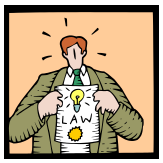
e-MANTSHI

A KZNJETCOM Newsletter

September 2014: Issue 102

Welcome to the hundredth and second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.

Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The South African Law Reform Commission has approved the publication of an issue paper towards a review of the Maintenance Act 99 of 1998, for public comment.

The issue paper draws attention to matters for possible law reform in the maintenance legislation under review. It presents issues that have been referred to the Commission by the Department of Justice and Constitutional Development for review, and additional areas that the Commission has identified as requiring law reform. All the identified issues will form the basis for further investigation and consultation by the Commission**.**

The current Maintenance Act was promulgated in 1998. Users of the Act have identified certain challenges in the Act, which have resulted in the Act not fully benefiting the beneficiaries of the maintenance system. The Commission has decided to take the opportunity granted by the current investigation to conduct a broad assessment of all maintenance issues that require review, with the aim of ensuring a comprehensive maintenance system for South Africa. The Commission invites all role players to bring to its attention any related issues that might inadvertently have been left out of the issue paper.

Questions and topics which the issue paper raises for consideration and input relate to the following points.

Issues identified by the Commission:

- whether mediation should be introduced for dealing with maintenance inquiries;
- whether a system should be developed to determine maintenance awards;
- whether additional forms of maintenance payment should be allowed; and
- possible broadening of the consequences for defaulting on maintenance obligations.

Issues raised by the Department:

- whether the Act should provide for an application for future maintenance;
- whether child beneficiaries should have *locus standi* in maintenance cases;
- how the appointment of maintenance investigators should be streamlined;
- whether the Act should provide for investigating officers to have powers of arrest;
- in dealing with civil execution and other procedural matters;

on execution of movable property–

- whether the Act should provide for the identification of movable property that is susceptible to execution;

in matters dealing with holding a financial inquiry–

- whether the Act should specifically provide for holding of a financial inquiry;

on rules governing the execution process–

- whether the Act should provide for the promulgation of rules regulating the execution process;
- whether the Act should regulate trusts, especially trusts established to evade maintenance obligations;
- whether the Act should provide for awarding of costs in maintenance matters; and
- how the Act should deal with remedies available to beneficiaries of maintenance.

The project leader for the investigation is Mr Irvin Lawrence, a commissioner and an attorney based in Durban. The Commission researcher is Ms Jennifer Joni. The issue paper is available at http://salawreform.justice.gov.za/ipapers/ip28-prj100-Maintenance-2014.pdf

Submissions and comments are invited from any interested person or organisation. The closing date for comment is **3 November 2014** and all comments and representations must be made in writing. Submissions should be sent to one of the following addresses:

The Secretary
SA Law Reform Commission
Private Bag X 668
Pretoria
0001
Telephone: (012) 622 6336
Fax: 086 266 1935 or E-mail: jjoni@justice.gov.za

Recent Court Cases

1. S V NDLANZI 2014 (2) SACR 256 (SCA)

If an accused does not object to his legal representative's strategy it would be difficult to prove that the legal representative had not carried out his instructions.

The appellant was convicted in a regional court of murder in that, whilst driving a taxi in the city centre in peak hour traffic, he had collided with a newspaper stall on the pavement and knocked over the deceased who was walking on the pavement. The appellant's taxi then collided with a stop sign and reversed and while doing so, drove over the deceased who had fallen to the ground. At the trial the appellant pleaded not guilty and when the state attempted to introduce the appellant's warning statement, his counsel objected and a trial-within-a-trial was held. The court ruled that the statement had been freely and voluntarily made and his counsel then indicated that he wished to take that decision on review. The trial was postponed and when the case resumed the appellant had a new lawyer who told the court that the mandate of the previous legal team had been terminated as it had not conducted the trial in accordance with the appellant's instructions in that counsel had cross-examined witnesses in a manner suggesting that he denied being the driver of the vehicle in question. Despite counsel's suggestions to the magistrate that in the circumstances he should recuse himself, the magistrate declined to do so and continued with the trial. On appeal, counsel for the appellant contended that the appellant had not had a fair trial because of the manner in which his defence was conducted. Counsel also contested the magistrate's finding that the appellant had dolus eventualis in respect of the murder.

Held, that the appellant's allegations concerning the conduct of the trial, although unsupported by evidence, were very serious and warranted serious consideration as, if they were true, they might justify the conclusion that he had not had a fair trial. It was however significant that neither his erstwhile attorney nor advocate was given an opportunity to respond to the allegations and he himself could offer no explanation why he had permitted his counsel to pursue the incorrect strategy right until the end of the state's case. The appellant had had more than enough time during the trial to raise an objection to the manner in which his trial was conducted, if he had any,

and quite inexplicably he had failed to do that. (Paragraphs [24]-[26] at *262i, 263b* and *264a.)*

Held, further, that the appellant's legal representatives would have been guilty of very serious professional misconduct which could have led to disciplinary proceedings against them by their professional bodies and one could not on the mere say-so of the appellant and without more, conclude that both would have taken such a serious risk. Because of this it had to be concluded that the appellant had consented to the trial strategy, alternatively that he had acquiesced in it. There was no merit in that ground of appeal. (Paragraph [28] at *264g-h.)*

Held, further, as to the conviction for murder, any person with a modicum of intelligence would have appreciated that driving a motor vehicle onto the pavement in the prevailing circumstances of the case raised the possibility that a collision with a pedestrian would occur with fatal consequences. Any right-minded person would have foreseen the possibility of the death of a pedestrian and on the evidence there was no basis for concluding that the appellant did not possess the requisite subjective intent in accordance with this standard. (Paragraphs [35] at *266b* and [36] at 266c.)

Held, however, on the evidence, the appellant believed that he would be able to avoid colliding with pedestrians on the pavement by turning to the right back onto the road. Consequently it could not be inferred that it was immaterial to the appellant whether he collided with a pedestrian on the pavement. It could also reasonably be inferred that he may have thought that a collision with a pedestrian, which he had subjectively foreseen, would not actually occur. In other words, the appellant had taken a risk which he thought would not materialise. The second element of dolus eventualis was accordingly not established on the evidence. The appellant had not acted as a reasonable driver and his negligence had led to the death of the deceased. The conviction was accordingly altered to one of culpable homicide and the sentence was adjusted in accordance with the lesser conviction. (Paragraphs [39] at *266g-h* and [40] at *266i-j.)*

2. JONKER V MANAGER, GALI THEMBANI/ JJ SERFONTEIN SCHOOL AND OTHERS 2014 (2) SACR 269 (ECG)

If a child in need of care is transferred from a child and youth care centre to a more restrictive child and youth care centre the children's court must ratify such a decision.

The applicant applied for an interdict to prevent the respondents from relocating children in need of care and protection from the first respondent to the

newly built child and youth care centre at Bhisho. The applicant also sought an order that the respondents be ordered to ensure that the first respondent be kept open as a functioning, secure school for children in need of care and protection who had been placed there by order of the children's court. The first respondent was run as a youth care facility and retained two programmes accommodating both children in need of care as well as children in conflict with the law. These were separate programmes housed in residentially separate buildings. All the children in need of care at the first respondent had been placed there by order of the children's court.

Held, that if a child had been placed in the care of a child and youth care centre following upon an order of the court in terms of the Children's Act 38 of 2005 or s 29 or ch 10 of the Child Justice Act 75 of 2008, then in terms of s *167(1)(b)* of the Children's Act, such child was in 'alternative care'. In terms of s 171 (1) the provincial head of social development may, by order in writing, transfer a child in alternative care from the child and youth care centre in whose care that child has been placed to any other child and youth care centre. (Paragraphs [44] at *281b* and [46] at *281e.)*

Held, further, that s 171 (4) provided for a certain measure of consultation prior to such order being issued. Furthermore, s 171 (6) *(b)* provided that no order in terms of ss (1) may be carried out without ratification by a children's court if the child were transferred from the care of a child and youth care centre to a 'secure or more restrictive child and youth care centre'. As it was common cause that no consultative process had been embarked upon and that the children's court, far from ratifying the transfer,
was unaware thereof it was clear that the proposed relocation of the children in need of care to the Bhisho facility was unlawful. (Paragraphs [47] at 2811 and [48] at *281g-i.)*

Held, further, as regards the order that sought to keep the first respondent open, that courts were ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplated a more restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. This relief could accordingly not be granted. (Paragraph [54] at *283b.)*

3. S v JANTJIE 2014(JOL) 32189 (ECG)

When convicting an accused on a charge of assault with intent to do grievous bodily harm it is not enough for the complainant to be struck with a stick once if there was no intent to commit the crime.

Makaula J:

[1] The accused was charged and pleaded guilty to assault with intent to do grievous bodily harm ("Assault GBH"). The magistrate questioned him in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 ("the Act") as follows:

"Court – Do you understand the charge against you?
Accused – Yes, Your Worship.
Court – Do you know the complainant?
Accused – Yes, Your Worship.
Court – How?
Accused – I know the complainant, Your Worship, and there is no relationship between us, the only thing happened, the complainant insulted me, Your Worship. (*sic*)
Court – On this day what happened? On that day did you assault her?
Accused – Yes, Your Worship, I did assaulted the complainant with a stick. (*sic*)
Court – What type of a stick was it?
Accused – It was a wooden stick, Your Worship.
Court – Where on her body?
Accused – I hit her on her shoulders, Your Worship.
Interpreter – The witness is pointing.
Court – And where else?
Accused – Only on her shoulder, Your Worship.
Court – How many times?
Accused – Only once, Your Worship.
Court – What was she doing when you assaulted her?
Accused – Your Worship, the complainant was insulting me at that stage and after hitting her, Your Worship, she just walk away. (*sic*)
Court – Do you know that a stick can injure someone?
Accused – Yes, Your Worship, I know that.
Court – And you know that your actions were unlawful.
Accused – That's right, Your Worship.
Court – Happy?
Prosecutor – All the elements, Your Worship. (*sic*)
Court – Okay sir, the Court is satisfied that you admit pleading guilty to the offence, you are accordingly found *GUILTY* as charged."

[2] The State proved that the accused had been previously convicted of the following

offences:
2.1 possession of property suspected to have been stolen;
2.2 domestic violence and *crimen injuria*;
2.3 assault GBH;
2.4 assault GBH;
2.5 theft; and
2.6 assault.
[3] It does not appear on the record that the accused was appraised of his right to advance factors which the Court should take into account when considering sentence. The mitigating factors there are, emanate from questions put to the accused by the magistrate which are that; the accused is 26 years, he has children who are staying with their mother and that he was doing odd jobs as he was not permanently employed.
[4] In aggravation of sentence, the court *a quo* took into account that the accused did not lead a clean life hence he had a number of previous convictions which involved assault and domestic violence. It is further interesting to note the following comments from the judgment on sentence:
"You have only yourself to blame. I have said this this morning but I am going to repeat it. Every person deserves a second chance in life. You have been given more than that. But now you think that the Court is just playing, I think now it is that we teach you lesson that we are not playing here. (*sic*) Because now you are making a mockery of the justice system, because if your are treated with mercy, then you think we are playing. People outside there will lose confidence in the whole justice system. That is one of the reasons why people take the law into their own hands when they are not satisfied with what the Courts are doing. Hence, sometimes you see on the television, people being necklaced and burnt with tyres. People say that they are tired of this justice system because the Courts are not helping them, so let us help ourselves, hence you find people being killed. Some of them are even innocent" (*sic*).
[5] The accused was sentenced to undergo 18 months' imprisonment.
[6] The matter came before my brother Tshiki J who raised the following queries:
"1. *Ad conviction*
1.1 When the Court questions the accused following a plea of guilty, it does so with a view to satisfy itself, not the public prosecutor as it seems to be the case herein, that all the elements of the offence are admitted by the accused.
1.2 On the basis of what evidence other than the use of the stick, was the Court satisfied that the offence of assault with intent to cause grievous bodily harm was proved in this case?
1.3 Was there any evidence of injuries caused to the complainant which proved the offence charged?
2. *Ad sentence*
2.1 The magistrate's comments in his judgment on sentence create the impression that he put more emphasis on the previous convictions of the accused rather than the merits of the case before him, more especially he ignored the fact that from the

record it does not appear that there were injuries proved to have been sustained by the complainant.
2.1.1 Did the Court seek any assistance from both the state and/or the complainant as to the nature of the injuries which would justify the sentence imposed? If so, why were they not recorded?
2.1.2 If not, on what basis, other than the previous convictions, was the Court satisfied that a sentence of eighteen (18) months' imprisonment was not harsh but a competent sentence in the circumstances?
2.1.3 Did the Court take into account that according to the evidence accused was also provoked by the complainant?
2.1.4 Please give full reasons for sentence."
[7] The magistrate responded as follows:
"AD CONVICTION
1.1 I am aware of this fact it is just that at times I like to confirm with the Public Prosecutor on certain issues as he is also a court official though not presiding officer.
1.2 The accused knew that a stick can cause grievous bodily harm and when he assaulted the complainant he was aware of this fact. From this it can be safely said that he intended to do grievous bodily harm. This is from his response under questioning in terms of section 1.2(1)(b) of C.P.A. (*sic*)
1.3 None. What is important in cases of this nature is the intention of the accused not necessary the end results. The injuries would of cause play a major role when it comes to sentencing.
To support my averment, I would like to refer the Honourable Reviewing Judge to CR Snyman Fourth edition at page 435 on Criminal Law. From this, what is important is the intention to cause grievous bodily harm. Whether grievous bodily harm is in fact inflicted is immaterial on determining hability. (*sic*) It is simply the intention to do such harm that is in question. This can be derived from the nature of the weapon used, part of the degree of force taken. (*sic*) In the present case accused used a stick which is dangerous weapon and was aware that it can cause grievous bodily harm. (*sic*) Though there was evidence of injuries. Accused clearly had intention to cause such injuries. (*sic*) In fact according to the Honourable Author one can be convicted of this assault though there are no injuries. (*sic*) In this regard I would like again to refer Honourable Reviewing Judge to the case of *Joseph* 1964 (4) SA 54 (CRA). It is on the basis of the above that I convicted the accused of the offence charged.
Ad sentence
Reason for sentence
1. The offence on its own is a serious offence.
2. It is prevalent in the district of Lady Grey.
3. It was committed against a female person which falls under a vulnerable group.
4. The weapon used in the circumstances was not justifiable. Though accused was provoked by the complainant he could have slapped her or kick her for that matter not use a stick against a female who is of the weaker sex by nature.
5. If one look at his previous convictions, it is clear that the accused is a man. (*sic*) In the past he has been treated with kit gloves (*sic*) by the courts as far as sentencing is

concerned. He has been treated with mercy and now throwing that mercy back at the face of the court. He has not learnt from his previous sentences. He is making mockery of whole justice system. If he was given a lesser sentence, surely people will lose faith system because it is clear that accused is not prepared to repent from his bad behaviour. (*sic*) It is for that reason that I ask the honourable to reviewing his judge to let the sentence stand" (*sic*).

[8] Assault with intent to do grievous bodily harm consists in an assault which is accompanied by the intent to do grievous bodily harm. What is required is that the accused must have known, or at least foreseen the possibility, that his conduct (*whether that took the form of the application of force or threats*) might cause the complainant grievous bodily harm.1 In other words, it is immaterial whether bodily harm is in fact inflicted. It is the intention to do grievous bodily harm that is relevant.

[9] In *S v Mbelu*3, the evidence was that the accused threw a bottle at the head of her lover and was convicted of assault *GBH*. On review before a full bench, Miller J, 2 dealing with the aspect of intent to do grievous bodily harm had the following to say: "Now where the court is confronted with the problem whether it should draw the inference that an assault was accompanied by this particular intent it usually has to rely on four main factors which provide the index to the accused's state of mind. I am not suggesting that these four factors are exhaustive; I do not suggest that in the large majority of cases these are the factors which provide a guide to the accused's state of mind. They are, first, the nature of the weapon or instrument used; secondly, the degree of force used by the accused in wielding that instrument or weapon; thirdly, the situation on the body where the assault was directed and fourthly the injuries actually sustained by the victim of the assault."

[10] Having analysed the evidence, Miller J concluded as follows:

"Looking at the matter in this light I cannot conscientiously say that the only reasonable inference which I can draw from this assault is that the accused intended to cause the complainant grievous bodily harm. In terms of some of the cases to which we were referred it appears that for this crime to be brought home to an accused it must be established that the harm which he intended was of such a serious nature as to interfere with health and however one expresses it, it is at least clear that there must be an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which might ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect. I cannot draw the inference that that intent was present although it might well have been."

[11] The only reason advanced by the magistrate for concluding that the accused intended to cause the complainant grievous bodily harm is because "a stick on its own is a dangerous weapon", the use of which is as a result intended to cause grievous bodily harm. The magistrate relies on what CR Snyman 4 says which is the following:

"Whether grievous bodily harm is in fact inflicted on Y is immaterial in determining liability (though it is usually of great importance). It is simply the intention to do such harm that is in question."

[12] With respect, what the magistrate misses is what is said by CR Snyman in the

next sentence, which reads:
"Important factors which may indicate that X had such an intention are, for example, the nature of the weapon or instrument used, *the way in which it was used*, *the degree of violence*, *the part of the body aimed at*, *the persistence of the attack and the nature of the injuries inflicted*, if any" (my emphasis).
[13] In *S v Melrose*5 Baron AJA, dealing with a case where the appellant assaulted and injured the complainant with a pipe wrench, had the following to say about the nature of the weapon and the injuries sustained:
"There can be no doubt that the pipe wrench which the appellant used was a weapon with which very serious injury indeed could be inflicted; and there can be no doubt also that the blow was aimed at and landed on the complainant's head . . . It is clear also that the degree of force used could not have been very great; the magistrate described the injury sustained by the complainant as 'not very serious', and reading the complainant's evidence and that of the appellant there is nothing to suggest that the blow did not land where it was intended to land. It is therefore valid to draw the inference that the injury actually sustained by the complainant was no less serious than the appellant intended to inflict."
[14] The learned Judge further referred to the formulation of the intention necessary for the commission of assault GBH. He referred to *S v Moyana* 6 which was followed in by the Zimbabwean Supreme Court of Appeal in *Ncube and another v S*, Case No. 73/83 where the following appears:
". . . whether (he) accused, when he perpetrated the assault, knew that there was a risk of grievous bodily harm resulting and was reckless whether or not that result ensued."
[15] Baron AJA contended as follows:
"On the facts I do not think that this is really a case of a man being aware of possible consequences and being reckless in regard thereto. As I have said, although the appellant, on his own admission, was in a temper, we must proceed on the assumption that he was sufficiently in control of himself to reverse the wrench; and it is also clear that the blow landed where it was aimed. The consequence, broadly speaking, what the appellant intended. The magistrate's finding that the injury was not very serious would in itself seem to me to rule out a conviction on a charge requiring an intention to inflict harm which 'seriously interferes with health' or was 'really serious.'"
[16] In the instant matter, the questioning by the magistrate elicited that the complainant was hit once with a stick (which has not been described fully) on the shoulders. There is no evidence that the complainant sustained any injury as a result thereof. All that is known is that the complainant simply walked away. The magistrate makes a startling remark that, "Though there was evidence of injuries." With respect the record does not refer to any injuries sustained by the complainant. No medical report nor evidence suggesting that there were injuries, therefore I do not know where the magistrate got to know that there were injuries. The magistrate further makes the point that, "Accused clearly had intention to cause such injuries." With respect it eludes me to which injuries he is referring to.

[17] The magistrate in his reasons relied on the case of *S v Joseph* 7 in convicting the accused. The facts of *S v Joseph* are distinguishable. The complainant in that case was a police officer who was dressed in full police riot uniform signalling to a motor vehicle to stop. Though it was at night he shone a spot lamp on his body so that he was visible. He signalled for an oncoming motor vehicle to stop by waving his arm up and down. He moved to the middle of the side of the road on which the car was not travelling. The accused left his path of travel and came straight to him to an extent that he had to leap out of the road. Having done so, the accused drove back to his side of the road. Quènet JP had the following to say:

"Although the point was not advanced in the appellant's favour, it is possible the appellant swerved simply to frighten Hill. If that was so, the act was so reckless and involved such a likelihood of injury, it would be proper to say he intended to injure Hill and his companion. There is nothing to suggest that his appreciation of the risk was in any way affected by liquor."

[18] In *S v Dube*8 which is similar to *S v Joseph*, *supra*, Manyarara JA had the following to say:

"The offence against Cynthia was committed in the course of street thuggery by the appellant's gang. *My view is that street thuggery is a type of offence which can be committed only with actual or constructive intent to do grievous bodily harm*, *in that it is essentially a type of violence directed against the victim recklessly or without regard to the consequences*. Whether bodily harm is in fact inflicted in the course of this form of assault is immaterial in determining liability, although it is usually of great importance for the purposes of sentence as Professor *Snyman* states" (emphasis added).

[19] *In casu,* it is clear that the magistrate erred in convicting the accused of Assault GBH. As alluded to it cannot be found in evidence that the complainant sustained any injuries. The finding by the magistrate that, "Though there was evidence of injuries . . .", is not borne by the evidence. The blow itself was aimed at the complainant's shoulder. She was hit once. Even though a stick was used, it cannot be inferred from the circumstances that the accused intended to cause the complainant grievous bodily harm. The reason by the magistrate that, "This can be derived from the nature of the weapon used, part of the degree of force taken", with respect, does not make sense to me. The amount of force used does not appear in evidence. I am therefore of the firm view that the conviction should not stand.

[20] In passing sentence, a presiding officer has to consider the triad, ie the crime, the offender and the interests of society.9 A balance has to be struck between the three factors. There should be no overemphasis of one factor against the others.

[21] In the instant matter, the magistrate has overemphasised the previous convictions of the accused and the use of the stick as a dangerous weapon. That is borne out by finding referred to in paragraph 5 of his reasons for sentence appearing on page 6 above.

[22] Furthermore, the following comments by the presiding officer when passing sentence emphasise this point.

"*COURT*: You have only yourself to blame. I have said this this morning but I am

going to repeat it. Every person deserves a second chance in life. You have been given more than that. But now you think that the Court is just playing, I think now it is that we teach you lesson that we are not playing here. Because now you are making a mockery of the justice system, because if your are treated with mercy, then you think we are playing. People outside there will lose confidence in the whole justice system. That is one of the reasons why people take the law into their own hands when they are not satisfied with what the Courts are doing. Hence, sometimes you see on the television, people being necklaced and burnt with tyres. People say that they are tired of this justice system because the Courts are not helping them, so let us help ourselves, hence you find people being killed. Some of them are even innocent" (*sic*).

[23] Having regard to these facts and the personal circumstances of the accused, the sentence needs to be altered. Hence on receipt and having gone through the record, I issued an order to the Registrar to have the accused released from custody. Consequently I make the following order:

1. The conviction and sentence are set aside and replaced with the following:

1.1 The accused is found guilty of assault;

1.2 The accused is sentenced to undergo 12 months' imprisonment wholly suspended for five years on condition that the accused is not convicted of assault during the period of suspension.

Footnotes

1 *South African Criminal Law and Procedure*: Vol II Common Law Crimes (3 ed) JRL Milton at 431–2.

2 CR Snyman *Criminal Law* (5 ed) at 462.

3 1966 (1) PH H176 (N) at 176.

4 At 462.

5 1985 (1) SA 720 (ZSC) at 723A–F.

6 1980 ZLR 460.

7 1964 (4) SA 54 (RA).

8 1991 (2) SACR 419 (ZS) at 424a–b.

9 *S v Zinn* 1969 (2) SA 537 (AD) at 540G.

Basdeo, V

"The law and practice of criminal asset forfeiture in South African Criminal Procedure: a constitutional dilemma"

Potchefstroom Electronic Law Journal 2014 Volume 17 No 3

Radebe, M K

"The Unconstitutional Practices Of The Judicial Service Commission Under The Guise Of Judicial Transformation: Cape Bar Council v Judicial Service Commission [2012] 2 All 143 (WCC)"

Potchefstroom Electronic Law Journal 2014 Volume 17 No 3

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

Contributions from the Law School

The *mandament van spolie*, the defence of impossibility and the illegal possession of property

The possession of a corporeal thing in South African law is protected by a number of different remedies. One of these is the *mandament van spolie*. This remedy has some unique feature. Perhaps the most significant of these is that a person who applies for this remedy does not have to prove that he or she has a right to the thing in question. Instead, such a person simply has to prove that he or she was in possession of a thing and that he or she was unlawfully dispossessed of that thing. In other words, a person who has been unlawfully dispossessed of a thing is entitled to be restored to possession before the merits of the case of debated or decided (*spoliatus ante omnia restituendus est*) (see *Nino Bonino v De Lange* 1906 TS 120 and *Yeko v Qana* 1973 (4) SA 735 (A) 739).

One of the consequences of this feature of the remedy is that not only a lawful possessor, but also an unlawfully possessor, for example a fraud, a thief or a robber,

is entitled to claim the protection of the *mandament van spolie* (see *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 6 SA 511 (SCA)). The reason why an unlawful possessor is entitled to claim the protection of the *mandament van spolie* is not because the law wants to protect such a person, but rather that the law wants to discourage self-help (and the chaos and anarchy that is often associated with self-help). The remedy is based on the principle that a dispute over the possession of a thing should be resolved by the due process of law and not by self-help (see *Greyling v Estate Pretorius* 1947 3 SA 514 (W) 516).

As is the case with many other remedies, the application of the *mandament van spolie* gives rise to a number of complex issues. One of these is whether possession can be restored to an applicant in those cases in which possession of the thing is illegal and would amount to a criminal offence. This issue – which has been the subject of conflicting Supreme Court of Appeal judgments (see *Ivanov v North West Gambling Board* 2012 (6) SA 67 (SCA) and *Ngqukumba v Minister of Safety and Security* 2013 (2) SACR 381 (SCA)) – was discussed recently by the Constitutional Court in *Ngqukumba v Minister of Safety and Security* 2014 (5) SA 112 (CC).

The facts

The facts of this case were as follows. In early 2010 the police seized a motor vehicle they suspected of having been stolen, without first obtaining a search and seizure warrant. After the police seized the car, the applicant – who owned the vehicle – applied to the High Court for a spoliation order. Although the High Court found that the vehicle had been seized unlawfully by the police, it refused to grant the spoliation order. This is because such an order would have placed the applicant in possession of the vehicle and his possession would have constituted a criminal offence.

The reason why the applicant's possession would have constituted a criminal offence, the High Court held, is because: first, the facts showed that the vehicle's chassis and engine number had been tampered with; and, second, that section 68(6)(b) read together with section 89(1) of the National Road Traffic Act 93 of 1996 ("the Traffic Act") prohibited the possession "without lawful cause" of a motor vehicle whose "engine or chassis number has been falsified, replaced, altered, defaced, mutilated, or to which anything had been added, or from which anything has been removed, or has been tampered with in any other way".

The applicant then appealed unsuccessfully to the Supreme Court of Appeal. In arriving at its decision the Supreme Court of Appeal (per Petse JA; Brand, Maya Theron JJA; and Meyer AA concurring) held that even where the applicant has satisfied the requirements of the *mandament van spolie*, it does not necessarily follow that he or she will be granted a spoliation order. This is because the defendant may raise an admissible defence, one of which is that restoration of possession is

impossible because the possession of the thing in question would not only be unlawful, but would also constitute a criminal offence (para 13).

Given that the applicant's possession of the vehicle in the case at hand would constitute a criminal offence, the Supreme Court of Appeal held further, a court order compelling the police to release the vehicle to the applicant would be no different from a court order compelling the police to restore possession of heroin or a machine gun to a person who was not lawfully entitled to possess these things. Essentially, the court would be ordering the police to commit an illegality and this is something that a court should not and cannot do. Or, to put it another way, a court cannot lend its imprimatur to an illegality (paras 15-16).

"The appellant's possession of the vehicle for now – until such time as a police clearance is issued and the vehicle is registered in accordance with the provisions of the Act – will thus be unlawful according to the criminal law. The police cannot lawfully release the vehicle to the appellant, whether he is the owner or erstwhile lawful possessor thereof. An order by a court that it be done will be no different than ordering a person to be restored in the possession of his or her heroin or machine gun which he or she may not lawfully possess. In fact, when counsel for the appellant was invited in argument to distinguish this case from a claim by the former possessor of heroin, he was unable to do so. To my mind, that finally illustrates why the *Ivanov* approach cannot be sustained" (para 15).

As the last sentence in the passage quoted above indicates, the Supreme Court of Appeal also held that an important consequence of the principles it adopted in this case is that its earlier decision in *Ivanov v North West Gambling Board* was "wrong insofar as it held that the applicant was entitled to unqualified restoration of possession of his spoliated gambling machines, even though his possession thereof constituted a contravention of the provisions of section 9(1) of the National Gambling Act 7 of 2004 and a criminal offence under section 82 of that Act" (para 12).

The judgment

After the Supreme Court of Appeal dismissed the appeal, the applicant appealed to the Constitutional Court. The Constitutional Court (per Madlanga J; Moseneke ACJ; Skweyiya ADCJ; Cameron, Jafta, Nkabinda, Zondo JJ; and Dambuza and Mhlantla AJ concurring) upheld the appeal and granted the spoliation order.

In arriving at this decision, the Constitutional Court held that the *mandament van spolie* is available not only against private persons, but also against government entities, such as the police. This is because like private persons, government entities sometimes engage in acts of self-help and these acts of self-help may lead to breaches of the peace, which the *mandament* is aimed at discouraging and

remedying. Irrespective of the consequences, the rule of law must be vindicated and the *mandament* seeks to achieve exactly that goal (para 12).

It does not matter, the Constitutional Court held further, whether the government entity was acting in terms of a statute or not. The real issue is whether it was properly acting within the law. This is because the principle of legality requires organs of state always to act in terms of the law. When the police dispossess an individual of a thing, therefore, it makes no difference that they purporting to act in terms of the powers conferred upon them by the Criminal Procedure Act 51 of 1977. If the police failed to comply with the provisions of this Act when they seized a person's thing then the act of seizing that person's property was unlawful (para 13).

Given that the *mandament van spolie* is available even against the police when they have seized property unlawfully, the Constitutional Court went on to hold, the key question in this case was whether section 68(6)(b) read together with 89(1) of the Traffic Act made it (legally) impossible for a court to order the police to restore possession of the vehicle to the applicant, as the High Court and Supreme Court of Appeal found (para 14).

In this respect, the Constitutional Court held that it is important to distinguish between those things which may not lawfully be possessed under any circumstances, for example heroin, and those things which may lawfully be possessed under certain circumstances, for example, a vehicle whose chassis and engine numbers have been tampered with. In those cases in which a thing may not lawfully be possessed under any circumstances, the *mandament van spolie* may not be available and vice versa (para 15).

The reason why a vehicle whose chassis and engine number has been tampered with may lawfully be possessed in certain circumstances, the Constitutional Court held further, is because section 68(6)(b) provides that it is criminal offence to possess a vehicle whose chassis and engine number have been tampered with only when such a vehicle is possessed "without lawful cause". When such a vehicle is possessed with lawful cause, the possessor will not be committing a criminal offence (para 15-16).

In addition, the Constitutional Court went on to hold, the inclusion of the phrase "without legal cause" in section 68(6)(b) indicated that this section read together with section 89(1) was not intended to oust the normal operation of the *mandament van spolie* and it should not be interpreted in a way that did. This is because an interpretation which ousted the normal operation of the *mandament* would undermine the spirit, purport and objects of the Bill of Rights and this would infringe section 39(2) of the Constitution.

“Nothing tells me that sections 68(6)(b) and 89(1) are plainly intended to alter the common law. There would be disharmony between these sections, on the one hand, and the availability of the *mandament van spolie,* on the other, only if section 68(6)(b) did not have the phrase ‘without lawful cause’. Thus the sections must be read not to oust the normal operation of the *mandament van spolie*. This reading promotes the spirit, purport and objects of the Bill of Rights and, therefore, conforms to the provisions of section 39(2) of the Constitution. This I say because possession is closely associated with and is often an incident of ownership. In some instances the protection of possession will guarantee wholesome enjoyment of the right to property. Not surprisingly, section 39(3) of the Constitution recognises the existence of rights and freedoms created by the common law of they are not inconsistent with the Constitution” (para 18).

Having made these points, the Constitutional Court then held that even though its order might possibly lead to a situation where an applicant is placed in possession of a thing, even though his or her possession amounted to a criminal offence, this consequence had to be accepted for two reasons:

First, it is not possible for a court during the proceedings for a *mandament van spolie* to investigate the merits and decided whether the applicant was legally entitled to be in control or not.

“Possession of the vehicle by the applicant pursuant to its return in terms of a court order would only be unlawful if it were established that he did not have lawful cause to possess it. That is a conclusion that can only be reached after an enquiry into the facts surrounding the applicant’s possession. Before that enquiry, one is not in a position to say the applicant’s possession of the vehicle will be unlawful – it may or may not be, depending on the result that the enquiry would yield. The question that arises is: in proceedings for a spoliation order, is it proper to hold that enquiry? I say not. That would be enquiring into the merits of the lawfulness of the applicant’s possession. Those merits are irrelevant in proceedings for a spoliation order: the despoiler must restore possession *before all else*” (para 21).

Second, that self-help is so repugnant to our system of law that the courts are prepared to allow a person to control a thing even if that is a criminal offence in order to discourage self-help.

“Self-help is so repugnant to our constitutional values that where it has been resorted to in despoiling someone, it must be purged before any enquiry into the lawfulness of the possession of the person despoiled. Earlier I made the point that restoration of possession may even be to a person who might eventually be shown to be a thief or robber. The return to the applicant of the tampered vehicle, which may be possessed lawfully, is no different” (para 21).

Comment

A number of important principles may be derived from this judgment. Amongst the most important of these are the followings:

First, the fact that it is (legally) impossible for an applicant to possess a thing because it is illegal to do so, and would thus amount to a criminal offence, is a valid defence to the *mandament van spolie*.

Second, because this defence has the potential to undermine the purpose of the *mandament van spolie*, namely to discourage self-help and preserve order, it may be claimed only in exceptional cases.

Third, the exceptional cases in which this defence may be claimed are restricted to those in which a thing may not be (legally) possessed by the applicant under any circumstances.

Fourth, if there are circumstances in which it is theoretically possible for the applicant to (legally) possess the thing the courts are not entitled to determine whether those circumstances exist, but must nevertheless still grant the spoliation order. This is because self-help fundamentally inimical to the values on which our Constitution is based.

Last, the Supreme Court of Appeal's judgment in *Ivanov v North West Gambling Board* can no longer be regarded as incorrectly decided, at least insofar as it relates to the defence of (legal) impossibility. Instead, the Supreme Court of Appeal's judgment in *Ngqukumba v Minister of Safety and Security* must now be regarded as incorrectly decided.

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Affirmative action and magistrates in the Equality Court

In 2006 a magistrate was denied promotion to regional magistrate solely on the grounds of being a white male. He was advised to apply to the Equality Court. His claim was successful. Justice Erasmus confirmed that it was legitimate for the State to adopt measures to promote representivity. In effect when such a policy is properly applied there is no discrimination. But the policy is irrational and discriminatory if it fails to promote efficiency or completely excludes applicants solely on the grounds of race or gender.

Peruse Justice Erasmus's judgment at ***Du Preez v Minister of Justice & Constitutional Development*** [2006] 8 BLLR 767 (Equality Court).

Solidarity

Solidarity is acting for another magistrate Martin Kroukamp who was not appointed as a senior magistrate and who has challenged the decision, also in the Equality Court. This is Solidarity's statement posted on SA Labour News today – Solidarity: Justice Minister asks for postponement to review magistrate's appointment.

Michael Masutha, the current Minister of Justice, today gave Solidarity the assurance at the Equality Court that he will review his predecessor's decision to not appoint Magistrate Martin Kroukamp as a senior magistrate. Minister Masutha also undertook to review the decision to withdraw and re-advertise 22 other senior magistrate's posts.

The Equality Court postponed the matter until after 21 October 2014 to enable the minister to consult with the Magistrate's Commission. Minister Jeff Radebe, who was subpoenaed to give evidence regarding his decision in the Equality Court, has therefore evaded being questioned before the court for the time being.

According to Dirk Groenewald, Head of Solidarity's Centre for Fair Labour Practice, Solidarity is disappointed at the missed opportunity for the Equality Court to deliberate on the issue of absolute

Status of magistrates

Justice of Appeal Malcolm Wallis in ***President of South Africa v Reinecke*** [2014] 5 BLLR 419 (SCA) allowed the Minister's appeal in a matter where a magistrate was awarded damages by the High Court in the sum of R9 460 270 together with interest and costs. The SCA judgment contains an erudite and convincing analysis of the status of magistrates and the remedies available to them.

Mr Reinecke was appointed as a relief magistrate for the district of Germiston in 1996. In October 2000 the Magistrates Commission advertised a number of posts

for magistrates throughout the country including one at Randburg described as ‘magistrate (relief)’. Mr Reinecke applied for this post and made it clear that he did not want the post if it meant that he would be performing relief duties primarily in Gauteng. He was appointed as a magistrate in Randburg on 10 May 2001. His appointment was not a happy one and on 2 January 2002 he resigned, giving one month’s notice.

Alleged constructive dismissal

Mr Reinecke contended that he resigned because of victimisation and discrimination against him by Mr Booi, the chief magistrate at Randburg, He claimed his working circumstances were intolerable and that he was constructively dismissed, amounting to a repudiation of his employment contract, which he accepted, as well as an unfair labour practice. Mr Reinecke referred a dispute over his resignation to the CCMA claiming that he had been constructively dismissed and wanted to be restored to his former position as a magistrate in Germiston, alternatively payment of two years’ salary.

CCMA proceedings abandoned

A commissioner had ruled in another case involving a magistrate that they were not employees as defined in the Labour Relations Act 66 of 1995 (LRA) and accordingly Mr Reinecke abandoned the proceedings in the CCMA. It should be noted that acting justice Murphy, as he then was, held in the labour court in ***Khanyile v CCMA (Minister of Justice & Constitutional Development)*** [2005] 2 BLLR 138 (LC) that magistrates were not employees.

High Court claim succeeds

In the high court Mr Reinecke claimed loss of income over a period of thirty years against the President of South Africa (the President) and the Minister of Justice and Constitutional Development (the Minister). He claimed the difference between the earnings he would have enjoyed as a magistrate until his retirement at the age of 65, and his actual earnings from employment during that period. His claim for R9 460 270 damages succeeded before Pretorius J.

Employment relationship

Mr Reinecke alleged that his appointment as a magistrate gave rise to an ‘agreement of employment’ subject to conditions of service determined in the regulations promulgated under s 16 of the Magistrates Act 90 of 1993 (the Magistrates Act). He argued that Mr Booi repudiated the agreement. Mr Reinecke’s pleaded claim was therefore one for damages founded on the repudiation of a contract of employment, accepted by him and giving rise to financial loss in the form of loss of income. The SCA judgment deals only with the position of magistrates in the period between 1996 and 2002 and it is recorded that nothing in the judgment affects the constitutional position of magistrates as part of the judiciary and the judicial authority of this country

in terms of Chapter 8 of the Constitution. The narrow question is simply whether at that time magistrates were employees of the State in terms of contracts of employment.

Status of magistrates

The Magistrates Act did not put an end to the status of magistrates as employees within the general public service, although by making special arrangements in relation to them, it removed them from most of the provisions applicable to other public service employees in terms of the Public Service Act 111 of 1984. Had it terminated their status as employees that would have involved a radical alteration to the basis upon which they had been appointed as magistrates. It would have converted them from employees of the State to office bearers having no contractual link to the State and dependent solely on public law remedies to enforce the rights vested in them by the Magistrates Act and the regulations made thereunder.

The terms of the Magistrates Act show that the relationship of magistrates, once appointed, and the State, as represented by the Department of Justice and Constitutional Development, continued to be one of employment under a contract of employment. The SCA held that

"Promotion, transfer and discharge are typical of an employment relationship. Office bearers are not ordinarily subject to promotion or transfer. Salaries, rank and grade of magistrates were to be determined by the Minister in consultation with the Commission."

Public Service and the Magistrates Act

In the public service at any level of government questions of rank and grade are typical of employment including the manner in which magistrates can be removed from office and also terms and conditions of service and the duties, powers, conduct, discipline, hours of attendance, leave and pension entitlements of magistrates. Although the Magistrates Act aimed at removing magistrates from the public service it is not clear that the severance has been complete. Under s 16(1)*(c)* of the regulations the 'creation of posts on the fixed establishment' and the 'number, grading, regrading, designation, redesignation or conversion of posts on the fixed establishment of any magistrate's office' may be determined.

Still an employment relationship

All these are *indicia* that, notwithstanding their whole or partial detachment from the public service, magistrates had not ceased to be employees of the State. Mr Reinecke's contention that from the time he became a magistrate he was an employee of the State had to be accepted. Any contract only arose after his appointment as a magistrate and was overlain with elements that derived not from contract but from the Magistrates Act and the regulations made thereunder.

Contract cannot ignore statutory elements

Mr Reinecke incorrectly relied solely on the contractual elements of the employment relationship and disregarded the statutory elements governing his appointment and the basis upon which he could be discharged from his post. One cannot divorce a contract arising from the performance of statutory functions and the exercise of statutory powers from its statutory background.

The SCA also held that

"Sometimes the contractual aspects will be crucial and sometimes the statutory. Which are the more important will depend upon the facts giving rise to the dispute".

If a magistrate is an employee of the State it will often be difficult to determine whether the remedies for a breach are to be found in contract or in public law when there is a breach of the basis upon which the magistrate's employment (in the broad sense) is regulated.

Employer's repudiatory conduct

Mr Booi advised the regional office of the department to terminate payments of Mr Reinecke's standing advance and to recover past payments from his salary. When Mr Reinecke reported for work at Randburg he was not allocated any judicial work other than a few postponements and was required to undertake work of an administrative nature. The judicial side of his work was removed. Such conduct on the part of the employer in a conventional situation of employment is a repudiation of the contract of employment. ***Stewart Wrightson (Pty) Ltd v Thorpe*** [1974] 4 All SA 1 (HC) is the authority for that statement and the SCA expressly approved Miller J's approach in the subsequent appeal in ***Stewart Wrightson (Pty) Ltd v Thorpe*** [1977] 3 All SA 267 (AD). Similar treatment of a magistrate was degrading according to ***Union Government (Minister of Justice) v Schierhout*** 1922 AD 179 at 184.

Difficulties with conventional situation

In the same way as his appointment had followed a statutory process with advertisement and interview leading to a recommendation by the Commission accepted by the Minister, the process for the discharge of a magistrate from service is a statutory one. In 2001 the following principles applied:

- The grounds of discharge were limited to misconduct, continued ill-health or incapacity to carry out the duties of the office efficiently (s 13(3)*(aA)* of the Magistrates Act).
- Discharge could only occur after an enquiry and recommendation by the Commission and the provisional suspension of the magistrate (s 13(3)*(a)*).

- The Minister was obliged to accept the recommendation of the Commission (s 13(3)*(aA)*).
- The Minister had to place a report before Parliament giving the reasons for the magistrate's suspension (s 13(3)*(c)*).
- Parliament had to resolve either to restore the magistrate to office or that the magistrate be removed (s 13(3)*(d)*) and the Minister was obliged to act upon that resolution and remove the magistrate.

Statutory dismissal process

Wallis JA further held that

"It follows that the process for dismissing a magistrate was at the time (and remains) a statutory process. Non-compliance with any part of that process would have been remediable (and still would be remediable) at the instance of the magistrate by resort to the high court".

Mr Reinecke could have applied under public law for an interdict restraining Mr Booi from implementing his decision to remove him from relief work and to prevent the removal of the allowance or any deductions being made from his salary by way of recoupment of past payments of the allowance. They are not contractual remedies, which are not appropriate to such a dispute.

Role of chief magistrate

The chief magistrate at the court where the magistrate is stationed had no role to play in any discharge and this meant that Mr Booi had no power to dismiss Mr Reinecke and the conduct of Mr Booi could not be a repudiation of the contract of employment as a magistrate. The SCA held that 'It would be entirely anomalous to hold that conduct by someone, who had no power to appoint or to discharge the magistrate, could nonetheless provide contractual grounds upon which the magistrate subjected to such conduct could terminate their appointment as a magistrate and claim damages'.

Alternative remedies

Mr Reinecke had other remedies available to him:

- In relation to his financial claims the grievance procedures laid down in the regulations could have been used.
- If those were unsatisfactory he could have sued to recover the amounts due to him.
- He could also have taken any adverse decision by the Commission on review.

- He could have approached the high court for interdictory relief in response to Mr Booi removing him from relief work and allocating him largely administrative duties.

An action for damages based on the failure of the employer to take reasonable steps to protect employees from suffering injury or ill-health in consequence of their working circumstances would also have been available if Mr Booi's treatment of him caused health problems and he could have taken sick leave.

Contractual remedies inappropriate

Justice of appeal MJD Wallis held that even if Mr Reinecke was employed under a contract of employment it would be inappropriate for him to benefit from a contractual remedy sounding in damages in addition to the public law remedies. He would then be placed in a significantly better position than a conventional employee because the acceptance of a repudiation of the contract of employment constitutes an unfair dismissal in terms of s 186(1)*(e)* of the LRA. A dispute over that dismissal must follow the procedures laid down in the LRA and the claimant's entitlement to relief is limited to at most the payment of two years' salary.

Wrong to rely on *Wolfaardt* and *McKenzie* cases

Mr Reinecke's counsel tried to justify the claim by reference to the SCA decision in ***Fedlife Assurance Ltd v Wolfaardt*** [2001] 12 BLLR 1301 (SCA) where it was accepted that the existence of remedies for unfair dismissal under the LRA does not exclude contractual claims or the pursuit of such claims in the ordinary courts rather than the structures of the LRA. However, the majority judgment in ***Wolfaardt*** was based upon a finding that the circumstances of that case – a purported premature termination of a fixed term contract of employment, accepted as a repudiation of that contract – did not fall within the definition of a dismissal in the LRA. In the present instance Mr Reinecke calculated his claim on the same basis as a claim for loss of earnings in a personal injury claim. That was manifestly inappropriate as was demonstrated when questions were posed in the course of the appeal about the validity of the allowances for contingencies. ***Wolfaardt*** does not provide support for Mr Reinecke's claim.

Neither that case, nor the later decision in ***South African Maritime Safety Authority v McKenzie*** [2010] 5 BLLR 488 (SCA) considered the situation of a constructive dismissal falling within s 186(1)*(e)* of the LRA. Nor did they consider the problems surrounding claims for damages by former employees, calculated on the footing that, but for the alleged repudiation of the employment contract, the employee would have enjoyed secure employment until retirement.

Wallis JA referred to ***Edwards v Chesterfield Royal Hospital NHS Foundation Trust*** [2011] UKSC 58; [2012] 2 All ER 278 (SC) in which the Supreme Court, by a majority, held that a contractual claim based on a failure to observe the contractually

agreed terms regarding procedures leading up to dismissal was precluded by the terms of the legislation that afforded a statutory claim for unfair dismissal.

(This article was posted on **September 25, 2014** by **Graham Giles** on his website.)

A Last Thought

A warning to all maintenance court officials

Mthimunye v Minister of Justice and Constitutional Development and Others (GP) (unreported case no 61876/2012, 9-5-2014) (Hiemstra AJ)

By Naleen Jeram

The High Court in *Mthimunye v Minister of Justice and Constitutional Development and Others* (unreported case no 61876/2012, 9-5-2014) (GP) (Hiemstra AJ) handed down a far-reaching judgment affecting the rights of maintenance creditors. The issue in dispute was the negligent conduct of the maintenance officials at a particular magistrate's court which resulted in the plaintiff (the mother of the children entitled to the maintenance benefit) not being able to attach a pension benefit paid to the debtor (the father). This note briefly examines the significance of the judgment and its practical consequences.

The plaintiff sued the Minister of Justice and Constitutional Development (first defendant) in his capacity as political head of the Department of Justice, and the National Prosecuting Authority (second defendant) in its capacity as the employer of the various maintenance officers that dealt with the matter (fourth, fifth, sixth, and seventh defendants respectively). The plaintiff's claim was based on the fact that the maintenance officers, acting in the course and scope of their employment, had negligently and unlawfully failed to take steps in terms of the Maintenance Act 99 of 1998 to attach a pension benefit in order to secure a valid maintenance claim.

In order to understand the impact of the judgment, it is necessary to sketch briefly the facts giving rise to the claim.

The father was employed as a teacher and was required to pay maintenance to the plaintiff in respect of his two minor children. In about 2006, the father resigned from his employment and was entitled to a pension benefit payable by his pension fund. According to the plaintiff, she had on numerous occasions informed the maintenance officers that the father had resigned and was entitled to a benefit payable by the fund.

Thereafter, she approached a senior magistrate at the court to ensure that her claim was prosecuted and that the pension benefit was attached. However, she was erroneously informed by the magistrate that pension benefits were not capable of attachment.

From the judgment, it is not clear why the maintenance inquiry was not finally resolved, but on 6 June 2006 a criminal case was enrolled in respect of the arrear maintenance liability. This matter was postponed on several occasions. The magistrate recorded that the father had failed to pay maintenance as he was awaiting his pension benefit but at that stage arrear amounts had been paid in full. As a result, the matter was withdrawn by the state. It subsequently emerged that this was also incorrect in that the debtor was still R 900 in arrears.

The plaintiff had on several occasions requested the various maintenance officers at the court to attach the pension benefit in order to secure her claim. During the evidence of the maintenance officials, it emerged that they were not fully aware of the remedies available in terms of the legislation with regard to the attachment of pension benefits. Moreover, it appeared as if the maintenance officials were under the impression that the father, on receipt of his pension benefit, would settle the arrear maintenance amounts. The maintenance officials could also not provide an explanation as to why criminal proceedings had been instituted instead of using the extensive civil remedies provided for in legislation.

By March ,2007 the father's bank account was in overdraft. It emerged that he had made 24 withdrawals ranging from R 2 000 to R 8 000 and all of these withdrawals were made at the automatic teller machine at the Carousel Sun Casino. Hereafter, another criminal inquiry was held and on 28 October 2009 he was convicted of the criminal offence for failing to pay maintenance. At that stage, the arrear maintenance amounted to R 24 500. He was sentenced to a fine of R 2 000 or 2 years' imprisonment. However ,the court further ruled that the arrears of R 24 500 were 'written off'. No reasons were provided as to why these amounts were written off. Thereafter, no steps were taken by the state to appeal the ruling nor was the decision reviewed. As a result, the plaintiff could not recover the arrear maintenance owed.

Hiemstra AJ was not satisfied with the conduct of the various maintenance officials

and outlined the various statutory duties placed on them. The court concluded that the maintenance officials had been grossly negligent. As a result, the plaintiff had suffered pure economic loss in the amount of the arrear maintenance due of R 24 500. The court concluded that, as a team of maintenance officers, they had neglected to take steps provided for in legislation and consequently, the employer, and the Minister of Justice were held liable for their unlawful and negligent omissions. The court, in this instance, opted not to make any orders against the maintenance officers in their personal capacities.

This ruling should send a clear message to all maintenance officials to remind them of their important duty to implement and fulfil the maintenance rights of the various maintenance creditors.

Retirement funds: Benefits payable on termination

In the context of retirement funds, benefits payable by employment-based pension or provident funds are normally payable on the termination of the employment contract. In terms of our law, it is well established that a pension benefit may be attached in order to secure a claim for arrear maintenance. Our courts have expanded this right and held that a pension benefit may also be attached to secure a future maintenance claim of the creditor, where there is a reasonable fear that the debtor may default on his or her future payments (see *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D), *Magewu v Zozo and Another* [2003] 7 BPLR 4859 (C), *Soller v Maintenance Magistrate, Wynberg and Others* [2006] 1 BPLR 53 (C), and *Burger v Burger and Another* [2007] 2 BPLR 50 (D)).

Where orders are to be made against retirement funds, the fund/s must be clearly identified and the amount to be attached must be specified. It must also be noted that the maintenance amount deducted from the pension benefit payable by the fund is subject to tax. Moreover, the method of payment (whether payment should be made to the court or some other mode of payment) should be contained in the order. The common practice is for the fund to pay the maintenance ordered as a capitalised lump sum to the court, which in turn, pays the maintenance creditor on a monthly basis.

Maintenance officers or debtors and their representatives, in any maintenance inquiry, can contact retirement funds or their administrators directly to establish membership and current benefit values. It is important to note that a private retirement fund is a separate juristic person and registered as such in terms of s 4 of the Pension Funds Act 24 of 1956 (and State funds are established in terms of various Acts of Parliament). The participating employer in the fund (the employer of the debtor) is a distinct separate entity from the fund and hence any order made

against the employer is not binding on the fund.

The practical difficulty facing many maintenance claimants (unlike the plaintiff in this case) is that often they are not aware that the member (maintenance debtor) has left service and is entitled to a benefit payable by the retirement fund. Where a maintenance inquiry is in progress or about to be instituted, and the member has left service, the maintenance creditor may then request the fund to withhold the benefit pending the outcome of the inquiry. Opinion is divided on whether the fund may legally withhold the benefit in these circumstances. On the strength of rulings by the courts in accepting that there can be a claim for future maintenance (including the strong emphasis on courts taking all possible steps to protect the rights of children) and the approach taken by the courts and the Pension Funds Adjudicator on the issue of withholding of benefits to secure the employer's claims pending civil or criminal proceedings, one can make a compelling argument supporting the withholding of the benefit pending the maintenance inquiry. Thus, maintenance creditors, to secure any future order granted by the court, may request the fund to withhold the benefit.

Maintenance officials and maintenance claimants should familiarise themselves with the legal requirements relating to the attachment of pension benefits. The failure to do so on the part of maintenance officials may result in adverse consequences for the maintenance officials personally and their respective employers.

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