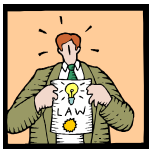
E-MANTSHI

A KZNJETCOM Newsletter

February 2009: Issue 37

Welcome to the thirty 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

1. Section 33(1) of the Constitution guarantees everyone the right to administrative action that is lawful, reasonable and procedurally fair. The Promotion of Administrative Justice Act, 3 of 2000 gives effect to that right and section 7 of the Act requires the Rules Board for Courts of Law to make rules of procedure for judicial review subject to the approval of the Minister and Parliament. These rules provide an appropriate procedure to facilitate proceedings for judicial review.

   The rules have been published on 3 February 2009 for general comment and will be considered by the parliamentary Portfolio Committee on Justice and Constitutional Development. The rules and the Forms relevant thereto are available at www.pmg.org.za/policy-docs .

2. The South African Judicial Education Institute Act, 2008 (Act No. 14 of 2008) came into operation on 23 January 2009. The proclamation was published in Government Gazette No. 31811 dated 22 January 2009.

Recent Court Cases

1. S. v. LE GRANGE AND OTHERS 2009(1) SACR 125 SCA

Judicial officers must manifestly conduct trials open-mindedly, impartially, freely and must avoid impatience.

Held, that the law required not only that a judicial officer must conduct a trial open-mindedly, impartially and freely, but that such conduct must be manifest, especially to the accused. The requirement of impartiality is closely linked to the right of an accused person to a fair trial, and such fairness would clearly be under threat if a court failed to apply the law and assess the facts impartially and without fear, favour or prejudice. Presiding over criminal trials was a difficult task, and cross-examination could sometimes appear protracted and irrelevant. However, impatience was something that a judicial officer must wherever possible avoid, and always strictly control. It could impede his perception, blunt his judgment and create an impression of enmity or prejudice in the person against whom it was directed. A judicial officer could perform his demanding and socially important duty properly only if he stood guard over himself, mindful of his own weaknesses and personal views, and controlled them. (Paragraphs [14] and [8] at 140*e-g* and 149*e-g*.)
Held, further, that many of the presiding judge's questions to the appellants had been legitimately put for elucidation or supplementation, but the record was also replete with questions that were intended to discredit the appellants, compounded in many instances by disbelief and scepticism. Far from merely clarifying matters, the questioning sought to pick holes in the appellants' version, and must have seemed to them to have been designed to produce answers favourable to the State. This questioning strongly indicated that the judge had made up his mind at an early stage that the State witnesses were telling the truth and the appellants lying. While judicial officers could, and did, form provisional views on the credibility of witnesses, it remained their fundamental duty not to close their minds to the possibility of changing such views until the last word had been spoken. Certain comments made by the presiding judge could mean only that he had decided, long before the cross-examination of the State witnesses, let alone before hearing the evidence of the appellants, that the State's case was the truth. He had not approached the appellants' case objectively and impartially, and the language used suggested that he had certain preconceived biases, which he had allowed to affect his judgment. (Paragraphs [20] and [23] at 150*c-f* and 152*f*-153*b*.)

2. S. v. WILLIAMS 2009(1) SACR 192 CPD

Section 112(1)(a) of Act 51 of 1977 should be used only for minor offences and then sparingly and only where it is certain that no injustice would result from its application.

The accused pleaded guilty to a charge of contravening s 12 (2), read with s 18, of the Social Assistance Act 59 of 1992, in that she had received social assistance knowing that she was not entitled thereto. The magistrate, applying s 112 (1) (a) of the Criminal Procedure Act 51 of 1977, convicted the accused and imposed a sentence of a fine of R12 000 or eight months' imprisonment, conditionally suspended for five years.

Held, on automatic review, that the sentence imposed was inconsistent with the provisions of s 112 (1) (a) of the Criminal Procedure Act. The fine imposed was clearly not within the parameters of s 112 (1) (a), as it exceeded the amount fixed by the minister, which was R1 500. The sentence was thus improper and needed to be set aside. (Paragraphs [4]-[10] at 194*e*-195*e*.)
Held, further, that it was also necessary to consider the lawfulness of the conviction. The jurisdictional fact required by s 112 (1) (a) was that the trial court must be of the opinion that the offence did not justify a sentence in excess of a fine of R1 500 *before* it was entitled to convict the accused solely on a plea of guilty. If the trial court considered that the offence justified a fine in excess of R1 500 it was obliged in terms of s 112 (1) (b) to question the accused in order to ascertain whether he or she admitted the allegations in the charge. Section 112 (1) (a) was intended for minor offences and was to be used sparingly and only where it was certain that no injustice would result from its application. *In casu* the magistrate had considered that the offence was serious enough to warrant a sentence exceeding the maximum prescribed fine, but had not applied his mind to the jurisdictional fact required by s 112 (1) (a). Accordingly, the conviction was not in accordance with justice. (Paragraphs [11]-[15] at 195*e*-196*c*.)
Conviction and sentence set aside. Matter remitted to magistrate to be dealt with in terms of s 112 (1) (b) of Criminal Procedure Act.

3. S. v. SAULE 2009(1) SACR 196 CKHC

An accused has the right to choose and be represented by a legal practitioner and although the right is not unfettered he must be given a reasonable opportunity to exercise this right.

During the course of his trial the appellant, one of three accused, ended the mandate of the attorney appointed by the Legal Aid Board to represent him, and informed the court that he had appointed an attorney of his own choosing. That attorney, however, failed to appear, despite various telephone calls being made to ascertain his whereabouts. The trial had already been delayed for extended periods and, anxious to avoid further delays, the magistrate insisted that the trial proceed. Since the appellant refused to choose between representing himself or continuing with the Legal Aid attorney, the magistrate ordered that the latter would continue to represent the appellant. When the time came for the parties to address the court on the merits, the appellant, now unrepresented, refused to speak. He was then convicted on three counts of robbery and two counts relating to unlawful possession of a firearm and ammunition. His uncooperative attitude persisted during the sentencing stage of the proceedings, and he refused to address the court in mitigation or to call witnesses. He was subsequently sentenced to an effective 24 years' imprisonment. In his appeal against both conviction and sentence it was contended on his behalf that the magistrate had erred in refusing to grant a postponement to enable the appellant to secure his attorney's attendance; and that, in general, he had not received a fair trial.
Held, that there was no justification for the magistrate personally to have telephoned the absent attorney. It was inappropriate for him, as the presiding officer, to have become embroiled in investigating issues that he was to adjudicate on. The

magistrate's comment that the appellant was wasting the court's time was also inappropriate and unwarranted. An adjournment of a few hours, as requested by the appellant, would not have prejudiced anyone; at most, it would have been an inconvenience. The appellant had the right to choose, and be represented by, a legal practitioner, in accordance with s 35 (3) (f) of the Constitution of the Republic of South Africa, 1996, and it was manifestly improper for the magistrate to have compelled him either to retain the Legal Aid attorney or to conduct his own defence. In denying the appellant the opportunity to establish why his representative was absent the magistrate had committed an irregularity.
There was no indication that any negligence on the part of the appellant was responsible for his attorney's absence, and the request for an adjournment was, in the circumstances, reasonable and bona fide; there had been no good reason for refusing it. (Paragraphs [13]-[20] at 207*e*-208*i*.)
Held, further, that an accused person's right to legal representation was not unfettered. Although a reasonable opportunity must be granted for the accused to exercise this right, at some stage the refusal of further postponements would be justified, and the trial could then proceed without the accused being represented. *In casu*, however, that stage had clearly not been reached, and the denial to the appellant of a reasonable opportunity to secure the presence of his representative was an irregularity that had rendered the trial unfair. The convictions and sentences must accordingly be set aside. (Paragraphs [21]-[23] at 208*j*-209*d*.)

4. BROWN AND ANOTHER v DIRECTOR OF PUBLIC PROSECUTIONS AND OTHERS 2009(1) SACR 218 CPD

Even if a warrant of arrest is lawfully obtained an arrest must be justifiable according to the demands of the Bill of Rights

Held, regarding the first applicant's contention that his arrest was unnecessary, as his attendance at court could have been secured by a warning or a summons, that even if a warrant had been lawfully obtained, this in itself did not necessarily justify an arrest to secure a suspect's attendance at court. As a drastic invasion of personal liberty, an arrest must be justifiable according to the demands of the Bill of Rights. However, the second respondent, having discovered that the second applicant and the couple's two children had left the country, was justified in concluding that the assessment of the flight-risk status of the first applicant had changed significantly. The presence of his wife and children in this country was no longer a factor that could be considered in his favour. It was also to be borne in mind that the first applicant had been sequestrated and, on the face of it, had no material ties to the country. Accordingly, the second respondent had been justified in arresting the first applicant, and therefore it had been shown on a balance of probabilities that his detention was lawful. (At 226*j*-227*c* and 227*i*-228*f*.)

Renke, S and Pillay, M

'The National Credit Act 34 of 2005: the passing of ownership of the thing sold in terms of an instalment agreement' **2008 *THRHR* 641**.

Roestoff, M and Coetzee, H

'Consent to jurisdiction – unlawful provision in a credit agreement in terms of the National Credit Act" **2008 *THRHR* 678**.

Van der Merwe, A

'In search of sentencing guidelines for child rape: an analysis of case law and minimum sentence legislation' **2008 *THRHR* 589.**

De Jong, M

'Opportunities for mediation in the Children's Act 38 of 2005' **2008 *THRHR* 630**.

Pieterse-Spies, A

'Inter-country adoption: a South African perspective' **2008 *THRHR* 556.**

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

Contributions from the Law School

Paternity: compelled testing and the best interest of the child
Botha v Dreyer (now Möller) [2008] JOL 22809 (T)

Introduction

Parenthood automatically results in the reciprocal duty of support between a parent and child. This legal relationship is based, with the possible exception of adoption, artificial insemination and surrogacy, on a *de facto* blood relationship between the parties. How to legally establish the truth to prove this relationship, notably paternity, in a parentage dispute has been fraught with uncertainty for decades. It is rather peculiar that the legislature has not expressly empowered the court to order the taking of samples for such testing in paternity cases – especially in light of the increased reliance on DNA evidence in the courts and the high statistical probability of proving (or disproving) paternity with these tests.

Presumptions

It is expedient to remind ourselves of the two common law presumptions that could play a role in a paternity dispute – presumptions that were forged centuries ago when the truth of paternity depended mostly on evidence by the birth mother. The first is the presumption that a child conceived or born of a woman who is a party to a marriage or a civil union is that of her husband or male civil union partner and not another. Historically, the courts have been hesitant to declare a child to be born of unmarried parents (extra-marital) (*F v L* 1987 4 SA 525 (W) and *B v E* 1992 3 SA 428 (T)).

The second common law presumption was rephrased in the Children's Act 38 of 2005 (s 36): a man is presumed to be the father of a child, born of a woman who is not a party to a marriage or a civil union, if it has been proven that he had sexual intercourse with her at the time when the child could have been conceived. In the absence of evidence to the contrary that raises reasonable doubt, such a man is presumed to be the biological father of the child. This statutory presumption places an evidentiary burden on the alleged father. This burden is different from the common law presumption equivalent that placed a legal burden on him to prove that he could not possibly be the father. As an aside it should be borne in mind that the rule that the mother's evidence should not be accepted without corroboration has been rejected in *Mayer v Williams* 1981 3 SA 348 (A), although the court did replace the rule with a lighter burden in that the mother's evidence should be carefully scrutinized in paternity cases.

Medical evidence

Although various factors may be relevant in proving (or rebutting) paternity, *inter alia,* evidence regarding the absence of sexual intercourse, impotence and sterility, three types of medical tests have been used in paternity disputes that could assist the court in determining paternity as corroborating the evidence of the plaintiff: one, a red blood cell test that could at most exclude paternity; two, the HLA tissue type testing that was used to prove paternity to a much more certain degree; and three, the more definitive DNA fingerprinting.

Where the parties voluntarily submit themselves and the child to such tests, or where the test results are available, the courts generally accept the results of such tests (*Ranjith v Sheela* 1965 3 SA 103 (D)). In *Van der Harst v Viljoen* 1977 1 SA 795 (C) the court accepted the tissue test evidence showing paternity on a probability scale of 99.85%. In a statutory rape case, the SCA accepted DNA analysis evidence regarding paternity of a child conceived during a rape (*Mathlare v S* [2000] JOL 7529 (A)). Legal acceptance of these tests is also evident from the Maintenance Act 99 of 1998 (s 21) that makes provision for orders relating to scientific tests regarding paternity. In *Botha v Dreyer* the court confirmed that judicial notice may be taken of the existence of these tests. It is unnecessary for medical evidence to be adduced regarding their nature and accuracy before an order is granted subjecting the parties to the tests – with the *caveat* that this does not exclude any challenge to the reliability of any particular test in litigation once the test had been performed.

Refusal to consent - negative inference

In instances where there is no court order and a party refuses to submit himself to such testing, s37 of the Children's Act applies. Where a party to any paternity proceedings refuses to submit himself or the child to the taking of a blood sample in order to carry out scientific tests relating to paternity, the court must warn the person of the effect which such refusal might have on the credibility of the party. Unlike its predecessor, this section is merely "a procedural safeguard for, or evidential warning" that the refusal might lead to a negative inference being drawn regarding credibility (Schwikkard & Van der Merwe *Principles of Evidence* 3rd edition (2009) 506). This does not resolve the main issue, namely the truth about the paternity of the child.

Compelling parents to submit to testing

The obtaining of the scientific test results to exclude (or prove) paternity has been fraught with legal difficulty; mainly as there has been no consistency in the courts as to the court's power to compel such tests in paternity disputes against the wishes of one of the parties. Two groups of cases can be identified.

The courts in *Seetal v Pravitha* 1983 3 SA 827 (D); *O v O* 1992 4 SA 137 (C) and *M v R* 1989 1 SA 416 (O) accepted the principle that the court as upper guardian does have the power to order both a minor and a parent to submit to such tests, where it would be in the best interests of the child – even if it is against the wishes of a parent. In the first two cases the court did not order the blood tests as it did not regard testing to be in the child's interests. In *M v R* the court found it to be in the interest of the child to compel his mother (and him) to undergo testing. The court stated that it had the inherent power to regulate its own procedures and as the search for and collection of evidence was a procedural matter; an order to compel was possible. The court noted that it would be in the best interests of the child to know the truth and that the tests are a reliable aid in resolving a paternity dispute. The interests of the child thus outweighed the right to privacy of the mother. The court specifically rejected the argument that it would not be in the interest of the child to be submitted to tests where it could prove that the man who is paying maintenance is not the father with the result that the child loses maintenance. Money wrongly taken from a man that is not the father is not a "benefit" that should be taken into account and protected by the court. A last noteworthy case, permitting the taking of evidence without permission, is that of *Ex parte Emmerson* 1992 3 SA 987 (W). The court authorized DNA testing on the remains of a man killed in an accident. The application was brought to establish the paternity of a child and to enable the mother to claim maintenance against his estate. The court noted that the deceased was no longer a legal subject and as such did not have the right to bodily integrity or privacy.

In contrast to these cases, the courts in the second group of cases, *Nell v Nell* 1990 3 SA 889 (T), *S v L* 1992 3 SA 713 (E) and *D v K* 1997 2 BCLR 209 (N) came to the opposite conclusion. In these cases the courts were reluctant to compel a party to submit to such testing against his/her will notwithstanding the fact that it could reveal the truth about paternity. The main arguments were one, that the power of the court as upper guardian related only to questions of custody and not the day-to-day parental power and control issues; two, that the compelling of a person to submit to testing is not a procedural matter as argued in *M v R* as it could affect the principles

of the substantive law; and three, that compelling a person to undergo such testing would be an infringement of the (interim) constitutional right to bodily integrity and privacy.

Botha v Dreyer

In the recent case of *Botha v Dreyer* an order was sought directing the mother and her minor child to be subjected to DNA testing for the purposes of determining whether he (Botha) is the biological father. Once confirmed, he sought a further declaration that he is entitled to full parental responsibilities and rights. The court argued that our origins as persons are, for most people, questions within the realm of the sacred and that truth is a primary value in the administration of justice that should be pursued because it invariably is the best means of doing justice. Murphy J noted that to exclude reliable scientific evidence because it involves a relatively minor infringement of privacy harms the legitimacy of the administration of justice. He concluded that there is "no overriding reason in principle or policy impeding the exercise of their inherent power and authority, as upper guardian or otherwise, to order scientific tests in the interests of discovering the truth and doing complete justice to all parties involved in a suit". He agreed with the first group of cases that as a general rule the more correct approach would be that the discovery of truth should prevail over the idea that the rights of privacy and bodily integrity should be respected – also because it would most often be in the best interests of a child to have any doubts about paternity resolved and put beyond doubt by the best available evidence.

The court noted the opposing fundamental constitutional principles of children's rights (s28) versus privacy (s14) and dignity (s10). The stipulation that a child's best interests are of paramount importance in every matter concerning the child, is a strong indication that where the competing interests of a parent's privacy/dignity and the child's interests are at stake that the latter should trump the former unless there are compelling reasons to the contrary. Furthermore, there is a duty on the court to ensure that the common law conforms to the rights and duties conferred in the Bill of Rights and reflects the changing social, moral and economic make-up of society. The court accepted the approach in *M v R* as in line with constitutional principles and could thus depart from a pre-constitutional decision of a higher court based on public policy considerations and as the precedent no longer reflected the *boni mores*.

The court also noted the changes brought about by the Children's Act specifically the greater flexibility in the award of different aspects of care and contact to unmarried fathers. In s 21 the unmarried biological father could automatically acquire the same parental responsibilities and rights as the child's mother provided he meets certain requirements. The court found that (par 39):

> "this significant change in policy towards the rights and responsibilities of unmarried biological fathers brings added importance to the need for scientific determinations of paternity. In the past a court in its discretion would grant aspects of parental authority to an unmarried biological father only if it considered it to be in the child's best interests. It could accordingly rule that the father had no rights or responsibilities beyond a duty to pay maintenance. Now,

> once paternity is established, the rights and responsibilities are automatic with the precise nature and content being subject to mediation, review and ultimately a parenting plan. Once paternity is established the parties become co-holders of parental responsibilities and rights on an equal footing."

Given the automatic extended rights and obligations of unmarried fathers the court regarded it in the interests of justice that the truth be established before burdening a party with responsibilities that might not be his to bear. The court determined that the best interests of the child only become relevant with the eventual precise determination of the extent of his responsibilities and rights by the various methods envisaged in the statute.

The final question the court considered was whether or not it will be in the best interests of the minor child to determine paternity with certainty. The court did not place much weight on the argument that concealing the truth from a child might have the supposed advantage of not 'bastardising' the child or cutting it off from an established source of maintenance as it would be an inherent and inescapable injustice in compelling a person to assume obligations not rightfully his.

The court concluded that it will be in the best interests of the child that paternity be scientifically determined and resolved at this early stage. Relevant factors included the fact that both parties at various times admitted and denied that Botha is the biological father; that the mother was intimate with a second party within the period of possible conception; that the child was barely one year old and thus there is no established relationship that might be unduly disturbed or harmed by a determination of non-paternity. If the applicant is established to be the father, the child will benefit in time from knowing the truth and from his commitment to her financial well-being. Added hereto, the possible stigma of a disputed paternity will also be removed.

Conclusion

The judgment is important in that it discusses the various constitutional principles, including the best interests of the child and the privacy rights of the parents, in light of the new provisions of the Children's Act. Whether this judgment would be the final word on the matter is however doubtful.

It is submitted that the legal system should take the recognition of the reliability of the DNA tests to its logical conclusion and acknowledge that it is no longer necessary to rely on either presumptions or the evidence of the mother – the truth could and should be the determining factor. To give the mother the 'choice' to choose a 'father' is not only an injustice to the man held liable for the maintenance of a child that is not his, but it also precludes the real biological father from the choice of participating in the life of his child.

Although the section is not yet operational and although it is limited to children born of artificial fertilisation, s 41 of the Children's Act recognises the right of a child to have access to the biological and medical information of genetic parents. To deny a child conceived through sexual intercourse the right to such information, through the denial of the truth about paternity, would not only be unconstitutional, but could also

potentially be medically life-threatening in instances of hereditary diseases. One can only hope that the legislature, or the Constitutional Court, would at some stage provide final clarity.

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If you have a contribution which may be of interest to other Magistrates you may forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

Debt Review

Introduction

At a recent discussion Magistrates of the Private Law Section, Pietermaritzburg concluded that, subject to further developments/interpretation in the High Courts as well as possible new arguments presented in our own courts, the issuing of debt re-structuring should be dealt with as set out hereunder.

A. Procedure

1. **Section 86 (7) (a):** Debt counsellor concludes that consumer is **not over-indebted** and rejects the application to be declared over-indebted.

In terms of section 86 (9) the consumer may then apply to the Magistrates` Court:

(i) for leave to bring an application and
(ii) if (i) is granted, for the Magistrate's Court to declare him over-indebted and then make the appropriate order(s).
(iii) An application for condonation will have to be brought if the aforementioned application is submitted to the court more than 20 days after the debt counsellor has provided a letter of rejection.

See Regulation 26 and Form 18

The application is brought in terms of section 87. It will have to be on notice to the credit providers and will have to comply with Rule 55 of the Rules of the M.C.

2. **Section 86 (7) (b):** Debt counsellor concludes consumer is **not over-indebted** but proposes to the credit providers a **voluntary** plan of **debt re-arrangement.**

(a) Consumer and **all** credit providers **accept proposal**. See section 86(8) (a) read with section 138.

To be filed as a consent order; no notice required therefore not to be enrolled on court roll.

(b) **Proposal not accepted** by every role player.
See section 86 (8) (b) read with section 87 and Rule 55 of Rules of M.C.

3. **Sec 86 (7) (c) :** Debt counsellor concludes consumer is **over-indebted** and makes proposal to M.C.

NCA provides no mechanism whereby these matters may be brought before MC. Section 87 does not apply. Also no Regulation or Form. ***Lacuna*** in NCA. (This is the situation whether or not the credit providers are prepared to consent to the proposal)

4. **Is there any remedy** for a consumer who wants to be declared over – indebted and/or have (an) agreement (s) declared reckless?

See section 83 and 85:"*in any court proceedings in which a credit agreement is being considered*" the court may declare that the credit agreement is reckless (section 83)/the court may declare that the consumer is over-indebted (sec 85).

(a) Consumer could bring "**declaratory application** "as a first document on which stamp duty is payable. Follow Rule 55 procedure.

Reasons: (i) Sec 83 + 85 authorizes Magistrates to make declaratory orders in these instances.

(ii) These orders may be made"in any court proceedings in which a credit agreement is being considered".

(iii) Sec 88 (3) envisages proceedings contemplated in sec 83 and 85.

(iv) The court orders that may be made are provided for in sec 83 (2) + (3) and sec 85 (b) read with sec 87.

(v) The machinery for such an application can be found in Rule 55 of the Rules of the M.C.

(vi) Even though sec 85 (a) allows the Court to refer the matter to a debt counsellor for a recommendation in terms of sec 86 (7), this will not take the court back to the doldrums because the case will be kept on the court roll.

(b) **Defended Matters**

Sec 83 +85 "in any court proceedings in which a credit agreement is being considered".

(i) Reckless credit could be raised as a defence.
(ii) Over indebtedness will never be a defence.
Quaere: Could it be raised by way of e.g. an interlocutory application? If so, it is suggested that the application be held in an abeyance pending finalization of the action.

B. Jurisdiction in terms of amount

When summons is issued sec 29 of the M.C Act, read with GN R459 of 24/03/1995 and GN R1411 of 3/10/1998 applies: The amount claimed should not be more than R100, 000 00.

However, by necessary implication there can be no monetary limit involved if a debt counsellor makes proposals to the Magistrates' Court or if an application is sought for a declaratory order as set out in A4 above.

Reasons: (i) Debt counselor may only make recommendations to a Magistrate's Court. See sec 86(7) (a), 86 (9) and 87.

(ii) When the counsellor rejects an application the consumer may only apply to the M.C. See sec 86(7) (a), 86 (9) and 87.

(iii) When a credit provider terminates a review and proceeds with enforcement proceedings it is the MC that may order that a review resumes. See sec 86(11).

(iv) In the event of a voluntary surrender the settlement amount may only be recovered in the M.C. See sec 127(8) (a).

C. Jurisdiction in terms of person

Suggested: District where consumer resides/carries on business/is employed.

Reasons: (i) Completely impossible to give effect to NCA if credit providers could not be joined in one **forum**.

(ii) Consumer has to be present. Consumer is already experiencing financial difficulties and should not have to appear in **fora** all over the

country.

(iii) See analogy of debtor in proceedings i.t.o. sec 65 A and sec 74(1) of Act 32/1944: Where debtor resides/carries on business/is employed.

D. <u>Does a sec 129 (1) (a) notice prevent the consumer from applying for debt review?</u>

See sec 86(2)

The answer is No.

Reasons: (i)"Debt enforcement "in terms of the NCA involves the Court in the sense of the Court having to be approached. The Court is not yet involved when the sec 129 notice is provided. It is a preliminary step.
(It is for this reason also that the sec 129 notice and the letter of demand required by sec 57 + 58 of Act 32/1944 may be combined; the Court is involved only when the relevant document is stamped and filed at court).

(ii) The sec 129 notice encourages the consumer to approach a debt counsellor. This will be pointless if the consumer could not, when appropriate, apply for debt restructuring.

P. Joubert
Pietermaritzburg Magistrate's Court
13/1/09

A Last Thought

"Be not too hasty either with praise or blame; speak always as though you were giving evidence before the judgement seat of the Gods**."**

Seneca

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