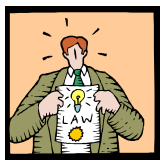
E-MANTSHI

A KZNJETCOM Newsletter

July 2009: Issue 42

Welcome to the forty 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. 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. A *Safety at Sports and Recreational Bill* has been introduced in Parliament on 15 July 2009. This purpose of the Bill is to provide for measures to safeguard the physical well-being and safety of persons and property at sports or recreational events held at stadiums, venues or along a route; to provide for certain prohibitions; to provide for the provisional and final risk categorisation of events; to provide for the establishment of measures to deal with safety and security at events; to provide for accreditation of role-players at events; to provide for event ticketing; to provide for the control of access of spectators and vehicles at events; to provide for the issuing of safety certificates for planned or existing stadiums or venues; to provide for the contents of safety certificates and amendments to safety certificates; to provide for appointment of inspectors and their powers of entry and inspection; to provide for the deployment of security services; to provide for spectator exclusion notices; to provide for prohibition notices; to provide for the establishment of an Appeal Board and for appeals; to provide for public liability insurance for events; to provide for payment of fees; to provide for offences and penalties; and to provide for matters connected therewith.

2. Regulations regarding the use of payment cards to purchase petroleum products at a retail site were published in Government Gazette No. 32389 dated 9 July 2009. Regulation 4 now reads as follows:

Method of payment for sale of petroleum products at a retail site

4.(1) A retailer must accept payment in the form of cash.

(2) A retailer may accept payment in the form of a payment card.

(3) A notice on the type of payment card that is acceptable to the retailer must be prominently displayed.

(4) If no type of payment card is acceptable to the retailer then a notice to that effect must be prominently displayed.

(5) Despite the acceptance of payment in the form of a payment card contemplated in sub-regulation 4(2), the Department of Energy must, for purposes of determining the retail margin, treat all transactions as cash sales.

(6) The Department of Energy must determine and publish the cost of cash payment cards and the elements thereof on its website.

Recent Court Cases

1. S. v. MOSESI 2009 (2) SACR 31 WLD

A magistrate cannot engage counsel in debate on the elements of an offence before all evidence is led and cases on both sides closed.

The appellant pleaded not guilty to a charge of extortion, but was convicted of attempted extortion, and sentenced to a fine of R10 000 or three years' imprisonment. In his appeal against conviction the appellant contended that the trial magistrate had unfairly assisted the State in the presentation of its case. The record showed that, immediately after the prosecutor had led the evidence of the complainant, the magistrate had engaged the prosecutor in a discussion about the respective definitions of the crimes of extortion and corruption. He had then adjourned the proceedings in order to consult legal textbooks, and, having done so, indicated to the State that the complainant's evidence appeared not to disclose one of the elements of the offence of extortion.

Held, that while it was a principle of law that a court could intervene at any time to elucidate a point, it should not anticipate or second-guess a litigant's strategy or case. *In casu* the magistrate had not waited for cross-examination to be completed prior to engaging counsel as to the elements of the crime. He did not know what other witnesses the State intended calling, nor was he aware of what questions might have been asked in cross-examination. His conduct had alerted the State to a deficiency in its case. A court's impartiality must be evident not only from the nature and scope of its questions to witnesses, but also from the type of questions it put to the legal representatives. The magistrate ought to have engaged in the debate only after all the evidence had been led and the cases on both sides had been closed.

The case bore testimony to the fact that a presiding officer should not enter the arena of a trial. The magistrate had contaminated the proceedings and, regardless of what had happened subsequently, a failure of justice had occurred. (Paragraphs [6]-[10] and [17] at 34b-34j and 36f.)
Conviction and sentence set aside.

2. S. v. NELL 2009 (2) SACR 37 CPD

The interests of the public and all relevant circumstances are to be considered in deciding whether evidence that has been illegally obtained would be admissible.

It is evident that s 35(5) of the Constitution of the Republic of South Africa, 1996, envisages circumstances when evidence will be admissible even if the obtaining of same entailed the violation of a right enshrined in the Bill of Rights. The correct approach is that the consideration whether the admission of evidence will bring the administration of justice into disrepute requires a value judgment, which inevitably involves considerations of the interest of the public and all relevant circumstances. The following factors may also be considered in determining whether the admission of the evidence will bring the interests of justice into disrepute: whether the evidence obtained was a result of a deliberate and conscious violation of constitutional rights; what kind of evidence was obtained; what constitutional rights were infringed; was such infringement serious or merely of a technical nature; and would the evidence have been obtained in any event. (Paragraph [21] at 42i-43b.)
The court in the present case held that the police officer who had conducted a possibly illegal search of the appellant's house for stolen goods had not subjectively intended to violate the appellant's constitutional rights; that the appellant had been aware of his right to legal representation and had exercised that right by instructing his wife to telephone his attorney; that the evidence obtained during the search was real evidence; that the manner in which it had been obtain could never be regarded as a serious and flagrant breach of the appellant's right to privacy; that no force was used to enter the appellant's premises. The court held accordingly that the admission of the evidence would not render the trial unfair or detrimental to the administration of justice, and that the exclusion of the evidence would rather bring the administration of justice into disrepute. The evidence was accordingly held to be admissible. (Paragraphs [22]-[24] at 43d-43i.)

3. S. v. TABETHE 2009 (2) SACR 62 TPD

The concept of Restorative Justice can also find application in more serious matters and is not limited to minor offences.

The accused pleaded guilty to a charge of raping the 15-year-old daughter of his life companion, and was duly convicted. The matter was referred to the High Court for sentencing, where it became apparent that both the complainant and her mother regarded it as desirable that the accused should not be sent to prison; rather, he should be sentenced in such a way that he could continue to support them and other members of the family, as he had been doing both before and since the incident. At

the court's request a victim/offender programme was conducted prior to the imposition of sentence, with the aim of determining whether the complainant's wishes regarding sentence were genuine and capable of benefiting those affected by the crime. It was also ascertained that a suitable community service programme existed which the accused could follow if a non-custodial sentence were to be imposed.
Held, that there were a number of substantial and compelling circumstances that justified the imposition of a lesser sentence that that prescribed by s 52 of the Criminal Law Amendment Act 105 of 1997. [The Court proceeded to list 24 such circumstances, relating to the accused, the complainant, the offence, and the interests of the complainant's family and of society in general.] This was the first rape case that had come before the court in which restorative justice could be applied in full measure in order to ensure, firstly, that the offender continued to acknowledge his responsibility and guilt; secondly, that he apologised to the victim and helped her to find closure; thirdly, that he recompensed the victim and society by supporting the former and by rendering community service to the latter; and fourthly, that he continued to support his family. (Paragraphs [35] and [36] at 67c-68f.)
Held, further, that although the court had to impose sentence fully conscious of the legislature's wish that severe minimum sentences should be imposed on rapists in virtually all circumstances, it was also obliged to impose a lighter sentence when the circumstances of a particular case dictated it. Restorative justice was a concept that had received judicial recognition, and there could be little doubt, in light of the challenges faced by the criminal justice system, including perennial prison overcrowding, that the concept must find application not only in minor offences, but in suitable matters of a grave nature. The present case was such an instance. (Paragraphs [37]-[40] at 68f-69a.)
Accused sentenced to ten years' imprisonment, suspended for five years on condition, inter alia, that he remain in designated fixed employment; that he contribute at least 80% of his income to the maintenance of the victim and her family; and that he perform 800 hours of community service.

4. S. v. VISAGIE 2009 (2) SACR 70 TPD

In applying the maxim *de minimis non curat lex* a judicial officer is charged with a policy decision to be exercised according to all relevant circumstances of the case.

The appellant was convicted in a magistrates' court of common assault and sentenced to be cautioned and discharged. The charge arose from an incident in which the complainant, a mechanic, and the appellant had become involved in a verbal altercation concerning repairs to the latter's vehicle. At a certain point the appellant pushed the complainant, causing him to trip over a piece of equipment and break his wrist. The appeal was based, inter alia, on the ground that the magistrate ought to have applied the maxim *de minimis non curat lex*.
Held, that whether or not to allow an acquittal on the grounds of the triviality of an alleged offence was a value judgment. In determining the applicability of the *de minimis* principle the judicial officer was charged with a policy decision that was to be exercised according to all the relevant circumstances of the case, including the

interests of the community. The circumstances in the present case, where two grown men had conducted themselves in a manner reminiscent of two little boys on a playground, were less serious than those in many of the cases where the maxim had been found not to be applicable. The complainant's provocative and aggressive conduct was also applicable. The complainant's provocative and aggressive conduct was also a relevant circumstance, as was the fact that the complainant had fractured his wrist. However, having regard to the severity of the injury and the manner in which it had been sustained, the mere fact that the complainant had been injured did not constitute a circumstance tending to exclude the application of the *de minimis* principle in this instance. In all the circumstances of the case it would better serve the administration of justice in the nation's busy courts, without adversely affecting the interests of the community as a whole, if the courts were not to become concerned with such childish and trivial behaviour. (Paragraphs [15] and [31]-[36] at 77c-d and 85h-87d.)
Conviction and sentence set aside.

5. S. v. DUBE AND OTHERS 2009 (2) SACR 99 SCA

In considering recusal a presiding officer should consider the degree of intimacy with a party or legal representative appearing before him or her – the greater the degree of intimacy the greater the need for recusal.

Three men were convicted in a regional court on a count of robbery with aggravating circumstances, and each sentenced to 16 years' imprisonment. Following the dismissal of their appeal to the High Court, the appellants successfully applied for a special entry to be made on the record. The special entry related to an alleged irregularity occasioned by the fact that the judge who had presided at the appeal hearing was the husband of the advocate who had argued it on behalf of the State.
Held, that the impartial adjudication of legal disputes was a cornerstone of the legal system. Judicial officers were to conduct trials open-mindedly, impartially and fairly, and such conduct must be manifest to all, especially the accused. Not only actual bias, but the reasonable perception of bias, disqualified a judicial officer from presiding over proceedings. This disqualification was so complete that continuing to preside after recusal should have occurred rendered the proceedings a nullity. (Paragraphs [7] and [8] at 103d-g.)
Held, further, that in general a judicial officer must not sit in a case where he or she was aware of the existence of a factor which might give rise to an apprehension of bias. The rationale for the rule was the principle that one could not be a judge in one's own cause. Any doubt was to be resolved in favour of recusal. In situations where a judge had a relationship with a party or a legal representative appearing before him or her, it was always appropriate for the judge to consider the degree of intimacy of the relationship; the greater the degree, the greater the need for recusal. Where it was difficult to avoid having closely connected people working in a given matter it would be preferable to bring in other judicial officers or legal representatives from different jurisdictions. If this was not feasible, the relationship must be brought to the attention of the parties and their consent canvassed before commencement of the hearing. If consent was given, it must be entered into the record. (Paragraphs [13]-[15] at 104i-105e.)
Held, further, that it was the litigant, not counsel, who must entertain a reasonable

apprehension of bias in order for the disqualification to be sustained. While it was so that the appellants' counsel had been aware of the judge's relationship to the State advocate, the appellants themselves had learnt of it only when the result of the appeal had been conveyed to them. Consequently, their counsel's lack of objection at the appeal hearing itself was irrelevant. There was also no merit in the argument that the appellants' apprehension of bias would have been justified only if the judge had been sitting alone. The proceedings had been tainted regardless of the fact that he had heard the matter with another judge. A reasonable litigant would have been justified in entertaining a reasonable perception of bias; however, this did not mean that any actual bias had been established. Furthermore, it could not be laid down as a rule that in every case where the judge was related to one of the legal representatives, he or she would be disqualified from sitting. Each case was to be evaluated according to its circumstances and in light of the established principles. (Paragraphs [16]-[109] at 105f-106g.)
Special entry upheld. Order of court a quo set aside and matter remitted to High Court for hearing before a differently constituted full bench.

5. STANDARD BANK OF SOUTH AFRICA LTD v HALES AND ANOTHER 2009 (3) SA 315 (D + CLD)

Where a consumer alleges over-indebtedness the court has a discretion which must be judicially exercised whether to refer a matter to a debt counsellor or not.

In legal proceedings on a loan agreement which is a credit agreement as defined in s 1 of the National Credit Act 34 of 2005, in which the debtor has sought an order in terms of s 85(a) of the Act that the court refer the matter directly to a debt counsellor for evaluation and a recommendation in terms of s 86(7), the word 'may' in s 85(a) vests the court with a discretion as to whether or not to take that step. It is clear that the need to exercise such discretion is triggered by the presence of two factors mentioned in the section, namely (1) proceedings in which a credit agreement is being considered; and (2) an allegation that a consumer (the debtor) under the credit agreement is over-indebted. (Paragraphs [6] and [7] at 319B-E)

Where in such legal proceedings an order in terms of s 85(a) of the Act is sought, the plea does not amount to a defence to the plaintiff's claim. It goes no further than to request the court to refer the matter to a debt counsellor in terms of s 85(a). This is no more than a request that the court exercise a discretion in the defendants' favour. Since the debt counsellor is obliged to make a recommendation to the court in terms of s 86(7), this is, at most, a dilatory plea rather than being in the nature of a confession and avoidance which would attract an onus. There is, therefore, no onus to discharge once the two factors are admitted to be present. There are no facts to prove on the part of the defendants which would discharge an onus. Instead, the defendants have only to persuade the court to exercise its discretion in their favour. (Paragraph [10] at 320D-G.)
The legislature has not seen fit to enumerate specific factors which should weigh with the court in exercising this discretion. In such circumstances the courts have steadfastly refused to produce a *numerus clausus* of factors which will apply in every situation. Section 3 and other relevant sections of the Act are intended to provide a

backdrop against which the discretion must be exercised. The court, in exercising any discretion, is required to do so judicially. This means that the court must have regard to a conspectus of all relevant material. It follows that it is in the interests of both parties, but in particular the party desiring the referral to a debt counsellor, that as much relevant material is placed before the court as possible to assist in this exercise. (Paragraphs [11]-[12] at 320H-321H.)
In the present case, the defendants, having requested the court to grant an order in terms of s 85(a) of the Act, referring the matter to a debt counsellor, had placed very little information before the court upon which it could exercise its discretion. The court held that, on the little material before it, it was not disposed to exercise its discretion in favour of the defendants and take the step referred to in s 85(a). The court accordingly granted judgment in favour of the plaintiff in its claim for payment of the amount outstanding on a mortgage bond. (Paragraph [26] read with para [22] at 327H and 324I-325E.)

From The Legal Journals

Mujuzi, J D
" Life imprisonment in South Africa: yesterday, today, and tomorrow"
(2009) SACJ 1

Barnes, J
" Not too 'Great Expectations': Considering the right to health care in prisons and its constitutional implementation"
(2009) SACJ 39

Le Roux, J & Muhire, Y
" The status of acts of sexual violence in international criminal law"
(2009) SACJ 69

Vessio, M L
"Beware the provider of reckless credit"
2009(2) TSAR 274

Kufa, M
"When more is said than done – The plea - bargaining process "
2009 De Rebus July

Malan, K
"Observations on the use of official languages for the recording of court proceedings"
2009 TSAR 141

Otto, J M
"Verkoop van regte teen 'n diskonto en die toepaslikheid van die National Credit Act"
2009 TSAR 198

Botha, M
"Pie heading for the sky? "
LexisNexis Property Law Digest v13 p7

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

Contributions from the Law School

The Draft Recognition of Customary Marriages Amendment Bill, 2009 and the implications for the Magistrates' Courts

Introduction

In May 2009 the Department of Home Affairs published the Draft Recognition of Customary Marriages Amendment Bill, 2009 for comment. In terms of this Bill the definition of "court" is extended to include a Magistrate's Court.

In terms of s 4(7) of the Recognition of Customary Marriages Act 120 of 1998 (the Act), a court may, upon application and upon investigation instituted by that court, order the registration of a customary marriage or the cancellation or rectification of any registration of a customary marriage effected by a registering officer. Similarly, a customary marriage may only be dissolved by a court (s 8(1)).

A few issues are noteworthy and will be discussed hereunder: one; the registering officers and the problems currently experienced in practice with the registering of customary marriages at the Department of Home Affairs; and two; the jurisdiction of the court and the duties that it will be imposed on the Magistrates' Courts.

From the case law it is evident that the registration of a customary marriage has important legal consequences. Where one of the parties to the customary marriage has died the other may be seeking to be recognised as a surviving spouse in order to access death benefits or maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990 (*Kambule v Master* 2007 (3) SA 403 (E)). Alternatively, the dispute may be about which of the women in his life should be allowed to bury the deceased (*Thembisile v Thembisile* 2002 (2) SA 209 (T); *Manona v Alice Funeral Parlour* [2002] JOL 9717 (Ck)). The validity of a customary marriage may have to be established to enable the parties to get a divorce and for an *interim* maintenance order to be made (*Mabuza v Mbatha* 2003 (4) SA 218 (C) and *Baadjies v Matubela* 2002 (3) SA 427 (W)).

The registering officer

The person responsible for the consideration and registration of customary

marriages is the registering officer. The registering officer is not defined in the Act and it is unclear whether he must be an official of the Department of Home Affairs or somebody else. The registering officer has wide powers in deciding whether a marriage qualifies as a customary marriage. If he is satisfied that it meets the requirements, he must register the customary marriage by recording the identity of the spouses, the date of the marriage and any lobolo agreed to (s 4(4)).

In terms of recent research conducted by the Centre for Criminal Justice at the University of KwaZulu-Natal it has become apparent that there are practical problems being experienced by persons attempting to register their customary marriages and in some instances discrepancies have been found between the records of the Department and the reality on the ground. There is also evidence that some married men “move on” with their lives without divorcing their spouse(s) and then enter into further marriages in contravention of the legislation.

The Bill will go some way in addressing some of these issues. The Bill firstly, makes provision for the specific written appointment of registering officers by the Minister of Home Affairs that sets out the date of appointment and the limitations in the appointment; secondly, where the registering officer refuses to register the customary marriage reasons must be provided and such reasons must be forwarded to the Department of Home Affairs; thirdly, the registering officer may not register the customary marriage where one of the parties are deceased; fourthly, the Director-General is the custodian of all records and documents relating to the registration of customary marriages; fifthly, it will be a criminal offence for a registering officer to knowingly register a customary marriage in instances where he is not authorised to do so; and lastly, the registration of a customary marriage must be done by both spouses together.

Proof of the registration of a customary marriage

Although the Act states that the failure to register a customary marriage does not affect the validity of the marriage (s 4(9)), the practical reality is that by the time the issue comes before the court, there are conflicting versions and opposing claims. What adds to the possible conflict is the fact that, currently, customary marriages may be registered by “either” of the spouses (s 4(2)).

The crux of the Act regarding the marriages’ legality is twofold: one, no spouse in a customary marriage may enter into a marriage under the Marriage Act 25 of 1961, except in terms of s 10(1) where he is, firstly, already in a monogamous customary marriage with the same wife; and secondly, where a husband in a customary marriage wishes to enter into another customary marriage, he must make an application to the court to approve a written contract which will regulate the future matrimonial property system (s 7(6)).

There have been cases where the court had to decide the marital status of two women *vis-à-vis* the same deceased man to determine to whom the deceased had been married or whether he has been married to both. Where a man has entered into a customary marriage with one woman and subsequently entered into a civil

marriage with another woman in contravention of the Act, the second (civil) "marriage" will be regarded as null and void (*Mrapukana v Master of the High Court* [2008] JOL 22875 (C)) and *Thembisile v Thembisile* (*supra*)).

The requirements for a customary marriage are important and the Act provides some clarity. Both parties must be over the age of 18 and have consented to be married to each other under customary law (s 3(1) (a)). Furthermore, the marriage must be negotiated and entered into or celebrated in accordance with customary law (s 3(1) (b)). No further details about the negotiation or celebrations are provided in the statute. It should be noted that there is a distinction to be drawn between KwaZulu-Natal and the rest of the country as in KwaZulu-Natal the Zulu customary law has been partly codified by the KwaZulu Act on the Code of Zulu Law 16 of 1985 and the Natal Code of Zulu Law Proc R151 GG 10966 of 9 October 1987. It should thus be appreciated that any court should, when determining the validity of a customary marriage, apply the requirement of the laws and customs relevant to the specific parties. This is a factual question.

In the case of *Mabuza v Mbatha* (*supra*) the court confirmed the flexibility of African customary law and the fact that it continues to evolve. It is in practice different from what it was centuries ago. In this matter the court found that it was inconceivable that the siSwati custom of *ukumekeza* (formal integration of the bride into the bridegroom's family) has not evolved and that it cannot be waived by agreement between the parties or their families. However, where the evidence showed that one of the requirements for a customary marriage is that there must be an agreement that *ilobolo* would be paid and there is no evidence of such an agreement, the court has found that there was no customary marriage (*Manona v Alice Funeral Parlour* (*supra*)).

Not all relationships have passed the scrutiny of the courts. In *Baadjies v Matubela* (*supra*) the court refused interim Rule 43 relief for maintenance *pendente lite* as the applicant could not prove that she was indeed married to the respondent. There was no official registration of the marriage and no certificate issued. Although this was not necessarily fatal to her application, the court found that the evidence also did not support her contention that they were married. Indeed, in an earlier domestic violence application she herself referred to the respondent as her "boyfriend".

Divorce

One of the main consequences of the Bill is that should it become law, the Magistrate's Court would have jurisdiction to dissolve a customary marriage on the ground of the irretrievability of the marriage (s 8(1)). Furthermore, the Mediation of Certain Divorce Matters Act 24 of 1987 and s 6 of the Divorce Act 79 of 1979 relating to the safeguarding of the interests of the dependent and minor children apply to the dissolution of a customary marriage (s 8(3)). Moreover, although controversial, a court that grants a decree of a divorce of a customary marriage will, *inter alia*, have the powers as contemplated in sections 7, 8, 9 and 10 of the Divorce Act. Section 7 of the Divorce Act deals with the division of assets and the maintenance of the parties and includes a redistribution order; s 8 deals with the

rescission, suspension and variation of orders; s 9 with forfeiture of benefits and s 10 with costs. Added hereto, the Recognition of Customary Marriages Act itself makes provision for the court granting the divorce where there is more than one wife, to consider any contract or agreement or order made in terms of s 7(4)-(7) of the statute (s 8(b)).

The consequence of the proposed amendment is that the Magistrate's Court would suddenly be required to take cognisance of this Act as well as the South African divorce law prior to its making a divorce order. An additional challenge, no doubt! One light in the tunnel is the Constitutional Court judgment of *Gumede v President of South Africa* 2009 (3) SA 152 (CC) where some guidelines for dealing with the division and redistribution of the assets have been set.

Conclusion

Although the Bill is important in that it corrects some of the defects in the original statute, there will be some impact on the Magistrates' Courts in the form of workload and then maybe training. However, the main positive effect of the Bill is that it would provide access to justice to women, especially rural women, which was after all the group the Act originally aimed to assist. In modern times where people are more mobile and the relationships are looser, certainty of a marriage remains important - especially as it has long term legal consequences.

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Matters of Interest to Magistrates

The Institute for Security Studies

ISS TODAY

16 July 2009: Retributive Justice and a Rehabilitative Approach to Offenders in South Africa

The Department of Correctional Services (DCS) is tasked with the responsibility of detaining 'offenders'* and at the same time to ensure that while in their custody, 'offenders' are rehabilitated so as to prevent them from committing the same crimes again. While the latter is the clear focus of the White Paper on Corrections (2005), the Correctional Services Act (Act No 111 of 1998), which has sections of it currently under review for amendment, seems to pay more attention to retribution measures.

The White Paper on Corrections maintains a rehabilitative approach. It seeks to move away from a conservative view of looking at corrections by emphasising that 'offenders' should not be simply left behind bars; rather they should be given tools to change their lives. It argues that punishment will not prevent offenders from engaging in illegal activities once they have been released:

'The White Paper represents the final fundamental break with a past archaic penal system and ushers in a start to our second decade of freedom where prisons become correctional centres of rehabilitation and offenders are given new hope…. will result in a second chance towards becoming the ideal South African citizen.'

The Correctional Services Act however does not focus specifically on rehabilitation. While it is acknowledged as indicated in section 38 of the Act, and during the Ministry's 2004/2005-budget vote, former DCS Minister Ngconde Balfour stated: "I am convinced that correction and rehabilitation is the only way in which we are going to insulate society against the cycle of crime. No high walls will do this", the Act does not make rehabilitation a priority. Instead, according to section 36:

'With due regard to the fact that the deprivation of liberty serves the purposes of punishment, the implementation of a sentence of imprisonment has the objective of enabling the sentenced prisoner to lead a socially responsible and crime-free life in the future'.

The Portfolio Committee acknowledged the differences in approach by the White Paper and the Act and as a result approved the amendment (Amendment Bill B32 of 2007) to the Act in May 2008. The proposed amendment is an attempt to merge the differing approaches in the White Paper and the Act by altering some of the vocabulary used when referring to those that have been incarcerated. Section 1 of the Amendment Bill, refers to prisons as correctional centres, for example.

Additionally, civil society groups and unions, such as the South African Prisoners Organization for Human Rights (SAPOHR) have called for better rehabilitation programmes and services in public prisons. Government, stakeholders and civil society therefore do not only acknowledge but also prefer the rehabilitative approach. Where then does the difficulty come in if there have been moves to merge the White Paper's rehabilitative stance and the Act's retributive tendencies? The difficulty lies in its implementation.

Public Correctional facilities still practice retribution. While the department has called for a rehabilitative approach, in practice this has proven difficult to implement mainly due to hindrances from society, DCS and the offender.

On a societal level, victims of crime tend to want to see their attackers incarcerated. In the National Crime Prevention Strategy (1996) it reads that *'… the deficits in the criminal justice system undoubtedly contribute to a culture of impunity on the part of perpetrators and a sense of helplessness on the part of victims'.* There's a sense of 'justice has been served' by society when offenders are behind bars, whether they are rehabilitated or not. This is also exemplified by newspaper headlines (for the consumption of the public) such as Revoke *'racist farmer's bail': community* (The Star, 8 July 2009) and *'You are lucky there is no more death penalty'* (Pretoria News, 3 July 2009). There is also a sense of relief that the perpetrator will no longer be around to harm anyone else. Even in cases where an offender is released, social re-integration measures by DCS are partly impeded by communities.

Without implying that positive initiatives such as the Victims Charter Survey should not exist, the focus on the victim also needs to be inclusive of the accused. While acts of 'restorative justice' assist in this regard, the high rate of recidivism, which was estimated at 94% in a Correctional Services Portfolio Committee meeting in 2008, indicates that the impact is not enough.

The DCS, while acknowledging the rehabilitative approach, is under resourced in terms of classrooms for rehabilitation to take place, recreational facilities and specialist staff to keep the programme running. The Portfolio Committee expressed concern over the large amounts spent on other programmes in comparison to rehabilitation. Private prisons, on the other hand follow a rehabilitation approach. Although there is no comparing the facilities with public correctional centres, they are still the responsibility of the state. Financial resources have allowed rehabilitation programmes in the two private correctional centres to be beneficial. The DCS would therefore need to re-align their budget priority, geared towards rehabilitation.

Implementation in some instances may prove to be useless in cases where the offender is unable to be rehabilitated. These are mostly repeat violent offenders who may need to be continuously monitored in a correctional facility. Harsh life sentences are usually given to them on the basis that they are a danger to society. This was the recent case (10 July 2009) with an alleged serial rapist, Tsediso Letsoenya, who received five life sentences.

The consolidation of the rehabilitative approach is therefore difficult, as the department has to ensure that while offenders are kept in their custody, they 'learn' something from 'doing time'. The balance, ensuring that justice is served and at the same time offenders are rehabilitated, needs to be maintained partly through changing societal perceptions of how government should react to those who disobey the law, involving more social workers and psychologists in social re-integration and rehabilitative measures. This would inevitably require, as proposed by the Portfolio Committee, a re-alignment of the budget in light of policy stipulations in the Amendment Bill (B32 of 2007), still under review, and White Paper on Corrections

(2005).

*In the Civil Society Prison Reform Initiative newsletter, it is noted that some civil society groups consider the term ‘offender’ as a setback for the attempt by the Department of Correctional Services to rehabilitate and change prisoners.

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A Last Thought

“It must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial. The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome, and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues. Bias in the sense of judicial bias has been said to mean a ‘departure from the standard of even-handed justice which the law requires from those who occupy judicial office’. In common usage bias describes ‘a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case’.”

As per Ponnan J A in *S v Le Grange and Others* 2009 (2) SA 434 SCA.

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