter must be regarded as unsworn testimony and as such is inadmissible. In the absence of any other evidence to justify a conviction, the conviction based on the evidence procured through the interpretation of an unsworn interpreter ought to be set aside. The complainant had not been recalled to explain the discrepancy between her statement to the police and her testimony in court and the statement had been rejected by the magistrate. The proceedings had not been held in accordance with justice and the conviction was set aside.

S v BAILEY 2007(2) SACR (1) CPD

Rules of practice for identification parades have no statutory force

S 37(1) (*b*) of the Criminal Procedure Act 51 of 1977 provided the only statutory basis for the holding of identification parades, but it did not prescribe the

requirements for the admissibility of evidence obtained from such parades. Certain rules of practice, however, had evolved to ensure as far as possible that the identification of a suspect at a parade was fair and reliable, and to enhance the evidential cogency of parade identification (Paragraph [33] at 12b-d.). (These rules are set out in *Du Toit et al Commentary on the Criminal Procedure Act* 'Rules of practice for identification parades' 3-11-3-25).

Held, that *in casu* there had been eight persons in the parade and, accordingly, the parade had complied with rule 5 (Paragraph [34] at 12*d*-*e*).

Held, further, as to rule 8, that it could not be found on the evidence on record that the other members of the parade were not sufficiently similar to the appellant. The line-up had constituted a fairly representative, if limited, sample of the younger male population of the townships of the Western Cape. Rule 8 did not prescribe an absolute standard that must be complied with to the letter; rather, it was a guideline in the quest for fairness and reliability. That was precisely the reason for the qualification 'more or less' of the same appearance, etc., in the rule. Rule 8 had accordingly also not been violated (Paragraphs [40] and [42] at 13*h*-*j* and 14*e*-*g*).

Held, further, that it was important to note that these rules had no statutory force and that non-compliance with any specific rule did not *ipso facto* deprive an identification parade of all evidential weight whatsoever. Depending on the circumstances of each case, breaches of the rules might affect either the admissibility of the evidence or its weight, or both admissibility and weight. It was therefore necessary for a court to consider, in each case where evidence regarding such identification was challenged, whether the challenge was directed at the admissibility or the weight of the evidence. That enquiry would determine, in turn, whether a trial-within-a-trial was to be held or not (Paragraphs [36] and [39] at 12*h*-13*b* and 13*f*-*g*).

From The Legal Journals

1. **HURTER, E**

   "Seeking truth or seeking justice: reflections on the changing face of the adversarial process in civil litigation"
   TSAR – 2007(2) p. 240

2. **WATNEY, M**

   "Unreasonable delays in criminal trials and the remedy of a permanent stay of prosecution"
   TSAR – 2007(2) p. 422

3. **VAN LOGGERENBERG, D AND DICKER, L**

   "Claims for interest in action proceedings." De Rebus July 2007 (The article can be accessed at www.derebus.org.za under Practice Notes/Civil

Procedure).

4. **MBODLA, NTUSI**

   "Thoughts on an appeal by the State on the merits (facts) of a criminal case". De Jure – 2007 Vol. 40(1) p. 161

5. **GOVENDER, M**

   "Taking of Evidence abroad"
   De Rebus August 2007 (This article can be accessed on the De Rebus website at www.derebus.org.za)

6. **REDDI , M**

   "Domestic violence and abused women who kill: private defence or private vengeance?" SALJ –2007 Vol. 124(1) p. 22

7. **Mr JUSTICE F D J BRAND**

   "Reflections on wrongfulness in the law of delict"
   SALJ – 2007 Vol. 124 (1) p. 76

   (If anyone would like a copy of any of the above articles you may request it from gvanrooyen@justice.gov.za)

Contributions from Peers

THE PART TO BE PLAYED BY THE COURT WHEN THE ACCUSED IS UNREPRESENTED: STATE v MAGAGULA 2001(2) SACR 123 TPD (MAINTENANCE)

It is always a relief and a bonus when searching case law not only to find a case in point but a veritable discourse on the subject. It's a case worthy of repeating.

The judgment of Stegmann J deals with 7 aspects when dealing with a contravention of Section 31(1) of the Maintenance Act 99 of 1998:

The court on review dealt with inter alia the following (from the head note).

(1) What the elements of the offence of contravening Section 31(1) of Act 99 of 1998 were;
(2) The element of a guilty mind (*mens rea*) in relation to this statutory offence;
(3) The raising of the defence of a lack of means in terms of Section 31(2);
(4) The burden of proof when the defence of a lack of means was raised;
(5) The part to be played by the court when the accused was unrepresented ;
(6) The order relating to the payment of arrears in terms of Section 40;
(7) Whether the present was a case for the conversion of the trial into a maintenance inquiry in terms of Section 41.

Again from the head note-
As to (5): when a court was faced with an unrepresented accused who had been charged with failing to comply with a maintenance order in contravention of Section 31, the court should assist the accused in the following ways:

(i) By establishing whether the accused admitted or denied one or more of the elements of the alleged offence, being the existence of a maintenance order directed to the accused and of which he had knowledge; the failure of the accused to comply with the order in the respect alleged in the charge; whether the accused knew that it was unlawful to fail to comply with a maintenance order in the absence of a lawful excuse;

(ii) By explaining to the accused that the only lawful excuse for failing to comply with a maintenance order was a lack of means, provided that it did not result from his own unwillingness to work or misconduct;

(iii) By explaining further that the law made provision for the conversion

of the trial into a maintenance inquiry if there were grounds for it and that if the accused believed that he had grounds on which to contend that the maintenance order was not valid or that it should be varied in any way, he should inform the court of such ground to enable it to consider whether or not to convert the trial into a maintenance inquiry;

(iv) By asking the accused whether he believed the maintenance order was invalid or that it should be varied, and if so, on what grounds;

(v) If the accused disclosed what might be a proper ground for converting the trial into an inquiry, the court should pursue it so that if it appeared that a conversion would inevitably become necessary, the necessary order for conversion should be made as early as possible and no further time should be wasted on the trial;

(vi) If the accused had no apparent substantial grounds on which the court might consider converting the trial into an inquiry, he should be asked to state in the plea proceedings if he so chooses, whether he is raising the defence of a lack of means;

(vii) It should be explained to the accused that lack of means was not confined to a complete absence of means but that it included inadequate means to comply with the maintenance order in full and that he may be acquitted of the charge if the prosecutor failed to satisfy the court that his means were adequate to pay the maintenance instalments to a greater extent than he did pay them or that his shortage of means was caused by his unwillingness to work or by his misconduct;

(viii) If the accused indicated that he did raise that defence, a plea of not guilty should be entered. The accused should not be asked by the

court to give any particulars to explain why (he) did not pay the maintenance or why he did not pay it in full or how he came to fall into arrears. Since the accused no longer had any burden of proof in this regard questions of this kind were no longer appropriate. The answers could no longer assist him but could only prejudice his position. He should not be asked anything more than was necessary to determine whether he was raising the defence of lack of means. It was then for the prosecutor to prove the rest.

Jeff Gar
Additional Magistrate/Pinetown

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

The Times

prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough.

“Even then, publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage.

“In making that evaluation, it is not only the interests of those who are associated with the publication that need to be brought into account but, more important, the interests of every person having access to information.

“Applying the ordinary principles that come into play when a final interdict is sought, if a risk of that kind is clearly established, and it cannot be prevented from occurring by other means, a ban on publication that is confined in scope and in content and in duration to what is necessary to avoid the risk might be considered.

“Those principles would seem to me to be applicable whenever a court is asked to restrict the exercise of press freedom for the protection of the administration of justice, whether by ban on publication or otherwise.

“They would also seem to me to apply, with appropriate adaptation, whenever the exercise of press freedom is sought to be restricted in protection of another right.

“And where a temporary interdict is sought ... the ordinary rules, applied with those principles in mind, are also capable of ensuring that the freedom of the press is not unduly abridged.

“Where it is alleged, for example, that the publication is defamatory but it has yet to be established that the defamation if unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose.”

Last Thursday, notwithstanding this judgment, a judge in the Transvaal Provincial Division interdicted the Mail & Guardian from running a story on an internal audit investigation into the head of the SABC’s legal services. She is quoted as saying that it was “just and equitable” to interdict the newspaper.

The judgment had very serious financial and ethical ramifications for the Mail & Guardian.

Another debate which raged as a consequence of the judgment was whether what is clearly an incorrect decision by the courts can be laid at the door of an “inexperienced” judge.

From a practitioner’s point of view, the smooth running of the Motion Court and the effective dispensing of justice in respect of urgent applications are most crucial. These are two areas of justice that should not be left to newly appointed or inexperienced judges.

The various judges president should ensure that newly appointed judges are given every

opportunity to hone their skills — and are protected from the tumult of the Motions Court.

They should be given an opportunity through a series of civil and criminal matters, appeals and reviews to learn their skills from more experienced colleagues.

In our law practice, recruits fresh out of university are seldom exposed to the client interface and are seldom called upon to appear in court.

They are given every opportunity to accompany senior and experienced practitioners to meetings and court appearances. They are given the opportunity to make mistakes without those mistakes having huge consequences for a client.

The dispensing of justice should be no different. The person in the street is entitled to have his or her case heard quickly, in open court and by the best possible judge or magistrate.

The error committed in respect of the Mail & Guardian interdict should be laid not at the foot of the judge who made the error, but at the foot of the judge president, who did not sufficiently groom and protect her.

Van den Berg is an attorney in private practice

--oO Article End Oo--

The Times

Close Window

Attorney way out of line

Usually, the attorney who feels aggrieved by a judge's decision challenges the decision in a higher court.

Another avenue, which was open to Van den Berg, would have been a scholarly critical analysis of the judgment — not the judge and the judge- president — in one of South Africa's many law journals. That he should find it acceptable to draw comparisons between the judge's position and "recruits fresh out of university" is intemperate and utterly disrespectful.

Under normal circumstances, fellow attorneys, in the form of the Law Society of South Africa, would haul him in for bringing the profession into disrepute. I know of cases in which members of the profession were sanctioned for far less.

"Experienced" judges have made mistakes, many of them elementary. Even the Supreme Court of Appeal judges have made their share of mistakes. That court admitted as much in the Shaik trial "generally corrupt relationship" saga. But that is hardly reason for a personal attack on the judges themselves.

Perhaps what Van den Berg would prefer is that the judiciary consist of "experienced" judges.

Of course, this term has a far more pregnant meaning than Van den Berg would have us believe — and those of us in the profession know exactly what he means when he refers to an "inexperienced" judge.

— Advocate Vuyani Ngalwana, by e-mail

--oO Article End Oo--

(See Midi Television (Pty) Ltd. V NDPP [2007] SCA 56 for the full judgment)