E-MANTSHI

A KZNJETCOM Newsletter

November 2008: Issue 34

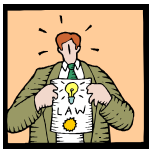
Welcome to the thirty fourth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource: The following comment was received during the month:

"Would you kindly forward the articles as mentioned under the topic "FROM THE LEGAL JOURNALS " Your assistance means a lot to some of us in rural areas where Law Libraries are non – existent and hope that you shall not tire from these requests. You don't know how much your research assists some of us.

Best wishes,

MOHOHLO T.J.
MAG / DITSOBOTLA*"*

Any comments and suggestions can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The *Prohibition or Restriction of Certain Conventional Weapons Act*, 2008 was promulgated on 13 October 2008 in Government Gazette No. 31508. The purpose of the Act is to incorporate the "Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects" of 10 October 1980 and its 3 protocols into South African Law and to provide for appropriate penal sanctions.

   Section 3 of the Act makes provisions for extraterritorial jurisdiction for a South African Court:

   "3.1 (1) If an offence is committed in terms of this Act, a court of the Republic may try any –
   (a) South African citizen contemplated in the South African Citizenship

Act, 1995 (Act No. 88 of 1995);

(b) person who is a permanent resident as contemplated in the Immigration Act, 2002 (Act No. 13 of 2002);

(c) juristic person incorporated or registered in the Republic,

charged with that offence, notwithstanding the fact that the act or omission to which the charge relates was committed outside the Republic.

(2) If an offence is committed in terms of this Act by a person other than a person referred to in subsection (1), a court of the Republic may try that person, notwithstanding the fact that the act or omission to which the charge relates was committed outside the Republic, if that act or omission affects or is intended to affect a public body, business or any other person in the Republic.

(3) Any offence committed outside the Republic as contemplated in subsection (1) or (2) is, for the purposes of determining the jurisdiction of a court to try the offence, deemed to have been committed –

(a) at the place where the accused is ordinarily resident or, in the case of a person contemplated in subsection (2), where the accused was arrested; or

(b) at the principal place of business of the accused."

The maximum sentence that may be imposed for a contravention of the Act is a fine or imprisonment not exceeding 15 years or both such a fine and such imprisonment.

2. The *Judicial Service Commission Amendment Act*, Act 20 of 2008 was published in Government Gazette No. 31540 dated 27 October 2008. The purpose of the Amendment Act is:

"To amend the *Judicial Service Commission Act*, 1994, so as to establish the Judicial Conduct Committee to receive and deal with complaints about judges; to provide for a Code of Judicial Conduct which serves as the prevailing standard of judicial conduct which judges must adhere to; to provide for the establishment and maintenance of a register of judges' registrable interests; to provide for procedures for dealing with complaints about judges; to provide for the establishment of Judicial Conduct Tribunals to inquire into and report on allegations of incapacity, gross incompetence or gross misconduct against judges; and to provide for matters connected therewith."

The Act will come into operation on a date to be fixed by the President by Proclamation in the Gazette.

3. A notice has been published in the Government Gazette No. 31557 of 3 November 2008 with proposed amendments to the *National Road Traffic Regulations*. Any objections, inputs or comments on the proposed amendments can be submitted within four weeks from the date of publication. Some of the interesting proposed amendments relate to definitions of "driving time" "resting period" and "speed detectors or jammers". Other aspects relate

to testing stations and the prohibition on the use of television receivers and visual display units in motor vehicles.

4. The *Jurisdiction of Regional Courts Amendment Act,* 2008, Act 31 of 2008 has been published in Government Gazette No. 31579 dated 5 November 2008. The Act makes provision for civil jurisdiction for Regional Courts and matters currently dealt with in the Divorce Courts. The Act will only come into operation on dates to be fixed by the President by proclamation in the Gazette.

Recent Court Cases

1. FOSI v ROAD ACCIDENT FUND AND ANOTHER 2008(3) SA 560 CPD

In an action for damages for loss of support where a parent was supported by her child, Customary Law must be applied in applicable cases.

In an action for damages in which a parent claims damages for the loss of support received from a child on the basis that the parent was indigent and that the child was under a legal duty to support and maintain the parent, the deciding principle in determining the liability of the defendant is whether the parent can prove that he or she was dependent on the child's contribution for the necessities of life. What constitutes necessities of life will depend on the individual parent's station in life. (Paragraph [13] at 565G.)

In terms of African customary law the child who is financially able to do so is under an obligation to maintain his needy parent. Having regard to s 211(3) of the Constitution of the Republic of South Africa, 1996, which determines that all courts in South Africa must apply customary law where appropriate, subject to the Constitution and legislation that deals in particular with customary law, there is no reason why consideration should not be given to this portion of customary law in the determination of liability of the driver of a motor vehicle towards a parent who has lost a child in a motor vehicle accident caused by the negligent driving thereof by the aforementioned driver. (Paragraph [25], read with para [24], at 571A-B and 570G/h.)

2. THINT (PTY) LTD v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS ZUMA AND OTHERS v NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2008(2) SACR 421 (CC)

If a search warrant is to be issued in terms of section 29 of the National Prosecuting Authority Act 32 of 1998 notice need not be given to the affected parties and all relevant facts must be placed before the judicial officer.

Held, that for certain textual and principled reasons, the default position was that an application in terms of s 29 of the Act could be made without notice to the affected parties. Section 29(4) stated that premises might only be entered under a search warrant 'issued in chambers'; this indicated that, ordinarily, the procedure was one without notice. Similarly, reference in s 29(1) to the Investigating Director entering premises 'without prior notice' was an indication that the legislature had intended the default position to be one where no notice was required. This was in accordance with common sense: if suspects received notice of an impending search it was not unlikely that they would remove or destroy the evidence sought. While the judicial officer could justifiably require notice to be given, in the ordinary course the provision of notice had the potential of frustrating the detection and investigation of serious, complex and organised crimes, especially where evidence was in a form in which it could easily be altered or destroyed. *In casu* this risk had been present; it had been explained in the affidavit supporting the application that the searches needed to take place simultaneously and that their purpose might be defeated if the suspects were alerted to them. In the circumstances there was no compelling reason to require the State to depart from the ordinary procedure of not giving notice, and it could not be said, therefore, that the application had been flawed on this ground. (Paragraphs [96]-[100] at 470f-471g.)

Held, that it was trite that an applicant in an *ex parte* application bore a duty of utmost good faith in placing all the relevant material facts before the court. However, an investigator could not be expected to disclose facts of which he or she was unaware; also, the duty was limited to material facts, and there was no crystal-clear distinction between facts which were material and facts which were not. Accordingly, the applicant would have to make a judgment as to which facts might influence the judicial officer, and which facts, though connected to the application, were not sufficiently relevant to justify inclusion. The test of materiality should not be set at a level that rendered it practically impossible for the State to comply with its duty of disclosure, or which would result in applications being so large that they would swamp ex parte judges. (Paragraph [102] at 471h-472d.)

Held, further, that s 29(5) of the Act required the investigators to place information on oath before the relevant judicial officer, stating that there were reasonable grounds to suspect the commission of an offence, and stating the need, in regard to the investigation thereof, for a search and seizure. The question was whether or not the State was required to establish that no other, less invasive means would produce the documents or items sought. Considering that s 29 was used only to investigate serious crimes that bore heavy penalties of imprisonment, there was a real possibility that a request under the summons procedure under s 28 of the Act would not result in the furnishing of incriminating items. Moreover, to require the State to follow s 28 first and then, only if that approach failed, to seek a warrant under s 29, would destroy any element of surprise and often completely undermine

the investigation. This would not reflect an appropriate balance between the constitutional imperative to prevent crime and the duty to respect, promote, protect and fulfil the rights in the Bill of Rights. The correct question to be asked by the judicial officer was whether it was reasonable in the circumstances for the State to seek a warrant and not to employ other, less invasive means. This, in turn, required the judicial officer to consider whether there was an appreciable risk that the State would not be able to obtain the evidence by a less invasive route. In answering this question the judicial officer must take into account the constitutional rights or interest that might be limited by the search and seizure; and would be entitled to take account also of the facts that those implicated in the offence might well not produce incriminating evidence when called upon to do so, and that, if notice was given of the search, the incriminating materials might be destroyed or concealed. (Paragraphs [124]-[127] at 478h-480c.)

From The Legal Journals

KNOETZE, I.

"Deskundige Getuienis v Die Wetenskap"

De Rebus
November 2008

VAN DER WESTHUIZEN, J

"A few reflections on the role of Courts, Government, The Legal Profession, Universities, the Media and Civil Society in a Constitutional Democracy".

University of Pretoria – Prestige Lecture Series
17 September 2008

MPATI, L.
"Is the Judiciary in Crisis?"

University of Pretoria – Prestige Lecture Series
29 October 2008

KELLY-LOUW, M.

"Introduction to the National Credit Act: a survey of a recent important statute and its regulations".

Juta's Business Law
2007 p147

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

Contributions from The Law School

Unfit to possess firearm – the court process

> "This Court is indeed aware of numerous and increasing instances where magistrates in dealing with the provisions of section 103 of Act 60 of 2000, almost routinely declare accused persons unfit to possess firearms whether or not enquiries were held. Where enquiries are held, such enquiries were extremely superficial and when the accused person merely said he/she did not need a firearm, the unfitness declaration becomes automatic regardless of the facts of the particular case. This approach on the part of the magistrates, not all of them, was incorrect…. It may well be useful … to … bring to their attention this problem including the purpose of Act 60 of 2000 under section 2 thereof; when unfitness to possess a firearm becomes automatic upon conviction; when enquiries ought to be held prior to the declaration of unfitness being ordered; the nature and format of such enquiries, and the difference between the offences listed under section 103(1) and the offences listed under Schedule 2 to the Act. This list is naturally not exhaustive, but may very well, in due course, reduce the burden of review of this particular kind of cases being forwarded for review." (*S v Simelane* [2007] JOL 18062 (W) par 9).

Introduction

The Firearms Control Act 60 of 2000 aims to establish a comprehensive and effective system of firearm control. The control takes various forms: a wide definition of the term "firearm"; the prohibition of certain types of firearms; and a general prohibition on the possession of firearms, unless licensed, with both the firearm and the licensee being specifically and individually identified - coupled with proven competency by the licensee. One further aspect of control is to ensure that certain persons, in a variety of circumstances, who should not be able to possess a firearm, be declared unfit to do so.

Two avenues are created in the Act to have a person declared unfit to possess a firearm: one, provision is made for the Registrar of Firearms, the National Commissioner of the South African Police Service, to make such a declaration in terms of s 102; and two, the court is authorised to do so in terms of s 103. The focus of this note is on s 103 and the aim hereof is firstly, to confirm the differences in approach required by s 103(1) as opposed to s 103(2); secondly, to highlight the

judicial guidelines set by the superior courts in the application of the discretion created in s 103; and thirdly, to give an overview of the available case law in point.

Section 103 of the Firearms Control Act

For expediency s 103(1), s 103(2) and Schedule 2 are quoted:

103(1) Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of-

(a) the unlawful possession of a firearm or ammunition;
(b) any crime or offence involving the unlawful use or handling of a firearm, whether the firearm was used or handled by that person or by another participant in that offence;
(c) an offence regarding the failure to store firearms or ammunition in accordance with the requirements of this Act;
(d) an offence involving the negligent handling or loss of a firearm while the firearm was in his or her possession or under his or her direct control;
(e) an offence involving the handling of a firearm while under the influence of any substance which has an intoxicating or narcotic effect;
(f) any other crime or offence in the commission of which a firearm was used, whether the firearm was used or handled by that person or by another participant in the offence;
(g) any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine;
(h) any other offence under or in terms of this Act in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
(i) any offence involving physical or sexual abuse occurring in a domestic relationship as defined in section 1 of the Domestic Violence Act, 1998 (Act 116 of 1998);
(j) any offence involving the abuse of alcohol or drugs;
(k) any offence involving dealing in drugs;
(l) any offence in terms of the Domestic Violence Act, 1998 (Act 116 of 1998) in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
(m) any offence in terms of the Explosives Act, 1956 (Act 26 of 1956), in respect of which the accused is sentenced to a period of imprisonment without the option of a fine;
(n) any offence involving sabotage, terrorism, public violence, arson, intimidation, rape, kidnapping, or child stealing; or
(o) any conspiracy, incitement or attempt to commit an offence referred to above.

103(2) (a) A court which convicts a person of a crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1), must enquire and determine whether that person is unfit to possess a firearm.

(b) If a court, acting in terms of paragraph (a), determines that a person is unfit to possess a firearm, it must make a declaration to that effect.

Schedule 2 CRIMES AND OFFENCES GIVING RISE TO UNFITNESS ENQUIRY BY COURT

1. High treason
2. Sedition
3. Malicious damage to property
4. Entering any premises with the intent to commit an offence under the common law or a statutory provision
5. Culpable homicide
6. Extortion
7. Any crime or offence-
   (a) in terms of this Act or the previous Act, in respect of which an accused was not sentenced to a period of imprisonment without the option of a fine;
   (b) in terms of the Domestic Violence Act, 1998 (Act 116 of 1998), in respect of which an accused was not sentenced to a period of imprisonment without the option of a fine;
   (c) involving violence, sexual abuse or dishonesty, in respect of which an accused was not sentenced to a period of imprisonment without the option of a fine; or
   (d) in terms of the Explosives Act, 1956 (Act 26 of 1956), in respect of which an accused was not sentenced to a period of imprisonment without the option of a fine.
8. Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule

Difference between s 103(1) and s 103(2)

In *S v Lukwe* 2005 2 SACR 578 (W) 580F-I the high court considered the difference in approach a court should take when dealing with an offender who committed a crime listed in s 103(1), as opposed to a crime listed in Schedule 2 as read with s 103(2), vis-à-vis the determination of the (un)fitness of the offender to possess a firearm. This interpretation was applied with approval in *S v Maake* 2007 1 SACR 403 (T) par 18; *S v Makolane* 2006 1 SACR 589 (T) 592D-593E; and *S v Simelane* [2007] JOL 18062 (W) par 9.

Starting point

Where an offender has been convicted of a crime listed in s 103(1), she is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The intention of the section, according to Borchers J and Saldulker J, is that unfitness should automatically follow on conviction of the most serious offences (*Lukwe* 580H-I). The court however recognised that s 103(1) is wide enough to encompass offences that are not very serious. In these cases the court can determine that the accused is fit to possess a firearm despite the fact that he has been convicted on an offence falling within the provisions of s 103(1) (*Lukwe* 580I-J). See for example S *v Tshabalala* 2006 1 SACR 120 (W)). On the other hand, with the conviction on an offence listed in Schedule 2 as read with s 103(2), there is no such automatic declaration of unfitness to possess a firearm. The court is obliged in peremptory terms to hold an enquiry into the fitness of the offender to possess a

firearm before making a decision in this regard (*Lukwe* 581A-B). It follows that with an s 103(1) enquiry, the court has to determine that the offender is *fit* to possess a firearm, whilst the enquiry in terms of s 103(2) is to determine whether the offender is *unfit* to possess a firearm (my emphasis).

Duty to hold and enquiry

Although the legislature does not specifically require an enquiry into the fitness of the offender in relation to offences listed in s 103(1), the court in *Lukwe* determined that there is a duty on the court to draw the offender's attention to the provisions of s 103(1) and to invite him to place facts before the court which might enable the court to find that he is indeed fit to possess a firearm. This is especially important where the offender is unrepresented as he, as a layman, cannot be expected to know of s 103(1) (*Lukwe* 581A). It is insufficient to accept that, as the offender did not place reasons before the court regarding his fitness to possess a firearm, no enquiry should be held (*S v Lote* [2006] JOL 17753 (E) 2). In *Maake* (par 20) it was noted that as the automatic deprivation of the right to possess a firearm may have serious consequences for an offender if s 103(1) is simply ignored, there is a duty on the court to ask pertinent questions to elicit information regarding the conduct and circumstances of the offender and the circumstances surrounding the commission of the offence to enable the court to make a determination regarding his fitness. The same principles are applicable with an s 103(2) enquiry. An enquiry after all implies the seeking of information (*S v Smith* [2006] JOL 18072 (W) par 7). Once the information is before the court, it has to make a determination, adjudication, as required by the subsection: is she fit to possess a firearm (s 103(1)) or unfit to possess a firearm (s 103(2)) (*Lukwe* 581C-D). The enquiry requires proper judicial consideration and should be reflected in the reasons given by the court for its decision (*Lote* 2).

Ordinarily, in a s 103(2) enquiry, if there is nothing to indicate the offender's unfitness to possess a firearm, he should not be declared unfit to do so (*Lukwe* 58B-C; *Simelane* 9. See also *Lote* 1; *S v Mandlophe* [2006] JOL 18461 (T) 4; and *S v Tshabalala* [2007] JOL 19674 (W) 5). The factors that the court could consider would depend on the circumstances of each case. Specific factors are, *inter alia,* whether the commission of the offence included the use of a firearm, violence or aggression; whether it was a first offence or that the offence bears little or no relation to the use or abuse of firearms (*Smith* par 7). The enquiry and the decision in this regard must be made during the sentencing phase, as the court is *functus officio* after sentencing the offender *(S v Zitha* 2005 JDR 0310 (T) 5).

Where the court did not hold an enquiry the finding would be "irregular, unjust and unprocedural" (*Simelane* 9); the decision would be set aside and the matter remitted for such an enquiry. This is the case for both an s 103(1) and s 103(2) enquiry. See in general *S v Boesak* [2005] JOL 16116 (E) 1; *Lukwe* 581f-g; *Maake* par 22; *Masakazi v S* [2007] JOL 20613 (E) 2; *S v Mbekwa* [2006] JOL 18826 (E) 1; *S v Mgaga* [2007] JOL 19152 (E) 2; *S v Sifunda* [2007] JOL 20386 (E) par 3; *S v Sikisa* [2006] JOL 18238 (E) 2; and *Smith* par 12. In *S v Vena* [2006] JOL 16518 (E) par 6 the court erroneously did not refer the matter back for an enquiry, but merely deleted the part of the sentence dealing with the declaration of unfitness.

Where the conviction and sentence is set aside on appeal or review, it follows that any declaration about the fitness of the offender to possess a firearm is also set aside (*S v Sidlova* [2005] JOL 15096 (Tk) 8 and *S v Hlatswayo* [2005] JOL 15679 (T)).

Listed crimes

In instances where the crimes in s 103(1) and s 103(2) overlap, s 103(1) would be applicable in light of the wording of s 103(2)(a). Without going through each of the subsections of s 103 quoted above, the following general comments should be noted: the offences listed in s 103(1) are generally offences in terms of the arms legislation, offences where firearms are used, where violence potentially plays a role or where the offender is sentence to imprisonment without the option of a fine. Schedule 2 offences (s 103(2)) generally refer to other serious offences or where the offender had the option of a fine.

Where an offender has been sentence to imprisonment without the option of a fine (s 103(1) (g); (h); (l) and (m)), two issues are important: the crime committed as well as the sentence imposed. The fact that the imprisonment is suspended does not alter the application of s 103. For the application of s 103(1)(g), see, *inter alia, S v Van Aardt* 2007 JDR 1043 (E) (murder: 12 years imprisonment); *Makeleni v S* [2006] JOL 16526 (E (murder: 7 years imprisonment); *Kofi v S* [2007] JOL 20609 (E) (robbery with aggravated circumstances: 15 years imprisonment); *Maake* (malicious damage to property and assault with the intention to grievous bodily harm: 3 years imprisonment); *Mbekwa* (assault with the intention to do grievous bodily harm: 18 months imprisonment); *Mgaga* (theft: 12 months imprisonment); *Sikisa* (attempted theft: 3 months' imprisonment); *Boesak* (theft: 1 year imprisonment); *Masakazi* (theft: 6 months' imprisonment); and *Lukwe* (theft: 12 months imprisonment conditionally suspended). In *S v Ama* 2006 JDR 1037 (T) par 7 the offender was convicted of robbery in the court *a quo.* This was reduced to assault on appeal with the offender being cautioning and discharged, making an order to declare the offender unfit to possess a firearm no longer a possibility under s 103(1).

Similarly, for Schedule 2 offences listed in item 7, see *Lote* (theft: suspended sentence – no detail in the reported judgment); *Mandlophe* (theft: R1200 or six months imprisonment) and *S v Ndlovu* [2008] JOL 21828 (W) (theft: R1500 or 3 months imprisonment). In this matter the court found that the offender was fit to possess a firearm, although the reference was merely to s 103 and not subsection 103(2) (a). In *S v Khoza* [2007] JOL 19192 (T) (assault with the intention to do grievous bodily harm:R3000 or 6 months imprisonment, wholly suspended) the court, based on an unreported case of *S v Nsimbini*, erroneously found that the accused must have been sentenced to a term of imprisonment only for s 103(2) to have application. This decision was rightly criticised in *Mandlophe* as failing to take into consideration the differences between s 103(1) and s 103(2) (p 5).

As far as s 103(1) (j) and (k) is concerned, an offence involving the abuse of alcohol or drugs; and dealing in drugs respectively, it was found that it was not the intention of the legislature that the mere possession or use of drugs would be sufficient to

trigger the automatic declaration of unfitness. There must be evidence of *abuse* of the substance or *dealing* in drugs (my emphasis) (*S v Humphries* [2005] JOL 14903 (W) par 9 and *S v Kolobe* 2006 1 SACR 118 (O) 119C-D).

Other cases that can be noted are *Makeleni* relating to s 103(1) (f) (attempted murder with firearm); *Nkadimeng v S* [2007] JOL 20621 (T) par 1 relating to s 103(1) (n) (rape) and s 103(1) (o) *S v Sikisa* (attempted theft).

Lastly, it should be noted that s 103 is not relevant in all criminal matters. Offenders in less serious offences, not covered in either s 103(1) of s 103(2), are not subject to an enquiry in terms of s 103. *Makolane* (593B, followed in *Mandlophe* 4) noted as an example those offenders that are sentenced to a fine with no imprisonment. *In casu* the accused paid an admission of guilt fine in terms of s 57A of the Criminal Procedure Act 51 of 1977. In *S v Ngwenya* [2006] JOL 17579 (T) par 5 the court noted that negligent driving and driving without a licence in terms of the National Road Traffic Act 93 of 1996 do not activate s 103. In *Mandlophe* (p 5) it was argued *obiter,* with reference to the unreported judgment in *S v Nsimbini,* that perjury as a crime against the administration of justice should not invoke s 103(2) in light of the purpose of the Firearms Control Act even though it falls within the ambit of s 103(2)(c). In *Simelane* the court referred to another unreported case of *S v Klaas Deck* where the offender was found guilty of theft and fined R2000 or 6 months imprisonment suspended for 5 years. The judge erroneously held that neither s 103(1) nor s 103(2) were applicable even though s 103(2) was clearly pertinent (p 11).

Notification of Registrar after declaration of unfitness

If a court, acting in terms of s 103(2)(a), determines that a person is unfit to possess a firearm, it must make a declaration to that effect (s 103(2)(b)) and must notify the Registrar in writing of that conviction, determination or declaration (s 103(2)(3)). This notice must be accompanied by a court order for the immediate search for and seizure of all competency certificates, licences, authorisations and permits issued to the relevant person in terms of the Act, and all firearms and ammunition in his possession (s 103(4)). This is not required where the determination that a person is not unfit to possess a firearm has been made in terms of s 103(1) (s 103(4)). A firearm and any other item seized in terms of this section must be kept by the South African Police Service or, if appropriate, by the Military Police, until an appeal against the conviction or sentence has been finalised or the time for an appeal has elapsed (s 103(5)). Despite the noting of an appeal against the decision of a court or of the Registrar, the status of unfitness remains in effect pending the finalisation of the appeal (s 104(1) (b)).

Effect of declaration of unfitness

Once a person is declared unfit to possess a firearm in terms of s 103 all competency certificates, licences, authorisations and permits issued in terms of the Firearms Control Act cease to be valid from the date of the conviction or the declaration as the case may be (s 104(1)(a)). As an enquiry is required in terms of s 103, it follows that it would be on the date of the declaration of unfitness. Once so declared, all competency firearms, ammunition, certificates, licences, authorisations

and permits must be surrendered to the nearest police station within 24 hours (s 104(2)). Provision is made for the disposal of surrendered firearms and ammunition through a dealer in terms of the Act, alternatively forfeiture and destruction by the State (s 104(3)). If the decision leading to the status of unfitness to possess a firearm of any person is set aside, any seized or surrendered firearm, ammunition, licence, permit or authorisation belonging to any such person, must be returned (s 104(2)).

The declaration of unfitness ceases after a period of five years calculated from the date of the decision leading to the status of unfitness to possess a firearm. The person may then apply for a new licence in accordance with the provisions of the Act (s 104(6)).

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If you have a contribution which may be of interest to other Magistrates you should 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 Following letter was published in the De Rebus of November 2008

"Powers of the magistrate's court in bail proceedings

'The magistrate's court is a creature of statute'. I have been hearing this statement since my university days, and what this simply means is that the magistrate's court has no powers beyond those provided for by the enabling Act.

Yet I have seen and heard of so many decisions taken by magistrates that were clearly beyond their jurisdiction.

One such example relates to bail proceedings in terms of s 50(6) (d) of the Criminal Procedure Act 51 of 1977 (the CPA). This provision provides that the court may postpone any bail proceedings or bail application to any date or court, *for a period not exceeding seven days at a time*, on the terms that the court may deem proper, and which are not inconsistent with any provisions of the Act.

Accordingly, any postponement of a bail hearing must be within the period of seven days, and any postponement beyond that period is beyond the powers of the magistrate's court and is therefore unlawful.

However, the practice has developed in the Bloemfontein magistrate's court to postpone opposed bail applications by more than a month, and this appears to be a normal practice. The explanation given for this is now usually, that the court rolls are congested and that there just is not sufficient time available to deal with formal bail applications within the seven days provided, with the obvious result that the accused remains in custody for yet another month while waiting for further investigations by the police.

As far as I know, the CPA does not provide for an exception to the provisions of s 50(6) (d). Accordingly, all bail proceedings may be postponed only for a maximum period of seven days. Perhaps there is another provision in the CPA or any other Act that provides for an exception to s 50(6) (d) of the CPA.

It may be that my criminal procedure knowledge is still lacking, as I deal with more civil matters than with criminal law matters. Maybe my seniors in practice may be able to enlighten me in this regard, and I look forward to their responses.

Andile Mloazana,
Candidate attorney, Bloemfontein"

1. The *Institute of Security Studies* has published a monograph entitled "Child Justice in South-Africa". It is authored by Ann Skelton and Boyane Tshehla. The monograph deals with issues of Child Justice and also compares current law with the new Child Justice Bill. It was published in September 2008 and some of its topics are the following:

   CHAPTER 2

   General developments in child justice
   Restorative justice

   CHAPTER 3

   International instruments pertaining to child justice
   The United Nations Convention on the Rights of the Child
   The United Nations Guidelines for the Prevention of Juvenile Delinquency
   The United Nations Standard Minimum Rules for the Administration of Juvenile Justice

   CHAPTER 4

   Overview of South African developments

   CHAPTER 5

   Probation services

The history of probation services
The development of probation services in South Africa
Policy and law reform regarding probation services
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CHAPTER 6

Current law and the child justice bill compared
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(Anyone who wants an electronic copy of the monograph can request it from gvanrooyen@justice.gov.za .)

2. The *S.A. Crime Quarterly* which is published by the Institute for Security Studies contains the following articles in the latest edition dated 1 September 2008:

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SA Crime Quarterly
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A long and winding road
The Child Justice Bill and civil society advocacy
Ann Skelton and Jacqui Gallinetti

Agents of restorative Justice?
Probation officers in the child justice system
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The struggle continues
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Giving substance to political will
The role of the SAPS in destroying firearms
Ben Coetzee and Noel Stott

Addressing psychologically motivated crimes
The work of the SAPS Investigative Psychology Unit
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(An electronic copy of the Crime Quarterly can also be obtained from gvanrooyen@justice.gov.za .)

A Last Thought

"A separate, but related, basis for independence is the need to uphold public confidence in the administration of justice. Confidence in our system of justice requires a healthy perception of judicial independence to be maintained amongst the citizenry. Without the perception of independence, the judiciary is unable to 'claim any legitimacy or command the respect and acceptance that are essential to it'."

Major J in *Ell v Alberta* [2003] 1 SCR 857 at para 2 - 23