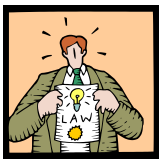
e-MANTSHI

A KZNJETCOM Newsletter

March 2012 : Issue 74

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



New Legislation

1**.** A notice was published in Government Gazette no 35106 of 5 March 2012 in which the incorporation of standards specifications into the National Road Traffic Regulations,2000 was promulgated as follows:

I, Sibusiso Joel Ndebele, Minister of Transport, acting in terms of section 76 of the National Road Traffic Act, 1996 (Act No. 93 of 1996), hereby incorporate SANS 1518:2011 and SANS 10233:2011 into the National Road Traffic Regulations,2000 under the National Road Traffic Act, 1996 (Act No.93 of 1996)

2. A notice was published in Government Gazette no 35119 dated 3 June 2012 to the following effect:

Notice is hereby given in terms of Rule 241(1)(b) of the Rules of the National Assembly that the Minister of Justice and Constitutional Development intends to introduce the Judicial Matters Amendment Bill, 2012, in the National Assembly shortly.

The explanatory summary of the Bill is hereby published in accordance with Rule 241 (1)(c) of the Rules of the National Assembly.

The Bill intends to amend -

(a) the Special Investigating Units and Special Tribunals Act, 1996 (Act 74 of 1996), so as to further regulate the litigation functions of a Special Investigating Unit; to provide for the secondment of a member of a Special Investigating Unit to another State institution; and to empower a Special Investigating Unit to charge and recover fees for performing any of its functions and to authorise any such fees previously levied; and

(b) the National Prosecuting Authority Act, 1998 (Act 32 of 1998), so as to further regulate the remuneration of Deputy Directors and prosecutors; and to regulate the continued employment and conditions of service of persons employed by the National Prosecuting Authority as financial investigators and analysts; and to provide for matters connected therewith.

A copy of the Bill can be found on the websites of the Parliamentary Monitoring Group at http://www.pmg.org.za and the Department of Justice and Constitutional Development at www.doj.gov.za

Recent Court Cases

1. S v NDEBELE 2012 (1) SACR 245 (GSJ)

Electricity *can* be stolen.

"The remaining question which arises irrespective of the link of the accused to the events is whether or not electricity can be stolen.

In order for a theft to take place, the property which is removed must be a thing capable of being stolen. According to Roman and Roman-Dutch Law as a *contrectatio* was the handling of a thing, theft could not be committed of an incorporeal thing which could not be touched and so could not be taken in hand. The general rule seems to be that only corporeal or movable things are capable of being stolen and thus incorporeal property cannot be stolen. See *South African Criminal Law and Procedure*, Volume 2, 3rd edition by J R L Milton page 600. Property stolen must be "'n selfstandige deel van die stoflike natuur." See *Snyman, Strafreg* 3de uitgawe, page 493.

It has long been recognised that rights of action (rights in chose) having no corporeal existence, cannot be the subject of theft. See for example, the chapter on *Larceny in Wharton's Criminal Law*, Volume 1 paragraph 878 and following and Glanville Williams Textbook of *Criminal Law*, 2nd Edition page 736.

The fact that an incorporeal cannot form the subject of theft, has been recognised as a difficulty, particularly where money and shares are concerned. The question was left open in *R v Milne* or *Erleigh*, 1951 (1) SA 791 (A). The fact that an account holder is not the owner of money in his bank however, does not mean that he is not a person with a special property or interest therein, such as to result in the monies being capable of theft. See: *S v Kotze*, 1961 (1) SA 118 (SCA). The Supreme Court of Appeal has held that a person who receives monies into his bank account in his name, knowing that he is not entitled thereto and who uses them commits theft. See *Nissan South Africa (Pty) Limited v Marnitz NO and others* (*stand 1 at 6 Aeroport (Pty) Limited intervening*), 2005 (1) SA 441 (SCA) at paragraphs 24 and 25.

The underlying objection to holding that an incorporeal is capable of theft is the requirement that there should be a *contrectatio*. Inasmuch as a taking is required, so the argument goes, there can only be the taking of a physical movable. This matter was dealt with directly in *S v Harper and Another*, 1981 (2) SA 638 at 664 and following which held an incorporeal capable of theft.

This concept has been recognised in our society, for example in Nissan supra. In the modern day there are more complicated transactions than existed historically and hence than were considered historically. In Nissan's case, the thief received into his bank account a credit independently of any action taken by him, which resulted in the amount reflected as standing to his credit being increased. In the ordinary course these credits are owned and possessed by the bank. The customer has only a special interest to them arising out of the contract he has with the bank. The credits exist electronically and constitute a cash value sounding in money. The rights reflected by the credit accordance with the customer/banker contract however vest in the customer who can use the credits at his will. The customer whose account was debited to create the credit in the other customer's bank account has diminished claims against the bank in his account. On the authority of Nissan such person has lost a thing capable of being stolen and that thing is stolen when the customer uses the credit to which he is not entitled. There is no physical handling of anything.

Hence the *contrectatio* is constituted by an appropriation of funds, which already exist in his account but, to which the customer is not entitled. This is not a *contrectatio* constituted by a physical removal of something from the owner. It is a taking of an electronic credit given by mistake and not processed or owned which is used deliberately against the interest of the owner. The *contrectatio* is constituted by an appropriation of a characteristic which attaches to a thing and by depriving the owner of that characteristic.

Inherent in the finding in Nissan's case is that this appropriation of a characteristic attaching to a thing does constitute theft. Once this understanding of what can be stolen is reached, the subsequent decisions which are all collated in South African Criminal Law and Procedure (supra) at 601 become explicable.

A decision which is out of step with that thinking, which has been in existence for many years now, is *S v Mintoor*, 1996 (1) SACR 514 (C) at 515 where it was held that electricity is an energy and that energy is incapable of theft. The learned Judges, who reached that conclusion, had no regard to the authorities (some of which postdate the judgment) to which I have referred in relation to the appropriation of a characteristic attaching to a thing and merely adopted the Glanville Williams

reasoning as authority for the proposition that electricity, could not be stolen. S v Harper was not considered. The minority judgment in Milne earlier cited supra was not considered.

It is necessary to consider what electricity is in this context. Eskom creates electricity by the use of fuel sources which power turbines. There is a cost involved in the creation of the electricity produced. That electricity is inserted into a grid. At points on the grid, there are consumers who, if Eskom permits them, may receive electricity and use such electricity. That right to receive and use the electricity, is subject to terms and conditions which Eskom imposes upon its consumers and to which they agree. One of the requirements is the obligation to pay money for the right to receive measured quantities of electricity.

Eskom, when it provides the electricity, does so using closed circuit. The flow of electricity is dependent upon the flow of electrons. Eskom creates energy which results in electrons flowing (this is what we call electricity). No electrons are lost. The characteristic attached to the electrons is that when they are driven in this way, they are energized and capable of driving a load. The energy does not exist as an abstract concept it exists in reality in the form of energizing electrons.

The electrons which are driven, and which, while travelling we call electricity, are the free electrons moving through the circuit. They belong to, are processed and released by Eskom. Eskom has the countrywide grid and the consumer has the tiny portion of the circuit attached to that grid which comprises the circuitry in his house after the meter. The number of electrons within the customer's circuitry is insignificant by comparison to the number of electrons in the grid. The process by which the electricity is delivered is that as an electron travels into the customer's circuitry, one leaves the customer's circuitry returning to the grid. In this way there is a flow of electrons which remains in balance. The number of electrons which enter and leave the circuit of each customer, as I have stated, are insignificant in relation to the total number of electrons in the grid.

That being so for all practical purposes, once the customer uses the circuit and allows electron into his circuitry, the electrons of Eskom remain within his circuit, in substitution for those electrons having departed. In this way, the electrons change position, having originally being possessed by Eskom and subsequently being possessed by the consumer. The characteristic which attaches to the electron is the energy by which it moves. That characteristic is consumed when the electricity passes through a load in the customer's residence on the customer's circuit. The energy is transferred into the load used by the consumer (a kettle, a light, or other electrical appliance). That characteristic and the extent to which it has been used or transformed by the use of the electrical appliance is measureable. That characteristic is the characteristic which Eskom chooses to produce and sell to its customers. Once that characteristic, energy, is used by the electrical appliance or the load, it is no more.

This also is the solution to the question of whether or not there has been a permanent deprivation. Electrons are not lost and eventually return to the grid from the customer's circuitry. However the characteristic attached to the electron, namely the force and energy it has while it is being driven towards and through the customer's circuit is removed from it. It is possible to understand this by considering

a stream of water. If a stream of water is pumped up a distance above the ground in a closed circuit and allowed to fall to the ground again, the force used to pump the water up equals the force with which the water falls back.

The falling water has a particular characteristic, it is imbued with energy. That energy, absent any interference with the flow, is not lost and so the water will strike the bottom with a degree of force. If however, a load is inserted on the downward fall of the water, for example, a water mill, or paddles, the force of the fall is transmitted into energising the turbine or paddles or other load put in the way and the force with which the water hits the bottom is reduced by the extent of the load. So the water after it strikes the load will fall more softly and with less force. It is immediately apparent that the characteristic of the water before the load and the characteristic of the water after the load is different. It is this difference which is lost that constitutes the characteristic lost by use of electricity.

I consider another example: if electricity is not capable of being stolen, then anyone would be entitled without permission of the owner to attach a load to his batteries and deplete the energy within them, thereby rendering the batteries useless. Yet nothing will have been stolen. Nothing physically has been taken from the battery, however its characteristics have changed.

It appears to me that modern day society has already advanced and accepted that there can be theft of this nature. See for example the informative article by C R Snyman, "*Die gemeenregtelike vermoeiings misdade en die eise van ons moderne samelewing*," 1977 SACC 11 particularly at 14.

It has long been recognised that the abstract and incorporeal nature of a right, which has been taken in the context of notes and coins is a loss. See for example, *S v Scoulides,* decided in the 50's (1956 (2) SA 388 (AD) at 394 G).

The same reasoning applies to the submissions made in relation to electricity credits.

It was submitted that I should consider developing the Common Law to encompass energy as a thing capable of theft. In my view, I do not have to do so and I do not deal further with this issue."[253*h* -257*a*]

2. S v BF 2012(1) SACR 298 (SCA)

Children offenders should not be imprisoned except as a measure of last resort and then only for the shortest possible period.

[10] Section 28(1)(g) of the Constitution provides:
'Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate of time, …'
Failure to give effect to the above constitutional imperative renders such omission a material misdirection by a presiding officer. Botha JA in S *v Jansen* (1) at 427H-428A

– said:
'To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report on the offender by a probation officer in, at least, all serious cases' (S v Adams, 1971 (4) SA 125 (C), and S v Yibe, 1964 (3) SA 502 (E)).
[11] The attention given to a child when considering sentence is not done in a vacuum. The seriousness of the offence, its impact on the victims and the interests of the broader society must be taken into consideration. The law does not prohibit incarceration of children. However, s 28 (1)(g) provides that the child 'may be detained only for the shortest appropriate period of time'. Undoubtedly the use of 'may' suggests that where circumstances demand incarceration as the only appropriate sentence, it can be imposed.
[12] In *Brandt v S* [2005] 2 All SA 1 (SCA) Ponnan JA referred extensively to international law principles and the South African Law Commission Report on Juvenile Justice (Project 106). These principles reiterate that proportionality is a consideration and that 'child offenders should not be deprived of their liberty except as a measure of last resort and, where incarceration must occur, the sentence must be individualized with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society' In *S v Williams* 1995 (7) BCLR 861 (CC) it was suggested that South Africa's child justice legislation should incorporate accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards. Concepts such as resocialization and re-education when dealing with sentencing of children, were suggested to be regarded as complementary to the traditional aims of punishment relating to adults.[p302*i* -303*f*]

From The Legal Journals

Sloth-Nielsen, J

"The *Jurisdiction of the Regional Courts Amendment Act*, 2008: Some implications for child law and divorce jurisdiction"

2011 Journal for Juridical Science 1

Ndaba, T A

"Child maintenance after a parent's death"

2012 De Rebus March

Jordaan, B

"The potential of court-based mediation"

2012 De Rebus March

Van Eck, M

"The State Liability Act – clarity on satisfaction of court orders against the state"

2012 De Rebus March

Le Roux-Kemp, A & Horne, C S

"An analysis of the wording, interpretation and development of the provisions dealing with the use of lethal force in effecting an arrest in South African criminal procedure"

2011 SACJ 266

Carnelley, M ,Schultz, H, & Winchester, T

"The admissibility of the Drager Alcotest 7110 MK 111 breathalyser- results in the South African courts"

2011 SACJ 333

Whitear-Nel, N

"Sentencing an accused whose legal representative fails to participate meaningfully in the process: A discussion of S v Samuels 2011(1) SACR 9 (SCA)"

2011 SACJ 347

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

Contributions from the Law School

Determining the best interests of the child in care proceedings – the right to contact by grandparents

The judgment in *J v J* ((GNP) unreported case number 19702/09 dated 25 January 2012) was the culmination of an unhappy family and medical situation. It surrounded a premature baby girl who, as a result of hospital negligence, lost her eyesight soon

after birth. Notwithstanding an award of R7 million made in compensation and invested in a Trust, the marital relationship of her parents deteriorated and culminated in a termination application of the marriage.

The bitter and aggressive dispute between the parents included allegations of vampire practices involving human blood with an alleged lover and contact with a witch leading a satanistic cult (against the mother) and a criminal charge of rape (against the father). Both parents insisted that the primary residence of the child should be with them. It was clear from the evidence at the outset that both parents lacked parenting skills to deal with a visually disabled child and were not ready to function as the child's primary caregiver.

In the interim, the maternal grandmother volunteered and was awarded care of the child pending the Family Advocate's report and until the court could reach a final decision in this regard - subject to supervised contact rights granted to both the parents. It was noted that although not common, the court has always had the power to award temporary care and supervision of a child to a person that is not the biological parent of the child (para 34). This interim solution was found to be in the best interest of the child at that time. In addition, a *curator ad litem* was appointed to ensure that the best interests of the child were optimally taken care of during the remainder of the proceedings.

During the period of 18 months from the first to the last application, numerous expert reports were compiled. All the reports confirmed the strong emotional bond between the child and her maternal grandmother and also between the child and both her parents. In addition it was noted that the child had been neglected didactically and developmentally, socially and emotionally.

As a result of the delay in the report by the Family Advocate, an unexpected benefit occurred – the parties were able to negotiate a settlement for the divorce action. Moreover, the child had improved beyond recognition as a result of receiving the appropriate stimulation and training at the home of the maternal grandmother and the Prinshof School for the Blind. The father also acquired the skill to interact with the child – an aspect that was highlighted in an earlier report. The mother however declined to participate in the re-assessment processes.

The final report recommended that the child be place in the primary care of the father with regular contact with both her mother and also her maternal grandmother! The court specifically found that although the suggestion, that the grandmother be granted the same contact with the child as the mother, was unusual; the history of the matter demanded this solution. The court adopted the suggestions and made the settlement agreement an order of the court. It did so after considering all the factors listed in s 7 of the Children's Act 38 of 2005 determining the best interests of the child. In each aspect, the father was found to be the most appropriate person to function as her primary care-giver.

The court again noted the importance for parents to enter into a parenting plan to rationally deal with the issues relating to their children – with the assistance of a

mediator to assist the parents to solve differences. What made this parenting plan different is that both the parents as well as the maternal grandmother were parties to the agreement – the parents as co-holders of parental responsibilities and rights and the grandmother as a "necessary party" to the parenting plan as she acquired rights and obligations in respect of contact with the child (at paras 58 & 61). One of the features of the parenting plan was that a specific mediator was appointed to speedily assist in any dispute that may arise.

Lastly, the court noted that it was undesirable for one of the protagonists to be a trustee in the Trust set up for the benefit of the child. In this regard the mother was replaced as trustee.

It was interesting to note that the court, after its finding, added a section, *obiter,* "The Children's Act in Comparative Context". Arising from South Africa's signing of the Convention on the Rights of the Child, the court noted a list of decisions of foreign tribunals that may be of assistance when deciding the best interests of the child, although the court did not specifically follow any of the decisions. The list includes decisions from Australia, New Zealand, Canada and Germany.

In conclusion, it should be noted that the court, when determining the best interests of the child, took cognizance of the role played by the maternal grandmother in the life of the child. The court specifically found that it would be in the best interests of the child to have regular contact with her and formalized the contact arrangements for the grandmother.

This case is distinguishable from the earlier cases of *Townsend-Turner v Morrow* [2004] 1 All SA 235 (C) and *Kleingeld v Heunis* 2007 5 SA 559 (T) where contact were denied on the facts. In the earlier matters the courts noted that a grandparent does not have an inherent right to contact with a grandchild and that such contact would only be ordered where it can be proven to be in the best interests of the child. In the case of *J v J* that was exactly what happened.

Marita Carnelley
University of KwaZulu-Natal

Matters of Interest to Magistrates

A draft Preliminary Inquiry form is included hereunder for use in preliminary inquiries in terms of the Child Justice Act, Act 75 of 2008.

PRELIMINARY INQUIRY FORM
(Section 43 of the Child Justice Act 75 of 2008)

		PRELIMINARY INQUIRY NO.
POLICE STATION:	CAS NO:	INVESTIGATION OFFICER:
DISTRICT/DIVISION:	PLACE OF PRELIMINARY INQUIRY:	DATE OF FIRST APPEARANCE:

PARTICULARS OF CHILD OFFENDER/S

NAME:			PARENT/GUARDIAN/APPROPRIATE ADULT:		
ADDRESS:					
MALE:		FEMALE:	NATIONALITY:		AGE:
IN CUSTODY:	DATE OF ARREST:	NOTICE:	SUMMONS:	CARE OF GUARDIAN:	ON BAIL:

ORDER OF COURT (Delete whichever is not applicable)

IN TERMS OF SECTION 50: The proceedings is stopped and it is ordered that the child be brought before the Children's court

_____ and that the child be dealt with

under sections 155 and 156 of the Children's Act, 2005 (Act 38 of 2005) because it appears that –

□ The child is a child in need of care and protection referred to in section 150(1) or (2) of the Children's Act, and it is desirable to deal with the child in terms of sections 155 and 156 of the Act;

OR

□ The child does not live at his or her family home or in appropriate alternative care;

OR

□ The child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth.

IN TERMS OF SECTION 49(1)(a): It is ordered that the matter be diverted in

terms of section 52(5) as per Form 6 hereto.

IN TERMS OF SECTION 49(2): It is ordered that the matter be referred to the

_____Child Justice Court in terms of section 47(9)(c) to be dealt with in terms of Chapter on _____ at 08:30.

□ The child(ren) *is/are kept in custody at _____

and the parent/guardian/appropriate adult is warned to attend the proceedings on said date, time and place.

□ The *child(ren) and his/her/their parent/guardian/appropriate adult are warned to appear on said date, time and place.

□ The *child(ren)_____
*is/are released on *his/her/their own recognizance and *is/are warned to attend the proceedings on said date, time and place.

□ The chil(ren) *is/are kept in custody at _____

and bail in the amount of _____ is fixed on the conditions as per annexure and the child *is/are warned to attend the proceedings on said date, time and place.

□ The conditions imposed in terms of section 24(4) is extended or altered as follows:

_____

_____

| --- | --- | --- |
| **DATE** | **PRESIDING OFFICER** | **DATE OF APPOINTMENT** |

PROCEEDINGS IN CAMERA

DATE: ---------- **PLI NO: ----------**

PRESIDING OFFICER: ……..

PROSECUTOR:……

INTERPRETER:……

DEFENCE: …….

PROBATION OFFICER:……..

DIVERSION SERVICE PROVIDER:……..

OTHER PERSON ……..

Reason why parent is excluded:……

□ **WRITTEN NOTICE: SECTION 18(1)** (Schedule 1 offence)

Written notice handed to the child in the presence of his parent/guardian?
Yes□ No□

Reason why not:……...

Has the probation officer been informed within 24 hours? Yes□ No□

□ **SUMMONS: SECTION 19**

Was the summons served on the child in the presence of his parent/guardian?
Yes□ No□

Reason why not: ……..

Has the probation officer been informed within 24 hours? Yes□ No□

□ **ARREST: SECTION 20**

Written report by investigating officer as to why the child in a schedule 1 matter was not released (See Ann ……)
Has the child's parent/guardian been informed of the child's arrest? Yes□ No□
Written report by police w.r.t.failure to inform parent/guardian (See Ann ……..)
Has the probation officer been informed within 24 hours? Yes□ No□
Written report by police w.r.t. failure to inform the probation officer (See Ann…..)

PROSECUTORS ADDRESS ON THE FACTS OF THE MATTER/PRIMA FACIE CASE

……
……

RIGHTS EXPLAINED TO THE CHILD AND HIS/HER GUARDIAN

- The child and his/her guardian are informed that this is an informal enquiry where the court will consider the assessment report and recommendation by the probation officer and also the recommendations of the prosecutor and that they are welcome to participate as the purpose of the enquiry is to make sure that all relevant information and viewpoints relating to the child, the alleged offence and victim are considered when decisions are made regarding diversion, release or detention of the child. They are also assured that whatever is being said in the preliminary enquiry is confidential and may not be used in any bail or trial proceedings.

- The child and his/her guardian is also informed that the objective of the enquiry is to try and prevent children from being exposed to the adverse effects of the criminal justice system, by means of diversion or referral to Children's Court if the child is in need of care and protection.

- They are informed that the objectives of diversion as set out in Section 51 are

- to deal with a child outside the formal criminal justice system in appropriate cases;
- to encourage the child to be accountable for the harm caused by him or her;
- to meet the particular needs of the individual child;
- to promote the reintegration of the child into his or her family and community;
- to provide an opportunity to those affected by the harm to express their views on it impact on them;
- to encouraging the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- to promote reconciliation between the child and the person or community affected by the harm caused by the child;
- to prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
- to reduce the potential for re-offending;
- to prevent the child from having a criminal record;
- to promote the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society.

- The child and his/her guardian are also informed that he/she may be represented by a legal representative at the enquiry. He/she may appoint his/her own attorney or apply for legal aid or conduct the proceedings

himself/herself. Both, the child and the guardian indicate that they understand and elect to:

□ Appoint own attorney…….

□ Apply for Legal Aid ……..

□ Conduct own proceedings ……

AGE DETERMINATION

□ Age estimation form (Form 4) submitted by the probation officer i.t.o. Sect 13(3) Ann…….
□ Results of age estimation of child done by medical doctor (Form 5) Ann……
□ Other documents, information, statements or evidence Ann……..

The age of the child is determined to be ……

□ **PROBATION OFFICERS ASSESSMENT AND/-OR REPORT**

I ……..have assessed the child in terms of Chapter 5 of the Child Justice Act 2008 / have not assessed the child as assessment was dispensed with i.t.o. Sect 41(3) of the Act. I have compiled a report i.t.o. Sect 40 containing my findings and recommendations which I now hand to the preliminary inquiry magistrate for consideration
……
……
……
……
……
……

CRIMINAL CAPACITY

□ Probation officers assessment report Ann……..
□ An evaluation of the child's criminal capacity report referred to in Sect 11(3) Ann …….
□ Other evidence See Ann ……..
□ The child's criminal capacity has been proven beyond reasonable doubt
□ The child's criminal capacity has not been proven beyond reasonable doubt. The child is hereby referred to the probation officer for further action i.t.o. SECTION 9.

Child addresses court on acknowledgment of responsibility:
……
……
……
……
……
Guardian: ……..

Prosecutor addresses the
court:……
……
……
……
……
……
……

Child agrees to diversion:……..Guardian ……

Prosecutor addresses court w.r.t. remand
……
……...
Child: …….
Guardian:……

The preliminary enquiry is postponed for a period not exceeding 48 hours to …….. for the following reasons:

□ prosecutor indicates that the diversion is being considered but an assessment has not been done and is required
□ to secure the attendance of a person or persons essential for the conclusion of the enquiry
□ obtain information essential for the conclusion of the enquiry to wit……..
□ establish the views of the victim regarding diversion and the diversion option being considered
□ find alternatives to detention
□ assess the child, where no assessment has previously been undertaken
□ further investigation of the matter
□ age determination of the child

The preliminary enquiry is postponed for a further period not exceeding 48 hours to the ……..because the postponement is likely to increase the prospects of diversion

The preliminary enquiry is postponed for a period not exceeding 14 days to the …….. for:

□ A more detailed assessment of the child as recommended by the probation officer and the magistrate is satisfied that there are reasons justifying such an assessment
□ In order to obtain the written indication from the DPP for the diversion of the matter i.t.o. Sect 52(3)

The preliminary enquiry is postponed for period determined by the magistrate to the (date)……. for:
□ The child is in need of medical treatment for illness, injury or severe psychological trauma
□ The child has been referred or a decision relating to mental illness or defect in terms of section 77 or 78 of the Criminal Procedure Act

The child is released o his own recognisance . He/she is warned to appear on the ……at 8:30 in court ……. The release of the child is unconditional or on the following conditions:

□ The child must report to ……..at least ……..times per week on a ……..
□ The child must attend ……..
□ The child must reside ……..
□ The child is placed under the supervision of ……..
□ The child is ordered not to interfere with any witness i.e. …….
□ Not to associate with ……
□ The child is ordered to ……
……

The child is informed that if he/she fails to appear on the abovementioned date and at the time and place referred to above or comply with any condition referred to above, the presiding officer may, on being noti8fied of the failure, issue a warrant for the arrest of the child or cause a summons to be issued in accordance with section 19 for the child to appear at the preliminary enquiry or child justice court

The parent/guardian informed that if he/she fails to appear or to ensure that the child appears on the specified date and time and place and if a condition has been imposed, to ensure that the child complies with that condition, he/she may be guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding three (3) months

□ The child is detained in a child and youth care centre …….
□ The child is to be detained in …… correctional facility.

THE MATTER IS REFERRED TO TRIAL

□ Prosecutor indicated that the matter may not be diverted (sect 47(9)
□ The child does not accept responsibility for the offence (sect 47(2)
□ The presiding officer does not divert the matter (sect 52(6)

THE PRELIMINARY ENQUIRY IS STOPPED AND THE MATTER IS REFERRED TO THE CHILDREN'S COURT

□ The child is in need of care and protection referred to in section 150(1) or (2) of the Children's Act and it is desirable to deal with the child in terms of sections 155 and 156 of the Act
□ The child does not live at his or her family home or in appropriate alternative care
□ The child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth

THE MATTER IS HEREBY DIVERTED

□ The child acknowledges responsibility for the offence
□ The child has not been unduly influenced to acknowledge responsibility
□ There is a prima facia case against the child
□ The child/parent/guardian consented to the diversion
□ The prosecutor indicates that the matter is a schedule 1 matter and may be diverted in accordance with subsection (2) or the DPP indicates that the matter may be diverted in accordance with subsection (3).

ORDER

□ In terms of section 49(1)(a) read with section 52(5) of the Child Justice Act 75 of 2008, the matter is diverted.

……. The program selected for you is noted in this document which is handed in and marked exhibit "……"

☐ In terms of section 53(1)(……) of the Child Justice Act, 75 of 2008, you are ordered to report to ……
…….
from the date of this order until …….

Mr/Ms/Mrs ……. may require you to comply with certain instructions in order for you to comply with the programme and you are requested to be co-operative.

Mr/Ms/Mrs …….

will monitor your compliance with this order and report back. Please note if you fail to comply with the order it may result in a warrant being issued for your arrest.

☐ In terms of section 53(3)(……) of the Child Justice Act 75 of 2008 you are ordered to report to
…….
at ……
from the date of this order until …….

Mr/Ms/Mrs ……
may require you to comply with certain instructions in order to you to comply with the programme and you are requested to be co-operative.

Mr/Ms/Mrs ……
will monitor your compliance with this order and report back. Please note if you fail to comply with the order it may result in a warrant being issued for your arrest.

□ In terms of section 53(3) of the Child Justice Act 75 of 2008 you are ordered to report to ……
at ……
from the date of this order until …….

Mr/Ms/Mrs ……
may require you to comply with certain instructions in order for you to comply with the programme and you are requested to be co-operative.

Mr/Ms/Mrs ……
will monitor your compliance with this order and report back. Please note if you fail to comply with the order it may result in a warrant being issued for your arrest.

□ In terms of section 53(4) of the Child Justice Act 75 of 2008 you are ordered to report to …….
at ……. from the date of this order until ……..

Mr/Ms/Mrs …… may require you to comply with certain instructions in order for you to comply with the programme and you are requested to be co-operative.

Mr/Ms/Mrs …… will monitor your compliance with this order and report back. Please note if you fail to comply with the order it may result in a warrant being issued for your arrest.

……
……

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PRESIDING OFFICER DATE

A Last Thought

"The question who magistrates are employed by is a legal issue. In my view the legal position of employees of the National Prosecuting Authority and that of magistrates are not identical. Section 9(1)(a) of the Magistrate's Courts Act, 32 of 1944 provides expressly that magistrates are appointed by the Minister of Justice. The Magistrates Act, 90 of 1993, establishes a Magistrate's Commission which *inter alia* ensures that the appointment of magistrates by the Minister takes place without favour or prejudice and advises the Minister thereon. In terms of section 10 of the Magistrate's Act, the Minister of Justice appoints magistrates after consultation with the Magistrate's Commission. Although magistrates function independently and impartially (see *Van Rooyen v The State 2002 (5) SA 246 (CC)*), that does not detract from the fact that they are appointed by and employed by the Minister of Justice. To the contrary, the statutory framework within which magistrates is appointed by the Minister of Justice ensures that they are appointed on the basis that they function independently and impartially. In carrying out their functions independently and impartially, they act within the course and scope of their appointment and in accordance with the basis on which they were appointed. It follows that the Minister of Justice remains in my view, as in the past, vicariously liable for the conduct of magistrates acting within the course and scope of their employment. " (Para 52.)

Per Van der Merwe A J in *Van der Walt and Van Wyk v The Minister of Safety and Security and others* Case 26171/06 and 26119/06 *South Gauteng High Court* Judgment dated 25 January 2012