E - M A N T S H I

A KZNJETCOM Newsletter

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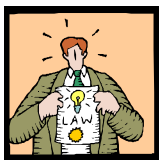
Welcome to the twenty fourth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and 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. The *Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act*, 2006 – Act 27 of 2006 was published in Government Gazette No. 30477 dated 16 November 2007. The purpose of the Act amongst others is to prohibit mercenary activity and to regulate the provision of assistance or service of a military related nature in a country of armed conflict and to provide for extra territorial jurisdiction for the courts in South Africa with regard to certain offences. In this regards sections 2, 3 and 11 are of relevance. Section 11 provides for extra territorial jurisdiction.

    11. (1) Any act constituting an offence under this Act and that is committed outside the Republic by -
        (a) a citizen of the Republic;
        (b) a person ordinarily resident in the Republic;
        (c) a company incorporated or registered as such under any law, in the Republic; or
        (d) any body of persons, corporate or unincorporated, in the Republic, must be regarded as having been committed in the Republic and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence.

        (2) (a) Any act that constitutes an offence under section 2 of this Act and that is committed outside the Republic by a person, other than a person contemplated in subsection (1), against the Republic, its citizens or residents must be regarded as having been committed in the Republic if that person is found in the

Republic;

(b) A person contemplated in paragraph (a) may be tried for such an offence by a South African court if there is no application for the extradition of the person or if such an application has been refused.

(3) Any offence contemplated in subsection (1) or (2), is, for the purpose of determining the jurisdiction of a court to try the offence, regarding as having been committed at –

(a) the place where the accused is ordinarily resident;
(b) the accused's principal place of business; or
(c) the place where the accused was arrested.

(4) Where a person is charged with conspiracy or incitement to commit an offence or as an accessory after the fact, the offence is regarded as having been committed not only at the place where the act was committed, but also at every place where the conspirator, inciter or accessory acted or in the case of an omission, should have acted.

The schedule to the act amends schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997).

No. and Year of Act	Short Title	Extent of Amendment
No. 105 of 1997	Criminal Law Amendment Act	1. The addition to Part I of Schedule 2 of the following item: "Any offence referred to in section 2 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006." 2. The addition to Part II of Schedule 2 of the following item: "Any offence referred to in section 3 of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, 2006."

The Act will come into operation on a date to be proclaimed in the Government Gazette.

2. The *Criminal Law (Sexual offences and Related Matters) Amendment Act,* 2007 has been promulgated and subject to subsection (2) took effect on 16 December 2007.

   Chapter 5 of the Act takes effect on 21 March 2008, or an earlier date fixed by the President by proclamation in the *Gazette*.

   Chapter 6 of the Act takes effect on 16 June 2008, or an earlier date fixed by the President by proclamation in the *Gazette*.

   Chapter 5 relates to services for victims of sexual offences and compulsory HIV testing of alleged sex offenders whilst chapter 6 deals with the national register for sex offenders.

3. The *Criminal Law (Sentencing) Amendment Act, Act* 38 of 2007 was promulgated in Government Gazette No. 30638 dated 31 December 2007. The Act replaces section 51 of Act 105 of 1997 by enacting discretionary minimum sentences for certain offences. The other amendments relate to the repeal of sections 52, 52A and 52B of Act 105 of 1997 and the amendment of section 53 of the same Act. The act came into operation on the 31st of December 2007. The Act is essentially a re-enactment of the minimum sentence legislation but it also gives Regional Courts jurisdiction to impose life imprisonment.

Recent Court Cases

1. S v MALULEKE 2008(1) SACR 49 (TPD)

Restorative justice is an important factor which should be used with circumspection in the criminal justice system.

Restorative justice has been developed by criminal jurists and social scientists as a new approach to dealing with crimes, victims and offenders. It emphasises the need for reparation, healing and rehabilitation rather than harsher sentences, longer terms of imprisonment, adding to overcrowding in jails and creating greater risks of recidivism. 'While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice namely: considering the needs of victims; helping offenders to take responsibility on an individual level; and nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.

Considering that crime rates in South Africa remain high and that government's focus appears to be on punishment rather than justice, a different approach is needed.' (Paragraph [26] at 52g-i.)

It is obvious that restorative justice cannot provide a single and definitive answer to all of the ills of crime and its consequences. Restorative justice cannot ensure that society is protected against offenders who have no wish to reform, and who continue to endanger our communities. But on the other hand restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions and assist the process of their ultimate reintegration into society thereby. In addition, restorative justice, seen in the context of an innovative approach to sentencing, may become an important tool in reconciling the victim and the offender, and the community and the offender. It may provide a whole range of supple alternatives to imprisonment. This would ease the burden on our overcrowded correctional institutions. (Paragraphs [32]-[34] at 54c-e.)

The incorporation of the principles of traditional justice into the South African criminal-justice system must be approached with circumspection. While it is generally appreciated that African legal systems did not know prisons, it would be dangerous indeed for a judge not versed in traditional customs to make assumptions that could prove to be grievously wrong and the incorrect application of which would do more harm than good. Experience in Canada, New Zealand and also, in particular, in Australia has, however, shown that the introduction of traditional, indigenous legal systems into at least part of the criminal-justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing of the victims' hurts, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large. There appears to be little reason why similar results could not be achieved in South Africa. Eventually, legislative intervention may be required to recognise aspects of customary law – but this should not deter courts from investigating the possibility of introducing exciting and vibrant potential alternative sentences into our criminal-justice system. (Paragraphs [38]-[41] at 55 e-i.)

2. S v. WILLIAMS 2008(1) SACR 65 CPD

Questioning i.t.o. section 112(1)(b) of Act 51 of 1977 should not amount to critical questioning where an accused denies an element of the offence nor should an attempt be made to convince the accused that his denial is improper or incorrect.

The accused had been charged in a magistrates' court on various counts, including one count of theft, nine counts of housebreaking with intent to steal and one count of attempted housebreaking with intent to steal. The accused, who was unrepresented, indicated that he wished to plead guilty to ten counts. When the first ten counts were put to him, he pleaded guilty to all of them. The magistrate thereupon questioned the accused in terms of s 112(1) (b) of the Act. When questioned on count 6, the accused stated that he could not remember all the incidents and that he could not remember how he had broken into the house of the

complainant. The magistrate thereupon obtained the docket from the prosecutor, perused it and said to the accused: 'It says you opened the window. It's a flat and you opened a window and went in?' The accused then admitted that he had opened the window. The accused also stated that he had been high on drugs on the day in question and that he did not know what he was doing on the day or every other day. The magistrate then proceeded to cross-examine the accused and eventually put to the accused that he had known what he was doing. The accused answered in the affirmative. The magistrate then convicted the accused and referred the matter to the regional magistrate for sentence. The regional magistrate considered that he was unable to proceed with sentencing and referred the matter to the High Court for review,

Held, that the conduct of the district magistrate constituted a striking irregularity. The magistrate had abandoned her judicial function, took over the role of the prosecution, and proposed certain allegations from the bench that were not 'allegations in the charge'. She had then elicited admissions from an unrepresented accused that he was not personally able to make, and which he might not have made had he been properly represented. (Paragraph [12] at 68i-69a.)

Held, further, that the reading of the police docket by the magistrate in relation to count 6 not only vitiated the trial on that particular count, but also the entire proceedings before the magistrate. The proceedings as a whole could not be regarded as having been conducted in accordance with justice. Once the magistrate had examined the content of the police docket she could no longer be regarded as one who was exercising her judicial authority impartially, as required by the Constitution of the Republic of South Africa, 1996. (Paragraph [13] at 69b.)

Held, further, that s 112(1) (b) did not authorise questioning, cross-questioning and badgering by a judicial officer in order to obtain admissions in the manner that the magistrate had. (Paragraph [17] at 69g.)

Held, further, that as a result of the magistrate's questioning the accused had been induced into making self-incriminating statements at a stage of the proceedings when the presumption of innocence had not fallen away through the reasonable and justifiable questioning contemplated by s 112(1) (b). (Paragraph [18] at 69h.)

Held, accordingly, that the trial of the accused had been unfair in that the court was not impartial and had failed to protect the rights of the accused in accordance with the provisions of ss 34, 35(3)(h) and 35(3)(j) of the Bill of Rights in the Constitution. (Paragraph [19] at 69h-i.) Convictions set aside and matter remitted to magistrates' court for trial before another magistrate.

3. S v. CORNELIUS AND ANOTHER 2008(1) SACR 96 CPD

It is the duty of a judicial officer to record the disposal, postponement or remand of cases in the Criminal Record Book

Rule 65(5) of the Magistrates' Courts Rules provides that: 'The judicial officer presiding at the hearing shall himself record in the criminal record book any

sentence imposed or other order of disposal made by him including acquittal, or other discharge, postponement of sentence, adjournment, remand to another court or committal for trial.' The recordings in the criminal record book are peremptory. Regional magistrates are not exempted from the abovementioned rule of court. The recording in the criminal record book assists in indicating what happened to proceedings in courts when accused appear before magistrates, especially where the information is not on tape. The rule of court mentioned above clearly indicates that all magistrates' courts are courts of record. There is no excuse on the part of a regional magistrate to omit recording the events in a criminal case on the day/s accused appear before him/her. (Paragraph [6] at 100i-101c.)

From The Legal Journals

The **Potchefstroom Electronic Law Journal** is a law journal of the Faculty of Law of the North-West University. The Electronic Law Journal can be accessed at www.puk.ac.za/LAW/per/per.htm .

The following are some of the interesting articles that have appeared in this journal:

E Couzens and M Dent

Finding Nema: The National Environmental Management Act, the De Hoop Dam, Conflict Resolution and Alternative Dispute Resolution in Environmental Disputes.

2006 VOLUME 3

LA Feris

Compliance Notices – A New Tool in Environmental Enforcement

2006 VOLUME 3

M. Kidd

Greening the Judiciary

2006 VOLUME 3

T. du Plessis

Legal Research in a Changing Information Environment

2007 VOLUME 1

MC Schoeman-Malan

Recent Developments Regarding South African Common and Customary Law of Succession

2007 VOLUME 1

Contributions from Peers

the doj & cd

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TO ALL LOCAL ATTORNEYS

CIRCULAR: NATIONAL CREDIT ACT, 2005 (ACT NO. 34 of 2005)

The National Credit Act, 2005 (Act No. 34 of 2005) (hereinafter referred to as the NCA) has now been in operation for more than five months. Despite this, it appears that in the majority of the cases where actions are based on credit agreements the provisions in the NCA which relate to debt enforcement are not complied with and in most instances requests for default judgment and judgment by consent are returned to the attorneys with queries.

At a workshop held on 9 November 2007 civil magistrates of the Northern KZN area have formulated their interpretation of some of the requirements of the Act as they relate to default judgments in terms of rule 12 and sections 57 and 58 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944). These guidelines, albeit based on nothing more than *prima facie* held views, may be of assistance in alleviating the aforementioned problem.

1. The NCA refers to the institution of court proceedings as debt enforcement proceedings. The NCA stipulates certain requirements that have to be met before legal proceedings may commence. These requirements also apply to default judgments under Rule 12 and consent judgments under sections 57 and 58 of the Magistrates' Courts Act, 1944.

2. Magistrates hold the view that debt enforcement in respect of a credit agreement can no longer be done by means of a "simple" summons. The summons must contain sufficient particulars to determine whether the requirements set out in the NCA have been met. The particulars of the claim should, *inter alia*, contain the following averments:

    (i) Particulars of the parties (to determine whether the NCA applies to the person)
    (ii) That the NCA applies to the agreement (or if the NCA is not applicable, the plaintiff should plead facts to indicate this)
    (iii) Type and category of the credit agreement (to determine whether the agreement is excluded from the NCA)
    (iv) Date when agreement was concluded
    (v) Principle debt and how the amount is made up, number of instalments and instalment amount, initiation fee, service fee, interest and interest rate, credit insurance, default administration charges, collection costs, costs pertaining to extended warranty, delivery fee, installation and initial fuelling charges, taxes, residual amount, licences and registration fees
    (vi) Positively allege that there was compliance with the Act in concluding the agreement i.e. quotation, 5 days cool-off period
    (vii) Other material terms of the agreement
    (viii) That the plaintiff (the credit provider) is duly registered with the National Credit Regulator (where registration is required by the NCA) and the renewal fees have been paid OR that the plaintiff has applied for registration and that it has not been refused

(ix) The consumer is in default and has been in default under the relevant credit agreement for a period of 20 business days or longer.

(x) That a written notice in terms of section 129(1) (a) has been properly served on the consumer (defendant).

(xi) That 10 or more business days have elapsed since delivery of the notice.

(xii) The consumer either did not respond to the section 129(1) (a) notice or the consumer rejected it.

(xiii) The consumer did not refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud.

(xiv) There is no matter pending before the Consumer Tribunal that relates to the credit agreement in question.

(xv) That the consumer under an instalment agreement or lease has failed to surrender the goods voluntarily (if applicable).

(xvi) If the consumer returned the goods that are subject to an instalment agreement or lease that the provisions of section 127 have been complied with and aver facts to prove compliance (if applicable)

3. The following documents to be filed with request for judgment:
   a. Original underlying credit agreement
   b. A copy of the section 129 notice and proof that it has been properly served on the consumer.
   c. Copy of certificate of registration with the NCR

4. The NCA is retrospective in so far as debt enforcement proceedings are concerned. See item 4 of Schedule 3 of the NCA. If a consumer is in default under a credit agreement and legal proceedings to enforce the agreement are initiated on or after 1 June 2007 the provisions of the NCA must be complied with, no matter when the credit agreement was concluded. (The term *"debt enforcement"* is used in the NCA instead of court proceedings.)

5. Legal proceedings may not commence before a written notice in terms of section

129(1) (a) has been properly served on the consumer. The section 129 notice cannot be replaced by a notice in terms of section 11 of the Credit Agreements Act, 1980 (Act No. 75 of 1980). The section 129 notice and the letter of demand may be a combined document.

6. The section 129 notice (and any other notice required in the Act) must be served on the consumer either personally or sent by registered mail. See section 168. Proof of delivery is required.

7. Before judgment can be granted the court must be satisfied that the requirements set out in section 130(3) have been met.

   The Court must be satisfied that:

   (i) At the time of institution of the proceedings the consumer is in default and has been in default under the relevant credit agreement for a period of **20 business days** or longer.

   (ii) The credit provider has delivered a section 129(1) (a) notice to the consumer, proposing referral of the credit agreement to a debt counsellor, alternative dispute resolution agent etc. and **10 or more business days** have elapsed since delivery of the notice. The periods of 20 and 10 days may run concurrently.

   (iii) If the consumer applied for debt review in terms of section 86 that the credit provider has given notice of termination of the debt review. Such notice may only be given after a period of at least **60 days** had passed since the date on which the consumer had applied for the review and the consumer having since then fallen into arrears in respect of the credit agreement and 10 or more business days have elapsed since delivery of the notice.

   (iv) The consumer either did not respond to the section 129(1) (a) notice or the consumer rejected it.

   (v) The consumer did not refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud.

   (vi) There is no matter pending before the Consumer Tribunal that relates

to the credit agreement in question.

(vii) In the case of an instalment agreement, secured loan or lease, the consumer has not of his own volition surrendered the property in question to the credit provider.

(viii) The credit provider has been registered with the National Credit Regulator (where registration is required by the NCA) and the renewal fees have been paid.

8. Regarding compliance with sections 129 and 130(3) it must be stressed that law cannot be pleaded and that the facts that are relied on must be stated. The court has to come to a finding of compliance with the law based on the facts pleaded.

9. At the very least the particulars of claim ought to refer to a section 129 notice attached thereto from which the court may then conclude whether or not section 129 has been complied with.

10. Section 130(3): The defendant has to know what averments the plaintiff is making and the court has to be able to conclude from the averments made that section 130(3) has been complied with.

11. The nature of the contract cannot be altered by the manner of pleading thereof.

12. A credit agreement will not necessarily take the form of a document signed by both parties. The registration details supplied by patients or the admission details supplied by parents of scholars may, together with terms and conditions of payment, establish credit agreements. Invoices submitted may contain terms and conditions that, in the event of non-payment, result in incidental credit being granted.

13. Small credit agreements have to be recorded in a prescribed form. See section 93 read with regulation 30. Section 9(2) defines small credit agreements.

14. Payments made i.t.o. statutory provisions, such as rates and corporate levies, do not constitute credit agreements even if a fee / charge / interest becomes payable by operation of law upon default of payment.

15. A distinction has to be made between rates payable to a Local Authority and monies payable for services rendered by a Local Authority. See the definition of "utility" and section 4(6) (b). Overdue amounts become incidental credit.

16. Sections 57 and 58 of the Magistrates' Courts Act (Act 32 of 1944): The first document whereby proceedings are initiated is either a summons or a letter of demand. As from 1 June 2007 this document has to be preceded by a section 129 notice.

17. An admission of liability and undertaking to pay (section 57) and a consent to judgment (section 58) signed prior to a section 129 notice is not valid.

18. It is advisable to deal with section 130(3) in the section 129 notice.

19. The Magistrate may *mero motu* raise issues of lawfulness / unlawfulness of the terms of a contract.

20. The defendant has to raise questions relating to reckless credit and over-indebtedness.

I trust that the above may be of assistance.

Yours faithfully

A D van der Merwe
ADDITIONAL 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

ANC resolution on the Transformation of the Judiciary

ANC

23 January 2008

As adopted by the 52nd ANC national conference, December 2007

NOTING THAT:

1. A number of the issues regarding the transformation of the judiciary that were decided upon at the National Conferences held in Mafikeng and Stellenbosch, and the 2005 National General Council have not yet been implemented.
2. Implementation of these decisions is long overdue.
3. There have been processes undertaken by both the executive, as well as the legislature, to consult all relevant role players, including the judiciary, on these policy issues, over a very lengthy period.

RESOLVES THAT:

1. A single, integrated, accessible and affordable court system must be established, including the integration of the Judicial Service Commission (JSC) and the Magistrates Commission (MC) into a single appointment mechanism and the establishment of a single grievance procedure for judicial officers.
2. The Constitutional Court should be the highest (apex) court for all matters, constitutional and non-constitutional, with the Supreme Court of Appeal (SCA) as an intermediate court of appeal, with the proviso that this should not lead to undue delays in the hearing of appeals. Decisions of the SCA will be final if the Constitutional Court does not grant leave to appeal in a matter. Full bench appeals at the level of the High Court should be abolished and circuit courts shall be introduced at the level of the Supreme Court of Appeal. (SCA).
3. The High Court system should be rationalised into a single High Court, with each province having, at least, a division of the high court, and the courts of appeal should be structured as described in paragraph 2. Each division of the High Court should have a single Judge President and a single territorial area of jurisdiction.
4. Skills resulting from specialisation must be retained as we move towards a single, integrated, streamlined court system. Therefore, specialist skills must be retained, but located within the single court system, for example, the Competition Appeal Court, the Electoral Court and Tax Courts must be so integrated. The Labour Appeal Court should be integrated into the SCA, as a separate chamber. The Labour Court should be integrated into each division of the High Court, possibly as separate Chambers. The creation of further specialised courts outside the single court system should be discouraged.
5. Judicial training and skills development of our judiciary is non-negotiable and must be vigorously pursued. Appropriate mechanisms must be urgently established to pursue the priority of establishing an adequate pool of judicial officers who are steeped in and reflect the progressive values of our

constitution.

6. The re-demarcation of courts to enhance access to justice, especially in rural areas, must be urgently expedited. Magisterial Districts must be re-demarcated by taking into account the boundaries of the other levels of government, especially municipal boundaries and the distribution of courts in accordance with population demographics, especially in previously disadvantaged and marginalised communities. Outdated court descriptors (titles / descriptions) should be renamed. The various jurisdictions, mandates, boundaries etc. must be rationalised, integrated and aligned.
7. A new layer of Regional Civil Courts should be established by extending their jurisdiction to civil law matters; the functions of the old "black" Divorce Courts must be taken over by the new Regional Civil Magistrates Courts.
8. "Community" courts, municipal and small claims courts must be promoted and expanded where practical and practicable.
9. There must be an alignment of traditional courts with our new constitutional dispensation and particular attention must be paid to the incorporation and development of our indigenous law
10. There needs to be an integrated system of court governance, within a single judiciary, with the Chief Justice as the head of the judiciary.
11. Whilst justice is an exclusive national competency, there is a need to look at the matter carefully in the context of co-operative governance with particular reference to access and equity. We reaffirm the need for everyone to respect the rule of law and the independence of the judiciary, especially in so far as the adjudicative function of the courts is concerned. The judiciary must adjudicate without fear, favour or prejudice, but should also respect the areas of responsibility of other arms of the state and not unduly encroach in those areas.
12. The principle of separation of powers and the independence of the judiciary must be respected by all spheres of government. In this context:
    a. The Chief Justice, as head of the judicial authority, should exercise authority and responsibility over the development and implementation of norms and standards for the exercise of all judicial functions, such as the allocation of judges, cases and court rooms within all courts in the court system.
    b. The administration of courts, including any allocation of resources, financial management and policy matters relating to the administration of courts, are the ultimate responsibility of the Minister responsible for the administration of justice.
13. There must be a single rule-making mechanism for all courts, which is inclusive of all role players, to process rules through the Rules Board, which is a specialist advisory body consisting mainly of legal practitioners, with the rules being approved by the Minister and Parliament, and in the process of adopting rules to allow for public participation.
14. Every person must enjoy the right to use an official language of his or her choice in all court proceedings of first instance. Interpretation services must be provided, as far as is possible, where the language in criminal proceedings is not the accused's official language of choice or is conducted in a language he or she does not understand. In the case of an appeal / review against the

findings of the court of first instance, the record must be typed in English, for use in the court of appeal/review. Any written court process (for example, a summons or writ of execution) should be produced and printed in English and, if it is the wish of a litigant, in one other official language, as prescribed.

15. This resolution, including past resolutions, must be urgently implemented by the end of the present term of government.

A Last Thought

"When dealing with the functions of a magistrate or Judge, the level at which cases are finalised might be important. However, it [is] not the sole factor which plays a role in the equation. The speed at which cases are finalised cannot be regarded as the sole criterion in determining productivity in dispensing of justice. The function of a presiding officer is not similar to that of a production manager in a factory, whose object is to meet targets and deadlines. In a factory the units manufactured, be they cars or garments are done by machines whereas in a court the object is to hear and to adjudicate over issues which will invariably differ from case to case. The duration of the trial will vary depending on the magnitude, novelty and complexity of the issues and the number of witnesses involved, and the nature and substance of argument." *Per* Ismail J. in *Travers v National Director of Public Prosecutions and Others* 2007 (3) SA 242 (TPD).