e-MANTSHI

A KZNJETCOM Newsletter

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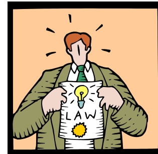
Welcome to the eighty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. The *Constitution Seventeenth Amendment Act, 2012* has been published in Government Gazette no 36128 dated 1 February 2013.The Act will come into operation on a date to be determined by the President. The Act reads as follows:

GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

______________ Words underlined with a solid line indicate insertions in existing enactments.

Amendment of section 165 of Constitution

1. Section 165 of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution), is hereby amended by the addition of the following subsection:

‘‘(6) The Chief Justice is the head of the judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.’’.

Amendment of section 166 of Constitution
2. Section 166 of the Constitution is hereby amended—
(a) by the substitution for paragraph (c) of the following paragraph:
‘‘(c) the **[High Courts, including]** High Court of South Africa, and any high court of appeal that may be established by an Act of Parliament to hear appeals from [**High Courts**] any court of a status similar to the High Court of South Africa;’’; and
(b) by the substitution for paragraph (e) of the following paragraph:
‘‘(e) any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the [**High Courts**] High Court of South Africa or the Magistrates’ Courts.’’.

Constitution Sixth Amendment Act of 2001
3. Section 167 of the Constitution is hereby amended—
(a) by the substitution for subsection (3) of the following subsection:
‘‘(3) The Constitutional Court—
(a) is the highest court **[in all constitutional matters]** of the Republic; and
(b) may decide **[only]**—
(i) constitutional matters**[, and issues connected with decisions on constitutional matters]**; and
(ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
(c) makes the final decision whether a matter is **[a constitutional matter or whether an issue is connected with a decision on a constitutional matter]** within its jurisdiction.’’; and
(b) by the substitution for subsection (5) of the following subsection:
‘‘(5) The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, **[a]** the High Court of South Africa, or a court of similar status, before that order has any force.’’.

Amendment of section 168 of Constitution, as amended by section 12 of Constitution Sixth Amendment Act of 2001
4. Section 168 of the Constitution is hereby amended by the substitution for subsection (3) of the following subsection:
‘‘(3) (a) The Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent

as may be determined by an Act of Parliament.
(b) The Supreme Court of Appeal may decide only—
(i) appeals;
(ii) issues connected with appeals; and
(iii) any other matter that may be referred to it in circumstances defined by an Act of Parliament.''.

Substitution of section 169 of Constitution

5. The following section is hereby substituted for section 169 of the Constitution:

''**High [Courts] Court of South Africa**

169. (1) **[A]** The High Court of South Africa may decide—
(a) any constitutional matter except a matter that—
(i) **[only]** the Constitutional Court **[may decide]** has agreed to hear directly in terms of section 167(6)(a); or
(ii) is assigned by an Act of Parliament to another court of a status similar to **[a]** the High Court of South Africa; and
(b) any other matter not assigned to another court by an Act of Parliament.
(2) The High Court of South Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for—
(a) the establishing of Divisions, with one or more seats in a Division; and
(b) the assigning of jurisdiction to a Division or a seat within a Division.
(3) Each Division of the High Court of South Africa—
(a) has a Judge President;
(b) may have one or more Deputy Judges President; and
(c) has the number of other judges determined in terms of national legislation.''.

Substitution of section 170 of Constitution

6. The following section is hereby substituted for section 170 of the Constitution:

''[Magistrates' Courts and other] Other courts

170. [Magistrates' Courts and all other courts] All courts other than those referred to in sections 167, 168 and 169 may decide any matter determined by an Act of Parliament, but a court of a status lower than **[a]** the High Court of South Africa may not enquire into or rule on the constitutionality of any legislation or any conduct of the President.''.

Amendment of section 172 of Constitution

7. Section 172 of the Constitution is hereby amended by the substitution in subsection
(2) for paragraph (a) of the following paragraph:
''(a) The Supreme Court of Appeal, **[a]** the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.''.

Substitution of section 173 of Constitution

8. The following section is hereby substituted for section 173 of the Constitution:
''Inherent power

173. The Constitutional Court, the Supreme Court of Appeal and the High **[Courts have]** Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.''.

Substitution of section 175 of Constitution, as amended by section 14 of Constitution Sixth Amendment Act of 2001

9. The following section is hereby substituted for section 175 of the Constitution:
''**[Acting]** **Appointment of acting judges**

175. (1) The President may appoint a woman or man to **[be]** serve as an acting Deputy Chief Justice or judge of the Constitutional Court if there is a vacancy in any of those offices, or if **[a judge]** the person holding such an office is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the Chief Justice, and an appointment as acting Deputy Chief Justice must be made from the ranks of the judges who had been appointed to the Constitutional Court in terms of section 174(4).
(2) The Cabinet member responsible for the administration of justice must appoint acting judges to other courts after consulting the senior judge of the court on which the acting judge will serve.''.

Amendment of section 178 of Constitution, as amended by section 2 of Constitution

Second Amendment Act of 1998 and section 16 of Constitution Sixth Amendment Act of 2001

10. Section 178 of the Constitution is hereby amended by the substitution in subsection (1) for paragraph (k) of the following paragraph:

''(k) when considering matters relating to a specific Division of the High Court of South Africa, the Judge President of that **[Court]** Division and the Premier of the province concerned, or an alternate designated by each of them.''.

Short title and commencement

11. This Act is called the Constitution Seventeenth Amendment Act of 2012, and takes effect on a date determined by the President by proclamation in the *Gazette*.

Recent Court Cases

1. S v RULULU 2013 (1) SACR 117 (ECG)

A court will only exercise its discretion to call the deponent of a certificate in terms of s 212(4) of Act 51 of 1977 upon proper grounds.

"Although section 212(12) of the Criminal Procedure Act 51 of 1977 (the Act) vests a court with a discretion to order the adducing of *viva voce* evidence from the deponent to the affidavit tendered in terms of section 212(4), it follows as a matter of common sense that a court will only exercise such discretion upon proper and not spurious grounds. The mere intimation by the appellant that the DNA test results are wrong is wholly insufficient to trigger the operation of section 212(12). As adumbrated hereinbefore, the chain of custody evidence was admitted in terms of section 220. Although it does not appear, from the magistrate's convoluted riposte to the prosecutions' contention that the affidavit was properly before court, that he was aware of the provisions of section 212(12), the failure to have called Warrant Officer *Ridwaan Boltman* (*Boltman*) to testify does not inure to the appellant's benefit. Boltman's evidence would have been superfluous."

2. S v MOYCE 2013(1) SACR 131 (WCC)

An accused person does not have an absolute right to legal representation, it is subject to reasonable limitations.

The appellant stood trial in a regional magistrates' court on a charge of robbery.

The case was postponed on numerous occasions, many of them for the purpose of the appellant obtaining legal representation. On one occasion, after a period of eight months in which the appellant alleged that he was attempting to get legal representation, and the case had been postponed six times for trial, the magistrate denied him a further postponement for that purpose and proceeded with the trial. He was convicted and sentenced. On appeal he contended that the refusal to grant him a postponement on 17 July 2005, in order to give him an opportunity to obtain legal assistance, established a fatal irregularity which resulted in his trial being unfair.

Held, that it was important to mention that the appellant had been ducking and diving, keeping the court guessing as to his next move in his next appearance, and whether he would opt to have or not to have a legal representative. (Paragraph [16] at *135b.)*

Held, further, that, despite the fact that the appellant was a difficult person, the magistrate had nonetheless shown tolerance and patience. The magistrate assisted the appellant with his case throughout the trial, especially in cross-examination. Looking at the matter holistically, there was no substantial injustice that occurred, despite him having no legal representative. It was not always a fatal irregularity where an accused did not get legal representation: the trial did not automatically become unfair. Each case was treated according to its circumstances. The appellant had abused his constitutional rights to legal representation. The appeal was dismissed. (Paragraphs [19] at *135i* and [20] at *136b.)*

3. S V MOFOKENG 2013 (1) SACR 143 (FB)

There are certain rules of practise which have evolved in conducting a criminal trial where an undefended accused is involved.

An undefended accused had been charged with the crime of assault with intent to do grievous bodily harm. The accused pleaded guilty and was convicted and sentenced to a fine of R500 or six months imprisonment. The matter went on automatic review in terms of s302 of the Criminal Procedure Act 51 of 1977.

“The right to a fair trial conferred by s 25(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 is broader than the list of specific rights set out in paras (a) to (o) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. The various rules of practice according to which our law requires a criminal trial to be initiated or conducted and which have been developed in our judiciary have to an extent been enclosed in section 35(3) of the constitution. The “rules” not specifically enclosed still applies, but the constitutional rights also require that the trial must be fair in accordance with "notions of basic fairness and justice”. S v Zuma and others [1995] ZACC 1; 1995 (2) SA 642 (CC) para [16]. As appears from S v Rudman and another; S v Mthwana 1992 (1) SA 343 (A) the rules of practice evolved to assist the illiterate and indigent accused in an endeavour to ensure that he or she is tried fairly and that justice is done. Although all of the “rules” are not necessarily relevant in this matter, it is apposite to reiterate them. The failure to comply with one or more “rules” may result in a failure in justice, depending on the facts and circumstances of the specific case. The rules can succinctly be summarised as follows:

17.1 Before the accused is called upon to plead the presiding judicial officer is obliged to examine the charge-sheet, ascertain whether the essential elements of the alleged offence(s) have been averred with reasonable clarity and certainty and then give the accused an adequate and readily intelligible exposition of the charge(s) against him. Section 35(3)(a) of the Constitution now confers this right.

17.2 Unless the charge-sheet contains an appropriate reference to it and the factual basis for bringing it into operation, the accused should be informed by the presiding judicial officer or the prosecutor of the operation of any presumption he may have to rebut and the prosecutor should inform the court and the accused of the content of the evidence he intends to lead.

17.3 Where it is competent for a court to convict an accused of an offence other than the one alleged in the charge-sheet a judicial officer may be obliged to inform an undefended accused of the competent verdict, unless the contravention is an alternative charge or the prosecutor indicates that the State's case is restricted to the offence(s) alleged in the charge-sheet.

17.4 At all stages of a criminal trial the presiding judicial officer acts as the guide of the undefended accused. The judicial officer is obliged to inform the accused of his basic procedural rights - the right to cross-examine, the right to testify, the right to call witnesses, the right to address the court both on the merits and in respect of

sentence and in comprehensible language to explain to him the purpose and significance of his rights.

17.5 During the State case a presiding judicial officer is at times obliged to assist a floundering undefended accused in his defence. Where an undefended accused experiences difficulty in cross-examination the presiding judicial officer is required to assist him in (a) formulating his question, (b) clarifying the issues and (c) properly putting his defence to the State witnesses.

17.6 Where, through ignorance or incompetence, an undefended accused fails to cross-examine a State witness on a material issue, the presiding judicial officer should question - not cross-examine - the witness on the issue so as to reduce the risk of a possible failure of justice.

17.7 If, at the close of the State case, an undefended accused is not discharged, the presiding judicial officer is obliged to inform him of his rights and in clear and unequivocal terms explain the courses open to him.

17.8 The judicial officer is obliged to inform the undefended accused in clear and simple language of any presumption the prosecutor is relying on, the implications thereof and the manner in which it can be rebutted.

17.9 The judicial officer should assist an undefended accused whenever he needs assistance in the presentation of his case and should protect him from being cross-examined unfairly.

17.10 The judicial officer has a general duty to ensure that unrepresented accused fully understand their rights and the recognition that in the absence of such understanding a fair and just trial may not take place. This includes the right to legal representation, especially where the charge is serious. In such event the accused should be informed of the seriousness of the charges and the possible consequences of a conviction. In cases where the charges are extremely serious it may be appropriate to encourage the accused to exercise his right to legal representation and the option to apply for Legal Aid assistance. Section 35(3) of the Constitution also guarantees these rights.

A conviction and sentence will only be set aside if the irregularity has led to a failure of justice. If an irregularity leads to an unfair trial, then that will constitute a failure of justice. S v Jaipal [2005] ZACC 1; 2005 (4) SA 581(CC) para [39]. Each case will depend upon its own facts and peculiar circumstances.

[18] It is clear that where an accused is unrepresented there is a duty on the presiding officer to take extra care to ensure that the accused knows what is expected of him/her, that he/she understands his/her rights and the procedure to follow.

[19] At no stage of the proceedings did the magistrate inform the accused of the procedure that was to be followed in applying section 112 of the Act. The magistrate also failed to inform the accused, at any stage before she pleaded guilty, of the possible competent verdicts that she could be convicted on should the plea of guilty not stand on a charge of assault with the intent to do grievous bodily harm."

4. S V MBALEKI 2013(1) SACR 165 KZD

What was expected of a court in a schedule 6 bail application was to exercise a value judgment in accordance with all the evidence, applying relevant legal criteria.

The appellants had been charged with murder and robbery with aggravating circumstances. After being arrested they had applied for bail on affidavit which had been refused by a lower court, despite the prosecutor and the investigating officer (the latter having been questioned by the presiding magistrate in regard to the strengths and weaknesses of the state's case) not opposing bail. The appellants appealed against the refusal of bail to the court, contending, inter alia, that the magistrate had erred in finding that their alibi evidence was uncorroborated and in failing to give due weight to the evidence of the investigating officer who had not opposed bail. It was contended that the magistrate had erred in failing to consider that these factors constituted exceptional circumstances (required to be shown in terms of s 60(11) *(a)* of the Criminal Procedure Act 51 of 1977 before bail could be granted), and by not showing that she had apprised herself of the presumption of innocence.

Held, that the legislature had burdened accused charged with schedule 6 offences with the onus of persuading a court that exceptional circumstances were present that permitted their release in the interests of justice. What was expected of a court was to exercise a value judgment in accordance with all the evidence, applying the relevant legal criteria. (Paragraph [11] at *168e.)*

Held, further, that the magistrate would have failed in her duty had she merely accepted the attitude of the prosecutor and the investigating officer. The legislature had considered it necessary to burden the appellants with an

onus in schedule 6 cases, and hence the question was very simple: had the appellants succeeded in discharging their onus? Neither of the appellants nor the so-called alibi witness had given viva voce evidence. It was difficult to see how the appellants could be convinced that they had discharged this onus. (Paragraph [12] at *169a-c.)*

Held, further, that it must necessarily follow, on an analysis of the evidence as a whole, the probative value of the statements produced by the appellants and the burden of 'exceptional circumstances' that rested on them, that they had not succeeded in demonstrating that the lower court was wrong and that the decision to refuse bail should be set aside. (Paragraph [13] at *169d.)*

Held, further, following S *v Dlamini;* S *v Dladla and Others;* S *v Joubert;* S *v Schietekat* 1999 (2) SACR 51 (CC) (1999 (4) SA 623; 1999 (7) BCLR 771), that the right to be presumed innocent is not a pre-trial right, but a trial right, and that this had been correctly understood by the magistrate. (Paragraph [14] at *16ge.)* Appeal against refusal of bail dismissed.

From The Legal Journals

Terblanche, S S

"The C*hild Justice Act*: a detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders"

Potchefstroom Electronic Law Journal 2012(5)

Knoetze, I

"The Criminal Law (Forensic Procedures) Amendment Act 6 of 2010"

De Rebus March 2013

Bentley, B

"Separating the baby and the bath water - Garnishee and emoluments attachment orders"

De Rebus March 2013

Miller, M

“Two for one - Duplicate convictions for one crime”

De Rebus January/February 2013

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

Contributions from the Law School

Guidelines for sentencing in relation to housebreaking

As argued previously (for a fuller discussion of the issues that follow, please see Hoctor ‘Punishing domestic housebreaking’ 2004 *Obiter* 190), the crime of housebreaking with intent to commit a crime (which will hereafter simply be referred to as ‘housebreaking’ for sake of space and convenience) is a crime of violation. The housebreaker or (to use the colloquial and English law term) burglar intrudes within the confines of enclosed territory where the complainant lives or stores his or her goods or possessions, for the purpose of committing a crime in this space. The crime developed in the context of an intrusion into the home, and the classic example of the crime remains domestic housebreaking, which encompasses, typically (as the intentional intrusion is not only criminalised where the purpose of the housebreaker is theft), not only the loss of material goods but psychological and emotional trauma on the part of the complainant. The risk of confrontation between the housebreaker and the complainant significantly amplifies the gravity of the crime. It is noteworthy that according to Statistics South Africa’s *Victims of Crime Survey 2012* (www.statssa.gov.za/publications/P0341/P03412012.pdf) the crime most feared by % of households in their area is housebreaking (at 57,4%).

The original model of the crime of housebreaking as a crime against the habitation has been significantly expanded to include not only dwellings within the ambit of the crime, but also storage places and business premises (for further discussion of this issue, see Hoctor ‘Which structures does the housebreaking crime protect? 2011 *Obiter* 417). The breadth of the ambit of the crime, given its functioning as an anticipatory crime and the ease with which elements of the crime such as breaking

and entry may be proved, means that differing cases of housebreaking may vary considerably in terms of the gravity of the crime. This poses particular problems for judicial officers in respect of sentencing – whilst the housebreaking crime is acknowledged to constitute a serious infringement of the rights of the victim, it is nevertheless very important not to allow the offender to be 'sacrificed on the altar of deterrence, thus resulting in his receiving an unduly severe sentence' (*S v Sobandla* 1992 (2) SACR 613 (A) at 617g-h; *S v Olivier* 1996 (2) SACR 387 (NC) at 391i).

The difficulties of balancing the primary factors involved in sentencing – since *S v Zinn* 1969 (2) SA 537 (A) these have been settled as the nature of the crime for which the offender is being sentenced, the interests of society and the personal interests and circumstances of the offender – are illustrated in the context of the housebreaking crime in three recent cases.

In *S v Matshiba* 2012 (1) SACR 577 (ECG) the court acknowledged that the housebreaking crime was serious and prevalent in the Eastern Cape Division of the High Court, but held that the trial court had overemphasised the seriousness of the offence, failing to take into account the accused's remorse (as evidenced by his guilty plea) (at para [17]). Hence, the court applied a further basic tenet of sentencing – mercy – in reducing the sentence on appeal. In *S v Moswathupa* 2012 (1) SACR 259 (SCA) the Supreme Court of Appeal acknowledged that housebreaking is 'extremely prevalent', and that it is in the public interest that 'sentences imposed in these matters should act as a deterrent to others [and that] [t]he message needs to go out to the community that people who commit these types of offence will be dealt with severely by the courts' (at para [9]). Nevertheless, the court saw fit to reduce the accused's sentence since it held that the sentencing court had failed to properly give weight to the mitigating factors present in the case, and had overemphasised the seriousness of the housebreaking crime and the interests of society (at para [6]). The words of Holmes JA (in *S v Sparks and Another* 1972 (3) SA 396 (A) at 410G) were cited with approval by the court (at para [9]): 'Wrongdoers must not be visited with punishments to the point of being broken'. In the third case in *S v Kruger* 2012 (1) SACR 369 (SCA) the Supreme Court of Appeal, noting the pernicious effect of the cumulative effect phenomenon, reduced the sentence originally handed down. Despite the personal circumstances of the appellant – that he cared for his sickly parents and that he was destitute – and that the crimes were not violent or heinous in nature, the court nevertheless emphasised the gravity of the housebreaking crime, pointing out that the appellant had broken into houses wherein the complainants 'believed themselves to be safe' (at para [10]), thus highlighting the seriousness of the intrusion associated with the crime.

In the light of these difficulties associated with sentencing the housebreaking crime it may be useful to briefly examine the way in which the analogous crime of burglary is dealt with in England and Wales. Sentencing guidelines are issued by the

Sentencing Council for England and Wales to 'promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary' (http://sentencingcouncil.judiciary.gov.uk/about-us.htm). Once guidelines have been issued for a particular offence, courts must follow these, unless it is in the interests of justice not to do so. The Sentencing Council issued guidelines for burglary offences in 2011 (*Burglary Offences – Definitive Guidelines*), which apply to all offenders aged 18 or older, sentenced on or after 16 January 2012, regardless of the date of the offence. The guidelines specify *offence ranges* (the range of sentences appropriate for each offence). In respect of each offence the Council has specified three categories, of differing levels of seriousness. Once the court has determined the category of the offence, it then will refer to the *starting points* specified by the Council for each category, which may be further adjusted (depending on the presence of aggravating or mitigating factors) within the *category range* specified by the Council.

The process for determining a sentence for a burglary offence[1] thus operates as follows (the *Definitive Guidelines* will be summarised below, with the common factors in respect of aggravated burglary, domestic burglary and non-domestic burglary being set out in the respective lists, and individual exceptions being noted) :

(i) The court determines the offence category, in terms of which category 1 is classified as 'greater harm *and* higher culpability'; category 2 is classified as 'greater harm *and* lower culpability *or* lesser harm *and* higher culpability; and category 3 is classified as lesser harm *and* lower culpability.

(ii) The court makes this determination solely by reference to the following factors (where an offence does not 'fall squarely into a category' the court will have to weight factors in assessing the appropriate category):

Factors indicating greater harm: theft of/damage to property causing a significant degree of loss to the victim (whether economic, commercial, sentimental or personal value for aggravated burglary, in domestic and non-domestic burglary commercial and sentimental considerations are, respectively, excluded); soiling, ransacking or vandalism of property; victim home/on the premises (or returns) while offender present; trauma to the victim, beyond the normal inevitable consequence of intrusion and theft (in the case of aggravated burglary 'significant' physical, psychological injury or trauma is referred to); violence used or threatened against victim; and context of general public disorder.

[1] The Theft Act, 1968, establishes a crime of *burglary* in s 9, in terms of which a person is guilty of burglary if (a) he enters a building or part of a building as a trespasser and with intent to steal, commit grievous bodily harm or unlawful damage to property; or (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm. In terms of s 10 of the Theft Act, a person is guilty of *aggravated burglary* if he commits any burglary and at the time has with him any firearm or imitation firearm, any weapon of offence, or any explosive.

Factors indicating lesser harm: in respect of aggravated burglary, absence of physical or psychological injury or significant trauma to victim, and fact that no violence or weapon was used or threatened; in respect of domestic and non-domestic burglary, fact that nothing or only property of very low value to victim is stolen, and limited damage or disturbance to property.

Factors indicating higher culpability: victim or premises deliberately targeted; significant degree of planning or organisation; member of a group or gang; equipped for burglary (i.e. implements carried and use of vehicle); weapon carried.

Factors indicating lower culpability: offence committed on impulse, with limited intrusion into property (in respect of domestic or non-domestic burglary); offender exploited by others; mental disorder or learning disability, where linked to commission of offence.

(iii) Having established the offence category, the court will examine the following starting points and category ranges:

Aggravated burglary:

category 1: starting point: 10 years' custody; category range: 9-13 years' custody

category 2: starting point: 6 years' custody; category range: 4-9 years' custody

category 3: starting point: 2 years' custody; category range: 1-4 years' custody

Domestic burglary:

category 1: starting point: 3 years' custody; category range: 2-6 years' custody

category 2: starting point: 1 year's custody; category range: high level community order[2] – 2 years' custody

category 3: starting point: high level community order; category range: low level community order – 26 weeks' custody

Non-domestic burglary:

category 1: starting point: 2 years' custody; category range: 1-5 years' custody

category 2: starting point: 18 weeks' custody; category range: low level community order – 51 weeks' custody

[2] A community order refers to community service, high level community orders involve intensive community service, whilst medium level and low level orders represent increasingly less onerous requirements.

category 3: starting point: medium level community order; category range: Band B fine (allowing for 75%-125% of relevant weekly income) – 18 weeks' custody

The Guidelines provide a non-exhaustive list of factors to which the court should advert in determining whether an upward or downward adjustment from the starting point is required. Relevant recent convictions are of particular significance in this regard (in terms of an upward adjustment), and courts may move outside the identified category range in the light of such factors. With regard to domestic and non-domestic burglary the courts should also consider in each case whether the custody threshold (or community order threshold, as the case may be) has been passed, such that this type of punishment is appropriate.

The list of factors include the following:

> Factors increasing seriousness: previous convictions (including nature of offence, its relevance to current offence, and time elapsed since conviction); offence committed while on bail; offence committed at night; gratuitous degradation of victim; steps taken to prevent victim reporting incident, obtaining assistance or assisting prosecution; abuse of a position of trust; child at home (or returns home) when offence committed (for aggravated and domestic burglary); victim compelled to leave home (for aggravated and domestic burglary); established evidence of community impact; commission of offence while under influence of alcohol or drugs; failure to comply with current court orders; offence committed whilst on licence; Offences Taken Into Consideration (TICs).
>
> Factors reducing seriousness or reflecting personal mitigation: offender has made voluntary reparation to victim; subordinate role in group or gang; no previous convictions *or* no relevant/recent convictions; remorse; good character and/or exemplary conduct; determination, and/or demonstration of steps taken to address addiction or offending behaviour; serious medical conditions requiring urgent, intensive or long-term treatment; age and/or lack of maturity where it affects the responsibility of the offender; lapse of time since the offence where this is not the fault of the offender; mental disorder or learning disability, where not linked to commission of offence; sole or primary carer for dependent relatives; and (in relation to aggravated burglary) injuries caused recklessly, and nothing or only property of very low value to the victim stolen.

(iv) The Guidelines then proceed to list the following general considerations, which it is incumbent on the court to consider after this process has been completed: consider any factors which indicate a reduction (such as assistance to the prosecution); reduction for guilty pleas; dangerousness; totality principle (assessing cumulative effect of sentences); compensation

and ancillary orders; reasons for the sentence; and consideration for remand time.

The guidelines of the Sentencing Council provide an illustrative and useful perspective on how to deal with the thorny problem of weighing up the considerations relating to sentencing in the context of the housebreaking crime. Whilst not detracting from the ultimate discretion of the courts, the guidelines are especially helpful in providing distinctions between the relative seriousness of aggravated burglary, domestic and non-domestic burglary (see, for example the differences between the starting points and category ranges for domestic and non-domestic burglary for an indication of the extent to which the particular trauma and danger associated with domestic burglary weighs upon sentencing maxima). In the light of the clarity of these guidelines, one wonders what has become of the Law Commission proposals for a sentencing guidelines commission for South Africa (see South African Law Commission *Report: Sentencing (A New Sentencing Framework: Project 82* (2000); Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 132ff).

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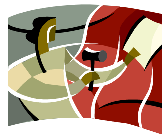

Matters of Interest to Magistrates

Requirements for the validity of a customary marriage and its development.

Motsoatsoa v Roro and another 2011 (2) All SA 324 (GST).

Introduction.

Customary marriage is one of the most important contracts in indigenous law. This type of contract brings about a relationship of which consensus is its basis. Most of the aborigines of this country easily conclude these contracts. It is therefore very important and wise when applying the principles relevant to these contracts to bear in mind the principles of ubuntu, equity, consideration and understanding. This is a

classical case where the high court should have applied indigenous law taking into account the above principles.

The facts of the case.

The deceased and the applicant were lovers. In 2005, deceased bought a house at Kempton Park. He resided there with the applicant. In 2007, the deceased introduced the applicant to his family with the intention of marrying her. On the strength of that, lobola negotiations were initiated between the family of the deceased and that of the applicant. In October 2008, it was agreed that the amount of lobola would be eighteen thousand rand (R18000). The deceased family paid part of the lobola in the amount of five thousand rand (R5000) and the balance remained outstanding. The deceased died in July 2009. The applicant approached the Department Home Affairs with a view to register the customary marriage posthumously. She did not succeed.

The applicant then approached the high court for relief. The high court held that handing over of the bride by her family to the family of the groom is one of the crucial elements of customary marriage. The court held that in the absence of a formal and official handing over of the bride, no customary marriage had come into existence in this case. The high court had to determine whether on these facts a customary marriage was concluded or not. The high court first examined the provisions of section 3(1) of the Recognition of Customary Marriages Act, 1998 which provides:

“For a customary marriage entered into between the parties to be valid,

a) the prospective spouses must both be above the age of 18 years and must both consent to be married to each other under customary law and

b) The marriage must be negotiated and entered into or celebrated in accordance with customary law.”

In applying customary law, the courts should be alive to the fact that it has undergone some changes and adaptations in line with the demands of modern times.

In *Mabena v Letsoalo 1998(2) SA 1068 at 1074h* Du Plessis J had this to say

“... Moreover, customary law exists not only in the” official version” as documented by writers; there is also the living law, denoting law actually observed by African communities.”

In *Dlomo v Mahodi, 1946 NAC. C&O 61 Tsolo* :

It was held” the essentials of a customary union are (1) agreement between the bridegrooms people and the brides people; (2) the passing of the cattle or its

equivalent, and (3) the handing over of the girl. Handing over may be either actual or constructive."

In *Majola v Lemuka, 1944 NAC. N&T*, it was said "It is not essential that there should be a feast and other celebrations before such a union can be organised. If the proposed husband, after the agreement in regard to lobola, lives with the woman with the knowledge of her people, this fact is an indication that the woman's father agreed to transfer the woman tacitly, if not directly".

In *Sithole v Xaba 1945 NAC N&T 81* it was stated that:

"Payment of lobola cattle is the chief ingredient."

To say that the formal handing over of the bride should be done through the process of *uduli* (Bridal party) is not the correct position in indigenous law. Formal handing over is not the only way of transferring the bride to the family of the groom. Formal hand over in this fashion is done by only a few rich families. In our days you rarely see transfer of the bride through *uduli*. A transfer can be done even when there is no bridal party. This would happen where after lobola is paid, the family of the bride takes her with her personal effects to the home of the groom. The bride will be welcomed through the slaughtering of the sheep called *tsiki* and the name will then be given to her. In other instances, the groom would, after lobola is paid, take the bride to his home with the knowledge of the family of the bride and that is regarded as transfer. The family of the bride would bring her personal effects if they so wish.

Analysis of the case

The applicant was introduced to the family of the deceased (groom). An amount of eighteen thousand rand (R18000) lobola was agreed upon by the parties. The deceased paid an amount of five thousand rand (R5000) towards lobola. This agreement was approved by the applicant's family. The applicant thereafter continued to live with the deceased as husband and wife. The family of the bride was aware of this arrangement.

To find that there was no marriage on these facts is disappointing and a distortion of indigenous law. It is the writers view that the formal handover is not a prerequisite for validity of a customary marriage as outlined in the cases cited above. There was no need for a formal handover of the bride in this case. This was a classical case of tacit transfer of the bride. The high court should have applied living customary law. Indigenous law had long been developed regarding this aspect of handing over the bride, it only needs application as outlined above.

This should have been fair to the applicant. Even if the respondent argues that the applicant's father indicated that transfer will take place after all lobola is paid, the

applicant was already living with the deceased. Applicant's father did not protest this he therefore tacitly transferred his daughter to the respondent. The marriage should have been held to be valid and the applicant was entitled to succession rights of the deceased.

MONSAMI MSHUNQANE
MAGISTRATE: LADY FRERE

A Last Thought

Debt collection practitioners – the biggest threat to debt collection practices

By Peter Rafferty

The old joke goes that 95% of lawyers give the other 5% a bad name.

Although this may hold true in many scenarios, this desperate and angry note deals with the 5% of unscrupulous lawyers employing overbilling techniques whereby debtors in the debt collection industry are overcharged on a large scale.

It is with utter disgust that I read article upon article about lawyers and debt recovery agents who overcharge debtors by raising fees that they are not entitled to or who do not apply the relevant caps established by law, simply to make extra money.

Make no mistake, such actions are illegal and must be dealt with in the harshest possible manner. Every time a lawyer or a debt collector overcharges a debtor or charges interest or fees in excess of the established caps, that lawyer or debt collector strengthens the case for the government to regulate the industry further.

In this way, the 5% of irresponsible, untrustworthy and dishonest lawyers and debt collectors who make use of such illegal overbilling methods will determine the way our industry will be dealt with in future.

I am personally not ready for the bad 5% to determine the future of the good 95%.

I have only one message for the 5% who change the meaning of words in legislation to suit themselves while they are really trying to exploit people: 'Get out of our industry'.

By now, if there is any lawyer in South Africa who does not know the difference in application between the workings of s 103 of the National Credit Act 34 of 2005 (NCA) and the old common law in duplum rule, that lawyer should not be practising law. Yet we find case upon case where lawyers do not apply the mechanisms of s 103 or (in cases where the NCA does not apply to a specific cause of action) the in duplum rule.

They simply disregard it because they can collect more from a debtor who does not complain, which means that they can charge more fees. This is criminal.

Then we also find 'smart' lawyers (who are obviously smarter than the rest of us) who believe that fee caps established by s 103 of the NCA do not apply to lawyers' fees and only apply to fees charged by creditors and debt collectors.

It takes a quick look at what happened in the personal injury space to recognise that lawyers who exploit people put the entire system in jeopardy.

In my opinion, there is little doubt of the Road Accident Fund's inability to perform the administrative functions entrusted to it, but this did not ultimately cause the collapse of the personal injury arena (and along with it numerous legal practices). Instead, in my opinion, it was the fact that too many lawyers were dishonest and were exploiting their clients and the system for purposes of self-enrichment.

In short, dishonest lawyers destroyed the personal injury practices of many other lawyers. (The worst thing is that these dishonest lawyers are so dishonest that they even hide the truth from themselves. They blame everyone from the government to the junior clerk in the Road Accident Fund's office for the demise of that industry, but not themselves.)

The question is whether we, the participants in the debt recovery arena, are going to allow this to happen again. Are the good lawyers going to stand by while the bad 5% of lawyers continue to exploit debtors from whom they are collecting debt? If so, we will have only ourselves to blame when the government decides to regulate things differently.

Recently the Minister of Finance and the Banking Association of South Africa jointly stated that they were committed to fighting illegal debt recovery practices

This is honourable, but the motivation for this has a lot to do with those lawyers and debt collectors who overcharge debtors. The banking association, representing all the banks, has agreed that banks will instruct their collection panels to cease making use of garnishee orders and will restrict the use of debit orders.

Legal practitioners have a duty to ensure that they respect the rule of law and that their colleagues do the same. It is not good enough to turn a blind eye when a practitioner sees a colleague destroying our industry, whether it is done in ignorance or for self-enrichment.

We need to preserve what we have. If you want to be the master of your universe, you need to be one of the good lawyers. If you are one of the lawyers who has gone over to ‘the dark side’, you need to re-evaluate the damage you are causing to the rest of us.

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