E - M A N T S H I

A KZNJETCOM Newsletter

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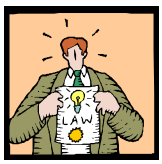
Welcome to the twentieth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we 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. The Correctional Services Amendment Bill, 2007 has been published on 27 July 2007. The Bill can be accessed on the website of the Parliamentary Monitoring Group (www.pmg.org.za .)

   The Bill seeks to amend the Correctional Services Act, 1988 (Act No. 111 of 1998), in order to align it with the White Paper on Correctional Services by addressing the following principles contained in the White Paper:

   - **Correction**: Aiming at addressing the offending behaviour of sentenced persons;
   - **Security**: Aiming at addressing the safety of inmates, officials and members of the public;
   - **Facilities**: Ensuring that the Department has a long-term facilities strategy to ensure conditions consistent with human dignity for offenders;
   - **Care**: Intending to address the well-being needs of inmates including access to social and psychological services;
   - **Development**: Providing for skills development in line with departmental and national human resource needs;
   - **After Care**: Intending to ensure successful re-integration through appropriate interventions directed at both the inmate and relevant societal institutions

   Some of the proposed amendments are the following:

   - The definition of "**prisoner**" is replaced by "**inmates**" which now means:

"any person, whether convicted or not, who is detained in custody in any correctional centre or who is being transferred in custody or is en route from one correctional centre to another".

- An "**offender**" is a convicted person sentenced to incarceration or correctional supervision.
- Section 31(2) of the act is to be substituted by the following:
  "An inmate may not be brought before court whilst in mechanical restraints unless authorized by the court."
- "**imprisonment**" is now defined as "**incarceration**".
- A new Section 73A is inserted after section 73 of the Act:

"**Incarceration framework**

73A. (1) The Minister must, in consultation with the National Council, by notice in the Gazette determine minimum periods for which offenders must be incarcerated before being considered for placement under community corrections, in this Act referred to as 'the incarceration framework'.

(2) The incarceration framework –

(a) must prescribe sufficient periods in custody to indicate the seriousness of the offences;
(b) must apply to all offenders generally;
(c) must provide for consistent application of its provisions;
(d) may provide for different periods in relation to the same offence, depending on the measure of good behaviour or co-operation of an offender during incarceration; and
(e) may provide for any ancillary or incidental administrative matter necessary for the proper implementation or administration of the incarceration framework.

(3) The incarceration framework may not be applied in a manner that would be in conflict with any other law or any direction given or decision made by a court of law."

2. A Bill has been published on 21 August 2007 to amend the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005. The objects of the Bill are stated as follows:

1. Section 1 (3) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (the Act), provides that the remaining provisions of sections 12 and 20 and the Third Schedule of the Black Administration Act, 1927 (Act No. 38 of 1927), will be repealed on 30 September 2007 or on such date as national legislation to further regulate the matters dealt with in these provisions has been implemented, whichever occurs first. These sections deal with the functions of traditional leaders in relation to the administration of justice.

2. Shortly after the enactment of the Repeal of the Black Administration Act

and Amendment of Certain Laws Act, 2005, work began on the preparation of national legislation to substitute sections 12 and 20 of the Black Administration Act, 1927. It soon became evident that the existing legal regime regulating the judicial functions of traditional leaders is so complex and disjointed, that in October 2006 the Minister for Justice and Constitutional Development appointed an interdepartmental task team, consisting of representatives of the Departments of Justice and Constitutional Development, of Land Affairs and of Provincial and Local Government, to develop a policy framework which will culminate in the enactment of legislation for the entire country. This task team has reached an advanced stage in the preparation of a document that is intended to form the basis of a comprehensive consultation process. The enactment of legislation flowing from this policy document before the deadline of 30 September 2007 is, however, not achievable; hence the need for this Bill which proposes that the date of 30 September 2007 be substituted with the date of 30 June 2008.

The Bill can also be accessed at www.pmg.org.za .

3. In terms of section 171 of the National Credit Act, 2005 (Act No. 34 of 2005) the Minister of Trade and Industry has made regulations for matters relating to the functions of the National Consumer Tribunal and rules for the conduct of matters before the Tribunal.

4. The Firearms Control Amendment Act, Act No. 28 of 2006 has been published in Government Gazette No. 30210 of 22 August 2007. The Amendment Act will however only come into operation on a date to be determined by the President by proclamation in the Gazette.

Recent Court Cases

1. S. v. MANZINI 2007(2) SACR 107 (WLD)

Defects in quality of interpretation of evidence affects evaluation of evidence and infringes accused's right to fair trial.

The appellant was convicted and sentenced in a regional magistrates' court of murder and attempted murder. The proceedings were in English and, as the appellant was Zulu-speaking, an interpreter was used. During sentencing the appellant complained that the interpreter had not properly interpreted his evidence. The record was referred to the chief interpreter who submitted a report that identified numerous errors and concluded that the interpreter's performance was alarmingly poor. A report from the Department of Justice also referred to a large number of errors. On resumption, the court was of the opinion that the errors had not contributed to the decision of the case and that the discrepancies would have made

no difference to the manner of presentation of the defence or to the verdict. The court thus proceeded with sentencing. On appeal,
Held, that the role of an interpreter was a vital and crucial element of a fair trial. (At 109*e*.)
Held, that what was interpreted was what appeared in the record. If the interpretation was incorrect, then the record was incorrect. (At 109*f*.)
Held, further, that interpreters were relied on to interpret what was said by witnesses. If the interpretation was incorrect, the presiding officer might not be able to make correct findings on contradictions and credibility, thus affecting the evaluation of the evidence of the witness. Legal representatives would also not be able properly to examine the witnesses and might make incorrect submissions. (At 109*f*-*h*.)
Held, further, that in South Africa the task of interpretation needed considerable skill and training. Some indigenous languages, although from the same family, had different meanings. The interpreter needed to convey to the court the meaning and the context as if they were conveyed by the witness. (At 109*h*-*i*.)
Held, accordingly, that the defects in the quality of the interpretation were material and impacted on the rights of the appellant to a fair trial, as enshrined in s 35 (3) of the Constitution of the Republic of South Africa, 1996. The appellant had consequently not been afforded a fair trial. (At 110*c*-*d*.) Convictions and sentences set aside.

2. CHARLES v. MINISTER OF SAFETY AND SECURITY 2007(2) SACR 137 (WLD)

There was no rule of law that required that a summons or notice to appear in court had to be used to secure an accused's presence in court whenever such methods were as effective as arrest.

The plaintiff claimed damages from the defendant on the basis that he had been wrongfully arrested and held for three days by police officers acting in the course and scope of their employment by the defendant. The plaintiff had been arrested on suspicion of having stolen a firearm. The arresting officers acted on the strength of a report by the owner of the firearm, one B, to the effect that he had been told by a third party that the plaintiff had stolen it. The third party confirmed to one of the arresting officers that the plaintiff had told him that he had stolen B's firearm. Before his appearance in court on the third morning of his detention, the charges were withdrawn against the plaintiff. The defendant contended that the arrest had been lawful and that it complied with s 40(1) (b) of the Criminal Procedure Act 51 of 1977, which authorised a peace officer to arrest, without a warrant, any person in Schedule 1 to the Act. The plaintiff, on the other hand, relying on recent authority, submitted that mere compliance with s 40 did not render an arrest lawful, and that more care and diligence was required of the arresting officer. The Court referred to recent authority which had concluded that where there was no reasonable apprehension that a suspect would abscond, or fail to appear in court if a warrant was first obtained for his or her arrest, or if a notice or summons to appear was issued, it was constitutionally untenable to exercise the power of arrest contained in s 40.

Held that the conclusion reached in this authority was clearly wrong. The true position was that there was no rule of law that required the milder method of bringing a person to court (summons or notice to appear) to be used whenever it would be equally effective. (At *143j*-144*b*.)

Held, that due compliance with the provisions of s 40 afforded a peace officer protection against an action for unlawful arrest, and the Court had no right to impose further conditions on such peace officers. To do so would be to open a Pandora's box where the Courts would be called upon to enquire into what was reasonable in a variety of circumstances, and where peace officers would be required to make value judgments every time they effected an arrest in terms of s 40. The section offered protection to those who legitimately relied upon it; obviously, however, the position would be different if the action of the peace officer was *mala fide* or an abuse of the right conferred on him by the section. (At 144*b*-*e*.)

Held, accordingly, that in the present case the fact that the police had been informed that the plaintiff had admitted to a third party that he had stolen the firearm, and the fact that this third party had confirmed this, constituted sufficient grounds to reasonably suspect the plaintiff of the offence. The police did not have to believe, or be convinced, that he had stolen the firearm; they merely had to 'reasonably suspect' that he had done so. (At 144*e*-*g*.) Action dismissed with costs.

3. S. v. MZATHO AND OTHERS 2007(2) SACR 309 (TPD)

A Regional Court has the right to refer a bail application to a district court if it could not entertain it, if it is in the interests of justice.

The accused appeared in a magistrates' court on a charge of rape. The matter was transferred to a regional court for trial and the accused were remanded in custody. On appearance before that court the accused applied for bail, in response to which the prosecutor applied to have the bail hearing referred to the magistrates' court on the grounds that the regional division concerned had only one regional magistrate and that if he were to hear the bail application he would not be able to preside at the trial. The prosecutor's application was granted and bail was fixed in the magistrates' court. Subsequently, the regional magistrate referred the matter to the High Court on special review, citing authority to the effect that regional courts did not have jurisdiction to refer bail applications to magistrates' courts. The regional magistrate referred to various problems that might arise from the application of this authority, especially in rural regional divisions served by a single regional magistrate.

Held, that the authority referred to by the regional magistrate declared that a magistrates' court had exclusive jurisdiction (subject to the rider in s 50(6) (c) the Criminal Procedure Act 51 of 1977) to hear the bail application of a person charged with a Schedule 6 offence from the first appearance of the accused until he or she appeared in any other court to which the matter might be transferred, whereupon such other court would enjoy jurisdiction to entertain a bail application. (Paragraph [21] at 317*g*-*h*.)

Held, further, that the authority did not state that such other court would have

exclusive jurisdiction. There was no clear provision in Act 51 of 1977 prohibiting a regional court from referring a bail application to a magistrates' court. (The Court proceeded to quote with approval a remark by the authors of a textbook to the effect that it had clearly been the intention of the Legislature to ensure that the right of an accused to be released on bail in terms of s 60 of the Act was not necessarily limited by the unavailability of a regional court.) (Paragraphs [21], [23] at 317*h*-318*h*.)

Held, further, that the provisions of s 39(2) of the Constitution of the Republic of South Africa, 1996, which required Courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights, were paramount and to be respected by the Court. (Paragraph [34] at 321*e-f*.)

Held, further, that s 38 of the Constitution provided for a competent Court to grant 'appropriate relief' to a person alleging an infringement of his or her rights. Allowing a bail hearing to be referred to a magistrates' court under the circumstances which prevailed *in casu*, and which might conceivable arise in many other remote 'one man' regional courts, would constitute such appropriate relief. (Paragraph [34] at 321*f-g*.)

Held, accordingly, that a regional court, confronted with a bail application which it could not entertain, had the power to refer the application to a lower court if such referral would, in the regional magistrate's opinion, be in the interests of justice and protect the fundamental rights of the applicant. (Paragraph [35] at 321*h*.)
Semble: The National Prosecuting Authority should consider the possibility of initiating an appropriate amendment to ss 50 and 60 of the Criminal Procedure Act in order to facilitate such a referral procedure. (Paragraph [35] at 321*i-j*.) Matter referred back to the regional court for trial.

From The Legal Periodicals

Kotze, E and Bezuidenhout, J.

"Linguistic fingerprints" as identifying evidence."

De Rebus September 2007

Heystek, E.

"Can a partner enter into a valid loan agreement with his partnership".

De Rebus September 2007.

(These 2 articles can be accessed on De Rebus website at www.derebus.org.za)

Contributions from Peers

SECTION 44 OF THE GENERAL LAW FURTHER AMENDMENT ACT, ACT 93 OF 1962

In 1962 the legislator enacted a section which most magistrates are unaware of. Even the fact that this legislation was amended by the Justice Laws Rationalization Act, Act 18 of 1996 has not brought it to the general knowledge of magistrates.

Section 44 (1) of Act 93 of 1962 reads as follows:

> 'Notwithstanding anything to the contrary in any other law contained, any person who commits an offence by placing any placard, poster, writing, word, letter, sign, symbol, drawing or other mark on any property, whether movable or immovable, of any other person or of the State, and thereby defaces or disfigures such property, shall be liable on conviction to imprisonment for a period not exceeding six months in lieu of or in addition to any other penalty which may be imposed in respect of such an offence.'

The section seems to apply to offences such as malicious injury to property, *Crimen Iniuria* or a Municipal By-law which falls within the ambit of the section and effectively increases the penal jurisdiction for contraventions of any relevant offences..

The interesting part of the section is however the rest of section 44 which reads as follows:

> '(2) If the court imposing upon a person over the age of eighteen years any penalty in respect of an offence referred to in subsection (1), is satisfied that the property concerned belongs to some particular person or to the State and if the owner of such property does not apply under the provisions of the Criminal Procedure Act 51 of 1977 for compensation, the court shall, in addition to such penalty sentence the convicted person to a fine equal to the cost or estimated cost of restoration of such property less any such cost which may have been paid to such owner or imprisonment for a period not exceeding twelve months in default of payment of the fine and the convicted person shall serve such additional sentence of imprisonment after the expiration of any other sentence of imprisonment imposed upon him in respect of such offence, except where the operation of such other sentence has been suspended in which case he shall commence to serve the additional sentence forthwith.
> (3) Such fine may be recovered in the manner provided in section 288 of the

said Act and any amount recovered shall be paid to the owner of the property defaced or disfigured.
(4) Notwithstanding anything to the contrary in any other law contained, a magistrate's court other than the court of a regional division shall have jurisdiction to impose summarily any sentence in respect of an offence referred to in subsection (1) which the court of a regional division may impose.'

Subsection (2) places an obligation on the court in sentencing an offender over the age of 18 years to impose a fine equal to the cost of restoration of the property in the absence of an application in terms of s 300 of the Criminal Procedure Act 51 of 1977. Section 300 makes provisions totally apart from the sentence, for a person suffering damage or loss of property to apply for compensation for such damage or loss. This subsection creates the interesting possibility that an offender may in fact be sentenced twice – once for the contravention of subsection (1) and once for the non-payment of the cost of restoration of the property. If there is therefore no money for the offender to pay the costs of restoration of the property, even after the application of subsection (3), he may be sentenced to a maximum period of twelve months imprisonment which must be served only after the expiration of the first sentence.

That the legislator wanted to make sure that the cost of restoration is paid, is underlined by the provisions of subsection (3) that refer to s 288 of the same Act. That section allows a court to issue a warrant authorizing the sheriff of the court to attach and sell any movable property of the offender to levy the amount of the fine including the costs and expenses involved.

Where the movable property is inadequate, a superior court may order the sale of immovable property (s 288 (2))

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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

Time to Help Women Up to the Bench

Cape Argus (Cape Town)

OPINION
3 September 2007
Posted to the web 3 September 2007
Cape Town

Some time last year, the Minister of Justice and Constitutional Development, Brigitte Mabandla, whispered into my ear and that of my colleagues who constitute the heads of courts, that funding could be found for a project to train women so as to accelerate their appointment to judicial positions.

The idea was attractive and the leaders of the judiciary constituted a committee, together with other personalities outside the judiciary, to refine the idea and to work on the logistics.

Judge Ivor Schwartzman agreed to involve himself in the project as judge mentor. He had no precedent, he was going to sail uncharted waters.

The question remains, however: why was it necessary to have this special project? Transformation is the manner in which we break from the past and create the egalitarian society which is the vision of the constitution. This specific programme shares this vision as it intends to transform the judiciary to become more representative by training aspirant women judges.

In South Africa, the dispensation of justice has historically been a role filled only by white males. For many years women were legally prohibited from involvement in the legal profession.

Mahatma Gandhi was the first attorney to register a woman as an articled clerk but the Law Society rejected her application to register for her articles, as did the high court. In the famous case of Madeline Wookey, the Appellate Division refused her application to be admitted as an attorney, holding that a woman was not a "person" as required by the legislation.

It was only in 1923 that legislation was enacted that allowed white women into the legal field. It was only in the 1970s that this invitation was extended to black women.

Even after this reform, women were still only allowed into the periphery of the legal field. During the 1950s, the legal fraternity and white society perpetuated the view that white women had to be protected from the harsh realities of the male dominated legal profession. And even the miserly gains made by white women were not extended to black women.

In 1967, 44 years after the admission of the first white woman attorney, Desiree Finca from Umtata was admitted as the first black woman attorney in the country.

Appearing before a magistrate in Vereeniging, Finca struggled to be heard as the magistrate claimed he had never heard of a black female attorney.

It was only after he confirmed her status with another attorney that the magistrate apologised and continued with the proceedings.

Even though women were allowed access to the legal profession, women continued to be subordinated by both African customary law and the Western legal system that emerged during the colonial and apartheid periods.

With the advent of the Constitution, all these discriminatory laws have theoretically been abolished. This however did not undo the effect of these laws which have continually undermined the role that women can play in our society.

The number of women judges in this country is just a small example of how women continue to be treated unfairly, with no regard to their ability or intellectual capacity. In 1999, five years after democracy dawned, only 10 out of 186 judges were women. There has been a steady increase and in 2004 12% of the judiciary was filled by women.

Today only 37 judges are women. Equality and justice require more than the abolition of the wrong; they also require us to act positively to rectify the injustice.

It is a call on us to remember that transformation never ends, that the call for an egalitarian society is a call which will not be satisfied upon the achievement of some statistical equality; it requires much more from us. It requires an ongoing commitment to transformation in substance, not only in form.

This transformation will not be easy as it requires a change not only of numbers but of attitudes and perceptions of women.

It will require dedication and commitment from all of us in the judiciary and particularly from the women who will be moving into the judiciary.

There is much inspiration for those women to find in the lives and works of women who have fought for change and justice in South Africa.

I would like to mention just a few of the women who have played a role in advancing women's role in the legal profession, in fighting the struggle against apartheid and promoting women's rights.

As early as the early 20th century Charlotte Maxeke led and founded a number of organisations dedicated to fighting against passes for women and improving labour conditions.

More recently, Phyllis Naidoo ran an important legal practice in the struggle but she did not begin her career as a lawyer. She was banned and put under house arrest for her involvement in the Natal Indian Congress. During this time she studied and

qualified as an attorney but was not allowed to practice until her banning period ended.

After this she set up her own legal practice, which was particularly concerned with prisoners on death row. She was eventually forced into exile in Lesotho, where she was the chief counsel to the Lesotho government, and later to Zimbabwe, where she worked for MK.

Lillian Masediba Ngoyi led the women's anti-pass march to the Union Buildings in Pretoria, one of the largest demonstrations staged in South African history - on August 9 1956, the day that today we celebrate as Women's Day.

She was an accused in the Treason Trial and was regularly arrested, detained and banned for her actions in the struggle.

One of the great martyrs of the struggle, both men and women, was Victoria Mxenge. She was admitted as an attorney in 1981 and inherited the attorney's practice of her husband, Griffiths, who had been so cruelly butchered by the apartheid forces of darkness.

One would have thought that this loss would have cowed and intimidated her, but no, Victoria became very outspoken, with a heart chilling courage.

I well remember attending with her the unspeakable sights after the massacres of students at Ongoye. There was blood all over, under beds and on walls, but she insisted on looking and recording what she saw. But then the enemy's lust for blood was insatiable. She was waylaid as she arrived home one night and butchered in full view of her children. So ended the life of a great freedom fighter and lawyer.

There were others.

Dorothy Nyembe participated in the establishment of the ANC Women's League and was heavily involved in the ANC and MK throughout her life. In 1969 she was convicted of harbouring MK members and sentenced to 15 years' jail.

When she was released she immediately became involved in NOW, again fighting to improve the lives of those around her.

Florence Mkhize was heavily involved in many political organisations throughout her life, including the ANC, SACP and SACTU. She later led the Release Mandela Campaign in Natal and was among the founding members of the United Democratic Front in 1983.

Dulcie September was a teacher who gave her life in the struggle. She began her opposition to apartheid fighting Bantu Education and was imprisoned for her actions.

She later joined the ANC, where she became one of their chief representatives in Europe. It was in this post that she was killed by a professional hit man.

These women heroines are not present with us today. They are our elders, and paved the way.

It is appropriate that we as South Africa's judiciary should give expression to our admiration for those who have brought about these advances. All these women give us inspiration and a model on how to challenge and change society.

Chief Justice Langa is the president of the Constitutional Court.
