e-MANTSHI

A KZNJETCOM Newsletter

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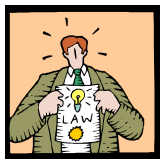
Welcome to the Fifty second issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search all the 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 RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. In Government Gazette no 33188 dated 12 May 2010 the following notice was published:

Exemption of motor vehicles from complying with the provisions of Regulations 3, 4 or Regulation 200(2) (a) of the National Road Traffic Regulations, 2000 under the National Road Traffic Act, 1996 (Act no 93 of 1996)

I S'busiso Joel Ndebele, Minister of Transport, acting in terms of section 75 of the National Road Traffic Act, 1996 (Act No. 93 of 1996) hereby grant exemption to motor vehicles imported into the Republic only for the purposes of 2010 FIFA Soccer World Cup Tournament from the 25 May 2010 to the 25 July 2010, from complying with the provisions of regulations 3, 4 or 200(2) (a) of the National Road Traffic Regulations, 2000 under the NRTA.

The exemption shall apply only to motor vehicles imported solely for the purposes of transportation of FIFA dignitaries and broadcasting for the 2010 FIFA Soccer World Cup Tournament, and shall apply only until the 25 July 2010.

2. In the same Government Gazette a notice was published in which the National Road Traffic Regulations of 2000 were amended. Most of the amendments have to do with the implementation of the bus rapid transport system

3. In Government Gazette no 33188 dated 14 May 2010 the following regulations were published by the Minister of Health

Regulations relating to the withdrawal of blood from a living person for testing.

The Minister of Health has, after consultation with the National Health Council, in terms of section 68(1)(h) read together with sections 55, 56(1), 90(1)(a) and 90(4)(c) of the National Health Act, 2003 (Act No. 61 of 2003), made the regulations in the Schedule.

SCHEDULE

Definitions

1. In these regulations, "the Act" means the National Health Act, 2003 (Act No. 61 of 2003) and any word or expression to which a meaning has been assigned in the Act shall have that meaning unless the context indicates otherwise; and

"health care provider" includes a retired health care provider.

Withdrawal of blood

2. A health care provider or a person contemplated in section 56 of the Act who is not a health care provider may, subject to regulation 3, remove blood from another living person in accordance with sections 55 and 56(1) of the Act.

3. A person who is not a health care provider may remove blood from another living person only if-

(a) that person has received training at a health establishment that is specifically designed for removal of blood by persons including persons who are not health care providers; and

(b) that person's name has been recorded by the person in charge of the relevant health establishment in a register specifically designated for recording such persons' names.

4. The removal of blood by persons who are not health care providers shall only be by means of pricking a finger with designated equipment to obtain a small quantity of capillary blood sufficient for testing.

Training

5. The training contemplated in regulation 3 shall-

(a) only be offered to persons who, in the opinion of the person providing training, are capable of understanding the subject matter of such training;

(b) be for a period not less than three hours; and

(c) include-

(i) information on obtaining informed consent of the person from whom blood is to be drawn;

(ii) preparation for and the actual removal of blood;

(iii) ensuring process quality;

(iv) the use of equipment;

(v) stopping the bleeding and the disposal of used but unwanted material;

(vi) information on the tests to be conducted;

(vii) interpretation of the test results; and

(viii) submission of removed blood for further management.

6 A person in charge of a health establishment must, when required, confirm in writing that a particular person received training for removal of blood at the relevant health establishment.

Commencement

7. These regulations come into operation on 17 May 2010.

Recent Court Cases

1. S v Mazibuko and others 2010 (1) SACR 433 KZP

For a circumstance to qualify as sufficiently exceptional to justify the accused's release on bail, it has to be one which weighs heavily in his favour, thereby rendering the case for release on bail exceptionally strong or compelling.

The appellants were in custody, awaiting trial on three counts of robbery and two of murder. The appellants and a fellow accused applied for bail in the Pietermaritzburg

regional magistrate's court. The State opposed bail and the regional magistrate refused bail for all three applicants. The two appellants appealed against that decision. It was common cause that the offences with which the appellants were charged were offences listed in Schedule 6 of the Criminal Procedure Act 51 of 1977 and therefore that s 60(11)(a) of the Act applied. It was also common cause that, as a result, the appellants bore the onus of proving on a balance of probabilities that exceptional circumstances existed which required their release in the interests of justice. 'What was not common cause was what was meant by the expression 'exceptional circumstances' in s 60. The magistrate was of the view that by using that expression the legislature's intention was to make it extremely difficult or almost impossible for an accused to make out a case for bail. The magistrate found that the ordinary grammatical meaning of the word 'exceptional' should be given to it and therefore that it meant 'unusual' or 'different'. Counsel for the appellants contended that it was not required of an applicant for bail to show that any particular factor counted exceptionally in the applicant's favour. All that was required was that the applicant had to show, taking into account the factors mentioned in ss (5)-(9) of s 60, that all the factors in ss (4) (a)-(e) counted in the applicant's favour, or that none of the grounds for refusing bail set out in ss (4) existed.
On appeal,

Held, that s 60(11) clearly distinguished between Schedule 6 accused and Schedule 5 accused and to place them on the same footing would render the distinction meaningless. In the case of Schedule 5 accused the only factor which distinguished those bail applications from those involving less serious offences was the question of the onus; s 60(11)(b) imposed an additional requirement, namely, proving exceptional circumstances. Dictum in *S v Dlamini and Others* 1999 (4) SA 623 (CC) applied. The interpretation contended for by counsel for the appellants was not correct. (Paragraph [121] at 438 d-e)

Held, further, as to what was meant by the expression 'exceptional circumstances', that it was not required of an accused to prove the existence of factors in addition to those enumerated in ss (5)-(9). Each one of the final paragraphs in ss (5)-(9) was a 'catch all' paragraph, reading 'any other factor which in the opinion of the Court should be taken into account'. The Constitutional Court in *Dlamini* therefore decided that an accused was entitled to rely on any factor expressly mentioned in ss (4)-(9) or any factor which was covered by the last paragraphs of ss (5)-(9). (Paragraph [13J] at 43sf-h)

Held, further, that, in order to give a meaning to the phrase 'exceptional circumstances', it was essential to ascribe a meaning to 'exceptional', and a good starting point was the dictionary meaning of the word. (Paragraph [14] at 438h-i)

Held, further, that 'exceptional' could firstly denote the rarity of something (i.e. the infrequency with which something occurred). Secondly, it could denote the extent or degree to which a quality or characteristic was present. The two meanings were, however, interlinked. Emphasis should be placed on the degree to which any circumstance was present. Kriegler J in *Dlamini's* case stated '(t)here is no reason to believe that courts will find it impossible to find that release on bail is justified where

an “ordinary” circumstance is present to an exceptional degree’. This appeared to be logical because by definition an ordinary circumstance could not be exceptional unless it was present to an exceptional degree. (Paragraphs [16] and [18] at 439b-c and 439d-f)

Held, further, that, for the circumstance to qualify as sufficiently exceptional, the accused’s release on bail had to be one which weighed heavily in favour of the accused, thereby rendering the case for release on bail exceptionally strong or compelling. The case to be made out had to be stronger than that required by ss (11) (b). Applying this approach, the process of deciding a bail application would be the same as in a case governed by ss (11) (b), save that the additional requirement of exceptional circumstances had to be satisfied. This meant that if an accused did not satisfy the ss (11) (b) test, it was not even necessary to consider whether the additional requirement imposed by ss (11) (a) had been met. (The court proceeded to discuss case law where the approach was followed.) (Paragraphs [19]-[22] at 439f-440e)

Held, further, applying the test, that it was insufficient for an accused who, for example, wished to rely on the weakness of the State’s case to simply show that the State’s case was weak. The accused had to show that the case was exceptionally weak by showing on a balance of probabilities that the accused would be acquitted. (Paragraph [23] at 440f-g)

Held, further, that the court was not satisfied that the appellants had made out a case that they were not flight risks, let alone a case that there was an exceptionally good chance that they would stand trial. The court was also not satisfied that the appellants would suffer exceptional prejudice were they to remain in custody. (Paragraph [32] at 442e-f)

Held, accordingly, that the magistrate was not wrong in concluding that no exceptional circumstances had been proved. (Paragraph [33] at 442f)
The appeals of both appellants dismissed.

2. S v Driescher 2010 (1) SACR 433 KZP

The only defence available to a person charged with failing to pay maintenance in terms of a maintenance order is a lack of means, provided the incapacity is not due to his unwillingness to find employment.

The divorce court had ordered the appellant to pay maintenance to his ex-wife, the payment being conditional upon the appointment of a receiver to the parties’ joint estate. It had been anticipated that, once the assets had been equitably distributed, the appellant’s obligation to pay maintenance would lapse. In terms of the consent paper, subsequently made an order of court, a receiver was to have been appointed as soon as possible. It was not clear from the consent paper whether the receiver ought to have been appointed at the initiative of the complainant or the appellant. No receiver was appointed until the appellant was summoned to appear in court to

answer a charge of failing to pay maintenance in contravention of the maintenance order. It appeared that the appellant had paid two months' maintenance and then stopped, as he had been waiting to hear from the receiver. From the evidence of the appellant there was a possibility that he had thought that his obligations to pay maintenance, arising from the consent paper, had lapsed. The appellant was convicted in the magistrates' court of failing to make payment in accordance with a maintenance order (s 31(1) of the Act). On appeal,

Held, that the circumstances and the concerns around them did not constitute a defence on the part of the appellant to a charge of failing to comply with a maintenance order, whether looked at individually or cumulatively. The only defence available to a person charged with failing to pay maintenance in terms of the maintenance order was incapacity to pay due to lack of means, provided always that such incapacity was not due to unwillingness on the part of the accused person to find employment. The appellant did not raise incapacity to pay as a defence and, in fact, nowhere in his evidence at trial did the appellant refer to any incapacity to pay. (Paragraph [7] at 446e-g)

Held, further, that it appeared that the appellant had no longer considered himself under obligation to pay maintenance, it had taken almost a year to appoint the receiver, and there had been a lack of proper advice as to how the terms of the consent paper were to be implemented. The magistrate ought to have invoked the provisions of s 41 of the Maintenance Act 99 of 1998, converting the criminal proceedings into a maintenance enquiry. The circumstances of the case justified the holding of such an enquiry. (Paragraph [7] at 446g-j)

Held, further, that any consideration of the merits of the appeal, in the light of the concerns raised, would have been a perpetuation of what appeared to have been an unfair trial right from the inception of the proceedings in the court a quo. (Paragraph [8] at 447a-b)

Held, accordingly, that the conviction and sentence imposed for failing to make payment in accordance with a maintenance order were set aside. The matter was remitted to the magistrates' court for an enquiry to be held in terms of s 10 of the Maintenance Act, 1998. (Paragraph [9j at 447c)

3. S v Zerky 2010 (1) SACR 460 KZP

A person is only a professional driver for the purposes of 65(2) of Act 93 of 1996 if, at the time of driving the motor vehicle in contravention of that provision, it was a vehicle of a type for which s/he requires a professional driving permit, irrespective of whether s/he is a holder of such permit.

When s 65(2) of the National Road Traffic Act 93 of 1996 (which makes it an offence for a person on a public road to (a) drive a vehicle; or (b) occupy the driver's seat of a motor vehicle the engine of which is running, while the concentration of alcohol in

any specimen of blood taken from any part of his or her body is not less than 0,05 grams per 100 millilitres, or in the case of a professional driver referred to in s 32, not less than 0,02 grams per 100 millilitres) mentions a professional driver as referred to in s 32 it is referring to a person who by virtue of the nature of the vehicle that they are driving at any particular time is required to be in possession of a professional driving permit of one or other type set out in the Road Traffic Regulations, 2000. It is the driving of the vehicle that attracts the obligation to possess a professional driving permit. Consideration of all three relevant provisions of the Act (i e ss 65(2), 32 and the regulations) points uniformly to the conclusion that a person is only a professional driver for the purposes of the criminal offence set out in s 65(2) of the Act if he or she is at the time driving a motor vehicle of the type specified in the regulations as requiring the driver to hold a professional driver's permit. The definition states that a professional driver is a person driving such a motor vehicle. The structure of the Act is that a person becomes a professional driver when they drive a vehicle of the specified class, irrespective of whether they have complied with their statutory obligation to obtain a professional driving permit. (Paragraphs [13], [15] and [16] at 466g-h, 467d-e and 468a-b)

Accordingly, where it appeared from the evidence that the accused, who had been convicted of contravening s 65(2) on the basis that he was a professional driver, had not been driving a vehicle that required him to obtain a professional driving permit, but had been driving a private motor vehicle for private purposes, the court on review held that the conviction was erroneous, even though the accused possessed a professional driving permit. (Paragraph [17] at 468b-c)

Section 65(2) of the National Road Traffic Act embodies two separate offences. The one is an offence committed by a professional driver, that is, a person driving a vehicle of the type that in terms of s 32(1) of the Act requires the driver to be in possession of a professional driving permit. The offence in respect of such a person is driving whilst the concentration of alcohol in a specimen of blood taken from him or her is not less than 0, 02 grams per 100 millilitres. The second offence relates to a person driving a vehicle, the driving of which does not require the driver to be in possession of a professional driving permit. That offence is committed where the person concerned has a concentration of alcohol in a specimen of blood taken from his or her body of not less than 0, 05 grams per 100 millilitres. It is therefore not proper or appropriate for a charge to embody two entirely separate offences, only one of which could possibly have been committed by the accused (the accused in the present case having been charged with driving a vehicle on a public road 'while the concentration of alcohol in a specimen of blood taken from his/her body was not less than 0, 05 gram per 100 millilitres, or in the case of a professional driver, not less than 0, 02 gram per 100 millilitres, to wit 0, 07 gram per 100 millilitres'). The prosecutor should decide at the outset, on the basis of the contents of the police docket, which will reflect the type of motor vehicle being driven at the time of the commission of the alleged offence, whether or not the accused is a professional driver, and charge the accused accordingly. In the form which is not proper or appropriate, the accused cannot know from the charge whether it is the intention of the State to allege that he or she is a professional driver, a matter which, if disputed, would have to be proved by the State beyond a reasonable doubt. A plea of guilty to

a charge formulated in this fashion is meaningless because it is not apparent to which of the two offences embodied in the charge the accused is pleading guilty. The continued use of a charge in this form must cease and an accused charged under s 65(2) of the Act must be informed in the charge-sheet whether they are being charged as a professional driver, with driving when the concentration of alcohol in a specimen of blood is not less than 0, 02 grams per 100 millilitres, or as an ordinary driver on the basis that the concentration of alcohol in their blood specimen exceeded 0, 05 grams per 100 millilitres. (Paragraph [18] at 468d-f and 468g-j)

4. S v Williams 2010 (1) SACR 493 ECG

The mere youthfulness of a witness can justify a conclusion that s/he doesn't understand the nature and import of the oath, provided that the court is satisfied that the witness comprehended the difference between truth and falsehood and therefore administered the admonition. It is now settled law that an investigation and finding, though preferred, was not required.

The appellant was charged with rape and indecent assault of a minor. He was convicted on the charge of rape and sentenced to imprisonment for life, but was found not guilty and acquitted on the indecent assault charge. The issue on appeal was whether, in light of the applicable constitutional principles and the decisions of S v B 2003 (1) SACR 52 (SCA) (2003 (1) SA 552; [2002] 4 All SA 451); and the Director of Public Prosecutions, KwaZulu-Natal v Mekka 2003 (2) SACR 1 (SCA) (2003 (4) SA 275), the evidence of the complainant was properly admitted; and, if not, whether there was sufficient evidence to sustain the conviction. The appellant's conviction flowed largely from the trial court's acceptance of the complainant's direct testimony that the appellant raped her, and corroboration for such evidence was found in the testimony of the complainant's mother and the medical evidence. It was common cause that the complainant's evidence was not tendered under oath, a clear infraction of the provisions of s 162(1) of the Criminal Procedure Act 51 of 1977 (the Act). It appeared from the transcript of the proceedings that the complainant was admonished to speak the truth and that this was done pursuant to the provisions of s 164(1) of the Act.

Held, that the judge omitted to either conduct an investigation or make a finding on the question whether or not the complainant understood the nature and import of the oath or affirmation due to ignorance arising from youth, defective education or other cause, as prescribed by s 164(1) of the Act. (Paragraph [61 at 496f)

Held, further, that earlier case law held that such an omission rendered the evidence inadmissible. It was, however, now settled law that such an investigation and finding, though preferred, was not required. (Paragraph [6] at 496f-g)

Held, accordingly, that it was self-evident that the judge's admonishment, that the complainant speak the truth, flowed directly from his conviction that, by reason of her youth, the complainant did not understand the nature and import of the oath. The

transcript demonstrated unequivocally that the judge was satisfied that the complainant comprehended the difference between truth and falsehood, and it was for that reason that his admonishment that she speak the truth was sufficient to render the complainant's evidence admissible. (Paragraph [9] at 498e-g) Appeal dismissed.

5. S v Bakos 2010 (1) SACR 523 GSJ

Where an accused declines to testify under oath due to religious convictions, but wished to speak honestly and truthfully, the magistrate should invoke s163 of the Criminal Procedure Act 51 of 1977.

At the end of the State's case against him, an unrepresented accused was informed by the magistrate that he had the right to testify under oath in his defence and to call witnesses, or to close his case if he so desired. The accused responded that it was against his religious beliefs to take the oath, but that he could 'speak honestly and truthfully out of my mouth'. The magistrate construed the accused's stance as being that he did not wish to testify. A witness was called to testify in the accused's defence, but, despite this, he was convicted. In his judgment the magistrate remarked that 'it was clear . . . that the accused was so afraid . . . to go into the witness box because he was going to concede certain aspects. . . '.On automatic review,

Held, that the magistrate had patently laboured under the misapprehension that, because the accused had declined to take the prescribed oath, he was electing not to testify in his defence. The magistrate had failed to appreciate the distinction between an election not to testify under oath, due to religious beliefs, and an election not to testify at all, in exercise of the constitutional right to remain silent. It was clear from the accused's words that he had wanted to testify, and the magistrate ought to have invoked the provisions of s 163 of the Criminal Procedure Act 51 of 1977, allowing the accused to testify under affirmation. The magistrate's failure to do so constituted a gross irregularity which vitiated the proceedings. (Paragraphs [6] [14] at 524i-527b)
Conviction and sentence set aside.

From The Legal Journals

Lerm, H

"The right to silence under threat"

De Rebus May 2010

Mills, L

"Applicability of National Credit Act to sectional title levies"

De Rebus May 2010

Van Niekerk, D

"Interpreting and opposing the debt review application"

De Rebus May 2010

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

Contributions from the Law School

LIABILITY FOR THE PAYMENT OF PUBLIC SCHOOL FEES BASED ON THE DUTY OF SUPPORT

The South African Schools Act 84 of 1996 (SASA) provides that "a parent is liable to pay the school fees determined in terms of s 39 unless and to the extent that he or she has been exempted from payment in terms of the Act" (s 40(1)). This provision *prima facie* confirms the common law duty on all parents to maintain their child (Maintenance Act 99 of 1998 s 15(2); Children's Act 38 of 2005 s 18(2) (d)). The Act however goes further than the common law when it defines a "parent" to mean: "(a) the parent or guardian of the child; (b) the person legally entitled to custody of the learner; or (c) the person who undertakes to fulfil the obligation of a person referred to in paragraphs (a) and (b) towards the learner's education at school" (s 1). The aim of this note is to confirm which persons will fall within this definition in light of the SASA provision.

Parent

As the maintenance duty of parents is part of their automatic parental responsibilities and rights as set out in s 18(2) (d) of the Children's Act, it follows that persons who have parental responsibilities and rights towards the child have the duty to maintain the child. These persons are: one, the biological mother of a child, whether married or unmarried (s 19(1)), subject to the exception relating to a minor mother and surrogacy; two, the biological father of a child if he is married to the child's mother; or was married to her at the time of the child's conception or birth or at any time in between these dates (s 20); and third, the biological father of a child if he meets certain criteria set out in the Act (s 21). However, even where the unmarried father does not qualify for parental responsibilities and rights, his common law maintenance duty is not affected and the duty remains (s 21(2)).

The issue has been muddled by the courts. The definition of "parent" was narrowly defined in the Northern Cape High Court in *Bestuursraad van die Laerskool Sentraal, Kakamas v Van Kradenburg* [2008] JOL 21631 (NC) par 13. The court found that with regard to the payment of school fees, the term "parent" in the SASA included only the custodian parent and not both parents. The court based its decision on the earlier decision of the Cape High Court in *Bestuursliggaam van Gene Louw Laerskool v Roodtman* [2003] 2 All SA 87 (C), where it was found that the term "parent" in the (now repealed) Education Affairs Act (House of Assembly) 70 of 1988 should be interpreted to mean only the custodian parent.

The practical implication of these cases was that a school could not, where the parents were living separately, claim any outstanding school fees from the non-custodian parent, unless he or she either contracted directly with the school or there was another foundation for the claim. In both these matters the parents of the children were divorced and the court had made a care (custody) order. Although the custodian parent remained solely liable for the fees, he or she could, in terms of the common law, claim from the non-custodian parent any amount paid in excess of his or her share of the maintenance of the child in general.

The Supreme Court of Appeal, in the case of *Fish Hoek Primary School v GW* [2009] JOL 24624 (SCA) took a different view from that in *Roodtman* and *Van Kradenburg*. The SCA found that the definition of a "parent" in the SASA is wide enough to include any parent of the child – regardless of the relationship between the parents of the child and regardless of whether the parent has any parental authority over the child. At issue *in casu* was the payment of school fees for a child born of unmarried parents in instances where the father did not have any parental authority over the child. The father was not the guardian or custodian of the child and there was no access or contact order. The claim for payment of the fees by the school was brought in terms of the SASA.

The SCA based its decision on the legislature's intention to create a wide meaning of the term "parent" in the section pertaining to the payment of school fees in the SASA. It argued further that their interpretation of the term accords with the constitutional demand that a court must "promote the spirit, purport and objects of

the Bill of Rights when interpreting legislation". Mothers are historically (and currently) the primary care-givers of children and almost always become custodial parents after a divorce or breakdown of their relationship. This places an additional financial burden on them and the "sad reality is that they then become overburdened in terms of responsibilities and under-resourced in terms of means. Despite our constitutional promise of equality, the division of parenting roles continues to remain largely gender-based" (para 13). The SCA recognised the need to be "acutely sensitive to the possibility that the different treatment of custodian parents and their non-custodian counterparts often can, and does, constitute unfair gender discrimination" (para 13). The court found that to interpret the SASA to exclude the non-custodian parent from its operation would frustrate the realisation of the constitutional goal of gender equality.

The court continued that their interpretation is in line with the common law duty on both parents to support their children in accordance with their respective means – a duty that extends to the educational needs of the child. Furthermore, as the SASA provides for compulsory education, a wider interpretation (and thus burdening of both parents with a duty to pay school fees), is also in line with the constitutional principle of the best interests of the child.

> "It, unquestionably, is in the best interests of the child that a non-custodian parent, who is unwilling, yet has the means to pay his child's school fees, should be made to do so, if necessary, by the injunction of an order of a competent court" (para 14).

The court noted that a different decision would saddle the custodian parent with all the responsibility and although there might be a claim against the non-custodian parent for the amount paid more than her *pro rata* share, such a claim is often "illusory". The court concluded that the sad reality is that many non-custodian parents do not have the means to pay school fees. If the school was not allowed to claim in these instances from the non-custodian parent, the result would be that the school would have to shoulder the loss or that the school has to mulct other parents with the additional burden which would be to the detriment of other learners (para 14).

The decision by the SCA should be welcomed. The crux is that, regardless of the relationship and history between the parents, the school is entitled to claim payment from both parents, as both parents are liable for maintenance in terms of the common law. This is so, regardless of whether there is an existing maintenance order or settlement agreement.

Although this judgment was based on parents that were never married, it is submitted that the definition of "parent" is equally wide to include divorced or separated parents. This judgment creates a dilemma for divorced or divorcing parties. Often a settlement agreement is made an order of court that may or may not specify who is liable for the school fees. In light of *Fish Hoek Primary School*, parties should be made aware that the school could claim the school fees from any or both

parents in terms of the SASA, and that the arrangement of the parties *inter se* is irrelevant to the school.

It should be noted that where one or both of the parents are deceased, the duty of support, and thus the obligation to provide for the education of the child, moves to the estate of a deceased parent. The school could thus submit a claim in this regard to the executor of the estate for school fees, unless the child's inheritance or means is enough to meet his or her maintenance needs. In the latter instance the claim for fees lies against the child himself.

Guardian

The second group of persons that is liable for school fees in terms of the SASA is "guardians". The parental responsibilities and rights of parents as discussed *supra* would, as a rule, include guardianship of the child, unless the court has ordered otherwise.

Custodian

Similarly, the custodian is generally a person with parental responsibilities and rights appointed by the court upon separation of the parents pending divorce, after a divorce or even where they have never married. However, the High Court may place a child in the care (custody) of a third party that is not the parent of the child.

It seems as if a legally entitled custodian in the SASA could also refer to a third party, a "care-giver" other than a parent and guardian who factually cares for a child. This person can include a foster parent; a person who cares for a child whilst the child is in temporary safe care; the person at the head of a child and youth care centre where a child has been placed; the person at the head of a shelter; a child and youth care worker who cares for a child who is without appropriate family care in the community; and the child at the head of a child-headed household (Children's Act s 1). Although the Children's Act does not require that such a person would be responsible for the maintenance of the child, the SASA does require these persons to pay the school fees, unless they are exempted.

The person who undertakes responsibility

The person who undertakes to fulfil the obligation of responsibility of a parent, guardian or custodian towards the learner's education at school is also liable for the payment of school fees in terms of the SASA. This is the broadest category of the definition and the only one specifically directed at education. Although not defined, this person is, seemingly, a third party who is not the custodian, but who voluntarily takes on the responsibility of a parent, guardian or custodian towards the child and, for our purposes, pays or agrees to pay the school fees of the child. In practice it would presumably be an extended family member not liable for maintenance, such as a step-parent.

Conclusion

The SASA casts the net of persons liable for school fees very wide to include parents, guardians, custodians, as well as those who undertake the responsibility. These groups of persons seem to overlap to some extent depending on the interpretation. However, for the purposes of the payment of school fees, it seems as if any of these persons could be approached by the school for the payment of school fees.

As an aside, the discussion above refers to the liability for school fees in the SASA that is broadly based on the common law duty to maintain. This is, however, only one side of the coin, as the liability for school fees may also be based on a variety of other legal principles: contractual liability; the principle of household necessaries irrespective of the matrimonial property system of the parents; possibly the principle of *stipulatio alteri* (where the obligation to pay school fees is set out in a court order); *negotiorum gestio* or undue enrichment. These issues are excluded from this discussion.

Professor Marita Carnelley
University of KwaZulu-Natal: Pietermaritzburg

Matters of Interest to Magistrates

CHILDREN IN CONFLICT WITH THE LAW – with effect from 1 April 2010 (Child Justice Act 75 of 2008)

Definition of child – section 1: 'means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).

Children under the age of 10 years

1. If it is alleged that a child under the age of 10 years old has committed an offence, a police official may not arrest the child, because such a child does not have any criminal capacity and cannot be prosecuted for that offence (s

7(1) and 9(1)).

2. The police official must immediately hand the child over with an information note (REGULATION 3) to (s 9(1):
    a. His/ her parents or an appropriate adult or guardian; OR
    b. If no parent, appropriate adult or a guardian is available or if it is not in the best interests of the child to be handed over to the parent, appropriate adult or a guardian, to a suitable child and youth care centre.
3. The police official must then immediately notify the probation officer of the handing over of the child by either handing a copy of the information note to the probation officer or faxing it to the probation officer. (s 9(1) (REGULATION 4)).
4. The probation officer must assess the child in terms of Chapter 5 as soon as possible but not later than 7 days after being notified (s 9(2)).
5. After the assessment (s 9(3)) the probation officer may:
    a. refer the child to the children's court (section 50) (REGULATION 5) (FORM1) if;
        (a) the child is in need of care and protection; OR
        (b) the child does not live at his or her family home or in appropriate alternative care; OR
        (c) the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth.
    b. refer the child for counseling or therapy (REGULATION 6) (FORM 1);
    c. refer the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years (REGULATION 7) (FORM 1);
    d. arrange support services for the child (REGULATION 8);
    e. arrange a meeting attended by the child, his or her parent or an appropriate adult or a guardian, and which may be attended by any other person likely to provide information for the purpose of the meeting; i.e. to assist the probation officer to establish more fully the circumstances surrounding the allegations against a child and formulate a written plan appropriate to the child and relevant to the circumstances (REGULATIONS 9 AND 10).
    f. Decide to take no action (REGULATION 11).

Children 10 years or older but under the age of 14 years
Children 14 years or older but under the age of 18 years

1. A child who is 10 years or older, who is alleged to have committed an offence must appear at a Preliminary Inquiry (PI) via written notice OR summons OR arrest (s5(2), Chapter 3))
2. Written notice (s 17, 18 and 21) (REGULATION 16): Police official may hand a written notice (section 56 of CPA) to a child if it is alleged the child

committed a Schedule 1 offence.

3. Summons (s17 and 19) (REGULATION 17): In terms of section 54 of the CPA.
4. Arrest (s 17 and 20) (REGULATION 18):
   Child may not be arrested if it is alleged the child committed a Schedule 1 offence (certain exceptions).
   Arrest is a last resort.
   If arrested, probation officer must be informed immediately but not later than 24 hours after the arrest.
   Probation officer must then do the assessment of the child (Chapter 5)
   If police officer is unable to inform a probation officer of such arrest, a written report must be submitted to the Inquiry Magistrate furnishing reasons for non compliance.
   The child must be brought to the PI within 48 hours (with or without a assessment report).
5. Before his/ her first appearance at the PI he/ she must be assessed by a probation officer (s 5(2)) unless:
   (a) assessment is dispensed with by the Prosecutor if it is in the best interests of the child (section 41(3)), OR
   (b) assessment is dispensed with by the Inquiry Magistrate if it is in the best interests of the child (section 47(5)0.
6. After the assessment, a PI must be held (s 5(3) except where the matter:
   (a) has been diverted (see Chapter 6); OR
   (b) involves a child 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved; OR
   (c) has been withdrawn.
7. The assessment report (Chapter 5) of the probation officer must include the following:
   (a) if the child is a child in need of care and protection in order to refer the child to the Children's Court;
   (b) estimate the age of the child if the age is uncertain (REGULATION 14) (FORM 3/FORM 4);
   (c) gather information relating to any previous convictions, previous diversion or pending charges in respect of the child;
   (d) formulate recommendations regarding he release or detention and placement of the child;
   (e) establish the prospects of diversion of the matter (where appropriate);
   (f) whether expert evidence referred to criminal capacity would be required as well as measures to be taken into account to proof criminal capacity;
   (g) determine whether the child has been used by an adult to commit the crime; and
   (h) provide any other relevant information
7. After assessment the probation officer must hand the assessment report to the PI prosecutor.
8. The PI prosecutor must then decide (s10):
   (a) that criminal capacity is likely to be proved and then he/ she must
      (i) divert the matter (Chapter 6) OR

(ii) refer the matter to a PI

OR

(b) that criminal capacity is not likely to be proved and then the prosecutor must hand the child to the probation officer to act in terms of section 9.

AT THE Prelimenary Enquiry (PI)

9. If the prosecutor decides to refer the matter to a PI, the prosecutor must then complete a PI file

Cover (SEE ANNEXURE), and insert the following (s 47(3):

(a) the assessment report, if available; AND

(b) any form and documentation required for the determination of age, if available;

(c) any documentation relating to previous conviction, diversion or a pending charge

(d) the report regarding the detention of the child in police custody by the IO – see section 22 (if applicable); AND

(e) any other relevant information.

10. The file must then be handed to the Clerk of the Court for entry in a PI court book.

11. The matter must then be placed before the Inquiry Magistrate.

12. The following people must attend (s 44) the PI:

(a) the Inquiry Magistrate;

(b) the PI prosecutor

(c) the child

(d) the child's parent, an appropriate adult or a guardian; and

(e) the probation officer

*(f) diversion service provider identified by the probation officer (if diversion order is likely to be made)

*(g) the interpreter (if applicable)

*(h) the legal representative (if any)

13. At the first appearance (s 47(2) the Inquiry Magistrate must then:

(a) explain the purpose and inquisitorial nature of the PI to the child (s 43); AND

(b) inform the child of the nature of the allegation against him/ her; AND

(c) inform the child of his/ her rights (s 47(1) and Chapter 11); AND

(d) explain to the child the immediate procedures to be followed in terms of this Act

14. The Inquiry Magistrate must then (s 43(2):

(a) consider the assessment report of the probation officer with particular reference to:

(i) age estimation of the child, if the age is uncertain (see sections 12, 13 and 14) (REGULATION 15) (FORM 4); and

(ii) the view of the probation officer regarding the criminal capacity of the child (see section 11) (REGULATION 13) (FORM 2);

AND

(b) establish whether the matter can be diverted;

AND

(c) identify a suitable diversion option (if applicable);
AND
(d) establish whether the matter should be referred to a children's court (see section 50);
AND
(e) ensure all the available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child;
AND
(f) ensure that the views of all persons present are considered before a decision is taken;
AND
(g) encourage the participation of the child and his/ her parent, an appropriate adult or a guardian in decisions concerning the child;
AND
(h) determine the release or placement of a child, pending
(i) the conclusion of the PI;
(ii) the appearance of the child in a CJC
(iii) the referral of the matter to a children's court

15. The Inquiry Magistrate may postpone (S 48) a PI for a period not exceeding 48 hours for the following reasons:
(a) where the child is in detention and the PI prosecutor indicates that diversion is being considered but an assessment has not been done and is required;
(b) if it is necessary in order to-
(i) secure the attendance of a person essential for the conclusion of the PI;
(ii) obtain information essential for the conclusion of the PI;
(iii) establish the views of the victim regarding diversion and the diversion option being considered;
(iv) make arrangements in respect of a diversion option;
(v) find alternatives to detention; or
(vi) assess the child, where no assessment has previously been undertaken; or
(c) for the purposes of further investigation of the matter.

16. If proceedings is postponed for purposes of noting a confession, an admission or to hold a identity
parade or a pointing-out, the Inquiry Magistrate must inform the child of the right to have a parent, a appropriate adult, guardian or a legal representative present during those proceedings.

17. Inquiry Magistrate may postpone PI for a period not exceeding 14 days:
(a) If probation officer has recommended that a further and more detailed assessment be undertaken and the Inquiry Magistrate is satisfied that there are reasons justifying such an assessment; OR
(b) in order to obtain the written indication from the DPP regarding diversion in terms of section 52(3)

18. The PI may be postponed for a period determined by the Inquiry Magistrate for:

(a) the child is in need of medical treatment for illness, injury or severe psychological trauma; OR
(b) the child has been referred for a decision relating to mental illness or defect in terms of section 77 or 78 of the CPA

ORDERS AT PI

19. An Inquiry Magistrate may make one of the following orders (S 49):
(a) Referral to children's court (section 50); OR
(b) Diversion (section 49 and Chapter 8); OR
(b) Refer to CJC (section 49(2).
20. After the order is made the PI file is then closed and filed.

REFERRAL TO CHILDREN'S COURT

21. If the Inquiry Magistrate referred the matter to the Children's Court, the Clerk of Court must hand a copy of such order to the Clerk of the Children's Court.
22. The Clerk of the Children's Court will then open a children's court file and act in accordance with the provisions of the Children's Act, 2005.

DIVERSION

23. If the Inquiry Magistrate ordered the matter to be diverted, the Clerk of the Court will provide a copy of the order to the diversion service provider.

Child Justice Court.(CJC).

24. When the Inquiry Magistrate refers the matter to the CJC, the Clerk of the Court must make a certified copy of the order and hand it on a rotational basis to the Clerk of the Court in the CJ court/s.
25. The Clerk of the Court in the CJ court/s must then hand the copy of the order on the day prior to the provisional date to Prosecutor who must then complete a J15.
26. The proceedings in the CJC are in accordance with the provisions of the CPA.
27. The CJC has the following additional powers in terms of this Act, i.e.
(a) Legal representation (Chapter 11)
(b) Criminal capacity (s 11)
(b) Referral of children in need of care and protection to children's court (section 64);
(c) Time limits relating to postponements (section 66);
(d) Diversion (section 67)
(e) Sentencing (Chapter 10)

This document must be seen as a guide that will develop as and when the practical application of the Act and Regulations dictate – YOUR PRIMARY REFERENCE MUST BE THE CONSTITUTION, THE CHILD JUSTICE ACT, THE CHILD JUSTICE REGULATIONS, and THE CHILDREN'S ACT and its REGULATIONS.

Oswald M Krieling
Senior Magistrate,Verulam

A Last Thought

Two Different Views —

Criminal Justice	*Restorative Justice*
• Crime is a violation of the law and the state.	• Crime is a violation of people and relationships.
• Violations create guilt.	• Violations create obligations.
• Justice requires the state to determine blame (guilt) and impose pain (punishment).	• Justice involves victims, offenders, and community members in an effort to put things right.
• ***Central focus:*** *offenders getting what they deserve.*	• ***Central focus:*** *victim needs and offender responsibility for repairing harm.*

Three Different Questions —

Criminal Justice	*Restorative Justice*
• What laws have been broken?	• Who has been hurt?
• Who did it?	• What are their needs?
• What do they deserve?	• Whose obligations are these?

From *The Little Book of Restorative Justice* by Howard Zehr