E-MANTSHI

A KZNJETCOM Newsletter

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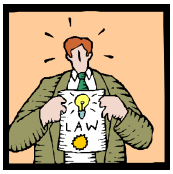
Welcome to the seventh issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope 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

A *Draft Civil Union Bill* has been published which has the following aim:

To provide for the solemnization of civil partnerships, the legal consequences of civil partnerships; the legal recognition of domestic partnerships; the enforcement of the legal consequences of domestic partnerships; and to provide for matters incidental thereto

The Bill can be accessed at www.pmg.org.za/bills/tabledbills.htm. (Although the bill has been approved by cabinet it has not yet been certified by the State Law advisors.)

Recent Court Cases

1. **NDLOVU v SANTAM LTD. 2006(2) SA 239 (SCA)**

The test for determining the finality of an order made by a magistrate is the same as the test for determining the finality of a judgment or order made by a Judge in the High Court. An order by a magistrate dismissing a special plea as to jurisdiction is an order having the effect of a final judgment, as contemplated in s 83(b) of the Magistrates' Courts Act 32 of 1944, and thus appealable. (Paragraphs [8], [9] and [10] at 245B-G, paraphrased.)

Where a plaintiff suing on a contract does not accept the defendant's repudiation of the contract, the repudiation is not a material fact which the plaintiff has to prove in order to establish his cause of action. The repudiation by the insurer is not material; it does not form an integral part of the insured's cause of action; it is not one of the *facta probanda* on which the insured has to rely. The fact that the repudiation might have taken place outside the magisterial district does not prevent the cause of action arising wholly in the district where the contract was concluded. (Paragraphs [1], [14] and [17] at 242G-I, 248A/B-D and 249D-E.)

1. **STANDARD BANK OF SOUTH AFRICA LTD v SAUNDERSON AND OTHERS 2006(2) SA 264 (SCA)**

The appellant bank in separate actions issued summonses against the respondents out of a Provincial Division of the High Court. In them the appellant asked for judgment against each of the respondents for the amount of their respective debts and, in accordance with the ordinary procedure, for ancillary orders declaring the mortgaged properties executable. The defendants failed to defend the actions and the appellant approached the Registrar for default judgments in terms of Rule 31(5). On order of the Deputy Judge President the matters were, however, disposed of in open Court rather than by the Registrar. The Court in question (the Court *a quo*) granted judgment by default in each case, but declined to order the mortgaged properties to be executable. This was because the Court was of the opinion that *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) had held that s 26 was compromised whenever it was sought to execute against residential property – irrespective of the nature of the property or the circumstances of the owner – and that in all such cases it had to be shown that execution was permissible under s 26(3) of the Constitution. The Court reasoned that, since the appellant's summonses lacked averments to the effect that the alleged facts were sufficient to justify an order in terms of s 26(3), they could not sustain an order of execution. In an appeal to the Supreme Court of Appeal,

Held, that the way the Court *a quo* had interpreted the decision in *Jaftha* was misplaced. What was in issue in *Jaftha* was not s 26(3) of the Constitution, but rather s 26(1), and the impact of that right on execution against residential property. (Section 26(3) was relevant in the event of eviction consequent upon a sale in execution, and was not in issue in *Jaftha*.) Nor did the Constitutional Court decide that s 26 (1) was compromised in every case where execution was levied against residential property. It had decided only that a writ of execution that would deprive a person of 'adequate' housing would compromise his or her s 26(1) rights and would therefore need to be justified as contemplated by s 36(1). The premise on which the Court below had proceeded was thus incorrect. (Paragraph [15] at 273F-H.)

Held, further, that s 26(1) did not confer a right of access to housing *per se* but only a right of access to 'adequate' housing, and that this concept was of necessity relative. *Jaftha* did not, however, decide that the ownership of all residential property was protected by s 26(1), nor could it have done so, bearing in mind that what constituted 'adequate housing' was necessarily a fact-bound enquiry. (Paragraphs [16]-[17] at 273I-274D.)
Held, further, that the situation in the present case was thus radically different from

that in Jaftha: there, the sale in execution had deprived the debtor of title to the home because she had been unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome. The judgment creditor in *Jaftha* had not been a mortgagee with rights over the property that derived from agreement with the owner. By contrast, the property owners in the present case had willingly bonded their property to the bank to obtain capital Their debt was not extraneous, but fused into the title to the property. The effect of s 26(1) on such cases was not considered in *Jaftha*. (Paragraph [18] at 274D-F.)

Held, further, that even accepting that execution against mortgaged property could conflict with s 26(1), such cases were likely to be rare. It was particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property would be denied altogether, nor could the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended. (Paragraph [19] at 274G/H-275A.)

Held, further that the fact that an execution order was sought in respect of residential property was not sufficient to constitute an infringement of s 26(1), and that since such an infringement had not in case either been alleged or shown, the appellant was not called upon to justify the orders sought. The orders ought accordingly to have been granted. (Paragraphs [20] and [21] at 275E/F-G.)

3. **S v BERGH 2006(2) SACR 225 NPD**

The appellant had been convicted in a magistrates' court of assault with intent to do grievous bodily harm and sentenced to two years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977. On appeal against both conviction and sentence,

Held, that, while it would have been desirable for the magistrate in the court *a quo* to have set out the reasons for her rejection of the appellant's evidence as 'highly improbable' and 'of very poor quality', and for her conclusion that his explanations were 'very vague', the record clearly supported these findings. [The Court proceeded to review aspects of the evidence in detail.] The magistrate was alive to the fact that she was dealing with the evidence of a single witness, and approached it with caution. Such slight inconsistencies as were to be found in the complainant's testimony were to be expected, given her confused and distraught emotional state following the assault. The magistrate's finding that the complainant was an honest and reliable witness could not be faulted. (At 228d-e.)

Held, further, as to the contention that the appellant should have been convicted of common assault only, that this was a factual question to be decided by taking into account, *inter alia*, the nature of the weapon or instrument used, the degree of force employed, the areas of the body at which the assault was directed, and the injuries actually sustained. *In casu*, the appellant had used his hands, rather than a weapon, but the nature and extent of the bruises and lacerations sustained by the complainant indicated the use of considerable force by the appellant. The assault had been directed at the complainant's entire body, and it appeared that the assault had been of prolonged duration. In the circumstances, it was apparent that the appellant had had the requisite intent to cause grievous bodily harm to the complainant. (At 231g-232c.)

Held, further, that the magistrate had correctly noted that cases of domestic violence were both prevalent and on the increase. There was a duty on courts to impose sentences that would deter future offenders. The courts had a duty in such cases to protect women, a duty which had not always been given the priority it deserved. It was trite, however, that the punishment must fit not only the crime, but also the criminal. In the present case the magistrate had erred in overemphasising the seriousness of the crime and failing to pay sufficient regard to the appellant's personal circumstances. Despite receiving a positive correctional supervision report on the appellant, the magistrate had given no reasons for rejecting this form of punishment. The appellant was a 46-year old first offender and a teacher of 25 years' standing who would probably lose his employment if directly imprisoned. He and the complainant had been living apart at the time of the trial and it was unlikely that any further assaults would take place. The appellant fell into the category of offenders who, though deserving of punishment, did not need to be removed from society. (At 42d-45e.)
Held, accordingly, that the conviction was to be confirmed. Sentence set aside and appellant sentenced to a fine of R10 000 to be paid in instalments, 12 months' correctional supervision, and one year's imprisonment conditionally suspended for three years. (At 235f-i.)

2. **S v MSELEKU AND OTHERS 2006(2) SA CR 236**

The three appellants were convicted in the High Court on three counts of murder. The first and third appellants received sentences of 18 years' imprisonment on each count (ordered to run concurrently), while the second appellant was sentenced to 12 years' imprisonment on each count (likewise running concurrently). After imposing sentence the trial Judge *mero motu* raised the possibility of an appeal against conviction on the basis that another Court might conclude that the extent to which he had become involved in the trial was irregular and had resulted in an unfair trial. Leave to appeal was granted on this ground (relating to the Judge's participation in the trial), and on two grounds relating to the merits (as to the credibility of one of the witnesses, and whether, based on the evidence, another Court would arrive at a different conclusion).
Held, that both ss 167 and 186 of the Criminal Procedure Act 51 of 1977 provided for judicial questioning. In addition, principles had been formulated to the effect that the Court could intervene at any time to elucidate a point. The purpose of such examination should be to clarify any points left unclear after examination of the witness by the parties. The Court should not cross-examine a witness, and its impartiality should be evident from the nature and scope of its questions. However, in criminal proceedings, if necessary in order for justice to be done, the Court would come to the aid of an accused who was represented by inexperienced counsel. [The Court proceeded to review an extensive line of authority on the point.] (Paragraphs [8]-[25] at 241d-246h.)

From The Legal Periodicals

Pretorius D.M.
"The *Functus officio* doctrine and statutory authorisation to vary or revoke administrative acts or decisions" THRHR – 2006 v.69(3) p396.

Le Roux, J.
"Recognising human rights in a young demorcracy: a criminal law perspective" – THRHR – 2006, v.69(3) p454.

Visser, P.J.
"Gedagtes oor feitelike konsaliteit in die deliktereg" – TSAR – 2006, no. 3, p581.

Neetling, J en Potgieter, J.M.
"Die regsoortuigings van die gemeenskap as selfstandige onregmatigheidskriterium" TSAR – 2006, NO. 3, P609.

Brickhill, J
The intervention of *amici curiae* in criminal matters – S v Zuma and S. v Basson SALJ – v 123(3), P391
.
Any requests for copies of the abovementioned articles can be forwarded to gvanrooyen@justice.gov.za

Contributions from Peers

ADMISSION OF GUILT FINES

versus

OBSTACLES CREATED BY SECTION 35(4) OF ACT 93 OF 1996.

Strategies have been adopted at many Courts whereby admission of guilt fines are being fixed and accepted in respect of offences relating to drunken driving (in all its various forms of appearance), reckless or negligent driving and some other offences involving the possible suspension or cancellation of drivers licences.

I am convinced that admission of guilt fines may not at all be fixed in respect of any crime which requires a court enquiry to be held into the possible suspension of any form of licence in terms of Section 35 of the Road Traffic Act, Act 93 of 1996.

Section 35(4) of Act 93/96 reads: "A court convicting any person of an offence referred to in subsection (1), shall, before imposing sentence, bring the provisions of subsection (1) or (2), as the case may be, and of subsection (3) to the notice of such person". Please see the footnote below for contents of subsections (1),(2) and (3).

The court cannot possibly abide by the imperative instructions legislated in Section 35(4) in the event of admission of guilt being fixed for any of the associated transgressions, because the accused cannot be informed of the possible suspension (or not) of his/her licence BY THE COURT BEFORE IMPOSING SENTENCE.

At the stage when admission of guilt had been paid, the accused is already presumed to have been convicted and sentenced (See Section 57(6) Act 51/77). It is then too late to conduct an enquiry!

There is only one remedy, so to speak, and that is to allow the matter to follow its ordinary course (without admission of guilt being fixed). The easy alternative would of course be for the legislator to intervene by scrapping the mentioned cumbersome provision in Section 35(4) and replace it with something like: "Whenever a person is charged with any of the offences referred to in subsection (1), that person shall be informed of the provisions of subsection (1) or (2), as the case may be, and of subsection (3)"

The current practice in some courts to have these enquiries referred to a court AFTER admission of guilt was paid, is just not on - it cannot at all be endorsed and should be discouraged vehemently with immediate effect.

<u>Footnote</u>:

For sake of convenience the relevant portions of subsections (1), (2) and (3) are repeated hereunder: (their contents are however of less importance for purposes of this discussion)

35. ***(1) Subject to sub-section (3), every driving licence or every licence and permit of any person convicted of an offence referred to in -***
(a) section 61 (1) (a), (b) or (c), in the case of the death of or serious injury to a person;
(b) section 63 (1), if the court finds that the offence was committed by driving recklessly;
(c) section 65 (1), (2) or (5),
where such person is the holder of a driving licence or a licence and permit, shall be suspended in the case of-
(i) a first offence, for a period of at least six months;
(ii) a second offence, for a period of at least five years; or
(iii) a third or subsequent offence, for a period of at least ten years, calculated from the date of sentence.

(2) Subject to subsection (3), any person who is not the holder of a driving licence or of a licence and permit, shall, on conviction of an offence referred to in subsection (1), be disqualified for the periods mentioned in paragraphs (i) to (iii), inclusive, of subsection (1) calculated from the date of sentence, from obtaining a learner's or driving licence or a licence and permit.

(3) If a court convicting any person of an offence referred to in subsection (1), is satisfied that circumstances exit which do not justify the suspension or disqualifications referred to in subsection (1) or (2), respectively, the court may, notwithstanding the provisions of those subsections, order that the suspension or disqualification shall not take effect, or shall be for such shorter period as the court may deem fit.

Louis Radyn
Senior Magistrate
Area Head: Judiciary (Emlazi Area)

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 0313681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

The Record of the Accused (Prepared by JCW van Rooyen SC)

[1] Section 271(4) of the Criminal Procedure Act 51 of 1977 provides that the court shall take previous convictions into account when imposing any sentence in respect of which the accused has been convicted. When this subsection was placed on the Statute Book by Parliament, Parliament was sovereign in its legislative power and any argument that consideration of previous sentences could imply that a person could be punished twice for his or her deeds as a result of such consideration, in spite of the common law rule against double jeopardy, would have been rejected on the basis that the common law had, to an extent, been amended by this legislative enactment. Since April 1994 the Constitution has, however, become the supreme law of the country and all legislative acts are subject to compatibility

with the Bill of Rights. Section 35(3)(m) of the Constitution provides that "every accused person has the right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted." "Conviction" must, of necessity include "sentence" since the latter is part of the offence with which the person was charged previously. Section 39(2) of the Constitution provides that when a court interprets any legislation it must promote the spirit, purport and objects of the Bill of Rights. Any interpretation of section 271(4) that implies that a person who has been found guilty of a crime could be punished more severely than the crime itself justifies because of his or her record, would be in conflict with the spirit and letter of section 35(3)(m). The record of a person may, at the most, be considered so as to determine how the person has reacted to punishment in the past and guide the court in deciding what form of punishment will be appropriate: if he or she has not reacted well to a suspended sentence, for example, a suspended sentence might not, depending on the circumstances of the case, be appropriate again. To argue that the person is a "bad" person because of his or her record, will also amount to pure speculation and would also amount to punishing him or her for past sins; an approach reminiscent of the rejected v*ersari in re illicita* doctrine.[1] Progressive punishment based on a record is, to my mind, unconstitutional. Of course, when a court has to decide whether a person must be declared a habitual or dangerous criminal, the record would be most relevant. Even then care would have to be taken that the record indeed justifies the inferences drawn from it. In other cases, however, the record's role should be limited to determining matters such as mentioned above.

If my interpretation is not justifiable I submit, with respect, that an urgent re-think of the weight which a record should carry must be undertaken: it is tradition to add to a sentence in

[1] See Snyman *Criminal Law* (1994) 148 *et seq.; S v Van der Mescht* 1962(1) SA 521(A); *S v Bernardus* 1965(3) SA 287(A).

the light of a person's record. If my constitutional interpretation is correct, terms would be shorter and this would lead to a substantial decrease in the prison population. A record really says so little: it merely states the sentences imposed for crimes in the past. One does not know whether the accused ever had legal representation, whether he or she was properly informed of his or her rights of appeal and whether the language barrier did not simply leave that convicted person in circumstances comparable to mediaeval incarceration. Section 271A of the CMA excludes references to records of offenses in certain lesser instances committed more than ten years ago, but it does not address the problem of lengthy prison sentences.

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INDEPENDENT COMMISSION FOR THE REMUNERATION OF PUBLIC OFFICE BEARERS

04 September 2006

MS Zeenat Carelse
Secretary of JOASA
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Dear Ms Carelse

COMMUNIQUE ON A REVIEW OF PUBLIC OFFICE BEARER REMUNERATION

During its communication road show meetings with Public Office Bearer stakeholder groups during December 2005 the Commission undertook to engage the same groups in follow-up meetings to communicate and receive comments on the benchmarking phase of its current review project of Public Office Bearer remuneration. Although the Commission has not yet completed the benchmarking phase thereof to the extent that monetary values could be attached to the different office-bearer positions, it deems it appropriate to communicate to Public Office Bearer groups on its progress since December 2005.

The following represent the major activities and events the Commission engaged in since December 2005:

- The Commission received the final report by its consultants in January 2006, which dealt with, amongst others, benchmarking to a limited extent. This necessitated the Commission to conduct its own benchmarking research.
- The Commission published its 2005 Annual Report, and distributed copies thereof to all Public Office Bearers and other relevant stakeholders.
- The Commission met with and engaged the President on certain philosophical issues relating to Public Office Bearer remuneration.
- Specific questions on fundamental aspects of the review process were posed to the heads of all three arms of government. The Commission

received submissions thereon from both the legislative and judiciary arms of government.

- The Commission conducted research on comparative Head of State remuneration for benchmarking purposes.
- The Commission considered and published its annual cost-of-living remuneration adjustment recommendations, which were accepted by the President in terms of Proclamations published on 29 August 2006, and by Parliament in terms of a resolution of 24 August 2006.
- The Commission established liaison with comparative international entities involved in the determination of office-bearer remuneration, and has already embarked on international study tours scheduled for September 2006.

The Commission has adopted an action plan that would enable it to make recommendations regarding its review project at the end of 2006. The action plan relates to the following major activities:

- Consolidation of research, reports and submissions into a format which could be used in a final report of recommendations.
- Consideration of different benchmarking options, and selection of the most appropriate methodology to determine fair and appropriate "total cost to employer" remuneration packages.
- Consideration of appropriate "tools of trade" for different Public Office Bearer positions.
- Conducting a final road show to obtain stakeholder comments on benchmarking and proposed remuneration packages, in November 2006.
- Consideration and drafting of an appropriate implementation plan.
- Drafting and publication of final report of recommendations.

We trust that you find this short communiqué informative, and that you will disseminate the contents thereof to the stakeholders within your institution.

Yours sincerely

DIKGANG MOSENEKE
CHAIRPERSON

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http://www.justiceforum.co.za/JET-LTN.asp
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