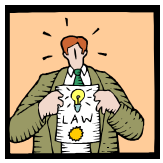
e-MANTSHI

A KZNJETCOM Newsletter

December 2009: Issue 47

Welcome to the forty seventh 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.
Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions 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. In Government gazette no 32761 of 30 November 2009 a notice was published by the Minister of Social Development in which it is intended to amend the *Social Assistance Act 2004* (Act 13 of 2004).

Interested parties are invited to submit comments on the proposed amendment bill to the Director-General: Social Development, Private Bag X901, Pretoria, 0001, fax number 012 312 7210 or e-mail: puseletsol@socdev.gov.za (for attention: Mr Puseletso Loselo) within 30 days of the date of publication of this notice.

Copies of the draft amendment bill can be obtained from the Department of Social Development's website: www.dsd.gov.za.. One of the proposed amendments is the amendment of the definition of a disability which reads as follows:

> " 'disability', in respect of an applicant, means a moderate to severe limitation to his or her ability to function as a result of a physical, sensory, communication, intellectual or mental disability rendering him or her unable to—
>
> (*a*) obtain the means needed to enable him or her to provide for his or her own maintenance; or
>
> (*b*) be gainfully employed;".

2. In Government gazette no 32738 dated 25 November 2009 the Minister of Police has declared an amnesty period for persons in possession of illegal firearms. The notice provides as follows:

> DECLARATION OF AN AMNESTY IN TERMS OF SECTION 139 OF THE FIREARMS CONTROL ACT, 2000 (ACT NO. 60 OF 2000)
>
> By virtue of the powers vested in me by section 139(1) of the *Firearms Control Act. 2000* (Act No. 60 of 2000), I, Emmanuel Nkosinathi Mthethwa, Minister of Police, hereby declare an amnesty as defined in section 138 of the said Act. Under section 1 39(2)(b) of the Firearms Control Act, 2000, I determine the period during which persons may apply for amnesty to commence on 11 January 2010 until 11 April 2010. Under section 139(2) (c) of the Firearms Control Act, 2000 I determine the conditions under which amnesty is granted, to be as follows
>
> (a) Illegally possessed firearms can be handed to the member on duty at any police station
> (b) If any person who is illegally in possession of a firearm and who surrenders the firearm in terms of this amnesty, wishes to apply for the licensing of that firearm as contemplated in section 139(4) of the Act. the following procedure must be followed
>
> (i) a written application for amnesty by the applicant must be handed in at a police station and the application must state the full names, identity number and residential address of the applicant, as well as the type, caliber, make, model and all marled serial numbers or other identification marks on the firearm or particulars of the ammunition:
> (ii) the firearm or ammunition concerned must be surrendered by the applicant to a member of the South African Police Service on duty at any police station and such a member must issue a receipt in respect of such firearm or ammunition to the applicant;
> (iii) the applicant for amnesty must, when surrendering the firearm or ammunition, notify the relevant Designated Firearms Officer hi writing if he or she intends to apply for a licence to possess the firearm or ammunition, as contemplated in section 139(4)(a) of the Firearms Control Act, and lodge the application within 14 days from the date on which the firearm or ammunition was surrendered (the relevant Designated Firearms Officer has the meaning assigned to it in the Firearms Control Regulations, 2004, and particulars of the nearest Designated Firearms Officer may be obtained from any police station): and
> (iv) the South African Police Service must act in accordance with the provisions of regulation 93(4)(a) of the Firearms Control Regulations, 2004, 'if an application contemplated in subparagraph (lii) is not duly lodged or not lodged within the specified period.
> Proper audit processes must be put in place to ensure the auditing of the records of all firearms, surrendered in terms of this amnesty.

Persons who wish to voluntarily surrender a licensed firearm may not surrender it through this amnesty process, but must follow the procedures provided for in regulation 94 of the Firearms Control Regulations, 2004.

3. In terms of section 96 of the *National Land Transport Act, 2009* (Act No. 5 of 2009), the 8th of December 2009 has been proclaimed as the date on which sections 2, 4, 5, 6, 7, 8(2), sections 9, 10, section 11 (2)(3)(4)(5)(6)(7), sections 12 to 47(4), section 48 (1), (2), sections 49 to section 96 come into operation. A notice to this effect was published in Government Gazette no 32788 dated 8 December 2009. Section 90 of the Act reads as follows:

90. Offences and penalties.—(1) A person is guilty of an offence—

(*a*) if that person operates a public transport service in contravention of section 50;

(*b* if the person operates a public transport service contrary to the terms and conditions of an operating licence or permit;

(*c*) if, being the holder of an operating licence or permit or the agent or employee of such a holder, the person allows someone else to use that operating licence or permit for a vehicle other than the vehicle specified therein;

(*d*) if the person applies for or obtains an operating licence knowing that a current operating licence has already been issued with regard to the same vehicle;

(*e*) if the person, with the intent to deceive, forges, alters, defaces, damages or adds to any operating licence or permit or other official document issued under this Act;

(*f*) if, knowing that a document is not an operating licence or permit or such other official document or that it has been altered, defaced, damaged or added to, utters or uses the document;

(*g*) if the person furnishes or gives false information in or with regard to any application made in connection with an operating licence, or in the course of appearing in any proceedings, investigation or inquiry relating thereto;

(*h*) if the person impersonates an authorised officer;

(*i*) if the person wilfully obstructs or hinders an authorised officer who is discharging his or her duties;

(*j*) if the person refuses or fails to comply with the lawful order, direction or demand made by an authorised officer in the discharge or performance of any function or duty entrusted to the officer by or in terms of this Act;

(*k*) if, where the person is conveyed as a passenger in the course of public transport, he or she—

(i) fails to pay the fare due for the journey when payment is requested by the driver or conductor;

(ii) smokes or drinks liquor on that vehicle in contravention of a notice on the vehicle which forbids smoking or drinking;

(iii) wilfully acts in a manner that inconveniences a fellow passenger;

(iv) disobeys a reasonable instruction issued by the driver or conductor for the purpose of maintaining order or ending a disturbance or controlling any emergency; or

(v) wilfully performs any act in or on the vehicle that could cause injury to or endanger the life of any person or cause damage to any property;

(*l*) if the person, being the holder of an operating licence or permit or the driver of a vehicle to which that operating licence or permit relates, fails to comply with any duty or obligation imposed on such a holder or driver by or in terms of this Act;

(*m*) if the person picks up or sets down passengers at or near an international border in contravention of section 75 (2);

(*n*) if the person uses a vehicle for a public transport service in contravention of this Act;

(*o*) if the person operates a tourist transport service without accreditation by the National Public Transport Regulator or operates a tourist transport service after his or her accreditation has been cancelled;

(*p*) if the person uses a vehicle for tourist transport services in contravention of section 84 (1) and (5); or

(*q*) if the person contravenes any other provisions of this Act.

(2) Where a person is convicted of any one of the offences mentioned in—

(*a*) paragraphs (*a*), (*b*), (*d*), (*e*) or (*o*) of subsection (1), a term of imprisonment not exceeding two years, or a fine not exceeding R100 000, may be imposed;

(*b*) any other paragraph of that subsection, a term of imprisonment not exceeding three months or a fine not exceeding R10 000 may be imposed.

(3) Whenever a manager, agent or employee of the holder of an operating licence or permit performs or omits to perform any act which, if the holder had performed or omitted to perform that act personally, would have constituted an offence in terms of subsection (1), that holder is guilty of that offence if—

(*a*) the holder—

(i) connived at or knowingly permitted the act or omission concerned; or

(ii) did not take all reasonable measures to prevent that act or omission; and

(*b*) an act or omission of the nature of the act or omission charged, whether legal or illegal, fell within the scope of the authority or the course of the employment of the manager, agent or employee.

Recent Court Cases

1. Minister for Justice and Constitutional Development and others v Moleko 2009(2) SACR 585 SCA

A decision to prosecute a judicial officer must be taken with the utmost caution and with due regard to judicial independence.

The respondent, a magistrate, had released two accused persons on a warning, despite the fact that they had been charged with an offence mentioned in Schedule 6 to the Criminal Procedure Act 51 of 1977, and therefore that evidence justifying their release ought to have been led. He was subsequently charged with, and unsuccessfully prosecuted for, defeating the course of justice. After his acquittal, the respondent brought an action for damages for malicious prosecution against the Minister for Justice and Constitutional Development, the Director of Public Prosecutions, and the Minister of Safety and Security. The action succeeded, but the losing parties obtained leave to appeal to the Supreme Court of Appeal.

Held, that, in order to succeed with a claim for malicious prosecution, a claimant must prove that the defendants had instigated or instituted the proceedings; that they had acted without reasonable and probable cause; that they had acted with malice (or *animo iniuriandi*); and that the prosecution had failed. The respondent's acquittal had satisfied the last of these requirements. With regard to the liability of the police, it was to be questioned whether they had done anything more than might have been expected from a police officer in the circumstances, namely to investigate the facts and leave it to the prosecutor to decide whether or not to prosecute. All the evidence pointed to the fact that the investigating officer had acted on the instructions of the office of the Director of Public Prosecutions. No police officer had

been responsible for the decision to prosecute the plaintiff and, accordingly, the appeal succeeded as far as the Minister of Safety and Security was concerned. (Paragraphs [81—[171 at 590e—591a, 591d and 592j—593a.)

Held, further, concerning reasonable and probable cause, that, in the context of a claim for malicious prosecution, this meant an honest belief, founded on reasonable grounds, that the institution of proceedings was justified. The prosecutor who had decided upon the prosecution, N, had supposedly relied on three aspects of the 'evidence' before making her decision: firstly,
that the respondent had released the accused despite being aware that they
were charged with a Schedule 6 offence; secondly, that the respondent had, in her view, made up his mind to release the accused regardless of any argument that might be provided by the State; and thirdly, that she had 'gained the impression' that the respondent was in principle against all accused persons being held in custody. As to the last of these aspects, N could not have formed such an impression, since, on her own evidence, she had never before encountered the respondent or received any report about him. It was also apparent from his warning statement that the respondent may not have been aware of the fact that the accused faced a Schedule 6 charge. N should have been aware of the possibility that, if the prosecutor had indeed informed the respondent that the accused were charged with Schedule 6 offences, and that a previous bail application had been refused, the respondent's anger and fury (as described by a police officer who had been present during the proceedings) had been such that he had simply not heard this. N must also have been aware, having read the respondent's warning statement, that the latter was adamant that he had not acted in bad faith, but rather that all his actions had been taken in the interests of 'the welfare of the accused and to safeguard the State'. The respondent had referred, in this connection, to the fact that one of the accused was reportedly 'extremely sick', and to an incident in the near vicinity where a prisoner had died in the court lock-up cells. Clearly, although she was aware of these serious allegations by the respondent, N had not made any queries about them before deciding to prosecute the respondent. Since N had not taken the necessary steps to establish that reasonable and probable cause existed for the prosecution, the respondent had satisfied the second requirement of a claim for malicious prosecution. (Paragraphs [20], [30]—[34J, [45j—[48] and [601 at 593f—h, 596a—597c,601g—6O2g and 6O5e.)

Held, further, that prosecutions of judicial officers for acts or omissions committed in the exercise of their judicial functions must remain an extraordinary and exceptional step. Any decision to prosecute a judicial officer must be taken with the utmost caution, due regard being had to judicial independence, but also to the related principle that judicial officers were subject to the Constitution and to the law, and thus could not be completely immune from criminal prosecution, in appropriate cases, for their acts and/or omissions in the exercise of their judicial functions. (Paragraph [561 at 604c-e.)

Held, further, regarding the requirement of malice or animus iniuriandi, that it would have to be proved that a defendant was not only aware of what he or she was doing in instituting or initiating a prosecution, but must at least have foreseen the possibility

that he or she was acting wrongfully, but continued reckless as to the consequences. Negligence, even gross negligence, would not suffice. In casu, N had clearly intended to prosecute the respondent and had done so without making any of the enquiries which cried out to be made, thus showing her recklessness as to the possible consequences of her conduct. Accordingly, animus iniuriandi had been proved. (Paragraphs [64] and [65] at 606e—h.)
Appeal by first and third appellants upheld. Appeal by second appellant dismissed with costs.

2. S v Mbatha 2009 (2) SACR 623 KZP

If a court is contemplating imposing a heavier sentence than the prescribed minimum sentence it must record those factors which it considers as justifying a higher sentence.

The appellant was convicted in a regional court of murdering a man, the offence apparently having been prompted by a business dispute. The appellant owned a modest business and had an entirely clean record. The explanation he gave at the trial was rejected as false, leaving the trial court with no insight into the reasons for the murder. There was no attempt to suggest that substantial and compelling circumstances existed that would justify the imposition of a lesser sentence than the minimum 15 years' imprisonment prescribed in terms of s 51(2) (a) (i) of the Criminal Law Amendment Act 105 of 1997. Instead, the trial court imposed a sentence of 20 years' imprisonment. The appeal was brought against this sentence.

Held, that it had been established with binding authority that the proper starting point in determining a sentence falling under this legislation was the prescribed minimum sentence; thereafter, the court was to consider whether the circumstances justified a departure from that prescribed sentence. While this approach had been laid down regarding downward departures from the minimum sentences, it was also the correct approach when a court was contemplating the imposition of a greater sentence than that prescribed. One of the purposes of the minimum sentence legislation was to provide a measure of uniformity in the punishment of serious crimes, and not simply to limit the discretion of the court in one direction while leaving it entirely at large in the other. (Paragraphs [l3] - [15] at 629d-h and 630a-b.)

Held, further, that it was not a requirement for the imposition of a heavier sentence than that prescribed that there should be substantial and compelling circumstances; to approach the matter on that basis would be to rewrite the statute. However, that did not mean that the standardised and consistent response from the courts, intended by the legislature, simply vanished whenever a judge was minded to impose a sentence greater than the minimum. The statute required generally that there be a consistent response to particular crimes; accordingly, the court was to identify the circumstances that took a given case out of the ordinary, and to record the aggravating circumstances that impelled the imposition of such greater sentence. Any factors that rendered the accused more morally blameworthy must be clearly articulated, while any factors pointing in the opposite direction must also be

weighed. Only where the balance was clearly in favour of a sentence greater than that prescribed, should same be imposed. A further factor to be taken into account was that any prescribed minimum sentence must be viewed in the context of the legislation as a whole, including the sentences prescribed for other offences. Thus, if a court was contemplating the imposition of a 20 year sentence when only 15 was prescribed, it should assess whether the moral blameworthiness of the accused was such that it properly deserved comparison with offences where the prescribed minimum was 20 years. (Paragraphs [lsj—[2lj at 630i—63lc, 631.f-i and 632a—c.)

Held, further, that there had been no indication from the judge *in casu* that he had been contemplating the imposition of a sentence greater than the minimum; indeed, the effect of certain questions had been to direct defence counsel's attention to the issue of whether or not circumstances existed that would have justified a lesser sentence. Failure to apprise the defence that a higher sentence than the minimum was in contemplation constituted a defect in the proceedings, and meant that the appellant had not had a fair trial as far as the imposition of sentence was concerned. (Paragraphs [241-4271 at 633c—d, 633h—i, 634e and 635c.)

Held, further, that apart from this defect, the trial court had misdirected itself in material respects, and that on the evidence before it there were no sufficient grounds for imposing a sentence of more than 15 years' imprisonment. Firstly, there was no indication that the trial court viewed the statutory minimum as the proper starting point, or that it had recognised the need to identify clearly those aggravating circumstances that justified the imposition of a higher sentence. Secondly, some of the circumstances that had been regarded as aggravating could not correctly be characterised as such. (The court proceeded to analyse these circumstances in detail.) Thirdly, there had been no attempt to weigh the aggravating factors that did exist against the obviously mitigating circumstances. The appellant had hitherto been a model citizen without any blemish on his record. Nothing in the facts of the case made the appellant's crime as heinous as those of a double murderer or a triple rapist, for whom the statutory minimum was 20 years' imprisonment. (Paragraphs [28]—[35] at 635e—i, 638b—d and 638g.)

Held, further, however, that it would not be correct simply to set aside the trial court's sentence and replace it with the sentence of 15 years which it should have imposed. To do so would be to leave the sentencing process still infected by grave irregularity; this could be cured only by setting the sentence aside and remitting the matter to the trial court for reconsideration of sentence in light of the present judgment. The evidence that emerged after a full investigation might cast a very different light on matters, and the resultant sentencing process would be fairer to the appellant and ensure that his constitutional right to a fair trial was fully realised. (Paragraph [36] at 638i—639b.)

Appeal upheld. Sentence set aside and matter remitted to trial court for reconsideration of sentence, including the hearing of evidence in mitigation.

3. S v Naidoo 2009(2) SACR 674 GSJ

Where there is no connection in time, space or fact between charges facing two accused it is impermissible for them to be tried together in respect of offences in which each and everyone is not implicated

The appellant was the second of a number of accused charged with various counts of theft, fraud and statutory contraventions, and with contravening certain sections of the Prevention of Organised Crime Act 121 of 1998 (POCA). At the commencement of the trial the appellant raised an objection to the indictment, claiming that there had been a misjoinder, since he had not been charged with all the counts that had been brought against accused 1. It was submitted on his behalf, with reliance on ss 155 and 156 of the Criminal Procedure Act 51 of 1977, that as it had not been shown by the State that accused 1 and the appellant were implicated in the 'same offence', in relation to the counts with which accused 1 was charged, it was irregular and impermissible that the two of them be tried together in respect of these offences. The objection was dismissed by the trial court, following which the appellant lodged an appeal.

Held, that there was authority for the proposition that where there was no connection in time, space or fact between the charges facing two accused, it was not permissible for them to be tried together in respect of offences in which each and every one of them was not implicated. If this were not so, an accused could spend weeks in court while evidence affecting another accused was dealt with, merely because on other counts he was charged with an offence in which the co-accused was connected. The situation *in casu* was different, however, since the State's case was that the various accused were all in different capacities involved in an illegal enterprise in contravention of s 2(1) of POCA. Various criminal activities had been undertaken, all having as their ultimate purpose the facilitation of various crimes for the benefit of the criminal enterprise formed by all the accused. Ultimately, the charge against each of the accused was one of racketeering and being part of a conspiracy to achieve a criminal result. There was accordingly no possibility that any of the accused ran the risk of being in a situation where any evidence led would not be relevant to the case he had to meet. It was necessary for the State to prove all the elements in the common-law offences which contributed to the illegal enterprise, which enterprise in turn constituted the main POCA count against them. In the circumstances there could be no question of the appellant claiming that he was not being charged with the 'same offence'. (Paragraphs [1 11-4211 at 679i—680g, 681e—g and 683d—e.)
Appeal dismissed.

From The Legal Journals

Mmusinyane, B

"The role of traditional authorities in developing customary laws in accordance with the Constitution: Shilubana and others v Nwamitwa 2008 (9) BCLR 914 (CC)"

2009 Volume 12 no 3 Potchefstroom Electronic Law Journal

Justice Louis TC Harms

"Judging under a Bill of Rights"

2009 Volume 12 no 3 Potchefstroom Electronic Law Journal

Van Heerden, C and Boraine, A

"The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law "

2009 Volume 12 no 3 Potchefstroom Electronic Law Journal

Maree, T

" Sectional Title levies and the NCA"

December 2009 De Rebus

Stadtler, S

"The High Court and debt review: Debt review applications after the declaratory order"

December 2009 De Rebus

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

Contributions from the Law School

The law of evidence as it applies to the child witness

Introduction

The nature and extent of crime involving children must be one of the more telling indices of the state of a society. The hard truth in South Africa is that such crime has reached and way exceeded a crisis point. We, as a society, will no doubt feel the effect of this for generations to come. Of all the different groupings in society, magistrates must be one of the most exquisitely sensitive to this crisis, for obvious reasons.

This note is a discussion of two aspects relevant to a child giving evidence in court – establishing the competence of the child, and swearing the child in. The principles discussed are well established, however, the application of the principles remains problematic – as evidenced by the number of cases overturned on review due to irregularities in the procedure.

1. Establishing the competence of the child witness

Before a child witness may give evidence, the presiding officer must be satisfied that s/he is a competent witness. The term ‘competence’ refers to a witnesses ability to lawfully give evidence in a court of law. If a witness is not found to be competent by the court, the witness is denied the opportunity of taking the witness stand altogether. This remains the case even where both sides (prosecution and defence) agree that the witness should be allowed to testify.

Children are regarded as competent to give evidence only if the court is satisfied that the child understands what it means to tell the truth, and can understand and answer questions. There is no specific age at which a child can automatically be assumed to have (or, conversely, not have) competence to testify. In every single case in which a child witness appears, the presiding officer before whom the child is appearing must satisfy him/herself that the child has the necessary competence. The crucial question is whether, subjectively, the presiding officer is of the opinion that the child understands the concept of truthfulness. The presiding officer can satisfy himself of this by asking questions of the child, and expert witnesses may also be called on the question. In South African courts, children as young as three have been found to be competent to testify in court (see, for example, *R v Manda 1951 (3) SA 158 A; R v Bell 1929 CPD; R v J 1958 (3) SA 699.)* but this is the exception rather than the norm. With younger children particularly, extraordinary skill is required to truly establish whether the witness understands what it means to tell the truth.

The consequences of the presiding officer not establishing the competence of the child witness are extremely serious. The child's evidence will be inadmissible – and this can lead to the conviction of the accused being set aside by a higher court. There are many examples of this in our case law. For example, in the case of *S v T 1973 (3) SA 794* it was clear that the trial court magistrate had not been convinced that the child understood the concept of truthfulnes. That in itself was sufficient to render the proceedings irregular. The magistrate in the case erred further by allowing the five year old child to testify by whispering her answers to questions to her mother who then relayed them to court. There is nothing in our law which allows for this – and this too rendered the trial irregular. The conviction of the accused was thus set aside.

It should be noted that while a support person is allowed to attend court and be present with him/her when s/he testifies the support person cannot speak for the child nor influence or interfere in any way with the child.

In a more recent case, *S v Kondile* 2003 (2) SACR 221 (CkH), the only question asked of the child witness to establish competence was ; " Do you know what it means to tell the truth?" to which the child replied "Yes- it is to tell the truth". The magistrate accepted this as showing that the child was competent. However, when the case was taken on review, the high court found that there was no basis in the brief exchange to conclude that the child understood the concept of truthfulness. The magistrate tried to explain his brevity by saying that he had deliberately kept the questioning on competence to a minimum so as to reduce the stress on the young witness. The high court did not buy his explanation and the child's evidence was declared inadmissible. The conviction of the accused on one of the charges against him was set aside on this basis.

2. Administering the oath or affirmation, or admonishing the child witness to tell the truth.

Section 162 of the Criminal Procedure Act 51 of 1977 requires that all witnesses be sworn in before testifying. There are two exceptions to this rule which are contained in sections 163, and 164 of the Criminal Procedure Act respectively. Section 163 provides that if the witness objects to taking the oath s/he may make an affirmation to tell the truth instead. The affirmation is phrased similarly to the oath, but omits any reference to God.

Section 164 of the Criminal Procedure Act 51 of 1977 was enacted to enable unsworn evidence to be legally received by the court in certain circumstances. The section
provides that if a person is unable to understand the nature and effect of the oath or affirmation, s/he may be allowed to testify provided the presiding officer simply admonishes the child witness to tell the truth. Prior to the landmark case of *S v B 2003 (1) SACR 52 SCA (confirmed in Director of Public Prosecutions, KZN v Mekka 2003 (4) SA 275 (SCA)*) our courts held that before a presiding officer would be

legally justified in admonishing a child to tell the truth (rather than administering the oath or affirmation) s/he would have to explicitly establish from the child that s/he did not understand the nature and sanctity of the oath or affirmation. The unfortunate legal consequence flowing from this approach was that in cases where presiding officers did not specifically ask the child witness whether s/ he understood the oath – and simply proceeded to warn the child to tell the truth – the relevant sections of the Criminal Procedure Act 51 of 1977 were not regarded as having been complied with, and any evidence given by the child witness was regarded as inadmissible. Thus, in cases in which the presiding officer had convicted the accused on the basis of the child's evidence, the conviction would be overturned by a higher court. This result occurred in alarmingly many cases (*see for example S v Kondile 2003 (2) SACR 221 CkH, S v Malinga 2002 (1) SACR 615 N)* .

The Supreme Court of Appeal in the case of *S v B 2003 (1) SACR 52 SCA* took a different approach to the traditional interpretation of *section 164 of the Criminal Procedure Act 51 of 1977*, and held that the presiding officer does not have to hold an explicit and express enquiry to determine that a child witness does not comprehend the oath /affirmation before proceeding to admonish the witness to tell the truth. All that is required in terms of this approach is that there be some rational basis to justify the presiding officer reaching the conclusion that the witness did not understand the oath/affirmation. The court held that in some cases the mere age of the witness would be sufficient to justify the conclusion that the child did not understand the oath – but did not specify at what age it could be assumed that the child could not comprehend the nature and sanctity of the oath.

This approach was tested in the case of *S v Chalale* 2004 (2) SACR 264 (W), where the magistrate had made no enquiry into whether two child witnesses understood the oath before proceeding simply to admonish them to tell the truth. The case went on review and one of the grounds of review was that section 164 of the Criminal Procedure Act 51 of 1977 had not been complied with. The child witnesses in this case were aged fifteen (15) and seventeen (17). The magistrate argued that he had assumed on the basis of the witnesses age that they lacked the capacity to comprehend the oath, and had thus proceeded to admonish them to tell the truth. The high court disagreed with the approach taken by the magistrate, holding that children of 15 and 17 usually do understand the nature and sanctity of the oath, and cannot therefore be presumed not to understand it. There was thus no rational basis for the magistrate to have concluded that the admonishment could be applied without enquiry into the witnesses understanding of the oath.

In the case of *S v Gallant 2008 (1) SACR 196 (ECD)* the high court made a similar finding where the child witnesses were eleven(11) and fourteen(14) holding that the magistrate was not justified in simply assuming that they would not understand the oath in view of their ages. The magistrate therefore acted irregularly in admonishing them without holding a formal enquiry into their appreciation of the oath. Another error made by the magistrate in this case was to assume that because certain of the witnesses were of the Islamic faith they would automatically object to taking the oath. Although the oath has a religious connotation – it is not linked to any one particular religion. In view of the irregularities in this case, the accused succeeded in

the appeal against his conviction.

Conclusion:

The message is clear – sloppy procedure in respect of establishing the competence of a child witness, and the swearing in of such a witness is not tolerated.

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Matters of Interest to Magistrates

Speech by Minister Jeff Radebe, Minister of Justice and Constitutional Development, on the occasion of the Black Lawyers' Association 32nd annual dinner and annual general meeting (AGM) at the Cape Town International Convention Centre, November 13 2009

I am very happy to be here tonight, and indeed feel honoured to address the 32nd Annual Dinner of this esteemed organisation, the Black Lawyers Association. The oppression of our people since their exclusion from the Union Government of 1910, assumed a legal approach.

That is why we have embraced the approach that says unless the legal profession is transformed, there will always be the feeling that the ghosts of the past are continuing to haunt us. For these reasons, we need society at large, and specifically organisations such as the Black Lawyers Association, to play a crucial role towards giving practical meaning to the transformation of the justice system as a whole.

In all our areas of transformation, unless society at large partake and lead in its own right, we will not be able to realise our goals. Take for instance the issue of crime prevention, unless communities participate in activities such as those of the Community Safety Forums, working in tandem with the police stations, criminals will always wreck terror on our communities.

Being cognisant of government's constitutional responsibility to ensure the achievement of equality and equity in the country, it is important that as government, we are at the forefront of ensuring the transformation, be that of specific sectors, such as the legal profession and the judiciary or that of being responsible for

promoting broad and overarching transformational initiatives impacting across various sectors.

The Legal Practice Bill currently still in the draft stage, seeks to transform the legal practice sector. The key object of the bill is to rationalise the various pre-1994 statutes which still regulate the legal profession in different parts of the country. A single statute is envisaged which will regulate all legal practitioners.

In turn, this will give rise to the streamlining of pre-1994 structures which will not only enhance access to the profession for aspirant lawyers, but will also enhance access to legal services, impacting positively on access to justice. Engagement with representatives of the legal profession has been taking place regarding basic principles that will lead to a single piece of legislation governing attorneys and advocates.

Among these basic principles is the creation of a single and unified statutory body to regulate the affairs of legal practitioners. While this principle envisages the continued existence of the two main categories of lawyers, namely advocates and attorneys, however, this will be by means of a single regulatory body that takes into account the needs of the different branches of the legal profession.

Of paramount importance is the need to protect and promote the public interest whilst ensuring a strong and united legal profession, which is indispensable for the protection of the principles upon which our Constitution is based, the maintenance and development of an effective legal system and for the promotion of an independent judiciary.

The transformation of the legal profession is a conditio sine qua non for the transformation of the judiciary. Section 174(2) of the Constitution, requires of the judiciary to be broadly representative of the demographics of South African society. The legal profession is the primary feeder to the judiciary therefore the bar and the side bar must at all times be equipped with this transformation imperative. The challenge posed by the transformation process of the legal profession, was well articulated by the former Chief Justice, the late Justice Ismail Mahomed, when he said that "the new Constitution has ushered in momentous times for all of us. For the Bar it is a time for the discovery of its potential greatness; a time for renewal and cohesion; a time for strong leadership with a faith which is optimistic and temper which is positive. It is not a time for dissipation and fragmentation or a time for despair, pessimism or retreat."

While this piece of advice was intended for the Bar, it is nevertheless to a large extent, relevant and equally applicable to the Attorneys' profession and the judiciary as a whole. The department has made progress in reaching consensus on key principles and I understand that a second draft Bill is currently being prepared for my attention and further consultation with all interested parties. I intend to introduce this Bill in Parliament as soon as possible in early 2010.

Bearing in mind that the State is the largest consumer of legal services in the

country, there is merit in recognising that the procurement of government litigation services be seen to be a vehicle and effective driver for this transformation imperative. In order to give effect to this goal, the department is considering ways in which it can ensure an equitable distribution of its legal work to the benefit of the previously disadvantaged practitioners.

In terms of achieving the goal and objective of improved access to legal services, coupled with the need to reduce the high cost of legal services, it is important that the Department of Justice and constitutional development, promote the efficient and effective Management of State Litigation.

Acknowledging that the management of litigation by the state is fragmented and lacking in policy direction, we commit to the ideals of an integrated, policy driven, professional, empowering and cost effective management of state litigation. In this regard the department is in the process of finalising a blueprint which will mirror a framework on how state litigation should be managed and coordinated.

This policy framework seeks to address the above challenges, to ensure an improvement in the quality of services rendered and generally for the proper management of state litigation. In the first quarter of the current financial year, of the 754 briefs that were issued to Counsel, 89% of these were issued to blacks (i.e. black females and males).

Of the 89%, 63% was issued to black male advocates and 26% was issued to black females. It should be noted that in the majority of cases client departments dictate as they hold the purse, which counsel to brief, and that the State Attorney has no say in the matter. This situation must be remedied. With respect to the value of the briefs, R68 331 868 was paid out to counsel as opposed to R62 177 845 that was paid during the first quarter of the last financial year. Expenses increased by R6 154 023, that translate to nine percent.

In the second quarter of the current financial year, 83% of value of briefs went to males and 17% to females. 71% went to blacks and 29% to whites. R56 714 352 was paid out to counsel for the period under review. In comparison to the previous quarter, payment to counsel decreased by R11 617 516. On year to year comparison, payments to counsel decreased by 13% from R65 182 071 to R56 714 352.

A cursory look at these statistics may indicate that we have in fact achieved our transformation goals. However, these statistics are in fact misleading in as far as they fail to indicate the actual value paid as per the briefs issued. What black practitioners in the legal profession decry is that they are in fact given those briefs that would pay by far less in monetary value, while the lucrative ones are given to established legal practitioners.

I understand future statistics to be prepared for next year will indicate these discrepancies so that the evidence of our transformation is not misleading and is tackled scientifically. The Legal Service Charter which was drafted in 2007 is one of

the initiatives undertaken to improve the above situation. The Charter will derive its force of law through the enactment of the Legal Practice Bill, envisaged for early 2010. The Charter signals guiding principles to provide a transformed legal profession and to eradicate the inequalities of the past. The commitment by the legal profession to the development of a scorecard to which will set measurable targets underscores its deep commitment to the transformation goals deriving from the Constitution. The scorecard will set targets for the following elements, among others: ownership, management, preferential procurement, skills development, employment equity and socio-economic development.

Ladies and gentlemen,

Despite the legislative enactments geared at ensuring a South Africa envisioned in our democratic constitution, there is no doubt that much relies on the capabilities and the will and desire of those involved in our social, economic and political establishments to ensure that those visionary ideals become a living reality.

For instance, despite all the legislations we can ever come up with, with regards to crime and corruption, these societal ills will never come to an end until the moral framework of society changes, and the people at large partake in combating this malice that undermines our democracy. Ultimately it is people and not statutes that make things happen.

Likewise, if the justice system is to be transformed, what that means is that we must feed it with progressive minds. Recently, we would remember the issue of an honourable Judge, who served under apartheid and never challenged State institutions that dispensed injustice to our people. While the constitution provide for citizens to duly challenge State institutions, the question invoked by such extraordinary decisions when taken by a judge invariably put into question the actual motives behind such actions.

Some may argue that what this points to, is that judges and all in the justice system, are human beings whom while applying the letter of the law, are in fact inspired by ideological and other moral outlooks. This is more so if the decisions challenged are in contrast re-confirmed by other judges, including by the Constitutional Court.

Of course these ideological outlooks are hardly overtly entertained as this is supposedly considered sacred in that regard, in order to keep the judiciary free from such influences other than the letter and spirit of the law. And I must emphasise that we must support that stance where we keep as sacred the motives of judges, with all its inherent weaknesses because it is nonetheless a correct atmosphere consistent with the desire to ensure the separation of powers amongst the three arms of the State.

Like those who enacted the legislative pieces that gave rise to the Union of South Africa who were supported by legal minds that believed in the racial supremacist project, we too need legal minds that believe in the ideals of a non racial, democratic, non sexist, equal, just and prosperous society. I therefore challenge the

BLA to continue to ensure that we design mechanisms that would ensure more black legal practitioners who espouse these ideals.

Lest I be misunderstood, I know there are many legal minds from amongst white people, who believe in the common destiny of our people irrespective of race or gender. Who could challenge the stances of Braam Fischer or of Advocate George Bizos or Joe Slovo and many others, with regards to the vision of an equal and democratic society?

As the BLA, we must be concerned with how many matriculants register for law studies at universities, how many graduate, how many proceed further with their studies, how many actually practice as lawyers, and how many become Senior Counsels, Magistrates, Judges, Judge Presidents and members of the various tiers of our courts up to the highest levels. Having said that, we can nonetheless point to some successes, but we must not rest on our laurels because the tasks ahead are evidently still daunting.

The history of our struggle for equality places on your shoulders the responsibility to be innovative and provide leadership in your own right, and not reduce yourselves to complainants or victims of the contemporary processes of our transformation. I have confidence that the genius of your competent and visionary minds will not fail us or those who died and invariably passed on the baton of a better South African society onto our shoulders. I believe that the resolutions that you will adopt in this AGM, will shed light on the actual mechanisms that would help transform our judiciary and the South African society at a large.

Ladies and gentlemen, our legal frameworks must not just stop the injustices of the past with repeal of legislations such as the Black Administrations Act, but also enable the emergence of the new society that we collectively envisage, amongst others through the Legal Practice Bill to correct the injustices of the past.

That is why we as government have embarked on a programme of land restitution, to reverse what the legal instruments such as the Group Areas and Land Acts sought to achieve. That is why we must collectively ensure that black empowerment becomes a reality and not a cosmetic dressing of the inequalities of the past.

We must also ensure that we work hard to ensure that indeed justice is accessible by all our people, and that is why we have designated the responsibility of Equality Courts within the Magistrates Courts. In addition, we will thrive to ensure that all our provinces have high courts as part of ensuring accessible justice for all.

Your invaluable input in all these developments is vital. As government, we guarantee you that we consider it as one of our utmost mandates that transformation results into changes that would benefit all our people.
I wish you well as you continue to chart a way forward on the challenges ahead and again I re-assure you that our doors will forever be open for any assistance that we can be able to give.

I thank you!

Issued by the Department of Justice and Constitutional Development

A Last Thought

It is unwise to be too sure of one's own wisdom. It is healthy to be reminded that the strongest might weaken and the wisest might err.

~ *Mahatma Gandhi*