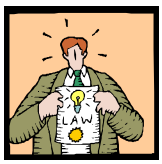
E-MANTSHI

A KZNJETCOM Newsletter

February 2007: Issue 12

Welcome to the twelfth issue of our KwaZulu-Natal Magistrates' newsletter. Since the inception of the newsletter in April 2006 we have received positive feedback on the contents. One example is an e-mail recently received from Isabel Mlaba from Pretoria which reads as follows: *"Thank u very much! Whoever came with the idea of e-Mantshi did an excellent job. It is so helpful, particularly to us district court magistrates since, unlike regional magistrates we are not provided with the green books and JUTASTAT is not really user-friendly."* Your kind comments are appreciated and further comments and articles for publication in forthcoming issues are welcome – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. A Draft Prevention of and Treatment for Substance Abuse Bill has been published for comment in Government Gazette No. 29554 of 26 January 2007.

   The aim of the draft Bill is to replace the outdated Prevention and Treatment of Drug Dependency Act, 1992 (Act No. 20 of 1992).

   The draft Bill envisages to –

   (a) ensure a co-ordinated effort to reduce the supply and demand of substances of abuse;
   (b) regulate the establishment, registration and management of treatment centres, in- and outpatient services, community-based services and halfway houses;
   (c) promote research and information management in the field of substance abuse; and
   (d) establish a Central Drug Authority to monitor and oversee the implementation of the National Drug Master Plan.

   The draft Bill can be accessed online at www.socdev.gov.za.

2. Proposed amendments to the National Road Traffic Regulations promulgated

i.t.o. the National Road Traffic Act, 1996 (Act No. 93 of 1996) have been published in Government Gazette No. 29571 of 31 January 2007. Objections can be lodged until 28 February 2007.

3. A Bill, the South African Judicial Education Institute Bill has been published on 9 February 2007 on the website, www.pmg.org.za. The aim of the bill is to establish a South African Judicial Education institute which will be providing judicial education for all judicial officers.

Recent Court Cases

1. S. v. SEWELA 2007(1) SACR 123 (WLD)

The appellant had pleaded guilty in a regional court to a charge of theft and handed in a statement in explanation of the plea in terms of the provisions of s 112(2) of the Criminal Procedure Act 51 of 1977. He thereafter changed his plea to one of not guilty on the basis that he had pleaded guilty because of fear, pressure, undue influence and promises emanating from the police and/or prosecutor. At the conclusion of the case the court found that the State had failed to prove the guilt of the appellant beyond a reasonable doubt but it nonetheless convicted him on the basis of the admissions contained in his plea explanation. In an appeal to a Local Division the appellant contended that the court *a quo* had erred in law in that, because he had retracted his guilty plea, the admissions contained in his plea explanation were not evidence before the court and could therefore not be used to found his conviction.

Held, that, in terms of the proviso to s 113 of the Act, once the accused retracted his guilty plea, the admissions contained in his plea explanation no longer stood as proof of the allegations so admitted. (Paragraphs [5]-[7] at 126*f*-127*b*.)

Held, further, that the State was nonetheless entitled to rely on the admissions contained in the accused's plea explanation as it remained part of the evidential material before the court. However, the usual rule that applied to extra-curial statements made by an accused, namely, that the State had to prove voluntariness, was applicable and the State therefore bore the *onus* of proving the plea explanation was made voluntarily (Paragraph [8] at 127*c*-*g*.)

Held, further, that, in the present case, the appellant had placed in issue the voluntariness of his plea explanation and the State had failed to prove voluntariness. (Paragraph [9] at 127*g* -128*a*.)

Held, further, that the court *a quo* had therefore erred in having regard to the appellant's plea and admissions contained in his plea explanation and the appeal

had to succeed. (Paragraph [10] at 128*b*.) Appeal allowed and conviction and sentence set aside.

2. S. v. ENGELBRECHT 2007(1) SACR 130 (TPD)

The accused had paid a fine in terms of s 56 of the Criminal Procedure Act 51 of 1977 and, after having already paid the full amount of the fine, had the fine reduced by the public prosecutor.

Held, that where a magistrate had not yet confirmed a conviction, it was within his power to confirm the conviction in the reduced amount and order the refund of the balance to the accused.

3. S. v. MOFOKATE 2007(1) SACR 137 (TPD)

The accused had been convicted for being in possession of drugs, in contravention of the Drugs and Drug Trafficking Act 140 of 1992. The charge sheet had, however, referred to the section of the Act applicable to dealing in drugs (s 5), rather than to the section referring to possession of drugs (s 4), and had also referred to the wrong part of a schedule.

Held, that the flaws in the charge sheet were not fatal to the conviction of the accused, since the court had been told that the accused had been charged with possession, and the accused had pleaded to and been questioned on possession. (Paragraphs [4] and [5] at 137*j*-138*c*.) Conviction and sentence upheld, with wording thereof corrected. (Paragraph [6] at 138*c*-*d*.)

4. S. v. TENGANA 2007(1) SACR 138 (CPD)

The accused was charged with dealing in liquor in contravention of s 154(1) (a) of the Liquor Act 27 of 1989, and a quantity of liquor was seized by the police in terms of s 20 of the Criminal Procedure Act 51 of 1977. The accused paid an admission of guilt fine, which was later confirmed by the magistrate in terms of s 57(7) of the Criminal Procedure Act. Thereafter the magistrate ordered, *extra curia*, that the liquor seized from the accused be forfeited to the State in terms of s 32(2) of the Criminal Procedure Act. The accused brought an application for the liquor to be returned to him, and the magistrate submitted the matter to the Court for special review in terms of s 304(4) of the Criminal Procedure Act.

Held, that the authority to deal with objects under s 32 of the Criminal Procedure Act vests in the police and the magistrate has no jurisdiction to deal therewith. (Paragraph [4] at 140*e*-*g*.)

Held, further, that a magistrate, who confirms an accused's conviction and admission of guilt fine in terms of s 57(7) of the Criminal Procedure Act, cannot order the forfeiture of the objects used in the commission of the offence in terms of s 35 of the Criminal Procedure Act. Implicit in s 35 is that the forfeiture order follows a trial. (Paragraph [7] at 141*d* -*g*.)

Held, further, that once a magistrate has confirmed a conviction and admission of

guilt fine in terms of s 57(7) of the Criminal Procedure Act, he or she is *functus officio*. He accordingly had no authority thereafter to make a forfeiture order. (Paragraphs [8] and [9] at 141*g*-142*a*.) Forfeiture order of magistrate set aside.

5. BAFANA FINANCE MABOPHANE v. MAKWAKWA AND ANOTHER 2006(4) SA 581 (SCA)

A clause in a money lending contract (in the present case a micro-lending agreement) whereby the debtor purports to undertake not to apply for an order placing his/her estate under administration, in terms of s 74(1) of the Magistrates' Courts Act 32 of 1944, and to agree that the loan debt will not form part of an administration order for which he/she might apply, is unenforceable as being inimical to public policy. (Paragraph [21] at 588I-589B.)

From The Legal Periodicals

1. PRETORIUS, C - J

"*Caveat subscriptor* and *iustus error* – Brink v Humphries + Jewell (Pty) Ltd 2006 4 THRHR p675.

2. HOCTOR, S

"Principles governing sentence on a charge of driving under the influence of intoxicating liquor or drugs" 2006 27.2. Obiter p293.

3. BHAMJEE, S AND STRODE, A

"HIV status as a mitigating factor in sentencing: a citizen review – S. v. Magida 2005(2) SACR 591 (SCA) 2006 27.2. Obiter p391.

4. DU TOIT, P

"Die toepassing van die contra preferentum-reël in die vertolking van formele erkennings in strafregtelike verrigtinge - S. v. Groenewald 2005 2 SASV 597 (HHA) 2006 27.2 Obiter p397.

(If you would like a copy of any of the above articles please send your request to gvanrooyen@justice.gov.za .)

Contributions from Peers

"THE PLASCON- EVANS RULE"

Plascon – Evans Paints v VanRiebeeck Paints **1984(3) SA 623 A at 634 – 635 D, per Corbett JA:**

> ***"…… the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief on the papers and without resort to oral evidence."***

In such a case the general rule was stated by van Wyk J in ***Stellenbosch Farmer's Winery Ltd v Stellenvale Winery (Pty) Ltd*** **1957(4) SA 234 C at 235 E – G to be:**

> ***"…….. where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify such an order ……. . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."***

Corbett JA then proceeds to say:

> ***"It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification.***
>
> ***It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.***
>
> ***The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain circumstances the denial by respondent***

of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact. If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and involve this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks.

Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far fetched or clearly untenable that the Court is justified in rejecting them merely on the papers." **- See *ASA Bakeries v Oryk and VB en Andere* 1982(3) SA 893 A at 923**

In the case of *Dhladhla and others v Erasmus* 1999(1) SA 1065 LCC at 1072 C, Gildenhuys J had to following to say with reference to the Stellenbosch Farmer's Winery case:

"If, on the papers before the Court, the probabilities overwhelmingly favour a specific factual finding, the Court should take a robust approach and make that finding.

The same applies when a denial by a respondent of a fact alleged by an applicant is insufficient to give rise to a real, genuine or bona fide dispute of fact.

This approach should however, be followed with some circumspection. The Court should not lightly settle a factual dispute solely by weighing up the probabilities emerging from the papers, without the advantage of viva voce evidence.

In the matter of Kalil v Decotex (Pty) Ltd and Another the Court gave the following guidelines:

'Naturally, in exercising this discretion the Court should be guided to a large extent

by the prospects of viva voce evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent.'

In *Soffiantini v Mould* 1956(4) SA 150 (E) at 154 G – H Price JP held:

"It is necessary to make a robust, common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over fastidious approach to a dispute raised in affidavits."

In *Senekal v Trust Bank of Africa Ltd* 1978(3) SA 375 A at 387 B the Court said:

"The respondent must at least refer to facts or adduce evidence of such a nature as to throw into judicially cognizable doubt the validity or legality of the claim."

Finally, in *Truth Verification Testing Centre CC v PSE Truth Detection CC* 1998(2) SA 689 Eloff AJ held:

"In his replying argument, Mr. Subel followed a line of argument which, to some extent, departed from his initial argument. He submitted, applying the test set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A) at 635H – 636 C in relation to dealing with disputed fact on motion, that the version of the second respondent as to the permission allegedly given by the applicant in December 1996 was so highly improbable and untenable that it was totally fanciful,

justifying its rejection out of hand. He submitted that it was simply impossible to entertain the thought that the applicant might even have considered giving such permission to the second respondent.

I am mindful of the fact that a Court should be loath to determine disputed issue on affidavit on the basis of the probabilities as they present themselves from an analysis of the respective conflicting versions of the parties. (Da Mata v Otto NO 1972(3) SA 858 (A) at 865 in fin.)

I am also mindful of the fact that the so-called* 'robust, common-sense, approach' *which was adopted in cases such as Soffiantini v Mould 1956(4) SA 150 (E) in relation to the resolution of disputed issues on paper usually relates to a situation where a respondent contents himself with bald and hollow denials of factual matter confronting him. There is, however, no reason in logic why it should not be applied in assessing a detailed version which is wholly fanciful and untenable.

The version of the second defendant is so improbable and unrealistic that it can be considered to be fanciful and untenable. I reject that version out of hand."

C.J. SCHOEMAN
ADDITIONASL MAGISTRATE
SCOTTBURGH

21/11/2006

Matters of Interest to Magistrates

Posted to the web on: 10 February 2007

Judges cannot be shielded from scrutiny

CARMEN RICKARD

THE 15 “concerned judges" whose memorandum to the chief justice was reported last edition saved my weekend. I would otherwise have spent it watching Climax windmill blades churning the air for rain and becoming outraged at their failure. But now I had something completely different to consider. Something significant enough to take my mind off irreversible vegetable interment in clay garden soil.

Following the October session of the Judicial Service Commission, the body that interviews and recommends candidates for judicial office and promotion, 15 black judges from Pretoria and Johannesburg wrote to Chief Justice Pius Langa. The memo, written in legalese, covers a number of issues, but as I reread it, I realised what it was actually saying.

In effect the 15 complain about a lack of judicial leadership. Clearly judges are frustrated at many levels, but this document is sparked by an offended sense of entitlement: a belief that judges — or certain of them — are entitled to protection by judicial leaders against public scrutiny and comment. When this protection didn’t materialise at the commission, they felt aggrieved and said so in writing.

They don’t like the fact that The Weekender carried two articles dealing with poor decisions by provincial judges, and for the convenience of the chief justice, the 15 “(annexed) copies of the articles hereto marked ‘A’ and ‘B’ respectively". These were reports on decisions overturned after consideration by the appeal court. But they were not merely reversed, as can happen to any judge; these were seriously bad, and the appeal judges said so.

Incidentally, it would be wrong to say that the appeal court reserves such comments for black judges or the “inexperienced". As reported in this newspaper last month, white judges with many years’ standing also come in for some klaps from the Climax blades in Bloemfontein.

The 15 don’t like the fact that these poor decisions were discussed in public and in private at the commission — and that commissioners “could have been caused to use selected judgments by the (provincial judges) to disqualify them for appointment to the (appeal court)". In other words, poor work should not stand in the way of a promotion to which one believes oneself entitled.

The petitioners want to know who authorised this discussion and what the chief justice intends doing about this “negative reporting". Producing the race card with the air of someone yelling “Snap", they tell their leader: “Remember, we see these

reports as impacting negatively on us and as a direct challenge to us, especially the black judges."

Seems to me that the people who complain about public scrutiny and discussion are in the wrong job. By its very nature, the work of a judge is public. That is how their accountability is exercised. Everything they say in court is “in public": the public is entitled to hear and comment on what is said. Judges write their decisions and these are made public precisely so that they can be held accountable. Otherwise they would be exercising vast powers with no meaningful control.

And the commission has a constitutional mandate to fulfil: it must give each candidate proper consideration or it would fail in its duty. Among other things, this means that if you apply for a post on the appeal court your judgments must be considered in assessing whether you would be an appropriate person to appoint. And it means that no one — no matter how eminent or otherwise worthy — is “entitled" to be appointed to any position. Nor is anyone entitled to be shielded from scrutiny on relevant issues.

The chief justice began a series of countrywide meetings with judges this week. Was this a chance for the grievances of the 15 to be raised? Would the judges, whether involved in the memorandum or not, use the opportunity to speak frankly about the host of problems plaguing the bench? Like failing infrastructure and inadequate resources, and the resulting deep unhappiness, even hopelessness, among members of the judiciary. And if they did, would anything change?

Judging from what I’ve heard about the Johannesburg meetings, it seems the sky is still empty. Nothing meaningful happened. The windmill blades keep churning but the rain just doesn’t come.

(From BUSINESS DAY 10 February 2007)