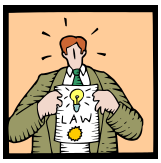
e-MANTSHI

A KZNJETCOM Newsletter

January 2014: Issue 94

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



New Legislation

1. The *Protection of Personal Information Act*, 2013 Act 4 of 2013 was published in Government Gazette no 37067 dated 26 November 2013 . The Act will only come into operation on a date to be proclaimed by the President. The purpose of the Act is to promote the protection of personal information processed by public and private bodies; to introduce certain conditions so as to establish minimum requirements for the processing of personal information; to provide for the establishment of an Information Regulator to exercise certain powers and to perform certain duties and functions in terms of this Act and the Promotion of Access to Information Act, 2000; to provide for the issuing of codes of conduct; to provide for the rights of persons regarding unsolicited electronic communications and automated decision making; to regulate the flow of personal information across the borders of the Republic; and to provide for matters connected therewith. The following sections are of relevance to Magistrates:

"82. Issue of warrants.—(1) A judge of the High Court, a regional magistrate or a magistrate, if satisfied by information on oath supplied by the Regulator that there are reasonable grounds for suspecting that—

(*a*) a responsible party is interfering with the protection of the personal information of a data subject; or
(*b*) an offence under this Act has been or is being committed,
and that evidence of the contravention or of the commission of the offence is to be found on any premises specified in the information, that are within the jurisdiction of that judge or magistrate, may, subject to subsection (2), grant a warrant to enter and search such premises.
(2) A warrant issued under subsection (1) authorises any of the Regulator's members or staff members, subject to section 84, at any time within seven days of the date of the warrant to enter the premises as identified in the warrant, to search them, to inspect, examine, operate and test any equipment found there which is used or intended to be used for the processing of personal information and to inspect and seize any record, other material or equipment found there which may be such evidence as is mentioned in that subsection.

83. Requirements for issuing of warrant.—(1) A judge or magistrate must not issue a warrant under section 82 unless satisfied that—
(*a*) the Regulator has given seven days' notice in writing to the occupier of the premises in question demanding access to the premises;
(*b*) either—
(i) access was demanded at a reasonable hour and was unreasonably refused; or
(ii) although entry to the premises was granted, the occupier unreasonably refused to comply with a request by any of the Regulator's members or staff to permit the members or the members of staff to do any of the things referred to in section 82(2); and
(*c*) that the occupier, has, after the refusal, been notified by the Regulator of the application for the warrant and has had an opportunity of being heard on the question whether the warrant should be issued.
(2) Subsection (1) does not apply if the judge or magistrate is satisfied that the case is one of urgency or that compliance with that subsection would defeat the object of the entry.
(3) A judge or magistrate who issues a warrant under section 82 must also issue two copies of it and certify them clearly as copies.

107. Penalties.—Any person convicted of an offence in terms of this Act, is liable, in the case of a contravention of—
(*a*) section 100, 103(1), 104(2), 105(1), 106(1), (3) or (4) to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment; or
(*b*) section 59, 101, 102, 103(2) or 104(1), to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and such imprisonment.

108. Magistrate's Court jurisdiction to impose penalties.—Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 107."

2. The *Judicial Matters Amendment Act*, Act 42 of 2013 was published in Government Gazette no 37254 dated 22 January 2014. Likewise the *Judicial Matters Second Amendment Act*, Act 43 of 2013 was published in Government Gazette no 37255. Both these amendment Acts are of importance to magistrates and is attached to this edition for information purposes.

Recent Court Cases

1. S v GREEF 2014 (1) SACR 74 (WCC)

The circumstances in which an order in terms of section 35(3) of Act 93 of 1996 is made must be related to the offence for which the accused is charged.

The appellant pleaded guilty in the magistrates' court to a contravention of s 65(2) *(a)* of the National Road Traffic Act 93 of 1996, in that he had driven a vehicle at a time when the concentration of alcohol in his blood was 0,19 g per 100 ml, in excess of the limit of 0,05 g per 100 ml. No previous convictions were proved. The appellant requested an order in terms of s 35 (3) of the Act, that the automatic suspension of his driving licence for six months as specified in s 35(1)*(c)*(i) should not take effect. The state contended that there were no circumstances which justified an order that the driving licence not be suspended. The magistrate sentenced him to a fine of R3000 or six months' imprisonment and a further fine of R3000 or six months' imprisonment, suspended for five years on appropriate conditions. He also ordered that in terms of s 35(1)(c)(i) the appellant's driving licence be suspended for six months.

As regards the circumstances in which the court would not suspend a license in terms of s 35(1)(c)(i), the court held that the necessity of a driving licence to an accused person for work or family reasons was not a circumstance that

could properly be said to relate to the offence. The same was true of the fact that the accused might be a first offender. (Paragraph [9] at *78i-j.)*

There were nevertheless certain circumstances which did relate to the offence and which might be thought to justify the non-suspension of the appellant's licence or the shortening of the period of suspension. The court was reluctant to send out a message to drivers that light and flimsy circumstances could be relied upon to escape the automatic suspensions laid down in s 35(1). Drunk driving is an enormous problem in South Africa. The deaths and injuries which were caused by this scourge took a huge personal and economic toll on the country. The circumstances that did relate to the offence in the present case were: That the accused drank a case of beer on the evening of Friday 29 July 2011 and on the morning of Saturday 30 July 2011 he drank three 'dumpies' of beer. It was past 18h00 on the evening of 30 July 2011 that he got into his friend's car to drive to the supermarket in order to buy chicken for his girlfriend, and had had nothing to drink for about five to six hours before driving. When he got into the car he did not feel that he was under the influence of alcohol and did not know that the alcohol would still be in his blood. He felt normal. He admitted that the blood specimen as analysed showed that the alcohol level was 0,19 g per 100 ml. There was no expert evidence as to whether a person with the appellant's build and metabolism was likely to suffer significant effects from that level of alcohol in his blood. His evidence that he did not feel himself to be under the influence was, however, not challenged by the prosecutor in cross-examination. The appellant was driving the car for a relatively short distance in a country town. There was nothing to indicate that the roads on which he travelled were particularly busy. It was not put to him in cross-examination that he had driven fast or recklessly or had been zigzagging around. The appellant testified that a minor collision occurred at a stop street while he was driving the car. There was some damage to the car he was driving (the car belonged to a friend), but no damage to the other vehicle. The appellant testified that he stopped at the intersection and then pulled away slowly, but that the other car entered the intersection without stopping. The other driver was under the influence of alcohol. The incident, as he described it, was not one which showed negligent or reckless driving on his part. On the facts of this case, these circumstances justified the making of an order in terms of s 35(3). (Paragraphs [12] at *79i-80f,* [13] at *80g* and [14] at 80j.)

The court accordingly upheld the appeal and set aside the suspension of the appellant's licence.

2. S v MOYO AND OTHERS 2014(1) SACR 83 (GNP)

A trial within a trial is not necessary where the question to be determined is whether legal representatives or interpreters were present when handwriting specimens were taken and the admissibility of that evidence is challenged.

During the course of a trial involving over 2000 counts of fraud allegedly perpetrated against the South African Revenue Service (SARS), the state wished to lead evidence relating to handwriting specimens that had been taken from each of the accused. Six of the accused applied for the court to hold a trial-within-a-trial to determine whether the handwriting specimens taken from each of the accused were taken freely and voluntarily. They contended that the specimens had been taken in the absence of their legal representatives; in some instances specimens had been taken under a promise to grant bail; and it had been stated to them that, if the samples were given and they were found not to be the accused's handwriting, charges against the accused would be withdrawn. It was submitted that there had been a violation of the accused's fundamental right to have their legal representatives present, and that no interpreter had been used whilst the investigators were speaking to the accused. They contended that, for these reasons, the taking of the specimens was rendered inadmissible and a unconstitutional. Two of the accused contended that the order by the magistrate, that they give their handwriting samples to the investigating officer, was ultra vires, as handwriting specimens were not bodily features as defined by s 37 of the Criminal Procedure Act 51 of 1977, and therefore the magistrate had not been entitled to make the order.

Held, that whether an interpreter or attorney was present when the specimens of handwriting were taken and a comparison was ultimately done, the result was not a fait accompli. The result could exonerate the person. The content of the words they wrote would not implicate the person from whom they were taken: The specimen was merely utilised in order to determine the characters of the alphabet used and whether the strokes in the writing would be upward or downward movements. For these reasons, calling the accused or his attorney to testify, and whether or not the interpreter was used, or whether the attorney was not consulted, would make no difference. The situation was no different to the case where an attorney was absent when an accused attended an identity parade. In the circumstances, it was not necessary to hold a trial-within-a-trial regarding the handwriting specimens. (Paragraphs [26] at *91i-92a,* [27] at *92a-b* and [30] at *92i.)*

From The Legal Journals

Du Toit, P & Ferreira, G

"The regulation of the possession of weapons at gatherings"

Potchefstroom Electronic Law Journal 2013 Volume 16 4

Boezaart, T

"The role of a curator ad litem and children's access to the courts"

De Jure 2013 Volume 3

Ramruch, V

"Unfit parent – Losing parental responsibilities and rights"

De Rebus December 2013

Bouwer, R J

"Protecting preferent creditors: Setting a reserve or obtaining consent?"

De Rebus December 2013

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

Contributions from the Law School

Domestic violence as a factor in imposing sentence

This short note seeks to highlight the major social pathology that is domestic violence, to stress its criminogenic nature, and to discuss how courts might give effect to punishing offences arising out of domestic violence.

It has been recognized that domestic violence constitutes a major problem in South African society. In the leading judgment of the Constitutional Court in *S v Baloyi* 2000 (1) SACR 81 (CC) at para [11], Sachs J noted the pervasive and insidious nature of domestic violence:

> 'What distinguishes domestic violence is its hidden, repetitive character and its immeasurable ripple effects on our society and, in particular, on family life. It cuts across class, race, culture and geography, and is all the more pernicious because it is so often concealed and so frequently goes unpunished.'

Noting that domestic and family violence challenges society at every level, Sachs J continues, citing (at para [11]) the Model Code on Domestic and Family Violence Nevada (1994), drafted by the US National Council of Juvenile and Family Court Judges:

> 'Violence in families is often hidden from view and devastates its victims physically, emotionally, spiritually and financially. It threatens the stability of the family and negatively impacts on all family members, especially the children who learn from it that violence is an acceptable way to cope with stress or problems or to gain control over another person. It violates our communities' safety, health, welfare, and economies by draining billions annually in social costs such as medical expenses, psychological problems, lost productivity and intergenerational violence.'

Domestic violence furthermore seriously impacts on human rights, not only in respect of the right to freedom and security of the person, which includes the right to be free from all forms of violence from public and private sources (s 12(1)(c) of the 1996 Constitution), but also to the extent that 'it is systemic, pervasive and overwhelmingly gender-specific, domestic violence both reflects and reinforces patriarchal domination, and does so in a particularly brutal form' (*S v Baloyi* at para [12]).

It has been recognized that the 'scourge of domestic violence' has 'become endemic in South Africa' (*S v Roberts* 2000 (2) SACR 522 (SCA) at para [7]), that it is 'rife' (*S v Makatu* 2006 (2) SACR 582 (SCA) at para [17]), and that domestic violence within our society seems to be 'ever-increasing' (*S v Mngoma* 2009 (1) SACR 435 (E) at para [9]). Domestic violence moreover results in the commission of serious crime. In *S v Rudman and another* 2013 (2) SACR 209 (GNP) at para [47] Pretorius J states that domestic violence 'more often than not results in murder'. Whilst this seems to be overstating the case somewhat, the 'disturbing prevalence of serious offences rooted in domestic violence' cannot be denied (*Director of Public Prosecutions, Transvaal v Phillips* 2013 (1) SACR 107 (SCA) at para [25], citing the passages quoted above from *S v Baloyi*).

Dealing with domestic violence is difficult, not least because it is a complex problem, requiring an incursion of criminal law into family and domestic relationships, into the realm of the 'strange alchemy of violence within intimacy' (*S v Baloyi* at para [16]). This leads to difficulties regarding proof and appropriate sentencing. Thus the ineffectiveness of the criminal justice system in addressing domestic and family violence 'intensifies the subordination and helplessness of the victims' (*S v Baloyi* at para [12]).

It follows that in sentencing a perpetrator of domestic violence, it is incumbent upon a court to 'have regard to its duty of protecting women' (*S v Bergh* 2006 (2) SACR 225 (N) at 232E-I, relying on the judgment in *S v Baloyi*). In *S v Makatu supra* at para [17] (cited with approval in *S v Mnisi* 2009 (2) SACR 227 (SCA) at para [21]), Lewis JA expresses this concern in the following terms:

> 'Domestic violence is rife and should be not only deplored but also severely punished. Family murders are all too common. Society, the vulnerable in particular, requires protection from those who use firearms to resolve their problems. The sentence imposed must send a deterrent message to those who seek solutions to domestic and other problems in violence.'

In *S v Roberts supra*, the Supreme Court of Appeal increased the sentence of the appellant, who had strangled his ex-wife to death, as the sentence of the court *a quo* had failed to give effect to 'the need for the sentence imposed to serve as a deterrent to other members of society who may be minded to give vent to their frustrations by resorting to domestic violence' (at para [16]. The court reinforced the need to impose direct imprisonment in domestic violence cases whenever appropriate, 'lest others be misled into believing that they run no real risk of imprisonment if they inflict physical violence upon those with whom they may have intimate personal relationships' (at para [20]).

In South Africa, the problem of domestic violence has been addressed by the legislature in the form of the Domestic Violence Act 116 of 1998 (see generally Carnelley 'Domestic Violence' in Milton, Cowling & Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (2004)), the stated aim of which (in the Preamble) is to 'afford victims of domestic violence the maximum protection from domestic abuse that the law can provide'. Domestic violence is defined in broad terms in s 1 of the Act as including: physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; damage to property; entry into the complainant's residence without consent, where the parties do not share the same residence; or any other controlling or abusive behaviour towards a complainant; in circumstances where such conduct harms, or may cause imminent harm to, the safety, health or wellbeing of the complainant.

Noting the breadth of this definition, how should crimes arising out of domestic violence be sentenced? It is instructive to briefly refer to the approach adopted by

the English Sentencing Guidelines Council in its Definitive Guideline entitled 'Overarching Principles: Domestic Violence', issued in 2006. The definition of domestic violence adopted for the purposes of this guideline is (para 1.1):

> 'Any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality.'

The guideline acknowledges that there are a wide range of offences which cover the gamut of incidents of domestic violence (para 1.2).

As regards the seriousness of the offence, the guideline proceeds from the starting point that offences committed in a domestic context are no less serious than those committed in a non-domestic context (para 2.1). Further, it provides that given the relational context of the domestic violence, the history of the relationship will invariably be relevant in assessing the gravity of the offence (para 3.1). The guideline sets out a number of aggravating and mitigating factors (although the list is not intended to be exhaustive) relevant to such offences committed in a domestic context, which are intended to be read alongside the general factors set out in the guideline 'Overarching Principles: Seriousness' (for discussion of which see Hoctor 'The notion of "seriousness" in sentencing in England and Wales' *e-Mantshi* 89 (June 2013) 15-20).

Where there is an abuse of trust or an abuse of power in the context of domestic violence, this may be regarded as an aggravating factor (para 3.3). In this particular context, abuse of trust refers to a violation of this understanding, whether through direct violence or emotional abuse. Abuse of power in a relationship involves 'restricting another individual's autonomy' by the exercise of control over an individual by means which may be psychological, physical, sexual, financial or emotional (para 3.4). As the guideline points out, an abuse of trust or an abuse of power are 'likely to exist in many offences of violence within a domestic context', although, given the breadth of the definition of domestic violence, these may not be significant where, for example, the offender and victim have been separated for a long time (para 3.5-3.6).

The seriousness of an offence involving domestic violence will be aggravated where the victim is particularly vulnerable. Where such vulnerability (whether the vulnerability comes about for reasons of age, disability, culture, religion, financial, or other reasons) is exploited by the perpetrator (to prevent help being sought, for example), then a higher penalty will be warranted (para 3.7-3.9).

Other aggravating factors listed in the guideline are: impact on children; using contact arrangements with a child to instigate an offence; a proven history of violence or threats by the offender in a domestic setting; a history of disobedience to court orders; and where the victim has been forced to leave home (para 3.11-3.19).

The guideline lists two possible mitigating factors, although both are carefully qualified. Thus positive good character could mitigate, particularly in the rare case where the incident is an isolated one, but the following qualification is added:

> '[I]t is recognised that one of the factors that can allow domestic violence to continue unnoticed for lengthy periods is the ability of the perpetrator to have two personae. In respect of an offence of violence in a domestic context, an offender's good character in relation to conduct outside the home should generally be of no relevance where there is a proven pattern of behaviour.' (para 3.20-3.21)

Provocation on the part of the victim could also mitigate punishment, more particularly where there has been psychological bullying over a long period, however such assertions 'need to be treated with great care' (para 3.22-3.23)

Finally, the guideline also makes provision for the sentence may be mitigated by the expressed wish of the victim that the relationship be permitted to continue, provided the wish is genuine , and giving effect to it will not expose the victim to a real risk of further violence. Both the seriousness of the offence and the history of the relationship must be carefully examined before such mitigation can take place, and a presentence report and victim personal statement must be obtained (para 4.3). The court can also take account of the interests of any children in making such a determination, and will examine the possible effects on the children if the relationship is disrupted as well as the likely effect on the children of any further incidents of domestic violence (para 4.4).

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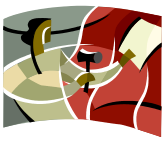

Matters of Interest to Magistrates

Like being raped all over again

Aarti J Narsee

She was raped, set alight and left for dead at the weekend but the nightmare might not be over for the nine-year-old from Delft. She might still have to face a gruelling interrogation when the case goes to court.

"Why were you wearing that? How do you know his penis penetrated your anus? Do you have eyes in the back of your head?"

These are some of the questions attributed to magistrates hearing sexual offences cases. They have been accused of making intimidating remarks and drawing unjustified conclusions about victims based on perceptions about the victim's relationship to the accused, her dress and her behaviour.

Magistrates have also been accused of failing to stop hostile interrogation of a victim.

Some magistrates take into account the lack of physical injuries to a victim, that the victim knew the perpetrator and whether the victim was a virgin - despite the law prohibiting consideration of all of these factors .

Samantha Waterhouse, of the Community Law Centre at the University of Western Cape, said she had heard magistrates describing rapes as "not bad" because the accused was the victim's partner.

Research associate at the Wits Institute for Social and Economic Research Lisa Vetten referred to a case in which, during sentencing, the magistrate asked a victim if she had a boyfriend.

When the victim said that she did, the magistrate concluded that she had not been traumatised by the rape.

Shaheda Omar, of the Teddy Bear Clinic, referred to a case heard in Johannesburg in which the magistrate asked the victim why her rape had not resulted in a "generalised fear of males" since she had a boyfriend.

Omar said that the "lack of sensitivity and knowledge" of court personnel led to "secondary victimisation" and, in some cases, the withdrawal of complaints.

Experts told The Times that rape judgments and sentences were inconsistent.

"Inconsistency gives the public the sense that the process is unfair. There is a lot of anger when someone walks away with a reduced sentence," said Sonja Bornman, of the Women's Legal Centre.

Experts believe the solution lies in training. But, they say, some magistrates refuse to undergo training, claiming that they have nothing to learn, and others say they cannot accept training other than by the Department of Justice because they must be seen to be neutral and objective.

However, director of media relations at the Office of the Chief Justice, Lulama Luti, said that 280 regional court magistrates and aspirant magistrates had received training to deal with sexual offences. She added that it would be “premature” to comment on the allegations about magistrates’ inappropriate comments as she wasn’t “presented with the full facts”.

(The above article appeared on the *Times Live* Website on 22 January 2014).

A Last Thought

"We know that greater legislative demands are being placed on magistrates, as they are on judges, in terms of the number of laws that have to be applied."

As per the Deputy Minister of Justice Mr J Jefferey in a speech delivered at the AGM of JOASA on 24 January 2014.