e-MANTSHI

A KZNJETCOM Newsletter

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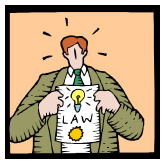
Welcome to the forty eighth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.asp.
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. On the 15th of January 2010 the Minister of Labour published regulations on Hazardous Work by Children in South Africa in terms of Section 44(1) of the Basic Conditions of Employment Act, No 75 of 1997 and Section 43(1) of the Occupational Health and Safety Act, No 85 of 1993.The regulations consist of the following:

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BCEA Regulations on Hazardous Work by Children

2. In Government Gazette 32850 of 29 December 2009 a notice was published in respect of a court order by the North Gauteng High Court which reads as follows

I, Jeffrey Thamsanqa Radebe, Minister of Justice and Constitutional Development, hereby publish the order issued by the North Gauteng High Court, Pretoria on 4 December 2009, in the matter between the Child Welfare South Africa and Registrar of the National Register for Sex Offenders and Another (Case No. 68184/09). The North Gauteng High Court, Pretoria issued the following order:

"1. A relevant authority as defined in section 40 of the of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 need not comply with section 48(1) of that Act unless and until the National Register for Sex Offenders is fully operational and functional for purposes of section 48(1).

2. When the National Register for Sex Offenders is fully operational and functional for purposes of section 48(1), the second respondent shall publish a notice indicating such in the Government Gazette and shall notify all Children's Court Commissioners accordingly.

3. The second respondent shall publish a copy of this order in the Government Gazette within fifteen days of the date of this order and shall

notify all Children's Court Commissioners as soon as reasonably practicable of the order.

4. It is recorded that, notwithstanding this court order and the agreement of the parties thereto:

4.1 the rights of each party are expressly reserved in relation to constitutionality of section 48(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007; and

4.2 the agreement does not constitute an acceptance by either of the respondents that the facts and contentions set out in the finding papers are correct.

5. Each party is to pay its own costs."

3. In Government Gazette 32834 of 28 December 2009 an amendment of Government Gazette 29865 of 4 May 2007 was published, extending the commencement date of the proviso clause after subregulation (2) of Regulation 252 of the National Road Traffic Regulations, 2000. The amendment reads as follows:

I, Sibusiso Joel Ndebele, Minister of Transport, acting in terms of Section 75 read with regulation 252 of the National Road Traffic Regulations, 2000 under the National Road Traffic Act, 1996 (Act No. 93 of 1996), hereby determine 01 July 2009 as the commencement date for the proviso clause after subregulation (2), of regulation 252 of the National Road Traffic Regulations, 2000.

Recent Court Cases

S v Mathebula 2010 (1) SACR 55 SCA

For an applicant in a bail application, where exceptional circumstances have to be shown, it is not enough to merely repeat S 60(4) of Act 51 of 1977 without the addition of facts that add weight to this *ipse dixit.*

The appellant was arrested on charges of murder and possession of arms and ammunition. Since the main charge formed part of the category of offences in Schedule 6 to the Criminal Procedure Act 51 of 1977, the appellant undertook the

task of adducing evidence to satisfy the court that exceptional circumstances existed, which in the interest of justice permitted the court to release him (s 60(1 l)(a) of the Act). His appeal to the North Gauteng High Court, Pretoria, against the refusal by the magistrate to grant bail to him pending his trial, was dismissed. In an appeal to the Supreme Court of Appeal;

Held, that the appellant relied upon affidavit evidence which was not open to test by cross-examination and, therefore, less persuasive. Furthermore, the appellant's denial of complicity and his alibi defence rested solely on his say-so, with no witness corroboration to strengthen it. The vulnerability of unsupported alibi evidence was notorious and dependent on the court's assessment of the truth of the accused's testimony. As to the appellant's suggestion that the police extracted an inadmissible confession from him, he provided no detail enhancing either his reliability or credibility. (Paragraph [11] at 59b—d)

Held, further, that, to successfully challenge the merits of the State case in bail proceedings, the applicant must prove on a balance of probability that he will be acquitted of the charge. Until an applicant had set up a prima facie case of the prosecution failing there was no call on the State to rebut his evidence to that effect. (Paragraph [21 at 59e and 59g—h)

Held, that, due to the paucity of facts in support of his case, the magistrate was left no wiser as to the strength or weakness of the State case; the appellant had not contributed anything to establishing the existence of exceptional circumstances. (Paragraph [13] at 59k-i)

Held, further, that the remainder of the factors were neither unusual nor such as to singly or together warrant the release of the appellant in the interests of justice. Parroting the terms of s 60(4) did not establish any of the grounds, without the addition of facts that added weight to the appellant's ipse dixit. (Paragraph [15] at 60b). Appeal dismissed.

S v Cedars 2010(1) SACR 75 (GNP)

Correctional supervision coupled with house arrest is not a competent sentence after a conviction in terms of S 112(1)(a) of Act 51 of 1977.

The accused was charged with theft of toothbrushes to the value of R130. He pleaded guilty to the charge. The prosecutor accepted the plea in terms of s 112(1)(a) of the Criminal Procedure Act 51 of 1977. The accused was found guilty on the plea only. With regard to sentence, on what was before the court, it was clear that the accused admitted he had committed the offence, and that he wanted to be subjected to a rehabilitation programme whilst under correctional supervision. The magistrate acceded to the accused's request and sentenced him to 12 months' correctional supervision.

Held, that under s 1 12(l) (a) of the Act, a sentence of correctional supervision coupled with house arrest was not a competent sentence. (At 76i—j)

Held, further, that, having regard to case law, a court on review has only to certify that the proceedings were in accordance with justice, and not necessarily in accordance with law. Also a court on review could confirm an incompetent sentence, where the circumstances of the case did not warrant the setting aside thereof. (At 77b—e)

Held, accordingly, that the circumstances of the case did not dictate that the sentence imposed was to be set aside. The sentence was in accordance with justice, although there was a technical irregularity. (At 77f—g)

Conviction and sentence confirmed.

S v Dyira 2010 (1) SACR 78 ECG

A Court must have proper regard to the danger of the uncritical acceptance of the evidence of a single witness who is also a child witness.

Our courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness. In the ordinary course (*a*) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general and with reference to the particular circumstances of the case; (*b*) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects; (*c*) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt; (*d*) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence. (Paragraph [101 at 85J—j)

The complainant, an 8-year-old girl, had delayed reporting an alleged rape for 17—18 weeks, during which time she had consistently denied that any offence had occurred, and had therefore not identified any suspect. Because the child refused to tell what had been done to her or by whom, she was referred to an institution called the Outreach Centre, which, inter alia, gives counselling and support to children who have been abused. The child persistently refused to speak about the incident throughout the entire period of a lengthy stay at the centre. She denied that anybody had done anything to her. She eventually went home just before Christmas. In February 2006 the investigation docket was transferred to the child protection unit of the South African Police Service for further investigation.

The child then told a constable and a social worker that she had been raped by the appellant. The appellant was arrested the following week. He denied the charge. On appeal against conviction:

Held, regarding the admissibility of the child's evidence that the State had not been able to eliminate the reasonable possibility that the complaint was not freely and voluntarily made. (Paragraph [3] at 8 lj—82c)

Held, further, that the delay in making a complaint had an effect on its admissibility. While the lengthy period of four months should not be regarded as conclusive against admitting the statement, it was a highly relevant and important consideration. The rule was that a complaint becomes admissible if it is made to a person to whom the complainant would be expected to make a complaint without delay and at the earliest opportunity which under all the circumstances could reasonably have been expected. (Paragraph [4] at 82d—e)

Held, further, that the State's argument was that it was reasonable for her to remain silent all this while by reason of the appellant's threat to kill her. While it might be so that the threat caused her not to make a report, the cautionary rules of practice, which applied in a case such as this, precluded a court from simply accepting such an explanation without a detailed and thorough examination of the circumstances. In this case, it was not possible to say beyond question that the delay was properly and understandably explained by evidence of the threat, particularly when the effect of the threat lasted for such a long period of time. (Paragraph [4] at 82k—f)

Held, further, that, while the immediate impact of a threat might well inhibit a small child from making an immediate report at the first possible opportunity, one would expect the impact of the threat to decrease with the passage of time. It is also fair to say that, the longer the delay, the greater the prospect of fabrication and the more likely the possibility of untrustworthiness or unreliability. The length of the delay goes not only to the issue of admissibility, but also to the reliability and acceptability of the child's evidence. Assuming that there was a threat to kill her as she said in evidence, it did not necessarily provide a satisfactory explanation for a delay of 17 weeks and the about-face that occurred thereafter. (Paragraph [4] at 83d—f)

Held, further, that whatever weight might be attached to the complainant's reporting this case, the fact remained that the complaint was made 1 7 weeks after the incident. She remained silent for a lengthy period, during which it was possible for her to have made a report, and the possibility of a subsequent fabrication was not eliminated or significantly reduced. This remained a weakness in the complainant's evidence and a serious flaw in the State case. It was necessary for the court to deal with it before it could be satisfied that there was proof of guilt beyond reasonable doubt. The judgment a quo did not deal with it. It merely accepted that the delay was excused by the threat. There was no evaluation of the effect of the delay, whatever its cause, on the reliability of the evidence. This was essential to a proper evaluation of the evidence, and the omission was a material misdirection. (Paragraph [5] at 83i—84c)

Held, further, regarding the insufficiency of the evidence to prove guilt beyond reasonable doubt, the courts, in determining whether the onus was discharged, had developed a rule of practice that required the evidence of a single witness to be approached with special caution. Similarly, the courts had developed a cautionary

rule which was to be applied to the evidence of small children. Here, more than one cautionary rule applied to the complainant as a witness. She was both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness. (Paragraph [61 at 84c—h)

Held, accordingly, that the trial court's ruling on the admissibility of the complaint to the constable was incorrect and the reception of that evidence was irregular. (Paragraph [51 at 83g)

Appeal allowed; conviction and sentence set aside.

S v Kotze 2010 (1) SACR 100 SCA

It is important for presiding officers faced with the evidence of a trap to be aware of Section 252A (6) of Act 51 of 1977.

The appellant was convicted by the Bellville regional magistrate's court on four counts of purchasing unpolished diamonds in contravention of s 20 of the Diamonds Act 46 of 1986. On four occasions he had purchased unpolished diamonds from T, a senior and experienced officer attached to the diamond and gold squad, who was operating as an undercover agent in a covert police operation. An appeal against conviction was dismissed in the Cape High Court. Leave was obtained to appeal to the Supreme Court of Appeal against conviction only. The only ground of appeal advanced was that, in terms of s 252A (3) of the Criminal Procedure Act 51 of 1977 (the Act), the magistrate should have declined to admit the evidence of T. Without the evidence of T there would be no admissible evidence of the transactions giving rise to the convictions, and they would fall to be set aside. While most of the evidence of T was not disputed, the appellant did dispute the circumstances in which it had come about. The appellant claimed that T had become an intimate friend and that they had shared confidences. The appellant went on to claim that, on each occasion that he bought unpolished diamonds from T, the initiative had come from T. The appellant furthermore stated that T incessantly brought up the subject of diamonds, even though he begged him to desist. The appellant further stated that, each time a sale was concluded, T had approached him with a tale of financial woe and insisted that the appellant purchase diamonds to assist him. The appellant contended that he had succumbed to T's persistence on each occasion, out of a spirit of Christian charity and a desire to help someone in need.

Semble: The magistrate ruled at the end of a trial-within-a-trial that the evidence of T was admissible. It was unfortunate that, in deciding to hold a trial-within-a-trial, the magistrate did not require the appellant to furnish the grounds on which he challenged the admissibility of the evidence, as should have been done in terms of the proviso to s 252A (6). It is importantfor presiding officers faced with challenges to the admissibility of the evidence of a trap to be aware of and apply ss (6), in terms of which the accused must 'furnish the grounds on which the admissibility of the

evidence is challenged'. The matter may then, in terms of ss (7), be adjudicated as a separate issue in dispute, i.e. during a trial-within-a-trial.(Paragraph [19])

Semble: Whilst s 252A (6) refers to the burden being discharged on a balance of probabilities, it was, in the court's prima facie view, incompatible with the constitutional presumption of innocence and the constitutional protection of the right to silence. Those rights must be seen in the light of the jurisprudence of the Constitutional Court, in which it has been held that their effect is that the guilt of an accused person must be established beyond reasonable doubt. That a confession was made freely and voluntarily and without having been unduly induced thereto must be proved beyond reasonable doubt. The court saw no practical difference between that case and the case where a conviction was based on the evidence of a trap. Each deals with the proof of facts necessary to secure the admission of the evidence necessary to prove the guilt of the accused. In the court's prima facie view therefore, and in the absence of argument, in order for the evidence of a trap to be admitted, it is necessary that the trial court be satisfied that the basis for its admissibility has been established beyond a reasonable doubt. (Paragraph [20])

Sections 252 A (1) and (2) of the Act

Held, that the starting point for determining the admissibility of T's evidence was s 252A (1) of the Act. In this regard ss (1) excludes the possibility of a defence of entrapment by explicitly stating that the use of a trap or engaging in undercover operations in order to detect, investigate or uncover the commission of an offence is permissible. Absent a constitutional challenge—and there was no such challenge in the present case—there was no room for an argument that the use of a trap or the undertaking of undercover operations was unlawful in South Africa. (Paragraph [21])

Held, further, that s 252A (1) lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice, in order to determine whether it should be admitted. (Paragraph [23])

Held, further, that s 252A (1) does not purport to prescribe the manner in which undercover operations or traps are to be conducted by the police. It merely distinguishes, on the basis of the manner in which the trap is conducted, between instances where the evidence thereby obtained is automatically admissible and instances where a further enquiry is called for before the question of admissibility can be determined. (Paragraph [24])

Held, further, that s 252A (1) prescribes a factual enquiry into whether the conduct of the trap goes beyond providing an opportunity to commit an offence. Section 252A(2) describes a number of features that may indicate to a trial court that the undercover operation or trap went beyond providing an opportunity to commit an offence. In this regard it was conceded by the prosecution and held by both the

magistrate and court below that T's conduct and the undercover operation went beyond merely providing the opportunity for the commission of the offence. (Paragraph [25] at 11 3d—f)

Held, further, that the starting point is that, in each case where the evidence of a trap is tendered and its admissibility challenged, the trial court first has to determine, as a question of fact, whether the conduct of the trap went beyond providing an opportunity to commit an offence. It does that by giving the expression its ordinary meaning and makes its decision in the light of the factors set out in ss (2). (Paragraph [26) at 113g.)

Held, further, that if one examined the context of ss (2) it was clear that the legislature was concerned to identify situations that would be relevant to and bear upon the factual enquiry postulated in ss (1). In its judgment the reference to the trap not going beyond affording an opportunity to commit an offence describes a situation where no issue exists about the propriety of the trap or the admissibility of the evidence derived therefrom. It appended in ss (2) an open list of factors relevant to the factual enquiry. Those factors have to be viewed holistically and weighed cumulatively, as different factors may point towards different answers. Not all of the factors will be relevant in every case. Sight must not be lost of the fact that there is only a single question to be answered, namely, whether the conduct of the trap went beyond providing an opportunity to commit an offence. If, on considering all relevant factors, the conclusion is that the conduct of the trap went beyond providing an opportunity to commit the offence, the enquiry will then move on to s 252A (3) because, in the legislature's judgment, that conclusion may cast doubt upon the propriety of the trap and the evidence obtained thereby, so that the situation requires further scrutiny before the evidence is admitted. If the factors in ss (2) are not taken as a check list, but merely as matters that may be relevant to the proper determination of the factual enquiry, taking into account in any particular case those that are relevant on the facts of that case, they ought to pose few problems. What will be required in every case is a careful analysis of the evidence in order to determine whether the conduct of the trap goes beyond the limit set by the legislature. (Paragraph [27])

Held, further, that, in the court's view, the finding that the conduct of T went further than providing an opportunity to commit the offences was incorrect. However, as the prosecution had conceded the point in both courts below, the enquiry had to turn to s 252A (3). (Paragraph [29])

Section 252A (3) of the Act

Held, that s 252A(3) (a) establishes two criteria for determining the admissibility of evidence obtained through the use of a trap or undercover agent. They are, firstly, whether the evidence was obtained in an improper or unfair manner and, secondly, whether its admission would render the trial unfair or would otherwise be detrimental to the interests of justice. The language of the section suggests that such exclusion is discretionary, but, insofar as there is a discretion, it is a narrow one. The power of

the court to exclude the evidence where the relevant circumstances are established will ordinarily be coupled with a duty to exclude it. (Paragraph [31)

Held, further, that s 252A (3) (b) sets out the factors relevant to the exercise of the court's power to exclude the evidence. Again this is not a closed list, as the court may take into account any factor that in its opinion ought to be taken into account in that regard. (Paragraph [32])

Held, further, that the appellant's evidence was disbelieved by the magistrate and the court below. Having regard to the appellant's contentions regarding the circumstances in which the transactions came about and his motivation for buying the diamonds, the court held that the appellant's evidence was rightly rejected. Furthermore, counsel's contention that the appellant's version prior to the first transaction should be accepted fell to be rejected as the evidence was of a piece with the evidence rejected and could not be separated therefrom.(Paragraph[34])

Held, further, that the rejection of the appellant's evidence was destructive of the contention that the evidence was obtained unfairly by virtue of methods adopted by T, and was likewise destructive of the submission that its admission rendered the trial unfair or was detrimental to the administration of justice. (Paragraph [35j)

Held, further, that counsel's submissions regarding areas of weakness in T's evidence in certain areas did not affect the conclusion that the appellant was a willing participant, nor did any of it bear upon the propriety or fairness of the methods adopted to obtain the evidence of those transactions, or the fairness of the trial. (Paragraph [35] at 1 18c—e)

Held, further, that, with regard to counsel's contention that the evidence of T should have been excluded because of departures from the conditions attached to the Director of Public Prosecution's (DPP) authorisation, part of the argument fell away with the rejection of the appellant's version. With regard to the balance of the contention (that T had not sought to record all encounters with the appellant) the court held that, even if the DPP had required every interaction to be recorded, there was nothing to show that T's failure to do so was detrimental to the interests of justice or rendered the trial unfair. The point was accordingly rejected. (Paragraph [36])
Appeal dismissed.

From The Legal Journals

Ntlama, N
"'Equality" misplaced in the development of the customary law of succession: Lessons from Shilubana v Nwamitwa 2009 (2) SA 66 (CC)"

2009 Stellenbosch Law Review 333

Watney, M
"'n Klemverskuiwing by inhegtenisneming sonder lasbrief"

2009 TSAR 733

Smith, C and van Niekerk, S J

"Execution against immovable property: Negotiating the tightrope of s 26"

De Rebus January 2010

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

Contributions from the Law School

Locus standi in a maintenance claim for adult children
Butcher v Butcher 2009 2 SA 421 (C)

It is trite law that the duty of a parent to support a dependent child does not come to an end at any particular age, even the attainment of majority, but continues until the child becomes self-supporting (see *inter alia Bursey v Bursey* 1999 3 SA 33 (SCA) 38 C-D; *Ex parte Jacobs* 1982 2 SA 276 (O) 278 C-D; *Lambrakis v Santam Ltd* 2000 3 SA 1093 (W) 1114 F-H). The scale of support however, would not necessarily be

as generous as for a minor child and is seemingly limited to necessaries (*B v B* [1997] 1 All SA 598 (E); *Gliksman v Talekinsky* 1995 4 SA 468 (W); Van Heerden (ed.) *Boberg's Law of Persons and Family Law* (1999) 247).

With the promulgation of s 17 of the Children's Act 38 of 2005 on 1 July 2007, the age of majority in South Africa dropped from 21 to 18 years. The question in this note relates to the *locus standi* to bring an application for maintenance for an adult, but dependent child. Must the application be brought by the custodian parent or the adult child? The scenario envisaged is a common one: an adult child, over the age of 18, still living at home and dependent on his or her parents for support. In many cases the child may still be attending secondary school; could be unemployed, working for an inadequate income or studying towards a tertiary qualification.

The facts of the case of *Butcher v Butcher* 2009 2 SA 421 (C) fall into this category. The divorcing parties have two children, 21 and 18 years old. Both live with their mother in the erstwhile family home (para [2]). An application was brought by the divorcing mother, in terms of rule 43 for, amongst other claims, maintenance *pendente lite* for the adult dependent children pending the conclusion of the divorce action (para [1]).

The applicant was advised by her attorneys, after the promulgation of the Children's Act, that the children would have to claim maintenance in their own names in the divorce action, but that for the purposes of the rule 43 proceedings, she could claim maintenance for them as they continued to live in her household (para [3]).

The legal question which arose was whether the court was competent to order the father firstly, to pay maintenance to the applicant-mother in an amount that would also benefits the parties' major children *pendente lite.* Secondly, was the court competent to make an order for the payment of additional amounts directly to the major children or for expenses on their behalf to the mother even though they have not been joined as parties in the divorce proceedings (para [9]).

The court argued that there was no statutory provision in either the Divorce Act 70 of 1979 or the Children's Act enabling a parent of an adult child to bring a maintenance claim on behalf of an adult child. The parent thus lacks the necessary *locus standi* in divorce proceedings to claim an order on behalf of such adult children that the other parent pay certain allowances directly to the children or to pay certain expenses on their behalf. Only the children themselves have the standing to pursue such claims against the other parent (para [15]). The court referred to *Smit v Smit* 1980 (3) SA 1010 (O) 1018C and *Sikatele v Sikatele* [1996] 1 All SA 445 (Tk), where adult dependent children, still living with their mother, independently claimed maintenance from the respective fathers.

It was noted that the Children's Act implicitly assumes that children are financially independent at 18 years of age and that parental financial responsibility should end at that date. This is however not the social reality in South Africa. Many children have not concluded their secondary education, let alone completed their tertiary education, when they turn 18. They in fact remain financially dependent on their

parents several years after they attain the age of majority. The court found it regrettable that neither the Divorce Act nor the Children's Act expressly authorises a parent with whom an adult dependent child resides to claim maintenance on his/her behalf from the other parent. Placing this burden on an adult dependent child who still lives at home in most circumstances puts him/her in an invidious position. The court also noted that where an adult dependent child still lives at home and the primary residence parent requires a contribution in respect of his living costs, it is undesirable that such a parent should look towards the adult child to pay over a contribution from an amount received as maintenance from the other parent (para [14]).

The claim *pendente lite* for household expenses, which in part is intended to cover the children's food and grocery expenses at the family home, is however on a different footing to claims for certain allowances to be paid directly to the children. The solution to the household expenses lies in s 7(2) of the Divorce Act. A court, when determining a spousal maintenance claim, must take into account, amongst other factors, the parties' respective financial needs and obligations, as well as their standard of living during the marriage. Where the parties have separated and the adult children of the marriage have continued to live with the mother who has had to use her household budget to run the family home and provide groceries for a three-member household, such parent's responsibility to provide the children with a home, with all that this entails, constitutes an "obligation" within the meaning of s 7(2) of the Divorce Act which can validly be taken into account in determining the quantum of her interim maintenance claim (para [17]).

The court found that the relief (for pocket money, clothing and cell phone expenses) sought by the applicant in respect of the adult children is not competent and should accordingly be refused. However, insofar as the respondent-father consented to an order that he continues to pay *pendente lite* the medical-aid cover in respect of the children, this tender would be incorporated in the order granted (para [16]).

In conclusion, in terms of *Butcher* it would be appropriate, in pending divorce proceedings, to include the costs of the joint household as part of a spousal maintenance claim. If there is an offer to contribute, or a settlement agreement between the divorcing parties, it can be included in the court order. Where there is no spousal maintenance claim, no offer and no settlement, only the adult dependent children have *locus standi* and they themselves should make application against their parent(s).

Where there is however an existing maintenance order the situation would be different. The court in *Butcher* held that an obligation to maintain a child, which was incorporated in a consent paper concluded when the child was a minor, was enforceable at the instance of the mother by means of a writ in circumstances where the maintenance obligation continued after the child attained majority (para [11]). The court approved the argument in *Bursey* at 591H: "The effect of an order such as the present is not that there is any diminution of or in the major status of John. There is no inroad made upon his right to enforce his common-law right to an upward variation of the maintenance payable to him by his parents upon proof by him of

such need. The effect is that the maintenance payable to him by his parents continues to be paid to him by his erstwhile custodian parent, the appellant, who recovers the contribution thereto to be made by first respondent pursuant to a valid order of this Court".

In following the *Butcher* judgment, the court in *Weichers v Weichers* 2009 JDR 0638 (GNP) concluded that the application of the major children, still maintenance-dependent, to intervene in the divorce proceedings of their parents should have been granted as they have a clear interest and have shown that their application was bona fide and not frivolously made (para [21]).

The implication of these decisions is that there would be more maintenance claims and litigation between children and parents, also in maintenance courts. From a policy position this is an unsatisfactory situation. Until 2007, parental maintenance litigation, although it impacted on the child, was one person removed from the child and it was not necessary for the child to "get their hands dirty" as a party to the dispute. This assisted with the ability by the non-custodian parent to retain a relationship with the children. The question now is whether the children would be "adult" or strong enough emotionally to sue parents for maintenance; and, whether parents are adult enough to handle a maintenance claim by a child? At the moment there is no alternative. Unfortunately the best interests of the child-criteria is no longer applicable as the children in question are over 18 years, majors and do not qualify as minors under the Constitution. Similarly, the High Court might not be able to provide a solution, as it is only the upper guardian of all minor children. It is submitted that the dilemma should be addressed by legislative intervention as a matter of urgency.

Marita Carnelley
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Matters of Interest to Magistrates

Magistrates as primary drivers and players in the change processes in Child Justice and the plight of an unaccompanied foreign child

Under the African sky, sitting in the shade of an old Mopani tree at the foot of Modimolle Mountain, one of my ancestors, aptly named *Motswatema (The progressor),* thought too loud in expressing her observations of a young mother removing a sharp edged knife from her infant's grasp.

The lucidity, eloquence and spirit of what she said caught the attention of her audience and her articulation of the true role of the mother became entrenched as an idiomatic expression:
“MMANGWANA O TSWHARA THIPA KA MO BOGALENG”
“The mother handles the knife at its sharpest edge”

Mothering, in Africa, has got nothing to do with conception, gestation period, labour pains, giving birth, sex or gender. Just to illustrate the point, there were no prisons in South Africa before the arrival of Jan van Riebeeck. Today, a prison visit by a Magistrate and a discussion with prisoners reveals that the absence of mothering is almost the sole cause of prison overcrowding. However, prisoners were conceived, carried for nine months; the females who gave birth to them went through labour pains in giving birth.

Although the females were and are still present, they were or remain simply not alive in the lives of their children. Every woman can give birth to a child. But not every woman can be the mother of a child. Similarly, every Magistrate can preside over a case. But not every Magistrate has a passion for children, which passion manifests his understanding of his/her primary guardianship of a child.

A Magistrate involved in Child Law can unfortunately, in the current prevailing circumstances, not strive for popularity with other stake holders, especially the Administration within the Department of Justice and Constitutional Development and other officials in other sister Departments in general, in particular the SAPS, Social Development and Home Affairs, if she has to succeed to act in the best interests of the children. Dealing with unaccompanied foreign children is not for conformists. It requires a Magistrate to move out of the alcoves of complacency, out of the box in the comfort zone of an air-conditioned courtroom and/or information technologically advanced chambers into the world of reality where the only mouse known to the child is the one in the family of rats; informed by integrity, values and a focus on the greater good.

This is not a declaration of war with our Court Support Services or my many friends within the sister Departments. This is being courageous in stating the truth some of us would rather not speak about, to wit, that our constitutional roles are often irreconcilable. My colleague, Advocate Simon Jiyane, in his capacity as the Director-General, is also the Accounting Officer of our Department. As a Presiding Officer, I do not have to account to our internal auditors, the Auditor-General and/or Parliament, nor am I constrained by the Public Finance Management Act in taking decisions, like he is. Therefore, on the same issue, to wit, the best interests of the child in a particular matter, I am not constrained by Treasury Instructions as he is. The premise, nature, scope and content of our work are not the same. Our views are likely not to be the same and our conclusions are likely not to be the same although both of us profess to act in the best interests of the child.

What is important, after recognizing that our roles are sometimes irreconcilable, is to manage our processes and discuss differences so that the factors which inform our differences do not lead to or amount to open conflict and/or disrespect to the other.

The Magistrate must be prepared to grab the knife at its sharpest edge as the primary guardian of the child that appears before him or her.

Barriers to the enjoyment of human dignity, equality and freedom, for children, manifest themselves in different forms. Some are inherent in the make-up of a child; others are in the administrative and judicial systems whereas others are founded within society. The different forms may be

1. Problems inherent within a child, for example
   - problems with one or more of the senses of the child, e.g. sight, hearing, smelling, feeling and taste, or even physical disability as well as emotional maturity and general intelligence

2. Administrative and Judicial systems, for example
   - methods and processes of assessments and adjudication
   - medium of instructions, languages of record and mother tongue
   - assistive and ancillary services

   These are problems brought about by the jurisprudence

3. Societal, for example
   - poverty
   - race, class, disability, sexual orientation and gender discrimination
   - negative attitudes
   - political instability

Apologists for children do not want us to acknowledge that there are barriers which may be inherent within a child. They refuse to accept that children are also mere mortals with flaws. It is primarily because of the prevailing view of apologists that children with inherent problems are pushed through the academic ladders in our schools even though the children themselves, the educators and school management, the parents and the Department of Education officials know that the children are not ready for the next phase and therefore they cannot be declared competent. We are happy to fool ourselves as if we have a constitutional and democratic right to be stupid. Our children deserve better.

It is because of the apologetic view towards children that we refuse to acknowledge that in the foundation phase, which is between the ages of six and ten, punishment of the child is a necessary evil to help correct behaviour. Apologists have succeeded in elevating a tool of discipline, whatever the circumstances, to abuse - so much so that parents, including Magistrates and Judges, do not know whether physical correction of a child's behaviour by a parent is acceptable or not, and if it is, where the line is between discipline and violence or abuse. Apologists have blurred, if not removed, the line. I have not been invited to discuss this aspect of our children; therefore these comments will suffice to illustrate the first of the barriers I mentioned.

The third form of barrier is, in the main, the social context in which the children find themselves. Our aim as the Magistracy must be to limit exposure of the children to these societal ills. Generally, the Government of the Republic of South Africa must be commended in the strides it has made to minimise the exposure of our children to these risks. Amongst others, the Government made sure that laws are in place to answer to these ills.

"Kom by die punt, Meneer Thulare": I can already hear some of you thinking. *"Etswa ka mooko wa taba, Morena".* I then turn to discuss the second form of barrier, to wit the problems of jurisprudence.

The Gauteng Provincial Child Justice Forum recently learned that there is a need, perhaps by the Magistracy, especially Commissioners for Child Welfare who in terms of the Judicial Manual must be the Head of Office, with exceptions, to visit centres within their districts where children are normally kept, to ascertain whether these children are actually detained in accordance with the legal processes. It was discovered in the East Rand that childrens' removals, especially by the South African Police Services, were never brought to the notice of the Childrens' Courts within 48 hours as prescribed by the Child Care Act 74 of 1983 for judicial review of such removals. In certain instances, children spent more than a year within the centre without any judicial review. In one centre in Benoni, 60 foreign unaccompanied minors were found where the removal and detention was never brought to the courts within 48 hours and some of the children were at the centre for a very long time.

Children under ten in general, in particular foreign unaccompanied minor children who may be removed following the provisions of section 9(1) (b) of the Child Justice Act 75 of 2008 and placed in a child and youth care centre, run the risk of spending considerable periods of time in such detention without judicial review, unless Magistrates who are Heads of Courthouses or in exceptional circumstances their designates, visit the centres for inspection purposes.

With respect, the developments in the East Rand, as regards foreign unaccompanied minor children at Kids Haven in Benoni, happened under the watch of our sister Departments the SAPS, Social Development and Home Affairs. It was a Magistrate who identified the problem when he was asked to review detentions or removals of children in the Childrens' Courts of Daveyton and then directed the middle management of Social Development to inspect all Places of Safety and correct the unlawful detention of children in his jurisdiction.

The other problem identified is that children removed, in practice, undergo a medical assessment before admission to a centre. Most of the time, the child is yo-yoed between the SAPS and the centre, most often because the SAPS struggle to have personnel of the Department of Health available at all times to do such medical assessments.

Police on the one hand argue that in terms of prescripts there is no provision for this assessments and that it is a creation of the centres; the centres on the other hand argue that most often they have fingers pointed at them for the medical condition and sometimes injuries to children, which conditions or injuries the children were admitted with and in the absence of that assessment on admission, they also do not have an informed identification of the medical challenges of the child to determine whether they will be able to render the necessary interventions. For example, not all centres have the resources to render palliative care or ARV therapy to children.

Where the Magistrate, when asked to review a detention, observes a failure to comply with the law in any manner whatsoever, such failure must be investigated, shortcomings identified and corrected. The unfortunate truth is that, in the main, public servants depend on institutional memory for training, as Departments do not generally have sufficient resources to train staff without adversely affecting service delivery. As a result, most of our Administrative personnel's only recourse to tuition or on the job training is what the "experienced personnel" convey to them.

A member of the SAPS, the Social Worker and the Clerk of the Court may not necessarily know that the person from whom a child is removed is entitled to be heard when the review of the removal is done by the Magistrate and that they carry the responsibility of informing such person of the date, time and place of the review in the Children's Court, unless the Magistrate trains them. It is for that reason that some Senior Officials in Social Development and in our own Department of Justice and Constitutional Development disputed my note that in terms of the Child Care Act 74 of 1983, Regulation 2, a Children's Court Assistant cannot be an Administrative Clerk in the Department of Justice and Constitutional Development. It has to be a qualified Social Worker.

I was informed by reading the provisions of the Regulation. They were basing their contention on institutional memory. Somebody decided long before 1994, without regard to the law, to elevate Administrative Clerks to the status of Children's Court Assistant. Justice College, with respect, did not correct the terminology or the illegal and misdirected position, and continued to train Administrative Clerks as "Children's Court Assistants". This unfortunately led to the Department of Social Development and the Department of Justice and Constitutional Development moving into a comfort zone. Childrens' Courts, throughout the country, do not have Children's Court Assistants as provided for by law. Whereas the law provides for a Clerk of the Children's Court and a Children's Court Assistant, in practice we have no Children's Court Assistants in the legal sense. Clerks of the Court wear borrowed clothes and by their attire they are called Children's Court Assistants; in substance and in law they can never be Children's Court Assistants. This is the truth Magistrates must tell Court Managers, Area Court Managers and Regional Heads in our Department, as well as the Directors-General of Social Development in the Provinces.

It is unfortunate that children, who are brought before the Children's Court by civil processes, will be more equal than Children in conflict with the law who are brought before the Children's Courts.

In terms of the Child Care Act 74 of 1983, the Children's Court Assistant must be notified of the removal of the child within 48 hours of such removal (Regulation 9(2)(b)(i)); no later than the first court day after receipt of such notice by the courthouse the Commissioner shall be informed (Regulation 9 (2)(c)) and the Commissioner shall review the removal no later than the first court day following his/her receipt of the request for review (Regulation 9(2)(c)). Therefore, the review must happen within 4 court days of the removal of the child.
In terms of the Children's Act 38 of 2005 the Social Worker (section 152(2)(b)) or Police official (section 152(3)(d)) removing a child must notify the Clerk of the Children's Court not later than the next court date of the removal of the child.

In terms of section 9(2) of the Child Justice Act 75 of 2008, the probation officer must assess the child not later than seven days after being notified by the Police official of the removal of the child. We have already three days more for a child in conflict with the law.

The member of the SAPS has no defined period within which he/she should bring the removal to the notice of the probation officer. All that section 9(1) (b) of the Child Justice Act 75 of 2008 tells him/her is that it must be immediately. The DK Illustrated Oxford Dictionary, 1998, defines this word as done at once; most pressing or urgent. The trouble is that this is not the only definition. Living by hope, as faith enjoins us, this is the definition we anticipate the SAPS will attach to this word. 'Immediately', in the Police station where there is lack of vehicular resources, may translate into more than two days. The SAPS may be compelled by circumstances to read more (or less) than the first definition into the word 'immediate' in their quest not to fall foul of the law and the result will be that children under 10 years who are in conflict with the law may spend up to ten days, basically up to two weeks in detention, before being assessed.

The training in law does not necessarily cover psychology and specifically child development sufficiently. Lawyers, Prosecutors and Presiding Officers therefore need experts from those fields in order to gain a deeper understanding of the relevant developmental forces underlying the behaviour of the child in order to formulate an appropriate intervention which will hold maximum benefit for the child, the parents and society in general.

The Presiding Officer requires information on the child as a person, on his/her strengths and weaknesses, on his/her characteristic behaviour patterns, on his/her family background and on the socio-economic environment in which the child grew up in order to formulate his/her methods and processes of interventions.

A decision formulated without having adequate information on the character and personality of the child, his/her relationship with members of his family and with other people, as well as on the environment from which the child originates, has little predictive value. It is an intuitive rather than a scientific process. A Presiding Officer should know the child better than its own mother, father, siblings or other relatives.

A Presiding Officer must be able to answer the questions, “who is this child?; what kind of person is the child?; what factors contribute to the child’s experiences and expectations?; what is the best possible intervention that can be made to ensure the tripartite goals of removing the barriers from the child, improving the science and philosophy of the law, and adding value to the community, are actually met?”.

This information can only be obtained through a factual and diagnostic study of the child and the child justice system, to enable the Presiding Officer to formulate an objective, rational and an effective intervention.

Such an investigation must be carried out by a person with sufficient diagnostic and analytical skills as well as a thorough understanding of human behaviour.
Unfortunately, in our developing countries, many children are invisible. Birth registration is the manifestation of the State’s responsibility in recognising the existence and identity, including name and nationality, of a child when recorded by the State. Many African children do not have birth certificates and therefore their membership of society is not acknowledged through visible official evidence.

This reality often leads to rural children in particular, routinely being omitted from benefitting when policies are implemented and programmes designed. This invisibility and other risks of missing out on environments that protect children, often lead to children being excluded from accessing services necessary for their survival and/or development.

A proper investigation by the Social Worker will be able to assist in determining from whic country the child came from, how the child came to South Africa and even why the child came to South Africa. It is necessary, once it is established that it is an unaccompanied foreign child, to direct, if the child does not yet enjoy legal representation, that the matter be referred to Legal Aid South Africa for their consideration.

After exhausting the internal remedies within Legal Aid South Africa as provided for by section 3(B) of the Legal Aid Act 22 of 1969, Magistrates should not hesitate to make orders that the Legal Aid provide legal representation for the child where otherwise substantial injustice may result if the child is not legally represented.

The Child Justice Act 75 of 2008 makes it peremptory for legal representation for purposes of trial of a child, even against the wishes of the child (see section 82 and 83). Unaccompanied foreign children generally need legal representation before the trial stage and even if they are not tried, at their first encounter with the authorities and most often long after they had appeared in court. For instance, where the social worker’s industry traces the relatives of the child, and he or she is convinced that the circumstances warrant reunification with the relatives and community, and none of the relatives has a bar-coded South African identity document, they cannot be enlisted as beneficiaries of the grants in terms of our Social Assistance regime simply because the information technology systems of Social Development and or the South African Social Security Agency allegedly cannot provide for them.

The other reason is that some of the children qualify for refugee status in terms of section 3 of the Refugees Act 130 of 1998. Social Workers are not experts in law and therefore lawyers must intervene. Only a lawyer can assist to determine whether the child from Zimbabwe is a person who has been, owing to *"events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality,… compelled to leave his or her place of habitual residence in order to seek refuge elsewhere (section 3(b))* or *is a dependent of a person contemplated in paragraph (a) or (b)" (section 3(c).* Paragraph (a) refers to a person who *"owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it;".*

Magistrates must take particular note of section 32 of the Refugees Act which provides that an unaccompanied child who appears to qualify for refugee status in terms of section 3 and who is found in circumstances which clearly indicate that such child is a child in need of care as contemplated in the Child Care Act 74 of 1983, must forthwith be brought before the Children's Court for the district in which he/she was found and that the Children's Court may order that that child be assisted in applying for asylum in terms of the Refugees Act 130 of 1998.

A legal representative may be able to establish that the unaccompanied foreign child qualifies for permission to remain within the Republic on any of the grounds provided for in section 33 of the Refugees Act 130 of 1998.

The legal representative may assist the child with representation in the review of the decision of the Refugee Status Determination Officer by the Standing Committee for Refugee Affairs. The legal representative may assist the child in lodging an appeal with the Refugee Appeal Board. These competencies do not reside within Social Workers; at best for unaccompanied foreign children they reside within Legal Aid South Africa where the Magistrate refers the matter to them. The legal representative may also assist the foreign unaccompanied child in enjoying the protection and general rights of refugees in terms of section 27, rights of refugees in respect of removal from the Republic in terms of section 28, restriction and detention in terms of section 29, issuing of identity documents in terms of section 30, application for travel documents in terms of section 31, reception and accommodation of asylum seekers in the event of mass influx in terms of section 35, withdrawal of refugee status in terms of section 36, offences and penalties in terms of section 37 and other related and ancillary issues outside the civil, family and criminal courts.

Referral of a matter to Legal Aid South Africa is not a favour done by the Magistrate to the child, neither is provision of legal representation for such a child a favour done by Executive of Legal Aid South Africa: it is the manifestation of the obligations imposed on South Africa by its signature to the Convention of the Rights of the Child, in particular Article 22 subsection 1.

Magistrates must make sure that unaccompanied foreign children are forthwith brought to the attention of the International Social Services Unit in the Provincial Office of the Department of Social Development. This is necessary because we have to give effect to Article 22 subsection 2. It is simply unfortunate that most provinces, although having these units, do not yet have guidelines to Social Workers on the ground as well as publicised points of contact for intergovernmental co-operation. I urge Limpopo Province to make sure that each and every Magistrate's Office receives the contact details of the personnel at this unit of the Department of Social Development.

With regard to unaccompanied foreign children, we have the responsibility as a country

1. To re-unite the child with her family in the country of origin.
2. To make sure that the country of origin of the child takes care of its children and therefore assist in the placement of the child into the formal care processes in the country of origin of the child.
3. When we have not succeeded in the primary goal mentioned in 1 above and secondary goal mentioned in 2 above, to place the child with a blood relative in our own country, or
4. To place the child in alternative care

This is what article 22 subsection 2 enjoins us to do.

Magistrates should also take cognisance of the provisions of Article 31 to 34 of the Convention Relating to the Status of Refugees. In the main these articles provide that the mere fact that a refugee is in the country without authorisation is no reason to impose penalties; that states shall allow refugees reasonable periods and all the necessary facilities to obtain admission into another country; that expulsion of a refugee shall be only in pursuance of a decision reached in accordance with due process of the law and the refugee shall be allowed to submit evidence to clear himself, to appeal and to be represented before the competent authority or person designated by the competent authority; that no state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The Immigration Act no 13 of 2002 defines a foreigner as an individual who is not a citizen. It is a legal representative who may assist a child in his challenges with the findings of an Immigration Officer that the child and/or the parents, guardian or a person in whose custody the child is, is an illegal foreigner in terms of section 8 of Act 13 of 2002. It is a legal representative who may assist the child in the review of such decision by the Minister of Home Affairs. The legal representative may also assist the child in the review or appeal of any decision that materially and adversely affects an unaccompanied foreign child when such child receives notice thereof (section 8(3)). The Director-General's decision, if still adverse to the child upon review or appeal (section 8(4) read with 8(5)), may be taken for higher relief to the Minister (section 8(6)).

Other reference material within the legal framework includes the 1967 Protocol Relating to the Status of Refugees, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the African Charter on the Rights of the Child and the Constitution of the Republic of South Africa Act 108 of 1996.

My sense of justice finds the provisions of section 47 (2) (b) (i) of the Child Justice Act 75 of 2008 objectionable. To have diversion founded by acknowledgement of responsibility by the child is simply too close to injustice for my comfort. In my view, we appear to be happy to bury justice in the cemetery of statistics for the National Prosecuting Authority. If it is in the best interests of the child to divert, we should divert. We should not only divert when the response of the child places a smile on the face of the prosecutor. Having grown up within the criminal justice system and the courts of South Africa, even those that in the privacy of rooms Prosecutors call "*hardegat*" deserve to be diverted, if the best interests of the child so demand. To burden a child with a criminal record when subsection 1 of Article 40 of the Convention on the Rights of the Child reads that we, as South Africa treat a child in a manner *"… which takes into account the child's age and the desirability of promoting the child's reintegration and the child's* ***assuming a constructive role in society,*** is for me too much a departure from this stated goal.

Conclusion

A man who, in the history of South Africa, was tried and sentenced by Parliament and not the courts, Robert Mangaliso Sobukwe, had this to say about leadership:
"True leadership demands complete subjugation of self, absolute honesty, integrity and uprightness of character, fearlessness and above all, a consuming love for one's people."

Daniel Thulare, Senior Magistrate, Daveyton Magistrate's Court, The Paper was presented at a Child Justice Seminar in Polokwane on
26 – 27 October 2009

A Last Thought

“The tough mind is sharp and penetrating, breaking through the crust of legends and myths and sifting the true from the false. The tough-minded individual is astute and discerning. He has a strong austere quality that makes for firmness of purpose and solidness of commitment.
Who doubts that this toughness is one of man's greatest needs? Rarely do we find men who willingly engage in hard, solid thinking. There is an almost universal quest for easy answers and half-baked solutions. Nothing pains some people more than having to think.”

Martin Luther King Jr.