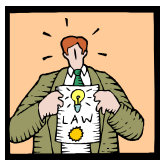
E-MANTSHI

A KZNJETCOM Newsletter

August 2009: Issue 43

Welcome to the forty third 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. Your feedback and input is the key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The Department of Justice and Constitutional Development has, for purposes of section 97 of the Child Justice Act, 2008, prepared draft regulations relating to child justice in order to facilitate the implementation of the Child Justice Act, 2008. These regulations have been published in Government Gazette No. 32507 of 18 August 2009. The Act provides a statutory framework within which children who are in conflict with the law and are accused of committing offences must be dealt with. Interested persons are invited to submit written comments on the draft regulations on or before 18 September 2009 to:
   The Director-General: Justice and Constitutional Development
   Private Bag X81, Pretoria, 0001; or
   1. Ms T. Skhosana at thskhosana@justice.gov.za, fax 0866487875; or
   2. Ms I. Botha at inbotha@justice.gov.za, fax 0866482289.

   The draft regulations can be accessed at www.doj.gov.za.

2. A protection of Personal Information Bill has been published in Government Gazette No. 32495 of 14 August 2009.

   The purpose of the Act is to –
   (a) give effect to the constitutional right to privacy, by safeguarding personal information when processed by a responsible party, subject to justifiable limitations that are aimed at –
      (i) balancing the right to privacy against other rights, particularly the right of access to information;

(ii) protecting important interests, including the free flow of information within the Republic and across international borders;

(b) regulate the manner in which personal information may be processed, by establishing principles, in harmony with international standards, that prescribe the minimum threshold requirements for lawful processing of personal information;

(c) provide persons with rights and remedies to protect their personal information from processing that is not in accordance with this Act; and

(d) establish voluntary and compulsory measures, including an Information Protection Regulator, to ensure respect for an to promote, enforce and fulfil the rights protected by this Act. The Bill can be accessed at www.pmg.org.za/bills.

3. A Second Draft of the amended Magistrates' Court Rules i.r.o. Civil Regional Court Jurisdiction has been approved by the Rules board and has been published for comment.

   Comments on the Second Draft can be emailed to David Neke at DNeke@justice.gov.za or to Nkosinathi Maseko at NMaseko@justice.gov.za by 31 August 2009.

   The documents are available at: www.pmg.org.za/policy_docs

Recent Court Cases

1. **DPP, KWAZULU-NATAL v REGIONAL MAGISTRATE, VRYHEID AND OTHERS 2009(2) SACR 117 (KZP)**

Although a magistrate has a constitutional duty to ensure trials are conducted expeditiously this duty must be weighed and balanced against the community's interest in ensuring wrongdoers are prosecuted – the prosecution cannot be prevented from presenting its case.

Seven accused stood trial, each on one count of kidnapping and two counts of assault with intent to do grievous bodily harm, arising from an incident in which one S was allegedly taken to a farm and tortured in an attempt to make him reveal the whereabouts of certain stolen cattle. During the trial a number of adjournments and postponements were granted to allow the complainant – who was emotionally

traumatised – to compose himself and to seek medical assistance. At a certain point the prosecutor requested a further postponement for the same purpose, but this was refused, the magistrate emphasising the accused's right to a speedy trial. The magistrate also ordered that the evidence that S had given up to that point be expunged from the record. The State having refused to close its case, the magistrate ordered it closed, whereupon the accused closed their cases and were acquitted. The applicant sought to have this acquittal reviewed and set aside, leading the court to consider, in the first instance, whether it was competent to review the proceedings of a lower court where an accused had been acquitted.
Held, that the provisions of s 304 of the Criminal Procedure Act 51 of 1977 were not applicable *in casu*. Accordingly, the only basis upon which review proceedings could be instituted was in terms of s 24(1) of the Supreme Court Act 59 of 1959. In determining whether an acquittal could be reviewed, the court had to take into account s 35(3) (*m*) of the Constitution of the Republic of South Africa, 1996, which provided an accused with protection against so-called 'double jeopardy'; the question was whether the accused's rights in this respect would be infringed if their acquittals were to be set aside. However, the right not to be tried for an offence for which one has already been acquitted must be interpreted in accordance with the principles of criminal law pertaining to *autrefois acquit*. One of these principles was that the acquittal must have been on the merits and, *in casu*, the accused had not been acquitted on the merits of the matter. The verdict of not guilty had been the result of three decisions by the magistrate: firstly, to release S from further cross-examination; secondly, to expunge S's uncompleted testimony; and thirdly, to constructively close the State's case. A judicial officer in the position of the magistrate was not able to evaluate the condition of a witness such as S, and to form a view that he was malingering. He ought, rather, to have directed that a proper enquiry be undertaken by appropriate experts with a view to determining whether or not S could continue with his testimony. The constitutional duty to ensure that trials were conducted expeditiously had to be weighed and balanced against the community's interest in ensuring that wrongdoers were prosecuted. It followed from this that the prosecution must at all times be permitted to present its case. *In casu* it had been prevented from doing so in circumstances which constituted a gross irregularity in the proceedings. The court was therefore entitled to set aside the verdict. (Paragraphs [22]-[33] at 126*c*-129*g*.)

2. S. v. JANSE VAN RENSBURG 2009(2) SACR 216 CPD

The evidence of a single witness must be critically evaluated and treated with caution.

The appellants, both police officers, were convicted in a district court of assault with intent to do grievous bodily harm, and sentenced to 24 months' imprisonment in terms of s 276(1)(*i*) of the Criminal Procedure Act 51 of 1977. They appealed against their convictions and sentences, on the grounds that the trial court had failed to approach the evidence of the complainant, a single witness, with the necessary caution; that it had erred in accepting his explanation for the contradictions and omissions contained in various statements made by him to the police; that it had failed to give sufficient weight to other contradictions in his evidence; and that it had erred in making a favourable credibility finding in respect of the complainant, and an

adverse one in respect of the appellants. It was common cause that the assault had consisted of an attack on the complainant by a dog under the control of one of the appellants, and that this attack had occurred in the course of an attempt to arrest the complainant.
Held, that, in order for a court to rely on the evidence of a single witness, it had to be clear and satisfactory in every material respect. It was clear from the judgment, however, that the trial court had failed to critically evaluate the complainant's evidence as a single witness, and that it had not treated the evidence with the necessary caution. The trial court's conclusion – that the complainant's evidence was satisfactory in all material respects – was not borne out by the record, and amounted to a misdirection. The court proceeded to refer to a number of contradictions in the complainant's evidence. While each contradiction, taken individually, might not necessarily be material, collectively they impacted negatively on the complainant's credibility. The fact that he had testified some seven years after the event made it highly improbable that the complainant could categorically remember that his various statements to the police had either not been read to him, or that he had not been afforded an opportunity to read them himself. It was, moreover, highly unlikely that all the police officers involved in the investigation would – as the complainant alleged – have written things in his statements that he had not said, or omitted things that he had said. He was a literate person, employed in a responsible position, and it was unlikely that he would have signed the statements without satisfying himself that they were correct. (Paragraphs [9]-[16] at 220*g*-222*f*.)
Held, further, that the evidence given by the appellants appeared to have been equally unsatisfactory and contradictory. There were numerous contradictions between their evidence-in-chief and their evidence under cross-examination, as well as between the evidence of the first appellant and that of the second appellant. Accordingly, there were two conflicting versions – that of the complainant and that of the appellants – with no objective facts to support either version. Both were tainted with unsatisfactory features. However, while the evidence of the complainant could not be said to have been satisfactory in all material respects, the version of the appellants, while highly suspect, could not be said to have been false beyond reasonable doubt. Accordingly, the State had not met the test of proof beyond reasonable doubt. (Paragraphs [17]-[20] at 222*g*-223*h*.)

3. S. v. MNISI 2009(2) SACR 227 SCA

In sentencing an accused who has acted with diminished criminal responsibility the element of general deterrence was of lesser importance.

The appellant had pleaded guilty to, and had been convicted of murder by a regional court. The appellant was a first offender and the offence was committed in circumstances other than those referred to in Part I of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. Accordingly, the provisions of s 51 (2)(a) of the Criminal Law Amendment Act were applicable. The regional court found that 'substantial and compelling circumstances' justifying a sentence of less than 15 years' imprisonment were present and sentenced the appellant to eight years' imprisonment. The appellant's appeal to a High Court failed. In a further appeal, it

appeared that the appellant, a prison warder, had shot and killed the deceased with his licensed service firearm. In his written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977, which was accepted by the State, the appellant stated that his wife and the deceased had been involved in an adulterous relationship, which the appellant resented and which he found to be extremely humiliating. The appellant confronted her about the relationship with the deceased and their respective families discussed the matter. He was relieved when his wife promised that she would no longer see the deceased and he felt hopeful that he would be able to reconcile with her. However, on the day of the incident the appellant found his wife and the deceased embracing each other in a car. The appellant immediately drew his service firearm and shot the deceased where he was sitting in the vehicle. The appellant stated that when he found his wife in the embrace of the deceased all the hurt and pain he had suffered through the adulterous affair flooded his mind and provoked him to the extent that he momentarily lost control of his 'inhibitions' and shot the deceased. The appellant claims that he did not intend to kill the deceased, but discharged the firearm recklessly, appreciating that his actions could kill the deceased.

Held (per Boruchowitz AJA, Cloete JA concurring), that the appellant's statement had laid a sufficient factual foundation to support a finding that he acted with diminished responsibility when he committed the offence. Murder was undoubtedly a serious crime but the appellant's conduct was morally less reprehensible by reason of the fact that the offence was committed under circumstances of diminished criminal responsibility. (Paragraph [6] at 231*f*-*h*.)

Held, further, that this factor had not been afforded sufficient recognition and weight by the trial court in imposing sentence on the appellant. Also in the appellant's favour, and not taken into account by the trial court, was the fact that the appellant acted with *dolus indirectus* when shooting the deceased. (Paragraph [6] at 231*g*-232*a*.)

Held, further, that the trial court had placed undue emphasis on the element of deterrence as an object of punishment. So far as individual deterrence was concerned, the evidence did not suggest that the appellant had a propensity for violence or was a danger to society. He was a first offender and, given the unusual circumstances of the case, was unlikely again to commit such an offence. (Paragraphs [7]-[8] at 232*b*-*d*.)

Held, further, that the element of general deterrence had to be placed in its proper perspective. Domestic violence was rife and those who sought solutions to domestic and other problems through violence had to be severely punished. Sentences imposed had to send a deterrent message. On the other hand, sight could not be lost of the fact that the appellant had committed murder whilst acting with diminished responsibility. In such circumstances the element of deterrence was of lesser importance when imposing sentence. (Paragraph [9] at 232*d*-*e*.)

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

Contributions from the Law School

Contempt of Court

1 The constitutional context

The South African Constitution (Act 108 of 1996) represents an emphatic break with a past characterized by denial of human dignity, and commits South Africa to a transition to a new society characterized by a commitment to recognizing the value of human beings (O' Regan J in *Bernstein v Bester* 1996 (4) BCLR 449 (CC) at par [148]). In this context, the right to freedom of expression has been described as being integral to democracy, to human development, and to human life itself. Justice Marshall of the United States Supreme Court emphasised this connection when he stated (in *Procunier v Martinez* 416 US 396 (1974)) that to suppress expression is to reject the basic desire for recognition and affront the individual's worth and dignity.

The importance of freedom of expression has been acknowledged in numerous cases in the pre-constitutional era in South Africa (*Mthembi-Mahanyele v Mail & Guardian Limited and Another* 2002 (12) BCLR 1323 (W) at par [29]. Nevertheless it is notorious that South Africa has recently emerged from a past where expression was subjected to severe restrictions through various legislative enactments, thus underlining the need to protect the right to freedom of expression in our new democracy (*Freedom Front v South African Human Rights Commission and Another* 2003 (11) BCLR 1283 (SAHRC) at 1288A-B). As Langa J (now CJ) has observed:

> 'The restrictions that were placed on expression were not only a denial of democracy itself, but also exacerbated the impact of the systemic violations of other fundamental human rights in South Africa. Those restrictions would be incompatible with South Africa's present commitment to a society based on a "constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours" (*Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (5) BCLR 433 (CC) at par [27]).

The right to freedom of expression is set out in s16 of the Constitution:

> '(1) Everyone has the right to freedom of expression, which includes –
>
> (a) freedom of the press and other media;
> (b) freedom to receive or impart information or ideas;
> (c) freedom of artistic creativity; and
> (d) academic freedom and freedom of scientific research.

(2) The right in subsection (1) does not extend to –

(a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

As O'Regan J has stated in *South African National Defence Union v Minister of Defence and Another* (1999 (6) BCLR 615 (CC) at par [7]), freedom of expression lies at the heart of a democracy:

> 'It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.'

Freedom of expression has been universally recognized in all democracies as crucial to the growth and enhancement of the constitutional state and essential to the progress and development of humankind (*Freedom Front v South African Human Rights Commission* 2003 (11) BCLR 1283 (SAHRC) at 1287E-F; *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International* 2005 (8) BCLR 743 (CC) at par [45] and as such is protected in almost every international human rights instrument (*Islamic Unity Convention v Independent Broadcasting Authority and Others* supra at par [28]). As O'Regan J has stated in *Khumalo and Others v Holomisa* (2002 (8) BCLR 771 (CC) at par [21]),

> 'It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.'

However, the right to freedom of expression, for all its significance, does not automatically trump other rights (see in the context of defamation *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) 25B-E, cited in *Santam Ltd v Smith* 1999 (6) BCLR 714 (D)). The context for the protection of the right to freedom of expression is of primary importance. It was held in *S v Mamabolo* (2001 (3) SA 409 (CC) at par [37]) that

> 'Freedom of expression, especially when gauged in conjunction with its accompanying fundamental freedoms, is of the utmost importance in the kind of open and democratic society the Constitution has set as our aspirational norm. Having regard to our recent past of thought control, censorship and enforced conformity to governmental theories, freedom of expression – the free and open exchange of ideas – is no less important than it is in the United States of America. It could actually be contended with much force that the public interest in the open market-place of ideas is all the more important to us in this country because our democracy is not yet firmly established and

> must feel its way. Therefore we should be particularly astute to outlaw any form of thought control, however respectably dressed.'

Although an open and democratic society requires that pluralism, tolerance and broadmindedness should prevail, these values can, in turn, be undermined by speech which seriously threatens democratic pluralism (*Islamic Unity Convention v Independent Broadcasting Authority* supra at par [28]; *Human Rights Commission of SA v SABC* 2003 (1) BCLR 92 (BCCSA) at 103G). Therefore, reasonable proscription of activity and expression that pose a real and substantial threat to such values and to the constitutional order itself, is a feature of open and democratic societies (*Islamic Unity Convention v Independent Broadcasting Authority* supra at par [28]). Given the potential which expression has for impairing the exercise and enjoyment of rights, such as the right to dignity, as well as other State interests, such as the pursuit of national unity and reconciliation, the right to freedom of expression is not absolute, and is subject to limitation under s36(1) of the Constitution (*ibid* par [30]).

2 The crimes

Contempt of court is criminalized on the basis of protecting three main interests: (i) the citizen's right to a fair trial (ii) maintaining the confidence of the public in the judiciary (iii) upholding the integrity of judicial orders and instructions (Milton *South African Criminal Law and Procedure Vol 2: Common-law Crimes* 3ed (1996) 165). It appears in two manifestations in South African criminal law (which will be discussed in turn): the common-law crime and the statutory provisions contained in the Magistrates' Courts Act 32 of 1944.

(i) Common-law contempt

The common-law crime of contempt of court is defined as 'unlawfully and intentionally violating the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it' (Burchell *Principles of Criminal Law* 3ed (2005) 945). The crime does not exclude the right to criticize the judiciary, but statements which do not amount to fair and legitimate criticism (or as Snyman *Criminal Law* 4ed (2002) 335 puts it, comment which is 'reasonable, *bona fide* and moderate, and made in the interests of the better administration of justice') could be classified as unlawful.

Contempts of court are classified as: (i) contempts *in facie curiae*; (ii) contempts *ex facie curiae* with reference to pending judicial proceedings; (iii) contempts *ex facie curiae* which do not refer to pending proceedings.

Contempt *in facie curiae* refers to contempt committed in the presence of a court while it is sitting (whether by counsel, witnesses, parties or spectators). The conduct on which this form of contempt is based is thus an act 'calculated to violate the dignity of the court or judicial officer' (Snyman 325), and may take the form of an insulting demeanour towards the court; use of insulting language towards the court; refusing to obey the court's lawful orders; appearing in court seriously improperly

dressed; being drunk in court; shouting and singing (for a more detailed list of prohibited conduct, along with relevant precedent, see Milton 176-177).

A recent question which has arisen before the courts in this regard relates to the use of a cell phone in court. In *Lewis v S* [2007] 3 All SA 477 (SCA) the Supreme Court of Appeal overturned a conviction for contempt of court on the basis that the accused did not have the necessary intention to violate the dignity of the court when he answered his cell phone in court and exited the court whilst having a conversation (there have been a couple of recent judgments where in the context of the statutory form of contempt of court contained in s 108 of the Magistrates' Court Act 32 of 1944 convictions for contempt of court as a result of cell phones going off in court were overturned as a result of the element of intention not being present (*S v Sonpra* 2004 (1) SACR 278 (T); *S v Molapo* 2004 (2) SACR 417 (T)). As noted in *S v Mushonga* 1994 (2) SACR 782 (ZS) at 788b-c, with regard to contempt of court, '[i]ntention is absent if the seemingly insulting behaviour is the result of forgetfulness, ignorance, absentmindedness, inadvertence or excitement'.

It seems that even where a person leaves his cell phone on in the knowledge that it may ring and disrupt the court, in the view of the Supreme Court of Appeal in *Lewis* this particular conduct should generally not be regarded as giving rise to liability for contempt of court. As Streicher JA concluded (at par [14]):

> '…[I]t may at times be more dignified to simply ignore conduct that may technically constitute contempt of court or to treat it less harshly than to convict the perpetrator of the offence. A rebuke or some other indication of disapproval should in most cases be an adequate measure to discourage cell phone transgressions in court.'

Contempt *ex facie curiae* with reference to pending judicial proceedings involves the publication of matter concerning pending judicial proceedings which has the tendency to prejudice the outcome of proceedings. This is the so-called *sub judice* rule – where in relation to a case which is still pending a statement or publication is made that, if accepted as correct, would influence the outcome of the case, then such statement or publication is regarded as contempt of court (Snyman 328-9). As Milton notes (at 177), the *sub judice* rule is designed to prevent 'trial by newspaper', and given the chilling effect that it has upon comment or information related to matters currently before the courts, it 'constitutes a major inroad upon the freedom of the press and the right of freedom of speech and information'. In the light of these concerns, it is significant that in the case of *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* 2007 (9) BCLR 958 (SCA), the SCA has curbed the breadth of the *sub judice* rule by requiring that what is required in these jurisdictions before a ban on publication will be considered is

> 'a demonstrable relationship between the publication and the prejudice that it might cause to the administration of justice, substantial prejudice if it occurs, and a real risk that the prejudice will occur' (at par [16]).

Nugent JA noted further that it is not sufficient that there be a risk of prejudice that

meets these criteria, but that the inquiry should examine not only whether the limitation must be directed towards a permitted end, but whether it is no more than necessary to achieve its permitted purpose (*ibid*). The Court's synopsis of this approach (at par [19] sets out the extent of the change:

> '[A] publication will be unlawful, and thus susceptible to being prohibited, only if the prejudice that the publication might cause to the administration of justice is demonstrable and substantial and there is a real risk that the prejudice will occur if publication takes place. Mere conjecture or speculation that prejudice might occur will not be enough. Even then publication will not be unlawful unless a court is satisfied that the disadvantage of curtailing the free flow of information outweighs its advantage. In making that evaluation it is not only the interests of those who are associated with the publication that need to be brought to account, but, more important, the interests of every person in having access to the information.'

Contempt *ex facie curiae* which does not refer to pending proceedings is typically committed by publications which violate the dignity, repute or authority of a judicial officer or the judiciary, by unfair and improper criticism. This is known as scandalizing the court. Other forms of contempt which fall within this category are simulating court processes, obstructing court officials and disobeying court orders (see Burchell 955). As regards scandalization contempt, this usually takes the form of either scurrilous abuse of a particular judge or the judiciary as a whole, or imputation of bias to a particular judge or the judiciary as a whole. In *Mamabolo*, it was held by the Constitutional Court that (the form of contempt of court known as) scandalizing the court was constitutional, stressing the importance of its protection of the authority of the courts (see par [16]-[20]; [24]-[33]). Whilst emphasising the enormous value of criticism of the courts in a democracy, the court held that the crime constituted a justifiable limitation on the right to freedom of expression in these terms (at par [49]:

> 'On balance, while recognizing the fundamental importance of freedom of expression in the open and democratic society envisaged by the Constitution, there is a superior countervailing public interest in retaining the tightly circumscribed offence of scandalizing the court.'

Contempt of court may be prosecuted summarily, allowing the court before whom the contempt is committed to there and then sentence the contemnor. Where the contempt is *in facie curia* the court can act immediately and without any other formality than informing the contemnor of the contempt and affording an opportunity of answering the complaint (Milton 196). It is evident that this power must be exercised circumspectly however, in the light of the circumvention of the principles of due process and the right to a fair trial (Burchell 957). Thus, in *Lewis* (in the context of a ringing cell phone) the SCA held that it was not necessary to deal with the matter summarily as the disturbance had passed, and in the court's view a rebuke and notification that the matter would be referred to the DPP for possible prosecution would be preferable, as it would preserve the court's dignity as well as allowing an accused time to prepare a defence and to engage a legal representative (at par [10].

The summary procedure also obtains with regard to contempt *ex facie curiae*, although in *Mamabolo* the Constitutional Court held that ‘save in exceptional circumstances’ the use of the summary procedure in respect of scandalizing the court was ‘a wholly unjustifiable limitation of individual rights’ (at par [58]).

(ii) Statutory contempt

As regards the statutory forms of contempt of court found in the Magistrates’ Courts Act, since the 1997 amendments to the Act (by Act 81 of 1997), which followed the Constitutional Court's decision in *Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC), the concept of contempt of court, as a basis for civil imprisonment in civil proceedings in the Magistrates' Court, has been seriously curtailed. These amendments repealed all reference to contempt of court under the execution provisions in Chapter IX of the Act.

The current provisions of the Act relating to contempt of court are embodied in Sections 106 (civil proceedings) and 108 (both civil and criminal proceedings) of the Act.

Section 106 provides that any person who 'wilfully' disobeys, or refuses or fails to comply with an order of court or judgment, or to a rent interdict in a civil summons, 'shall be guilty of contempt of court and shall, upon conviction, be liable to a fine, or to imprisonment for a period not exceeding six months or to such imprisonment without the option of a fine'. This creates, as a criminal offence, the wilful disobeying of a civil order or civil judgment. The essential element is 'wilful' and this implies both a deliberate and intentional disobedience, whether as an act or as an omission, on the part of the defaulter, and that such act or omission was *mala fides*. These elements being present, it is then the defaulter who must prove that he/she was *bona fide* in such act or omission, such as a misunderstanding, mistaken belief or some intervention which prevented compliance. If successful in proving such circumstances, the defaulter will escape committal for his/her contempt of court.

In general, reference to 'judgment' and 'order' in this section refer to judgments or orders which require a person to do something or to refrain from doing something (*ad factum praestandum*) and not to judgments or orders for payment of money (*ad pecuniam solvendam*).

Section 108 creates as a criminal offence;
1) the wilful insulting of a judicial officer in court or during a preparatory examination, or a clerk or messenger or other officer at such sitting; or
2) wilfully interrupting such proceedings; or
3) wilfully misbehaving at the place where the court is sitting.
These provisions relate to both civil and criminal proceedings and are applicable to anyone (including the accused in a criminal case, and members of the public) at such sitting. The insult, interruption, or misbehavior must be intentional or deliberate. In addition to being liable to being removed and detained under s 5(3) in a civil proceeding, breach of the above provisions entitles the presiding officer to

summarily sentence (or on summons) the offender to a fine not exceeding R2 000 or in default of payment to imprisonment for a period not exceeding six months, or to imprisonment without the option of a fine. Section 108(2) imposes a review procedure to be followed.
This summary sentencing provision relates only to instances of contempt of court committed *in facie curiae.*

It may be noted that the provisions of s 108 are not a statutory form of the common-law crime of contempt of court (see Cowling 'Offences related to the administration of justice in the civil courts' in Milton, Cowling and Hoctor *South African Criminal Law and Procedure Vol III: Statutory Offences* (service 14, 2005) C2-11). In *S v Memani* (1993 (2) SACR 680 (W) at 681*i*-682*b*) it was held that

> 'It will at once be seen that the subsection caters for conduct which could fall short of the common-law concept of contempt. It includes wilfully insulting the judicial officer in a manner which could be contempt in the conventional sense but it also includes such lesser conduct as 'misbehaving'. It also includes conduct which is directed not only at the judicial officer himself but also a clerk or a messenger. It is in other words designed to provide for a sort of disciplinary proceedings to take care of a wide variety of misbehaviours from contempt of court downwards.'

As Cowling (*ibid*) points out, the effect of s 108(1) 'is to constitute as an offence conduct which would not amount to contempt of court at common law'. The rationale for this is that while common-law contempt protects the maintenance of the dignity of the judicial office, s 108 protects the dignity of the particular judicial officer (see *S v Lavhengwa* 1996 (2) SACR 453 (W) at 465*h*).

Given that the same rationale underlies the use of the summary procedure in both common-law contempt *in facie curiae* and s 108(1) – the need to take 'prompt and drastic action to preserve the court's dignity and the due carrying out of its functions' (*R v Silber* 1952 (2) SA 475 (A) at 480H) – similar considerations apply to those mentioned above by the court in *Lewis*.

3 Concluding remarks

Protection of the right to freedom of expression is the earnest duty of all South Africans, not least the courts, in the context of our recent history in which infringement of this right 'was used as an instrument in an effort to achieve the degree of thought control conducive to preserve apartheid and to impose a value system fashioned by a minority on all South Africans' (*Phillips v DPP, WLD* 2003 (1) SACR 425 (CC) at par [23]). It is nevertheless essential to protect the reputation of the judicial process. This does not mean unduly limiting the right to freedom of expression. Robust and informed public debate about the affairs of the judiciary is essential in a constitutional democracy such as ours. This freedom to debate does not however justify any actions or statements that (in the words of Kriegler J in *Mamabolo* (at par [32]) 'are downright harmful to the public interest by undermining the legitimacy of the judicial process as such'.

Judicial officers thus bear a weighty responsibility. They must defend the integrity of the administration of justice with all the authority at their disposal. However, in the context of contempt of court, such power must be exercised cautiously, ignoring conduct which does not really impair the dignity or authority of the court or the orderliness of proceedings (*S v Nel* 1991 (1) SA 730 (A) at 749G). Too liberal a use of the court's powers to punish persons for contempt can undermine the very reason for the existence of such power (*ibid*).

Rob Pennefather and Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

Gerhard,

You may recall that I invited all E Mantshi readers sometime ago to provide me with input regarding their experiences with the adjudication of environmental crime cases. I received inputs from only two magistrates. Surely, somewhere in South Africa there must be some of our colleagues who had dealt with some of these matters. I, once again wish to plead with all of them to share one or two of their incidents in court with me. Each and every contribution will be published in a bench book which is in the process of being finalized.

Please be so kind as to publish my appeal in the next E Mantshi.

Kind regards

Louis Radyn

Address by Magistrate J Gar on Alternative sentencing at the combined cluster meeting in Durban in June 2009

CHIEF MAGISTRATES – T.C. MABASO – DURBAN, C.S. NGCOBO - PIETERMARITZBURG, OUR CLUSTER HEADS – MRS SUBBAN – SUB CLUSTER HEAD, HEADS OF OFFICES, SENIOR MAGISTRATES, LADIES AND GENTLEMEN.

It is a great honour to address you today on alternative sentences for which I thank you.

I cannot put in any better than the quote from the Honourable Justice M.S. Navsa.

“A prison visit is a sobering experience. Massive overcrowding is the norm. As a puisne judge I stopped pontificating about rehabilitation in judgments on sentencing. Often prison administrators have their hands full dealing with the mere mechanics of managing prison populations – how to arrange meals and exercise times on rotation and how to marshal the limited resources at their disposal. For juvenile awaiting trial prisoners imagine the shock of being thrust into these conditions. The number of prisoners awaiting trial for inordinate periods is substantial. The opportunity to develop human material so as to engage in a career or to study is limited if not non-existent. Juveniles have no way of studying awaiting trial. The disproportionate number of warders in relation to prisoners is not only a security factor; it impacts directly on the manner in which prisoners are treated.

Internationally the prison population is notoriously at the bottom of priority lists. This trend should be resisted. Human capital should not be lost. People should be afforded an opportunity at redemption. While prisons should not be rest and recreation centres, they should however, not hold persons under medieval conditions. Ideally, persons returning to society should not return as hardened criminals but should return as persons who are able to reintegrate as useful citizens. Human rights activists should reconsider the low priority afforded to prisoner’s rights”.

To quote our previous State President, “We cannot erase that which is ugly and repulsive and claim happiness that comes with freedom if communities live in fear. Violent crime is senseless (To quote Vanessa Barolsky). What objective does the attacker who has stolen a cell phone achieve when he shoots the person whose cell phone he has already taken? We may judge the actions of a crime syndicate boss who plans to shoot dead a rival as morally reprehensible. But because we understand its intention, this conduct does not provide the horror and incomprehension produced by, for example, the mutilation of a child or the casual shooting of an elderly woman after a housebreaking has already been committed., Venessa Barolsky argues that the essential challenge in post apartheid South African violence, is therefore not about death, but about life. What we need is to create a society where life is valued for life’s sake.

It is a similar situation at schools where both teachers and pupils have been killed. Do we need security guards at schools? If pupils went to school for the right reasons, we would not be debating the security question. This is where we all have a part to play. We rely on legislation for protection, but legislation cannot change a person’s heart.

There are various reasons why people are involved in crime and I believe in certain offences it is a progression system whereby petty crime turns into serious crime. It is so sad when as a magistrate a suspect comes to you for confession purposes. It is only after arrest that the offender realizes the seriousness of his action, and it’s too late. They even plead that if the Investigating Officer could only take them to the victim’s family they could apologize. A school boy steals a car radio, he is in matric and he has the world at his feet. If he only realized it would be so difficult to obtain entrance into a tertiary institution or obtain employment with a conviction of theft and so it goes on; it is the life skills that is missing. Life skills help us make good judgment calls.

An accused pleads for leniency when he appears on an admission of Guilt fine of a

R1000-00 for driving a car without a valid driver's license. His personal situation is that 4 years ago he was run over by a speeding car which never stopped and he spent 11 months in hospital recovering – yet he doesn't see the connection between his present charge and his injury.

On this journey of rehabilitation, which is one of the important aims of sentence is to try and ensure the offender regains his self respect.

We are in desperate need of more probation officers. The few that we have work under extreme pressure and it is difficult to get a report in less than six weeks. By the time an offender is sentenced he knows the justice system quite well. This does not bode well when we realise that the problem for most offenders is a social sroblem.
How do we get by with scant recourses when we realize that social upliftment is a means to reducing crime-?

My first aim in sentencing is to change the mindset of the offender. This is not as difficult as it sounds with the life skill courses our NGO's offer. If you are not happy with the content and duration of the courses offered, deal with the organizations until you are. What one must bear in mind is that prison is the University of Crime. It is imperative to give first offenders a viable alternative so that they end their criminal activity. A solid skills development programme is essential. I will read out excerpts of reports after life skill courses have been completed.

(1) He has got rid of his friends who had a negative influence on him.
(2) He is thinking beyond the present what he wants to do with his life.
(3) He has a purpose, a vision in his life now.
(4) If you cannot lead yourself you cannot lead others.
(5) I am going back to school to finish my matric.
(6) Before, I just went to school because my mother told me, now I have a passion to continue learning.
(7) I want to be a somebody in life.

(8) I now have a goal in life.

(9) I appreciate life and realize that you must respect the earth and the people in it.

(10) Don't take life for granted.

(11) You cannot live without a dream. You have to visualize what you want and set goals to achieve it. Everything must be done steps by step. Don't be scared to ask for help.

(12) I have learnt to forgive, not only others but myself.

(13) Self Discovery – know what are your talents, strengths and ability. Make your own decisions and do not blindly follow others.

(14) Everything starts with you, namely respect, forgiveness, relationships. If you cannot respect yourself, you cannot respect others.

(15) Your world view must be positive at all times

(16) You must choose your friends carefully.

(17) If you don't have a vision, you can only live in the now and have no vision for tomorrow.

(18) We have rights, but we must also respect other people's rights.

(19) If you have problems find some one to help you.

(20) I now help my neighbors if they need help.

(21) **REPORT:** Thank you for referring "A" for inclusion into our High School Leadership Programme. This is a programme that empowers young people to live a life that is values based. The class he attended entails different aspects of life skills topics such as Self Leadership which will help him to resist peer pressure. He also did topics like Vision and Goal Setting, Worldview, Healing the wounds of the past and Forgiveness as well as Relationships and Team building. "A" has successfully completed the course. He did not only obtain a certificate of achievement but also he received an award title: "The Most Improved" due to his change in his behaviour. He attended all his sessions willingly and his life has come to a turning point. The course really helped him to know how to choose friends that will be a good influence.

Adjustment.
Out: Dagga abuse, trouble maker at home.
In: He has discovered that he is valuable and worthy. He is self motivated and believes in himself.
Future Plans: He wants to be faithful in attending follow up meetings. He also wants to focus and concentrate more on his school work, because he now knows that his school work is his priority. "A" comes from a nuclear family and he sees that ever since he started to engage himself in negative things that his parents disapproves of, he has lost the good relationship he had with his parents and now he wants to restore the good relationship that existed within his family.

RECOMMENDATION: "A" is still a young man that has a great potential and he is willing to live a life that is pure and righteous. I recommend that he goes to a rehabilitation centre that will guide and help him in quitting smoking. It will also help him if he finds somebody to mentor him as he needs to focus more on his personal development as a young person. (World Changes Academy.)"

It goes without saying that these offenders are now ready (or" ripe") to be sentenced. I also make use of marriage guidance counselors and Crisis Centres and World Changes Academy who run life skill courses also in the township. Domestic Violence is also a serious problem and counseling is essential in my view – I will just read a report from the Open Door Crisis centre after initial counseling

"Background:
The clients were married for 13 years, got divorced 3 years back that was in 2005. They have 6 children, 3 of whom are grown up. The first born is 26 years old, and the younger 3 are still minors of 12, 10 and 9 years of ages. The children are staying with their mother and their father is staying at his parent home with his sister, but in an outside two roomed house. Mr "B" is unemployed his wife is the working and the only bread winner.

Problem:

Though they are divorced, Mr “B” was still harassing his wife beats her and abuses her verbally. She decided to get a protection order against him, but he still continued with the assault on her even with the protection on him. Further action was going to be taken against him to be arrested, but the wife withdrew the case, because she said he is the father of her children and she does not want him to go to jail but to realize that what he was doing was wrong. The court referred both of them for counseling.

Counselling Sessions:

Our first counseling session was on the 13th June 2008, the second on the 18th of June 2008, and the 3rd on the 30th June 2008, within this period, they both agreed on a plan. I also noticed some changes in their way of communication. I made another appointment of two different sessions but unfortunately, it was on Wednesday the 9th of July so we were unable to meet due to the taxi strike.

Outcome:

They both have realized that before they can be together again, they need counselling and they are willing to continue with it until they can manage their anger and difference.”

(Open Door Crisis Centre).

“This letter serves to confirm that the above mentioned has been attending counselling sessions at The Open Door Crisis Care Centre, Pinetown.
He attended all four (4) sessions he was booked for. He was taught conflict management skills, anger management skills and the importance of submitting to authorities.

(Open Door Crisis Centre).

A life skill is only the first part of the sentencing process.

I am firm believer in community service. The benefits are; firstly, it enables the offender to have his dignity restored by helping others, and secondly, possible job opportunities may arise. That the community benefits go without saying.

I try to ensure that the offender does not regard community service as punishment. He/She must understand that it is a vehicle to assist him, so that when his service is complete, he can still offer his services and be called upon when the need arises. I am certainly against Community Service being carried out at police stations or libraries for obvious reasons. In Pinetown, we have a data base of some clinics, orphanages, old age homes and welfare organizations in the area and this list continues to grow. I usually ask the offender if there are any such organizations in his area and provide him/her with a pro forma letter to the person in charge, enquiring if they require assistance. The offender returns to court a few days later with the contact details and the prosecutor makes contact, explaining what the court has in mind and what the offender has been convicted of. The offender is then sentenced. All or part of the sentence is suspended with the usual conditions, including attending a life skills course, a refresher course and community service. Section 297(8) letter are sent to both the life skills programme facilitator as well as the organizations where community service is being conducted, for them to “police” the offender, taking the pressure off correctional service.- I have copies of such letters which I will hand out consisting of 2 pages. In other words one requires changing the mindset of the offender that first caused him or her to be arrested plus a commitment to change.
Finding places for community service requires planning. The local Health Department first require permission from Head Office in Durban. Clinics do require help and offenders with skill can import their knowledge.

“Du Toit et al on the Commentary on the Criminal Procedure Act states on page 28-46 (service 19). “A coordinator was appointed for each magistrate’s office, who will contact institutions and persons in order to obtain their co-operation in the control

and supervision of persons performing community service. The co-coordinator generally will be responsible for setting up the infrastructure necessary for the practical implementation of community service orders. Registrars of the various Divisions of the Supreme Court will also be put in possession of relevant information by the co-coordinator" I suggest that this co-coordinator also ascertains from the community which projects are in need of attention and before sentence, this co-coordinator makes a report to court after interviewing the accused to be sentenced as to his or her talents or expertise. All this work is consuming and help is required for the magistrate either by this co-coordinator or volunteer to run this project at each court".

Dealing with Restorative Justice, Mike Batley of the Restorative Justice Centre last year trained 25 members of World Changes Academy.
Two cases came to mind in this regard.

After convicting a 20 year old of breaking into his neighbour's house – I decided upon correctional supervision route for sentence. I realized that the offender would serve his sentence close to the complainants home so I enquired from her whether she had any objections – what came out was I suggest mind boggling. The lady told me that this was not the offenders fault because she and the offender's parents were having difficulties and it was the parents who influenced the offender. Both the parents and complainant attended a Restorative Justice Interview to deal with the problem.

The second matter. An Assault GBH matter, the court enquired from the complainant what she expected from the court on sentence in respect of her neighbour the accused. I then sent them both to World Changes Academy for a Restorative Justice Agreement which was incorporated in the sentence. The agreement reads as follows:

- The accused apologized to the complainant and she accepted.
- The accused committed herself to bring a goat to the complainants house

in order to perform a traditional ritual to cleanse the complainant and her house. This will take place on the 2nd of May 2009 at 11:00am. The accused will be accompanied by her brother to deliver the goat.

- The accused agreed to pay an amount of R1500-00 as compensation for injuries to the complainant. She will pay this amount in installments for three months.
- 1st installment: 30th May 2009.
- 2nd installment: 27th June 2009
- 3rd installment: 1 August 2009.
- They will both go to Hillcrest Police Station for payments: The officer on duty will be the witness when the payments takes place and they will both sign affidavits to state that the payment has taken place.
- They will meet at Hillcrest Police Station between 8:00-9.00am.

(World Changes Academy).

In closing – I would like to leave you with this thought – Human beings are distinguishable from other creatures that in order to interact with one another they require morality, reason, creativity and self worth.

I thank you for listening to me.

Jeffrey Gar

Add Magistrate Pinetown

A Last Thought

For various historic reasons we have developed a successful thinking method for finding the truth. We have never developed the thinking needed to create value. Our habits of thinking such as argument are primitive and inadequate for exploring a subject. We have neglected the very important aspect of perceptual thinking. We have never explored the logic of creativity. All these things can now be done - and are being done. At last we can improve world thinking.

Edward de Bono

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