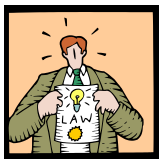
e-MANTSHI

A KZNJETCOM Newsletter

June 2013: Issue 89

Welcome to the eighty ninth 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 Minister of Justice and Constitutional Development has, under section 23 of the Debt Collectors Act, 1998 (Act No. 114 of 1998), and after consultation with the Council for Debt Collectors, made the following regulations in the Schedule. These regulations have been published in Government Gazette no 36515 of 7 June 2013.

SCHEDULE

Definition

1. In these regulations "the Regulations" means the regulations published by Government Notice No. R. 185 of 7 February 2003, as amended by Government Notices Nos. R. 1623 of 7 November 2003, R. 741 of 29 July 2005, R. 1044 of 2 November 2007, as corrected by Government Notice No. R. 1093 of 23 November 2007 and amended by Government Notices Nos. R. 1120 of 27 November 2009, R. 162 of 1 March 2011 and R. 623 of 10 August 2012.

Amendment of regulation 11 of the Regulations

2. Regulation 11 of the Regulations is hereby amended by the substitution for the expression "R736" of the expression "R814".

Substitution of Annexure B to the Regulations

3. The following Annexure is hereby substituted for Annexure B to the Regulations:

"ANNEXURE B

Expenses and fees

[Regulation 11]

Note:

The total amount to be recovered from the debtor in respect of items 1 to 7 of the Annexure shall not exceed the capital amount of the debt or R814, 00, whichever is the lesser.

Item	Description	Amount
1.(a)	Necessary ordinary letter, registered letter, facsimile or e-mail:	R17,00 (and in the case of a registered letter, the costs of the registration fee to be added).
1.(b)	Registered letter (section 57 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944)):	The amount as prescribed from time to time in item 8 of Annexure 2, Table A, Part II of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa.
1(c)	Necessary electronic communication, other than facsimile or e-mail, (per electronic communication):	R2,20 (maximum of ten electronic communications per month).
2	Necessary phone call, which is not a consultation (per call):	R17,00.
3	Other necessary expenses not specifically provided for, a total amount of:	R17,00.
4(a)	Acknowledgement of debt and undertaking to pay debt in terms of section 57 or section 58 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) (including the necessary consultation with debtor):	The amount as prescribed from time to time in items 9 and 10 of Annexure 2, Table A, Part II of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa.
4(b)	Original documents signed by the debtor under item 4(a) at the debtor's residence or place of work:	R166,00.
4(C)	Necessary registered credit bureau search:	R11,00 (maximum of four searches per month).
5	At the request of the debtor, the drawing up and furnishing of a settlement account, other than the six monthly settlement account:	R33,00.

6	Correspondence received and attended to:	R8,00.
7	Necessary consultation with debtor:	R41,00.
8	Attending taxation:	R65,00.
9	On receipt of an instalment (one or more) in redemption of the debt inclusive of instalments made directly to the client:	A fee of 10% of the instalment received, subject to a maximum amount of R407,00. No additional fee shall be charged for any attendance in connection with the receipt or payment of any instalment.".

Recent Court Cases

1. S v BANGISO 2013 (1) SACR 558 (GNP)

A Court is not competent to impose two or more sentences of imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977 which in total exceed a period of five years.

[2] The Appellant (to whom I will for the sake of convenience refer to as “the

Accused") was charged in the regional court, sitting at Pretoria, on four charges, namely -

(a) two charges of contravention of section 10(a) of the Sexual Offences Act, 1957 (Act 23 of 1957) (counts 1 and 2), in that upon or about March 2007 and at or near Pretoria the Accused did wrongfully and unlawfully procure or attempt to procure P M, a girl aged 16 years, and N N, a girl aged 15 years, to have unlawful sexual intercourse with any other person other than the Accused herself or in any way assist in bringing about such intercourse by instructing the said girls to have sexual intercourse with unknown adult male persons;

(b) two charges of kidnapping (counts 3 and 4) in that upon or about the same period and at or near the same place the Accused did unlawfully and intentionally deprive the said P M and N N of their liberty against their will or deprive their

guardians of their lawful control of these girls by keeping them against their will in Lodge Ingwe No. 94, Reilly Street, Pretoria.

[3] The Accused pleaded not guilty to all these charges, but was convicted as charged on all counts on 12 November 2008 and was on 26 February 2009 sentenced -

(a) on counts 1 and 3, taken together for purposes of sentence, to five years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, 1977 (the Act):

(b) on counts 2 and 4, taken together for purposes of sentence, similarly to five years imprisonment in terms of the said section 276(1)(i).

[4] The Accused filed an application for leave to appeal against the sentences imposed on 13 November 2009, almost nine months late (and after having served almost all of the compulsory one-sixth of one of the two sentences), but was granted condonation for such late-filing and leave to appeal against the sentences imposed (and on the same date released on bail pending this appeal).

[5] As is apparent from the Accused's Notice of Appeal, her appeal is in effect based on the grounds thereof -

(a) that the magistrate erred in sentencing the Accused to two terms of imprisonment under section 276(1)(i) of the Act "without ordering that the two terms run concurrently, thereby sentencing the (Accused) to an effective term of imprisonment, before the (Accused) would be eligible to be placed under correctional supervision in the discretion of the Commissioner of Correctional Services" which sentence is, so it is submitted, shockingly inappropriate;

(b) that the magistrate erred in imposing a sentence that does not give affect to the magistrate's intention at the time.

[6] In order to duly appreciate these grounds they must be seen against the background of the averments made in the Accused's affidavit filed in support of her application for condonation for the late-filling of her application for leave to appeal.

[7] In this affidavit she stated -

(a) that at the time she was sentenced she was advised that she would only have to serve 10 months in respect of each of the sentences imposed and elected to accept the sentence as such;

(b) that she was later advised by an officer of the Department of Correctional Services that the effect of the sentence was that she should serve the full five years of her sentence and thereafter to serve 10 months of the second sentence imposed before she can be considered for correctional supervision;

(c) that she was then taken back to court to obtain clarity on the sentence where the magistrate on that occasion on 1 July 2009 confirmed that the sentences were not to run concurrently.

[8] A transcription of the proceedings held on 1 July 2009 shows -

(a) that the question whether she was first to serve five years of the first sentence imposed and thereafter to serve 10 months of the second sentence before she can be considered for correctional supervision, was debated with a view of persuading the magistrate to refer the matter for special review;

(b) that the magistrate indicated that what she had in mind was that the Accused should serve at least 20 months of the 10 years period of imprisonment she was imposed;

(c) that the magistrate indicated that there is in her view nothing wrong with the sentences she imposed and that, in so far as the Commissioner of Correctional Services may have a problem in interpreting the sentences, it is for the Accused to take the Commissioner's decision on review, but that the Accused can take her decision on review on the grounds thereof that the sentence imposed is an incompetent one or to otherwise take the matter on appeal (hence the eventual application for leave to appeal).

[9] The question which we are in my view called upon to pronounce upon is whether the sentences imposed by the magistrate are competent sentences as envisaged in section 276(1)(i) of the Act and, if so, whether they give effect to the magistrate's intention.

[10] These questions first of all call for a consideration of the relevant legislative provisions.

[11] The sentences imposed upon the Accused purport, as I have already indicated, to have been imposed in terms of section 276(1)(i) of the Act which reads, in so far as it is relevant for present purposes, as follows:

" (1) Subject to the provisions of this Act and any other law and of the common law. the following sentences may be passed upon a person convicted of an offence, namely-

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board ".

[12] The circumstances under which a sentence may be imposed in terms of section 276(1)(i) is regulated by section 276A(2) of the Act which reads, in so far as it is likewise relevant, as follows:

v'(2) Punishment shall..... only be imposed under section 276 (1)

(i)

(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(b) for a fixed period not exceeding five years.”.

[13] In relation to a period of imprisonment imposed in terms of section 276(1)(i) to be served, section 73(7)(a) of the Correctional Services Act, 1998 (Act 111 of 1998), provides as follows:

“A person sentenced to incarceration under section 276(1)(i) of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise." (My emphasis).

[14] From these sections it is in my opinion obvious -

(a) that the court concerned must be of the opinion that the offence concerned

justifies the imposition of imprisonment (whether or not coupled with a fine) for a period not exceeding five years in which event the imprisonment imposed should not exceed a fixed period of five years, obviously, without the option of a fine (section 276A(2));

(b) that at least one-sixth of the period of imprisonment imposed which can never, if the maximum period of five years imprisonment is imposed, be less that 10 months, being the period after which placement under correctional supervision should be considered by the Commissioner “unless the Court has directed otherwise” (section 73(7)(a)), by determining a longer period than the envisaged one-sixth of the period of imprisonment imposed.

[15] In applying the provisions of this section to the circumstances of this matter, it would appear as if the magistrate were of the opinion that the four offences in question justified an aggregate period of 10 years imprisonment of which the Accused should serve 20 months, being one-sixth of 10 years.

[16] As is apparent from the provisions of section 276A(2), a court is not competent to impose a sentence in terms of section 276(1)(i) in respect of an offence which in the court’s opinion justifies a sentence in excess of five years imprisonment.

[17] The question, however, is whether or not the five year period prescribed in section 276A(2) should be calculated only in respect of the one offence of which the accused is to be sentenced or in respect of the aggregate period of imprisonment imposed in respect of that one offence, together with any other periods of imprisonment, whether or not in terms of section 276(1)(i), which may also have been imposed in respect of any other offence or offences the accused may have been convicted.

[18] In S v Gouws 1995(1) SACR342(T) the Judges were concerned with a matter on review where the accused had, apart from having been convicted on a charge of theft, also been convicted on a charge of having escaped, in contravention of section 48(1)(a) of the then Correctional Services Act, 1959, from a police cell. On the theft charge he was sentenced to five years imprisonment in terms of section 276(1)(i) and on the charge of having escaped to six months imprisonment. On the question whether the sentence imposed on the theft charge was a competent sentence as the aggregate period of imprisonment imposed on the accused on the two charges exceeded the five years imprisonment prescribed in section 276A(2) of the Act, the Judges in effect held (at 343i-344d) that the sentence in terms of section 276(1)(i) is not rendered invalid by the imposition of a sentence for another offence which, together with the former sentence, exceeds the period of five years as stipulated by section 276A(2). The practical problems arising from compliance with section 280(2) in such a situation can be overcome, so it was held, in two ways, namely, the court can order that the sentence of ordinary imprisonment be served before the sentence in terms of s 276(1)(i) or, in the absence of such an order, the Commissioner of Correctional Services can determine in terms of section 32(2) of the (then) Correctional Services Act, 1959 (section 139(2) of the now existing Correctional Services Act, 1998), that the sentences be served in that order.

Subsections (1) and (2) of section 280 of the Act to which reference is made in that judgment, reads as follows:

280. (1) When a person is at any trial convicted of two or more offences or when a person under sentence or undergoing sentence is convicted of another offence, the court may sentence him to such several punishments for such offences or, as the case may be, to the punishment for such other offence, as the court is competent to impose.

(2) Such punishments, when consisting of imprisonment, shall commence the one after the expiration, setting aside or remission of the other, in such order as the court may direct, unless the court directs that such sentences of imprisonment shall run concurrently.".

Section 139(2) of the Correctional Services Act, 1998, to which is also referred to in that judgment, reads as follows:

“(2) (a) Subject to the provisions of paragraph (b), a person who receives more than one sentence of incarceration or receives additional sentences while serving a term of incarceration, must serve each such sentence, the one after the expiration, setting aside or remission of the other, in such order as the (Commissioner of Correctional Services) may determine, unless the court specifically directs otherwise, or unless the court directs such sentences shall run concurrently.

[19] Upon a proper analysis of the reasoning in this judgment, the result is that a court may, for instance, where an accused is sentenced on various charges, none of which justifies the imposition of a period of imprisonment in excess of five years, impose in respect of one of them a period of imprisonment in terms of section 276(1)(i) and in respect of the others such other sentences as the court may deem fit, whereupon, the Commissioner of Correctional Services may direct, unless the court has directed otherwise, that all the other sentences be served first before the section 276(1)(i) sentence is served.

[20] Although such an approach may, depending on the length of the other sentences imposed, perhaps, defeat the aims of section 276(1)(i), which is aimed at mitigating a long term of imprisonment by allowing for the early release of the accused (S v Scheepers 2006 (1) SACR 72 (SCA) at 76d), the question, however, remains whether such an approach can be followed where, as in this case, two or more periods of imprisonment, not running concurrently, are imposed or considered to be imposed in terms of section 276(1)(i).

[21] In my opinion a court is, for obvious reasons, not competent to impose two or more sentences of imprisonment in terms of section 276(1)(i), which in total exceeds the prescribed five year period.

[22] As in this case the Accused has in effect cumulatively been sentenced to 10 years imprisonment in respect of which the provisions of section 276(1)(i) cannot find any application.

[23] In this regard some guidance can be obtained in the case of S v Cassiem 2001 (1) SACR 489 (SCA) in which the Court was concerned with a case where the accused was sentenced to five years imprisonment in terms of section 276(1)(i) plus a further two years imprisonment which was conditionally suspended. In relation to the effect of such a sentence the Court held at 494c as follows:

"The effect of this was the appellant was, in effect, sentenced to a total of seven years' imprisonment. This the magistrate was not empowered to do under s 276(1)(i). This Court in S v Stanley 1996 (2) SACR 570 (A) has already decided that the suspended period of imprisonment forms an integral part of the total period of imprisonment. It was held that to render the sentence under s 276(1)(i) competent the total period of imprisonment should not exceed five years, because such excess may interfere with the exercise of the discretion by the Commissioner of Correctional Services under the section. In my view, the sentence imposed by the magistrate offended against the provisions of s 276(A)(2)(b) which forbids the imposition of a sentence in excess of five years under s 276(1)(i).".

[24] In so far as the magistrate intended to impose a sentence in terms of which the Accused should at least serve 20 months, it could have been effected in two ways, namely -

(a) to combine, as provided in section 276(3)(a) of the Act, any period of imprisonment she deemed fit in the circumstances, which may even be in part suspended, with correctional supervision in terms of section 276(1)(h) with imprisonment (S v Stanley 1996 (2) SACR 570 (A) at 575d) on having, of course, considered correctional supervision after having obtained, as provided in section 276A(1)(a), a report from a probation officer or a correctional official;

(b) to have ordered the two sentences to run concurrently in the event of which there would have been no difficulty in the interpretation of the sentence and the relevant provisions to which I have already alluded to.

[25] I am accordingly of the opinion that the sentences imposed are incompetent sentences and in any event do not give effect to the magistrate's intention.

2. S. v MNGENI 2013(1) SACR 583 (WCC)

In taking down a confession a police officer has no duty to provide any legal advice or assistance to an accused other than that required by section 35 of the Constitution.

"[103] The State in its arsenal of evidence unleashed against the accused, presented evidence of a statement the accused had made after his arrest to Captain Jonker and a pointing out made to Captain Ontong on 17 November 2010. The accused disputed the admissibility of such evidence. I made a ruling admitting such evidence, without giving reasons on 26 September 2012. I will now give the reasons for my ruling. The principal witnesses who testified during the "Trial within a Trial" were Captain Jonker, Lt Colonel Kwinana, Constable Mbali, Warrant Officer Pharo, Captain Hendrikse and the main witness during the pointing out was Captain Ontong. The evidence of a video recording of the accused making the statement as well as the

[104] The accused attacked the admissibility of the statement and the pointing out the accused made on a number of grounds. It was alleged that both were not made freely and voluntarily and that they were made under undue influence. In particular, it was alleged that the accused was severely beaten and tortured at the hands of the police from the moment of his arrest until after he appeared in Court. He alleged that even though his constitutional rights were explained he was not given an opportunity to consult with a lawyer when he made such a request.

[105] The accused further alleged that even during the time when he made the statement to Captain Jonker and Captain Ontong the proceedings were interrupted and he was beaten. He alleged where this was not shown on the video footage, the recording was tampered with. He later abandoned this complaint.

[106] All the witnesses for the State denied the allegations of assault at the hands of the police. The defence did not present any evidence during the “Trial within a Trial” and the accused did not himself testify. The evidence during the “Trial within a Trial” overwhelmingly showed that the accused was not ill-treated let alone assaulted by the police.

[107] The statement he made to Captain Jonker as well as the pointing out he made were captured on video. In both instances he is clearly seen and heard to say he was not assaulted or ill-treated by the police and he decided out of own free will that he wanted to talk. How the accused thought in the light of the overwhelming evidence against him he could have convinced the court that he did not make the statement or the pointing out freely and voluntarily, is puzzling. I therefore find that the pointing out and the statement were made freely and voluntarily and without any undue influence.

[108] I wish to now deal with the accused’s allegation that his right to legal representation was infringed in that when he elected to obtain legal representation he was denied the opportunity. I wish to first precisely set out the facts.

[109] Before the accused made the statement he asked Jonker if it was wise to make a statement without a lawyer present. Jonker said to the accused that it was up to him if he wanted a lawyer present. He was further informed that if he wanted a lawyer present, that he (Jonker) would stop the proceedings and then he had to first consult with a lawyer before proceedings could again proceed.

[110] The accused said to Jonker that he felt that he needed to speak to his grandmother to see if she could get a lawyer. Then Jonker explained to him that the state could provide him with Legal Aid and then they would stop with the taking of his statement and arrange for a lawyer. The accused answered that he felt “lost” but he also wanted to give a statement.

[111] Once again Jonker explained to him that it was his right to have a lawyer present. The accused then told Jonker that he would get a lawyer at Court and he did not want to waste time and have to wait for a lawyer. Once again it was explained to him that it was his right to have a lawyer present and he must not feel forced or be influenced to make a statement and that he could have his lawyer present. The accused then answered that he would proceed to make a statement without his lawyer.

[112] The question that needs to be decided is whether, in the above circumstances, there was a duty on Captain Jonker to go further than merely explaining to the accused his right to legal representation. Should Jonker have stopped the proceedings notwithstanding the fact that the accused said he wanted to proceed without a lawyer after Jonker had on more than one occasion explained to him that

he could stop the proceedings should the accused elect to consult a legal representative.

[113] In terms of the Constitution of the Republic of South Africa Act 108 of 1996, it is the duty of an arresting officer as well as a police officer, usually a more senior commissioned officer, who is tasked with the taking of a statement against an accused person, to inform him or her of his or her rights. What is further expected of them is to make sure that an accused person understands their rights.

Section 35(1) of the Constitution of the Republic of South Africa Act 108 of 1996 reads:

"*Arrested, detained and accused persons*

(1) Everyone who is arrested for aiiegedly committing an offence has the right-

(a) to remain silent;

(b) to be informed promptly-

(i) of the right to remain silent; and

(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person"

Section 35(2) of the Constitution of the Republic of South Africa, Act 108 of 1996, as far as it is applicable, reads:

"*(2) Everyone who is detained, including every sentenced prisoner, has the right-...*

(b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly

(c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;..."

[114] It is not expected of the police officer taking a confession or statement to offer an accused person any legal advice as to how best to exercise his or her rights. There is no duty on the police to provide any further assistance than what is required and set out in the Constitution as long as the process is fair and the accused is not deliberately set up in such a manner that he or she would be forced against his or her will not to exercise his or her rights in terms of the Constitution.

[115] I am further in agreement with the view expressed by the Court in S v Vumase 2000 (2) SACR 579 (W) at 581 c - **e** where it was held:

"*The Constitution requires that an accused person should be advised of his rights in such a way that he is made aware of the contents thereof in a meaningful way. The*

Constitution does not require that an accused person be further advised on the best way to exercise such rights"

And further at 581 g - h:

"*Both the duties of the police and the duties of the presiding officer at a trial require to be carried out in a fair way. But those duties are not the same. The fact that a judicial officer may in certain cases be obliged to advise an accused person that he should avail himself of legal representation in order that the accused person be afforded a fair trial does not mean that the police officer taking a statement has, in order to be fair, to advise an accused person to obtain the services of a legal representative before he makes a statement. The giving of a statement by an accused person to the police often serves to facilitate a police enquiry. An accused's statement is an important investigative tool, of which the police are entitled to avail themselves. Unlike the position of a judicial officer, who is an umpire who oversees the fairness of the proceedings before him, the police are in an adversarial position vis-a-vis an accused and as such the rules of fairness differ. A balancing of the rights of the State against the rights of an arrested person must be achieved in a way that is fair to both sides. In my opinion if a police officer is satisfied on reasonable grounds that the accused understands his rights fully, he does not have to go further to advise him to obtain the services of a legal representative".*

[116] If regard is to be had to the evidence presented in this case during the "Trial within a Trial", the police as from the moment of the arrest of the accused, acted with utmost professionalism and fairness. Jonker repeatedly advised the accused of his rights, the accused fully understood his rights when they were explained, and nothing more could have been expected of Jonker. It is clear from the evidence that the accused wanted to co-operate right from the beginning. There was no need for the police to have done anything untoward. For these reasons the statement made by the accused as well as the pointing out were admitted into evidence against him."

3. AVONTUUR & ASSOCIATES INC v CHIEF MAGISTRATE, OUDSTHOORN 2013(1) SACR 615 (WCC)

Where a search warrant had been issued to seize an attorneys documents, an attorney claiming privilege had to act in the interest of his client and not in his own interests.

The first applicant, a firm of attorneys, and the second applicant, an attorney and sole director of the firm, applied to the court to set aside a warrant of search and seizure issued by a magistrate in terms of s *20(a)* and *(b)* of the Criminal Procedure Act 51 of 1977. The police had applied for the warrant during their investigations into a charge of fraud relating to debt-collection work performed by the applicants for a municipality. It was alleged that the

fraud was perpetrated by means of bills of costs drawn up for the applicants by a firm of costs consultants. The documents seized by the police were the correspondence and accounts drawn up by the costs consultants and were found at the offices of the first applicant and at the home of the second applicant. In support of the bid to have the warrant set aside, the applicants contended, inter alia, that *(a)* the communications between the applicants and the costs consultants were privileged and the files themselves were privileged; and *(b)* the magistrate had failed to properly exercise his discretion when deciding whether or not to authorise the warrants, in that the investigating officer did not inform him, in breach of a legal duty to do so, that a less invasive means than the search and seizure existed to obtain the files.

Held, that the broad principle was that only confidential communications and material integral thereto between attorney and client, made for the purpose of obtaining legal advice, were privileged. In an attorney's file there would invariably be documents and information which in the ordinary course would not be privileged, such as statements of account reflecting the amount received by the attorney from the defendant, particulars of the attorney's fees and disbursements and what the net amount was that was paid over to the client. Such unprivileged documents could be seized. It remained the duty of the applicants to claim the privilege because in any event privilege was the right of the attorney's client. But in claiming privilege the attorney had to act not in his own interests or on his own behalf, but always for the benefit of the client. Unless the attorney did so, his claim to privilege may be regarded as not genuine at all. In the latter event a court would be entitled to disregard the claim to privilege and permit seizure. (Paragraph [30] at *632d-g.)*

Held, further, that the applicants' claim to privilege over the files in the instant matter was not genuine, as it was inimical to its client's (the municipality's) interests, as it wanted the matter investigated. (Paragraph [30] at *632j-633a.)*

Held, further, as to the respondents' argument that there was an imputed waiver of any privilege over the files by the municipality, the argument assumed that there was or might be confidential advice on the files, although nowhere in the papers was it mentioned that there was confidential advice on the files. Imputed waiver (or deemed waiver) took place when, irrespective of what the holder's intention may have been, his conduct reached a point of disclosure that considerations of fairness required that the privilege had to cease. Importantly in the instant matter, a municipal official had submitted a sworn statement wherein he alleged that the applicants had breached their duties, and as a result the municipality must be deemed to

have waived any privilege in regard to the files relevant to this issue. (Paragraphs [30] and [31] at *633a-d.)*

Held, further, that, in the light of the fact that on the applicants' own admission only eight (at the most, nine) files may contain communications between the applicants and the costs consultant, the submission that, with regard to these eight files at least the applicants had waived their privilege, could not be faulted. (Paragraph [33] at *634e-g.)*

Held, further, as regards the contention, that there was a legal duty on the investigating officer to inform the magistrate that there was a less invasive means than the search and seizure to obtain the files, that the state was required to prove that less invasive means would not produce the documents, something which may be well-nigh impossible to do. Rather, a judicial officer, in determining whether to issue a warrant, had to consider whether there was an appreciable risk, to be judged objectively, that the state would not be able to obtain the evidence by following a less invasive route. In the present circumstances, objectively judged, the investigating officer had discharged his duties. Application dismissed. (Paragraph [48] at *644h-645b.)*

From The Legal Journals

Sloth-Nielsen,J

“A foreskin too far? Religious, “medical” and customary circumcision and the Children’s Act 38 of 2005 in the context of HIV/Aids”

Law Democracy & Development 2012 Volume 16 p69

Van der Merwe, H J

“One moment of extreme irresponsibility”: Notes and comments on *Humphreys v S* and the volitional component of *dolus eventualis* in the context of dangerous or irresponsible driving”

Law Democracy & Development 2013 Volume 17 p64

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

Contributions from the Law School

The notion of 'seriousness' in sentencing in England and Wales

In my previous contribution to *e-Mantshi* (February 2013: Issue 85), I briefly examined the issue of guidelines for sentencing in relation to the housebreaking crime. In the short note that follows, I will summarise the Sentencing Council's Guideline on one of the overarching principles of sentencing, seriousness.

To recap, the Sentencing Council for England and Wales was established 'to promote greater transparency and consistency in sentencing, whilst maintaining the independence of the judiciary'. It is an independent, non-departmental public body of the Ministry of Justice and replaced the Sentencing Guidelines Council and the Sentencing Advisory Panel in April 2010. The guidelines discussed below emanate from the predecessor of the Sentencing Council, the Sentencing Guidelines Council. In the absence of local sentencing guidelines following the legislative inaction to date with regard to 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), it is useful to consider the report of the Sentencing Council. The primary role of the Council is to issue guidelines on sentencing which the courts must follow unless it is in the interests of justice not to do so.

What follows is a précis of the sentencing guideline regarding the principle of seriousness in sentencing (published in 2004), offered in the hope that this discussion may provide guidance to judicial officers having to engage in the complex and challenging task of sentencing.

The context: the Criminal Justice Act 2003

In terms of s 142(1) of the Criminal Justice Act 2003, it is incumbent on any court sentencing an offender of 18 years or over to have regard to five purposes of sentencing: (a) the punishment of offenders; (b) the reduction of crime (including its reduction by deterrence); (c) the reform and rehabilitation of offenders; (d) the protection of the public; and (e) the making of reparation by offenders to persons affected by their offence. The sentencer has discretion in weighing these interests

against each other, but must ultimately make a determination as to the *seriousness* of the offence. Such determination in turn will directly influence the court's decision regarding which of the sentencing thresholds has been crossed, what type of sentence (custodial, community or fine) is most appropriate, and how much of this type of punishment should be handed down. In terms of s 143(1) of the Criminal Justice Act, seriousness is assessed in terms of two primary considerations: the culpability of the offender and the harm caused or risked being caused by the offence:

"In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused."

Culpability

In terms of the English law, there are four levels of criminal culpability for sentencing purposes: *intention* to cause harm (highest culpability); *recklessness* (equivalent to the South African concept of conscious negligence); where the offender has *knowledge* of the risks resulting from his actions but does not intend them; and *negligence*. The latter three concepts may be present in varying degrees. Where the offence is one of strict liability, even though culpability is not in issue for the purposes of conviction, the courts are required to assess culpability for the purposes of sentencing.

Harm

Section 143(1) is broadly framed, encompassing offences where harm is caused, as well as where neither individuals nor the community suffer harm, but where a risk of harm is present.

In respect of individual victims, the types of harm caused or risked by different types of criminal activity are diverse and victims may suffer physical injury, sexual violation, financial loss, damage to health or psychological distress. In each of these categories there are degrees of harm. Ultimately the court should take into account the impact that the crime has on the victim, taking the personal characteristics and circumstances of the victim into account. Where no actual harm has resulted, the court will assess the relative dangerousness of the offender's conduct, having regard to the likelihood of harm occurring and the gravity of the harm that could have resulted.

Some offences are injurious to the community at large (instead of or as well as to an individual victim) and may include such forms of harm as economic loss, harm to public health, or interference with the administration of justice.

Other types of harm may be more difficult to define or categorise, such as cruelty to animals, where a human victim may suffer psychological trauma and/or financial loss, as well as the harm to the animal. Some conduct is criminalised purely by reference to public feeling or social mores. In addition, public concern about the damage caused by some behaviour, both to individuals and to society as a whole, can influence public perception of the harm caused, for example, by the supply of prohibited drugs.

Assessment of culpability and harm

As is evident from s 143(1), in assessing the seriousness of an offence, not only actual harm which results but also intended harm or foreseeable harm must be taken into account. This assessment process may be difficult, particularly where there is an imbalance between culpability and harm (whether because the harm resulting is greater than the harm intended or whether the offender's culpability is at a higher level than the harm resulting from the offence).

Nevertheless, the governing principle is that the culpability of the offender in the particular circumstances of an individual case should be the initial factor in determining the seriousness of an offence. Therefore harm must always be subjectively judged in the light of offender's culpability. The guidelines hold that culpability will be greater if: (i) an offender deliberately causes more harm than is necessary for the commission of the offence, or (ii) where an offender targets a vulnerable victim (because of their old age or youth, disability or by virtue of the job they do). Moreover, where unusually serious harm results and was unintended and beyond the control of the offender, culpability will be significantly influenced by the extent to which the harm could have been foreseen. Further, if much *more* harm, or much *less* harm has been caused by the offence than the offender intended or foresaw, the culpability of the offender, depending on the circumstances, may be regarded as carrying greater or lesser weight as appropriate.

Aggravating and mitigating factors

The guidelines for a particular offence will normally include a list of aggravating features which, if present in an individual instance of the offence, would indicate *either* a higher than usual level of culpability on the part of the offender, *or* a greater than usual degree of harm caused by the offence (or sometimes both).
These are the aggravating features listed in the guidelines:

Factors indicating higher culpability:

❏ Offence committed whilst on bail for other offences

❏ Failure to respond to previous sentences

❏ Offence was racially or religiously aggravated

❏ Offence motivated by, or demonstrating, hostility to the victim based on his or her sexual orientation (or presumed sexual orientation)

❏ Offence motivated by, or demonstrating, hostility based on the victim's disability (or presumed disability)

❏ Previous conviction(s), particularly where a pattern of repeat offending is disclosed

❏ Planning of an offence

❏ An intention to commit more serious harm than actually resulted from the offence

❏ Offenders operating in groups or gangs

❏ 'Professional' offending

❏ Commission of the offence for financial gain (where this is not inherent in the offence itself)

❏ High level of profit from the offence

❏ An attempt to conceal or dispose of evidence

❏ Failure to respond to warnings or concerns expressed by others about the offender's behaviour

❏ Offence committed whilst on licence

❏ Offence motivated by hostility towards a minority group, or a member or members of it

❏ Deliberate targeting of vulnerable victim(s)

❏ Commission of an offence while under the influence of alcohol or drugs

❏ Use of a weapon to frighten or injure victim

❏ Deliberate and gratuitous violence or damage to property, over and above what is needed to carry out the offence

❏ Abuse of power

❏ Abuse of a position of trust

Factors indicating a more than usually serious degree of harm:

❏ Multiple victims

❏ An especially serious physical or psychological effect on the victim, even if unintended

❏ A sustained assault or repeated assaults on the same victim

❏ Victim is particularly vulnerable

❏ Location of the offence (for example, in an isolated place)

❏ Offence is committed against those working in the public sector or providing a service to the public

❏ Presence of others e.g. relatives, especially children or partner of the victim

❏ Additional degradation of the victim (e.g. taking photographs of a victim as part of a sexual offence)

❏ In property offences, high value (including sentimental value) of property to the victim, or substantial consequential loss (e.g. where the theft of equipment causes serious disruption to a victim's life or business)

Where a factor or factors indicate that an offender's culpability is *unusually* low, or that the harm caused by an offence is less than usually serious, such factor or factors may be regarded as mitigating factors.

These are the factors listed in the guidelines indicating significantly lower culpability:

❏ A greater degree of provocation than normally expected

❏ Mental illness or disability

❏ Youth or age, where it affects the responsibility of the individual defendant

❏ The fact that the offender played only a minor role in the offence

In addition, s 166(1) of the Criminal Justice Act 2003 makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence'. When the court has formed an initial assessment of the seriousness of the offence, then it should consider any offender mitigation. The issue of remorse should be taken into account at this point along with other mitigating features such as admissions to the police in interview.

Moreover, sentencers will normally reduce the severity of a sentence to reflect an early guilty plea. (This subject is covered by a separate guideline and provides a sliding scale reduction with a normal maximum one-third reduction being given to offenders who enter a guilty plea at the first reasonable opportunity.) Credit may also be given for ready co-operation with the authorities. This will depend on the particular circumstances of the individual case.

Once the seriousness inquiry has been completed, the sentence is required to match the offence to a type and level of sentence is a separate and complex exercise assisted by the application of the respective threshold tests for custodial and community sentences. Thus, having assessed the seriousness of an individual offence, sentencers must consult the sentencing guidelines for an offence of that type for guidance on the factors that are likely to indicate whether a custodial sentence or other disposal is most likely to be appropriate.

Finally, the guidelines address the issue of the prevalence of the offence. In this regard the key factor in determining whether sentencing levels should be enhanced in response to prevalence will be the level of harm being caused in the locality.

Enhanced sentences should be exceptional and in response to exceptional circumstances. Sentencers must sentence within the sentencing guidelines once the question of prevalence has been addressed.

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Matters of Interest to Magistrates

LLB Summit: Legal education in crisis?

The much-awaited LLB Summit, initiated by the South African Law Deans' Association (SALDA), the Law Society of South Africa (LSSA) and the General Council of the Bar (GCB), took place on 29 May.

Speakers who discussed the future of the LLB degree included LSSA co-chairperson Kathleen Matolo-Dlepu; acting Judge of the Constitutional Court Ronnie Bosielo; and chief executive officer of the Council for Higher Education (CHE), Ahmed Essop.

The summit's programme also included a panel discussion and breakaway group sessions.

Welcoming delegates, Ms Matolo-Dlepu said that the summit ought to address challenges related to the LLB. She added that the objective of the summit was to deal with the 'LLB crisis', to examine 'the root of the problem' and to make recommendations on how to improve the degree.

The four-year degree

During a keynote address, Judge Bosielo recalled that he had actively participated in the debates in the 1990s that culminated in the four-year LLB degree. He indicated that, at the time, he was a member of the Black Lawyers Association (BLA), which 'argued forcefully … for the adoption of the four-year LLB degree'.

He added: 'The principle reason for that stance was simply because we were trying to address what were then serious problems encountered by law students from historically disadvantaged communities. One was that the length of the LLB degree … was seen to be an impediment to those who did not have the financial resources

… We were concerned with the spread of lawyers in the country in ratio to the population of the country; the sad reality was that we had very few black lawyers in the country. The intention was that, by shortening the degree, perhaps we would open the doors for students from previously disadvantaged communities to enter university and come out within a very short period of time.'

Judge Bosielo believed that it was now time to evaluate the four-year degree and question if it was achieving the goals set 15 years ago and, if not, to identify where the problem lay and decide on what could be done to remedy the situation.

He said: 'It is universally accepted that … the strength, … vitality and vibrancy of any constitutional democracy depends largely on the quality, the pedigree and integrity of its lawyers. … A weak legal profession will invariably produce weak judges. In my view, if the legal profession is populated by lawyers with low standards, … this would be reflected in the structure of the judiciary.'

Judge Bosiolo said that the legal profession needed to ask itself if it was training and producing lawyers who believed in fairness, equality and justice. Further, the profession needed to ask if the current LLB degree was adequate and appropriate to train the lawyers who were needed today – lawyers who act ethically and who understand the Constitution and the future role they will have to play. In his view, lawyers should have the spirit of *ubuntu* and be willing to sacrifice, instead of being selfish; they should be socially conscious and develop the ethos of '*batho pele'*; and they must be prepared to serve the community.

He noted that the recent 'chorus of complaints' on the quality of LLB graduates, which claimed that graduates lacked broad skills, including writing, reading, ethics and an understanding of the Constitution, 'cannot be brushed aside'.

He added that it was 'comforting' that the 'real stakeholders', such as the GCB, the Society of Law Teachers of Southern Africa (SLTSA), the BLA, the National Association of Democratic Lawyers, the LSSA and SALDA had identified difficulties in the LLB degree.

He said that the world had changed into a global village and, therefore, the legal profession could not remain the same. The profession has no choice but to change its mindset – 'adapt or you will perish,' he said.

In closing, Judge Bosiolo said that he was confident that the summit's delegates, given their spread of experience, would develop a solution to assist universities to produce lawyers who will be an asset to South Africa's democracy.

Perspectives on the LLB

In a panel discussion, representatives from different law faculties and the legal profession discussed their perspectives on the degree. The panel comprised senior lecturer at the department of private law at the University of Cape Town, Dr Lesley Greenbaum; President of SALDA, Professor Vivienne Lawack; Vice-president of SLTSA, Professor Engela Schlemmer; representative of the GCB, advocate Leon Dicker; and the chief executive officer of the LSSA, Nic Swart.

Former co-chairperson of the LSSA, Krish Govender, chaired the discussion. At the outset, Mr Govender said: 'A student is a product of a good society, community, parents or values … . The law faculty is not going to fix the student at the end of the day.'

He said that students needed to understand the context of law in the global village and where the law faculties fitted in. He said that the content and philosophy of the LLB degree should nurture a student to 'think outside the box' and be a better lawyer. He added that the LLB degree should produce graduates who will play a better role in society.

Dr Greenbaum said that, even though the four-year LLB degree was introduced to reduce costs and increase access to the law profession, 'the harsh reality is 22% of students complete the degree in four years,' she said.

She added that challenges students faced included the inadequacy of primary and secondary education, which left them unprepared for university, as they lack digital knowledge, literacy and numeracy skills.

Professor Lawack noted that students who obtained a BA Law or BCom degree prior to registering for an LLB degree had a higher completion rate in the minimum period compared to those who registered for the LLB degree as a first degree. She added that universities were aware that students lacked skills in areas such as ethics, legal knowledge and critical analysis. To curb this, she said that universities had made interventions, with varying degrees of success. She observed that there was a correlation between the low completion rate of the LLB in the minimum period and the inadequate schooling system.

Another challenge related to the degree, Professor Lawack said, was an absence of resources at universities, as law schools' subsidy level was at the lowest government funding band in education. She said that for every R 1 a law student received, a history student received R 2, an engineering student received R 3 and a life studies student received R 4.

She added that government perceived teaching law as 'cheap'. However, she said this was not accurate and more funding was needed to maintain law clinics and libraries, which she said were the 'laboratories of law schools'. She added that government should, therefore, increase legal education funding.

Professor Lawack said that the role of law clinics should be intensified and clarified, and lawyers in practice should assist law schools by supervising cases at law clinics. She said that law students needed to cultivate a discipline that will enable them to generate new knowledge so that they are able to approach the problems and issues they will encounter when they graduate.

Professor Lawack recommended that the LLB degree be extended to a mandatory five-year period, but said that more law modules should not be included; the aim being to enable law students to acquire the required skills, with the possibility of introducing non-law modules to help students understand the context in which law is practised.

Professor Schlemmer was of the view that the effectiveness of the LLB degree must be reviewed. She suggested that students write an entrance examination prior to registering for the degree in order to assess their reasoning and deduction skills, because, she said, universities could not 'pretend to provide skills on a scientific level unless the student possesses the skills'.

She added that at some universities the dean's performance was dependent on the students' pass rate; therefore, students were 'spoon-fed' to prepare them to write examinations. In turn, this meant that students did not understand complex legal concepts and were unable to understand legal problems.

Professor Schlemmer said the advantage of a postgraduate LLB degree was that it could provide students with skills, for example in the advanced law of succession, as there was 'little time for that' in the current LLB degree. She said that other advantages of the postgraduate LLB degree were that students would acquire an exit-level degree after three years and the government funding level would change.

Mr Swart said that the law profession needed lawyers with skills to apply the law, who are ethical, who understand the pressures of the profession and who understand what is necessary to manage a successful practice. He added: 'Whatever the duration, we should have a degree that gives us value.'

Mr Dicker recalled that when he studied law, the dean of the faculty of law said that the faculty was not in the business of producing law mechanics, but was rather in the business of producing well-rounded jurists. He said: 'We should look at going back to the old model and prepare students for today's practice. The starting point would be to enable students to acquire the right culture and be able to perform duties that are required in practice. The GCB is in agreement with the LSSA that the period of the LLB degree should be extended to five years.'

LLB review

Mr Essop said that there had been a process of engagement between the CHE and the law deans, with the objective of reviewing the LLB degree. He said that some of the issues raised at the summit would be taken to the council.

He also referred to a survey on the LLB degree that was conducted by the CHE in 2010, but was not released. He said: 'There was a section in the survey that looked at the four-year degree and the inconsistency in the way the degree was presented. For instance, some universities require students to accumulate 480 credits per year, while others only require 120 credits.'

Mr Essop said that, while the CHE had authority to decide on the duration of the LLB in terms of the Higher Education Act 101 of 1997, academic integrity of the qualification would be attained through the support of the profession and the process of improving the LLB degree should be peer driven.

In order to have a better quality LLB degree, Mr Essop said the profession should ask:

- What is the purpose of the qualification?
- What is the knowledge a student will gain through the qualification?
- What legal knowledge is a graduate expected to have?
- What underpins the qualification?
- What is the purpose of what the student is learning?
- Is what the student is learning related to legal challenges in the rest of the world?
- Is the duration of four years sufficient?
- Is a postgraduate degree a better route?

Mr Essop said the common perception that only students from previously disadvantaged schools did not complete the degree in regulation time was untrue.

He said that there was a need to assess issues of funding and staffing of law faculties, which would be looked at in a national degree review. Based on what the review finds, Mr Essop said that the CHE could make a case for additional resources in law faculties.

Resolutions

Following the group discussions during the summit, delegates requested the CHE to conduct a standard setting process for the LLB, to commence by 30 September 2013 and to be concluded by 30 June 2014.

Further, the exercise must include stakeholders in consultation with the steering committee of the summit.

The exercise will attend to –

- graduate attributes identified at the summit, such as knowledge of substantive law, generic skills (for eg those related to language, literacy, numeracy, research, analysis and information technology), ethics and a commitment to social justice;
- workplace requirements;
- resources; and
- problem areas identified at the summit.

It was also resolved that standard setting for the degree will include wide consultation and ongoing liaison with the relevant stakeholders, and an LLB national task team will be convened to monitor this process.

The task team will be made up of two members from each of the following: SALDA, the GCB, the LSSA, the Justice Department, SLTSA, the Department of Higher Education and Training and any other relevant stakeholder. The task team will be convened by SALDA and the LSSA before 31 August 2013.

Further, the agenda of the task team will be set by the steering committee, taking into account the outcome of the summit. The structure of the LLB, considering that the consensus at the summit was that the duration of the degree should be five years, as well the issue of funding, in particular with regard to law clinics, will be the first items on the agenda of the task team.

Mapula Sedutla

(The above article appears in the July issue of the *De Rebus* Journal)

A Last Thought

Prof S P Sathe (*Judicial Activism in India* (2002)),..” argues that judicial activism is “counter majoritarian” in that it starts from the position of bias for the poor, under-privileged and marginalized. He argues that judicial activism in favour of the powerful is unnecessary because the powerful have the means to assert their hegemony in the social and political system in any event. He reckons that it is not just unnecessary but “counter-revolutionary and inimical to social change to allow the power of the dominant socio-political forces to determine judicial outcomes (2002:281). This is how he expresses it:

“If judicial activism is to be conceptualized as interpretation of the law or the Constitution from the perspective of not only law, but justice, any interpretation that tends to perpetuate the existing class domination is negative judicial activism and any interpretation that expands the rights of the disadvantaged sections as against the dominant sections or the individual against the State is positive judicial activism.” While it may be argued that Sathe perhaps overstates the case, or that the circumstances in India are different from our own, the subtle point to be made is that the judiciary has to be freed to think laterally and at depth. Furthermore, the judiciary must be conscious of the social dynamics that underlie the matters that come before court, and the court must be freed from the constraints at times of precedent. In any event, one should never assume that there is a suggestion here of unrestrained subjectivity and irrationality. What is of value is that the court puts itself at the service of people by making the judicial process intelligible to the ordinary people, promoting access by removing the aura and veneer of respectability, and by addressing alienation in terms of class, race and gender.”

N Barney Pityana :Transformation of the judicial system in a Constitutional democracy: In the Shadow of Bram Fischer. (Lecture given in Bloemfontein on 26 April 2013).