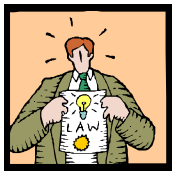
E-MANTSHI

A KZNJETCOM Newsletter

December 2007: Issue 23

Welcome to the twenty third issue of our KwaZulu-Natal Magistrate's 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 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. A notice of intention to amend the National Credit Regulations, 2006 has been published in Government Gazette No. 30466 dated 12 November 2007. The proposed amendments are the following:

Amendment of regulation 39 of the Regulations

2. Regulation 39 of the Regulations is hereby amended by the substitution for sub-regulation (3) of the following sub-regulation:
"(3) "*unsecured credit transaction*" means a credit transaction in respect of which the debt is not supported by any pledge or other right in property or suretyship or any other form of personal security other than credit life insurance"

Amendment of Schedule 2 to the Regulations

3. Schedule 2 to the Regulations is hereby amended by the addition of the following item:
"7 "A credit provider may charge search and production fees contemplated in section 65(4)(b) of the Act, not exceeding R5,00 for a replacement copy of any document required in terms of the Act, and R1,00 per page for copies of each page of such document."

Comments about the proposed amendments can be forwarded to EMasotja@thedti.gov.za before 20 December 2007.

2. Corrections to the Regulations relating to Debt Collectors, 2003: amendment in terms of the Debt Collectors Act, Act 114 of 1998 have been published in

Government Gazette No. 30486 dated 23 November 2007. The corrections to Government Notice No. R1044 of 2 November 2007 are the following:

1. The substitution for the expression "R650" in regulation 5 which amends regulation 11 of the Regulations relating to Debt Collectors, 2003 in the English text of the expression "R530".

2. The renumbering in the Afrikaans text of –

   (a) regulation "4" to read regulation "5"; and
   regulation "5" to read regulation "4".

Recent Court Cases

1. S v. KWEZI 2007 (2) SACR 612 ECD

If a certificate i.t.o. section 212(4) of Act 51 of 1977 by a doctor is used as evidence and there are objections to it the doctor should be called to give evidence – Formal admissions i.t.o. section 220 of Act 51 of 1977 should rather be used.

An unrepresented accused stood trial on one count of assault with intent to do grievous bodily harm and one count of common assault. During the course of the trial the prosecutor applied to hand in an affidavit in terms of s 212(4) of the Criminal Procedure Act 51 of 1977, and proceeded to read into the record his summary of the contents of a medico-legal report on form J88, to which the affidavit was attached. The accused voiced unhappiness about aspects of the report, whereupon the magistrate informed him that if he wished to contest the contents of the report he should bring witnesses to rebut the medical evidence. On automatic review two points arose: whether the requirements for the admissibility of the evidence in terms of s 212(4) had been met; and whether the evidence had been admitted fairly.

Held that the affidavit and the J88 certificate did not strictly comply with the provisions of s 212(4). The affidavit did not state that the deponent was in the service of the State and, while it recorded that he was a district surgeon, it did not specify a district. Although the magistrate had been prepared to take judicial notice of the fact that district surgeons were in the service of the State, this was not a proper course in the face of an objection to the evidence by an unrepresented and probably uneducated accused. There was authority for the view that the contents of a J88 form did not become evidence if there had not been proper compliance with the admissibility requirements set out in s 212(4). (Paragraph [5] at 615*d-e*.)

Held, further, that it was patently unfair merely to advise an unrepresented and uneducated accused that if he wished to dispute the medical evidence he was at

liberty to adduce evidence to rebut it. It had been the practice of the courts for some years not to rely on the provisions of s 212(4) for proof of medical evidence, but rather to use the procedure of formal admissions under s 220 of the Act. If the accused agreed with the facts set out in the medical report, they were admitted; if not, oral evidence was given. (Paragraph [6] at 615j-616b.)

Held, further, that *in casu* the strict letter of s 212(4) had been applied. The record also showed that the magistrate had paid no regard to the accused's objection on an aspect that was unquestionably of concern: while the prosecutor had advised the court that according to the J88 form the wound was one day old, that was not what the form actually said. Nevertheless, the magistrate had relied on the evidence of the wound to corroborate the evidence of the complainants and to convict the accused. (Paragraph [7] at 616e-f.)

Held, accordingly, that this was not a case in which the evidence was overwhelming, and where there had been no failure of justice despite the irregularity. The failure of the judicial officer to ensure that the presentation of evidence was in accordance with constitutional standards meant that the accused had not had a fair trial. (Paragraph [7] at 616g.)
Conviction and sentence set aside.

2. S v. MANGANYI 2007(2) SACR 617 (TPD)

It is incompetent to order that a sentence consisting of a fine with alternative imprisonment must run concurrently with another sentence.

The accused was convicted in a magistrates' court of the unlawful possession of 1, 9 kg of dagga in contravention of s 4(b) of the Drugs and Drug Trafficking Act 140 of 1992; of driving a motor vehicle without a driver's licence in contravention of s 12(a) of the National Road Traffic Act 93 of 1996; and of driving a motor vehicle that was not registered for the current year. According to the charge-sheet the latter offence constituted a contravention of "s 42(1) (b) of the National Road Traffic Act 95 of 1996'. On the first count the accused was sentenced to five years' imprisonment and on each of the remaining counts to a fine of R1 500 or five months' imprisonment. It was ordered that the sentences run concurrently. The matter came before the High Court on automatic review.

Held, that the accused had twice previously been convicted of the unlawful possession of dagga, most recently within a year of the present offence. While direct imprisonment was certainly required, a term of five years was shockingly inappropriate, especially as the accused had not had the benefit of a partly suspended sentence as a deterrent measure. A sentence of three years' imprisonment, of which 18 months would be suspended, was appropriate. (At 619d-619h.)

Held, further, regarding the sentence on count two, that it was incompetent for a court to order that a sentence consisting of a fine with alternative imprisonment must run concurrently with another sentence. Section 280(2) of the Criminal Procedure Act 51 of 1977 provides that

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

See Kriegler *Suid-Afrikaanse Strafproses* 6 ed at 720. The sentence on count 2 should be suspended.

3. S v. MAKHANDELA 2007(2) SACR 620 WLD

If an accused's application for legal aid is unsuccessful a magistrate has the duty to determine whether substantial injustice would result from a lack of representation

The appellant appealed against his conviction of robbery with aggravating circumstances and against the 15-year sentence imposed therefor. When the appeal was called, the Court raised a question concerning whether or not there had been a procedural irregularity regarding the appellant's right to legal representation at State expense. It appeared from the record that the appellant's application to the Legal Aid Board had either been turned down, or simply not processed. After a postponement to allow him to appoint his own attorney, which he failed to do, the trial continued with the appellant conducting his own defence.

Held, that once the presiding magistrate had informed him that his application for legal aid had been unsuccessful, he must have believed that the only option left to him was to engage his own representative. Thereafter, when the trial resumed after the postponement, he would still have been under the impression that he would not be able to obtain representation at State expense. The appellant could hardly have been expected to know that, even though his legal aid application had been turned down, he could still seek the assistance of the presiding magistrate to obtain representation. (At 624g-j.)

Held, further, that in terms of s 35(3)(f) and (g) of the Constitution of the Republic of South Africa, 1996, the appellant had had the right to legal representation at State expense if substantial injustice would otherwise result. While an accused wishing to avail himself of this right would ordinarily apply to the Legal Aid Board for assistance, it was for the presiding judicial officer to determine whether substantial injustice would result from a lack of representation. Consequently, where an accused's legal aid application was unsuccessful, it would be the duty of the presiding magistrate to address this question, taking into account particularly the seriousness of the offence, the complexity of the case and the capacity of the accused to fend for himself. *In casu* the magistrate had clearly been at fault. He should have informed the appellant that the failure of his legal aid application was not the end of the matter, and explained to him the role that he, the magistrate, had to play. He should have realised that the appellant's decision to appoint an attorney, far from being an informed choice, was simply the only option that the appellant thought was open to him. The magistrate should also have taken steps to ascertain why the appellant's legal aid application had been turned down. Given the appellant's lack of financial resources and the fact that he faced a possible 15-year sentence, the presiding

magistrate's breach of duty thus had the effect of depriving the appellant of the legal representation to which he had been entitled under the Constitution. (At 625f-626g.)

From The Legal Journals

VERMAAK, L

"Die oorweging van Borgtog"

December 2007 p20 *DE REBUS*

PILLAY, D

"Legal writing: Part 1: Writing Effective sentences"

December 2007 p30 *DE REBUS*

(Both these articles can be accessed on the website of De Rebus at www.derebus.org.za .)

Contributions from Peers

AUTHORISING WARRANTS OF ARREST

1. Arrest constitutes a serious restriction of the individual's freedom of movement and can also affect his/her dignity and privacy. To guard against unlawful arrest the magistrate must ensure that the arrest is justified in accordance with statutory and general precepts.

2. Section 43 of the Criminal Procedure Act, 1977 authorizes a magistrate to issue a warrant for the arrest upon the written application of a prosecutor.

3. The following sections of the Criminal Procedure Act authorize a magistrate to issue a warrant for the arrest of an accused who fails to appear in court:

    - Section 55(2) – failure to appear on summons

- Section 56(5) – provides that the provisions of section 55 shall *mutatis mutantis* apply to a written notice to appear in court handed to an accused under section 56(1)

- Section 67(1) – failure to appear after release on bail

- Section 72(4) – failure to appear after release on warning in lieu of bail

- Section 170(1) – failure to appear of accused out on warning after adjournment or to remain in attendance.

4. Section 188 deals with the failure of a witness to attend court after being subpoenaed to attend proceedings or warned by the court to appear in court at a next appearance date.

5. Magistrates must take heed of the followings prerequisites before authorizing a warrant of arrest:

Section 55(2) – failure to appear on summons:

- The service of the summons must be effected by an authorized official (i.e. a police official, sheriff or deputy sheriff).

- The return of service must be properly completed, signed and clearly state the method of service.

- The summons must be served in accordance with the methods provided for by law. Section 54(2)(a) provides for the following methods of service, namely:-
    - to the accused personally, or
    - if the accused cannot be found by delivering it at the accused's residence or place of employment or business

to a person apparently over the age of 16 years and apparently residing or employed there.

- The summons must be served on the accused at least 14 days (excluding Sundays and public holidays) before the trial date – see section 54(3).

- No alterations to the name of the accused, place and court of appearance or date of appearance on the summons are allowed.

- If summons or return of service is defective the matter should be struck off roll.

Section 56 – failure to appear on written notice:

- Only **personal service** by a peace officer is allowed.

- The notice ***must*** contain a certificate by the peace officer that he handed the original to the accused and that he explained the import thereof to the accused. The certificate must be signed by the peace officer.

- The notice ***must*** offer the accused the option of paying a set admission of guilt fine and clearly state the exact amount of the fine which may not be more than R 2500-00.

- The name, address and age or identity number of the accused must be reflected on the notice.

- The notice must contain sufficient details of the offence allegedly committed and, if applicable, refer to the correct statutory provisions.

- No alterations to the name of the accused, place / court of appearance and trial date are allowed.

- If the notice is defective or altered it must be struck off the roll.

Section 67 – failure to appear after release on bail:

- Withdrawal of bail and provisional forfeiture of bail money are compulsory if accused fails to appear.

- Provisional order becomes final automatically after 14 days.

- Court cannot enquire in summary manner whether accused contravened section 67A if accused failed to comply with bail condition.

Section 72(4) – failure to appear after released on warning:

Police official must issue the accused with form SAP 496 (previously form J127). A copy of the form which must be properly completed and signed must be handed in for consideration by the presiding magistrate before a warrant is authorised.

- Same requirements applicable to written notices regarding service and alterations shall apply.

NOTE:

Your attention is drawn to a minute sent out by the Chairperson of the Magistrates Commission [reference 6/5/1 (SMC) dated 8 September 2003] which reads as follows:

RE: ISSUING WARRANTS OF ARREST FOR TRAFFIC OFFENCES

I have received complaints that some of the magistrates sitting in the traffic courts

have on occasions authorized the issuing of warrants of arrest under the following circumstances:

(a) Where there has not been proof of personal service on the accused; this is especially so in cases where automatic cameras had captured the registration number of an offending vehicle. One has to be careful: firstly, as the summons was not served on the owner personally, it might not have been brought to his /her attention; secondly, the offending vehicle might have been driven by a different person when the offence was committed.

(b) Warrants have reportedly been issued without the name of the accused first being called three times as required; apparently, the attitude is that the accused are too many for this exercise.

It is appropriate to remind ourselves that the power to authorize a warrant of arrest must be exercised very carefully. Please convey this concern to your colleagues. It is the duty of a judicial officer to protect the freedom and liberty of ordinary people. Those who fail to do so may have to accept the full consequences of their conduct. The purpose of this letter is to urge presiding officers to be very careful.

Jan Venter
Magistrate/Ladysmith

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

1. "**Children FIRST**" is a journal on Issues Affecting Children. In the latest Edition September 2007 / Vol 11 no. 65 the following articles appear:
   - Children making ends meet;
   - Families on the Edge of survival;
   - Child Scavengers;
   - Helping to combat HIV and Aids;
   - Positive Discipline of Children;
   - Hurting Children is wrong;
   - Obstacles in reporting rape.

   The publication is published by the Children FIRST Editorial Board and more

information on this organization and further interesting articles can be obtained on their website at www.childrenfirst.org.za .

DEPARTMENT: JUSTICE AND CONSTITUTIONAL DEVELOPMENT
REPUBLIC OF SOUTH AFRICA

MAGISTRATES COURT JUDICIARY: EMLAZI

Tel: 031-9072190
Fax: 031-9064785

The Judiciary: Emlazi
Private Bag X02
MOBENI
4060

Reference: 17/1/2-LCJ
Enquiries: L.P.P. Radyn
Date: 2007-11-28

The Secretary
KZN JETcom

Dear Gerhard

REPORT BACK: PEER LEARNING COLLOQUIUM.

1. **A peer learning seminar was facilitated by myself on Friday 23 November 2007 at Hibberdene in accordance with the guidelines set by KZN JETcom. This workshop was scheduled in January 2007, at which stage all concerned were informed in writing of the envisaged date.**

2. **All magistrates in the Emlazi and Port Shepstone area clusters were invited. From a potential of 38 magistrates, only 13 attended. Our efforts were awarded with the presence of only one magistrate from the Port Shepstone area cluster (and he turned up 30 minutes before closure of the peer learning session).**

3. **The session was dedicated to 1 hour power point presentations on:-**

   3.1 Judicial ethics and conduct (Louis Radyn);
   3.2 Public speaking (Louis Radyn);
   3.3 Detention of juveniles (Les Harrylal).

4. **The remaining two hours were devoted to open discussions on:-**

3.4 Default judgments (introduced by Wendelynn Bowler);
3.5 Section 55 Enquiries (introduced by Louis Radyn o.b.o Prem Singh who could not attend);
3.6 Adjustment of fines (introduced by Shabnum Ameer)

5. At the end of the day it was agreed that it was more than a worthwhile, fruitful effort. The excellent lunch, once again generously sponsored by Iole Matthews (IPT), was thoroughly enjoyed by all.

6. I shall endeavour to make all the mentioned power point presentations available to Iole for inclusion on the Justice Forum website.

7. Despite the somewhat disappointing attendance, I am still convinced that these training sessions should continue and all other colleagues in the entire judiciary should be inspired to do the same in their areas.

Louis Radyn
Area Head: Judiciary

A Last Thought

1. The following story is part of the introduction to the Draft Policy on the Expropriation Bill which was published in Government Gazette No. 30468 of

13 November 2007:

"In 1659, a little war of plunder broke out between the Dutch and the Khoisan. After many years of abuse at the hands of the Dutch, the Khois had decided to wage resistance. At the time, Jan van Riebeeck was the commander of the Dutch in the Cape. The war ended at about the beginning of 1660. The leader of the Khois, Autshumao (also called 'Harry the Strandloper') had been captured during the war and imprisoned at Robben Island.

In April 1660 after the war, he was brought back for peace negotiations. During those negotiations Van Riebeeck told Autshumao that not enough grazing land was available for the cattle of both the colonies and the Khoi-Khoi. Autshumao then asked Van Riebeeck:L

> "*If the country is too small, who has the greater right; the true owner or the foreign intruder?"*

The response of Van Riebeeck as recorded in his diary was:

> *"We have won this country in a just manner through a defensive war, and it is our intention to keep it."*

Van Riebeeck's response is seminal. It was the beginning of a colonial process of land deprivation that continued for more than 250 years, and sparked many violent conflicts".
