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A KZNJETCOM Newsletter

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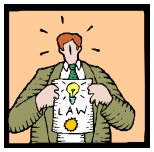
Welcome to the third issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or faxed to 031-368 1366.



New Legislation

The National Credit Act, 2005 (Act 34 of 2005) will come into operation in a piecemeal fashion on the following dates: (See Government Gazette No. 28824 of 11 May 2006 p 3.)

(a)1 June 2006 as the date on which sections 1 to 11 (Chapter 1); sections 12 to 25 and 35 to 38 (Chapter 2, Part A, C and D); sections 39 to 59 (Chapter 3); section 69; section 73; sections 134 to 152 (Chapter 7); sections 153 to 162 and sections 164 to 170 (Chapter 8 excluding section 163); sections 171 to 173 (Chapter 9); Schedule 1; Schedule 2 and Schedule 3 shall come into operations;

(b) 1September 2006 as the date on which sections 26 to 34 (Chapter 2, Part B); sections 67, 68, 70 and 72 shall come into operation;

(c) 1 June 2007 as the date on which section 60 to 66 (Chapter 4, Part A); section 71; sections 74 to 88 (Chapter 4, Part C and D); sections 89 to 123 (Chapter 5); sections 124 to 133 (Chapter 6); and section 163 shall come into operation.

Recent Court Cases

1. S v SCHOLTZ 2006(1) SA CR 442 (ECD)

In order to successfully raise the defence of non-pathological incapacity, the reasonable possibility must exist that the accused was not able to distinguish between right and wrong and that he could not act according to this distinction. The mere raising of the defence that the accused did not know what he was doing or that he could not act according to this knowledge, was not sufficient. *In casu*, in the absence of any further evidence which could

provide the factual foundation for dismissing the inferences of intentional and voluntary behaviour, and as he had not presented any expert evidence regarding the possible effect of the intake of alcohol on his ability to distinguish between right and wrong or to act accordingly, the appellant's assertion of incapacity could not succeed. (At 444*h*-445*h*.)

2. SANTAM LTD AND OTHERS v BAMBER 2005(5) SA 209 WLD

The appellants, the defendants in an action by the respondent as plaintiff in a magistrate's court claiming indemnity from the appellants as co-insurers in terms of an insurance policy, appealed against a decision of a magistrate refusing an application for the rescission of a default judgment granted against the appellants in terms of Rule 12(1)*(b)* of the Magistrates' Courts Rules. It appeared that after the time for filing a plea had expired, the plaintiff's attorney had served a notice of bar in terms of Rule 12(1)*(b)* on the appellants' attorney requiring delivery of the plea within five days. The plea was served on the plaintiff's attorney on the last day of the five-day period allowed but it was filed with the clerk of the court only on the next court day. The plea was thus delivered one court day late in terms of Rule 12(1)*(b)*, entitling the plaintiff to approach the court for default judgment without notice to the appellants as defendants. Such a request for default judgment was filed by the plaintiff's attorney, together with the summons, the notice of intention to defend and the notice of bar. The defendants' plea, which was in the plaintiff's attorney's possession, was not filed. The court file went astray and the defendant's plea was probably never put before the magistrate adjudicating the request for default judgment. Default judgment was subsequently granted by the magistrate. The appellants applied for the rescission of the default judgment, but the application was refused. In an appeal to a High Court,

Held, that the plaintiff's request for default judgment constituted an abuse of the process of the court. The plaintiff's attorney, having been served with the defendants' pleas, could not have been in any doubt that it was the defendants' intention to defend the matter. (At 212C.)

Held, further, that a request for default judgment was in the nature of an *ex parte* application where generally an applicant was required to make full disclosure of all relevant factors. There was no good reason why the plaintiff's attorney should not have disclosed the fact of service of the plea on her in the request for judgment by default. (At 212C-D.)

Held, further, that, in the application for rescission of the judgment, the magistrate should have found that, had the plea been placed before the magistrate adjudicating the request for default judgment, it should have induced him not to grant the default judgment. (At 213B.)

Held, further, that once it is accepted that the plea was, or should have been before the magistrate who granted default judgment, such judgment clearly was obtained by mistake which in itself constituted sufficient reason for the rescission thereof. (At 213D.)

3. S v MOILA 2006(1) SA 330 (TPD)

Held, that contempt of court was one of the common-law crimes with the object of protecting and preserving the due administration of justice. It could be committed in various ways and the law distinguished between contempt of court *in facie curiae* and *ex facie curiae*. Scandalising the court was an example of contempt of court *ex facie curiae* and it referred to contempt committed 'outside the face of the court'. (At 345G/H-346E/F.)

Held, further, that contempt in the form of scandalising the court entailed the publication of words that tended, or were calculated, to bring the administration of justice into contempt. The Court again applied the words of Kotzé J in *In re Phelan* (1877-81) Kotzé 5 at 7 that had

found acceptance in our courts: 'Now nothing can have a greater tendency to bring the administration of justice into contempt than to say, or suggest, in a public newspaper, that the Judge of the High Court of this territory, instead of being guided by principle and his conscience, has been guilty of personal favouritism, and allowed himself to be influenced by personal and corrupt motives, in judicially deciding a matter in open Court.' (At 346G-H.)

Held, further, that Kotzé J's description was subject to the reservation that Judges were open to criticism and, if fair and reasonable commentary was offered against a judicial decision said to be bad in law or contrary to public good, it would not constitute contempt of court. Every citizen had the right to make fair comment, even robust comment, on the conduct of Judges as matters of public interest, provided the comment was made *bona fide*, free of malice and without oblique motive. However, it would be contemptuous where the comment was a scurrilous abuse of a Judge, in his capacity as such, but even then, only in the most intolerable instances. (At 346I/J-347B.)

From The Legal Periodicals

The **De Rebus** (The S.A. Attorneys' Journal) contains discussions from the latest law reports in every issue under the heading: *The Law Reports*. Since the journal is distributed free of charge to all attorneys any magistrate should request a copy from his local attorney to read these discussions and other interesting articles.

The De Rebus is also available online at **www.derebus.org.za.**

Contributions from Peers

UNSWORN OR UNAFFIRMED EVIDENCE: WHEN ADMISSIBLE

Introduction

The general and peremptory rule is that in criminal proceedings no person may be examined as a witness unless he or she is under oath, as prescribed in section 162 of the CPA. This provision is subject to the exceptions in sections 163 (1) [affirmation] and 164 (1) [unsworn or unaffirmed evidence] of the CPA. It is the latter provision which is the subject of the present focus, owing to the numerous higher court decisions resulting from irregularities in the application of its principles in the lower courts.

The underlying operational principle

Common to each of the three provisions of the CPA referred to is the fundamental principle that if a presiding officer is not satisfied that a witness has the capacity to distinguish between truth and falsity, that witness is not competent to testify. It is from this basic

premise that a presiding officer will proceed to apply these provisions.

Section 164 (1) of the CPA
"*Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth, the whole truth and nothing but the truth.*"

A series of higher court decisions relating to the application of this provision will be referred to below in order to establish with clarity what the current legal position is:

S v Malinga 2002 (1) SACR 615 (N)
The accused was convicted by a Regional Court of raping a nine year old girl and referred to the High Court for sentence. The High Court confirmed the conviction and imposed sentence, but granted leave to appeal against the conviction.
The complainant gave her evidence through an intermediary without being sworn in or warned to tell the truth or asked whether she understood an oath. During the course of the complainant's evidence the magistrate interrupted her and indicated that the court had omitted to formally warn the witness. The following questions were put to her:
"*Do you know the difference between truth, that which really happened, and lies, make up stories?... Yes your worship.*
And people who come to Court they are expected to speak only the truth?.... Yes your worship.
And will you continue to tell the truth hereafter?.... Yes your worship."
In setting aside the conviction and sentence it was held that before applying the provisions of section 164 (1), a finding must be made that the witness does not understand the nature and import of an oath and, in order to reach such a finding, there must be some form of preliminary inquiry. If after such inquiry the court finds that the witness does not have the capability to understand the nature and import of an oath, it should establish whether he or she knows what it means to speak the truth. In the instant case the record did not reveal that any inquiry was made to establish whether the complainant was able to understand the nature of an oath neither did it reveal any finding made by the magistrate as required by section 164 (1). Non compliance with this provision, therefore, rendered the evidence given by the complainant inadmissible.

Director of Public Prosecutions, KwaZulu-Natal v Mekka 2003 (2) SACR 1 (SCA)
The respondent was convicted by a regional court of rape and indecent assault of a nine year old girl and sentenced to 10 years' imprisonment. On appeal, and in setting aside the conviction and sentence, the NPD held that the magistrate failed to inquire from the complainant whether she understood the nature and import of the oath and that such failure constituted an irregularity rendering the complainant's evidence inadmissible.

The proceedings in the regional court preceding the complainant's testimony were recorded as follows:
"*Court: M. how old are you?*
M: I'm nine years.
Court: Do you go to school?
M: Yes.
Court: What standard are you in class?
M: Standard 2.
Court: You're a clever girl. All right, do you know the difference between truth and lies?

M: Yes.
Court: What happens to you at school if your teacher finds out you are telling lies?
M You get punished.
Court: All right, it's very important you tell us the truth today in court and you're warned to tell the truth."

The regional magistrate conceded that she never inquired from M whether she understood the nature and import of the oath or whether she considered the oath to be binding on her conscience before admonishing her to tell the truth, but added that she believed that due to the complainant's tender age she would not have understood the nature and import of the oath and therefore merely admonished her to tell the truth after she was found to be a competent witness who knew the difference between truth and falsehood.

The SCA, in its judgment referred to *S v Malinga (supra),* but did not follow it. In concluding that the magistrate did not commit any irregularity by allowing the complainant to testify after having warned her to tell the truth and in upholding the appeal, the court, referring to and confirming the correctness of its previous judgment in *S v B* 2003 (1) SACR 52 (SCA), held that an inquiry is not always necessary in order to make the finding required by section 164 (1) and that the mere youthfulness of a witness may justify such a finding. The fact that the magistrate, after having established the age of the complainant, proceeded to inquire whether she understood the difference between truth and lies and then warned her to tell the truth was a clear indication that she considered that the complainant, due to her youthfulness, did not understand the nature and import of the oath. The magistrate confirmed this in her reasons and the magistrate did, therefore, make a finding that the complainant was a person who, from ignorance arising from youthfulness, did not understand the nature and import of the oath.

Lewis & another v S [2003] JOL 11219 (C)
Both *B* and *Mekka* [*supra*] were applied and followed by the court in dismissing a contention that the evidence of a 14 year old witness was inadmissible because the magistrate omitted to hold an inquiry before he formed an opinion that the witness did not understand the nature and import of the oath or affirmation. The court held that nothing more is required of the presiding judicial officer than to form an opinion that the witness does not understand the nature and import of the oath or affirmation due to ignorance, arising from youthfulness, defective education or any such like cause. The record of proceedings showed that the magistrate was informed by the witness that he was 14 years of age before he tendered his evidence, and arising from this information the magistrate had formed an opinion that the witness did not understand the nature and import of the oath or affirmation. Based on this opinion the magistrate proceeded to admonish the witness to speak the truth, the whole truth and nothing other than the truth.

S v Chalale 2004 (2) SACR 264 (WLD)
In an automatic review before Borchers J (Marais J concurring), the two State witnesses were aged 17 and 15 respectively. In both cases, the magistrate failed to inquire from them whether they understood the meaning of taking an oath: He simply admonished both to tell the truth in terms of section 164 (1) of Act 51 of 1977. The Court held that before the provisions of section 164 (1) can be utilized, the judicial officer is required to make a finding that the witness does not understand the nature and import of the oath due to 'ignorance arising from youth, defective education or other cause'.

Referring to *B* and *Mekka* [*supra*] the court held that where, in this case, the witnesses were 17 and 15 years old, there was no information available to the magistrate upon which he could form an opinion that they did not understand the nature and import of the oath and

that in the court's experience, youths of 17 and 15 years usually do understand the import of the oath: The opposite can certainly not be presumed and this was a case where, in order to reach the finding required by section 164 (1), the magistrate should have made the necessary inquiries.

Conclusion
No doubt the reader may well be asking: What has changed since *Malinga* then? The answer, in my view, lies in what was said in *B* [*supra*] in par. [15] of the judgment where it was held that there is no express requirement in section 164 (1) that a presiding officer must hold an investigation to establish if a witness understands what it means to take an oath. It may for example happen that, when there is an attempt to administer the oath or obtain an affirmation, it comes to light that the person concerned does not understand the nature and meaning of the oath or affirmation. Sometimes the youthfulness of the child called will, in itself, indicate that the child is ignorant of the meaning of an oath and in such case, no further investigation need be conducted. Nothing more is required than that the presiding judicial officer form an opinion that a witness does not understand the meaning of the oath or affirmation, owing to ignorance arising from youth, defective education or other cause. Although preferable, no formal recording of a finding is required.

The conclusion would seem to be that the record of proceedings should at least reveal some objectively ascertainable fact or circumstance from which it can be established that the witness does not understand the meaning of the oath or affirmation. Although each case will depend on its merits, it may be wise to err towards caution and thoroughness, rather than inviting one's judgment for second-guessing. For that reason it might also be advisable to inquire whether the witness concerned understands the difference between truth and falsehood for purposes of the admonition [the question whether such an inquiry needs to be held was not decided in either *B* or *Mekka* and, therefore, *Malinga* remains binding on this aspect].

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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 by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest for Magistrates

Retirement vs. Re-Tyrement

Published by Lynda March 30th, 2006 in Generations, Articles

The first Baby Boomers will turn sixty this year and they will do what no other generation has done before them: Re-tyre.

There are a number of factors that are already causing futurists to look at the effects of this upcoming change. Many predict that it will bring about a societal change of Tsunami-like proportions. In America, 70 million Boomers will retire over the next twenty years. One of the factors that have changed the Boomer world is medical science. Many more people are living much longer. The generation behind the Boomers, the Xers, are not as large in number as their predecessors. In the States there are approximately 46 million in Generation X – 35% less than the Boomers.

These low numbers are causing much concern amongst actuaries who are trying to balance the pension fund cash flows of major corporations. Many Boomers have spent most of their work life at one company thus their pension fund has been the main focus of their retirement funding. As corporations have merged and been bought out, people have been retrenched or shifted. Many may have been retrenched early or will be surprised in the near future by such a change. These employment concerns have seen the Boomer generation looking at their future through new eyes. Watching their parents and older peers' mode of retirement has also had a dramatic impact on their perception of the retirement life stage.

Many people in the Silent Generation retired into a life of golf, bridge and the joy of relaxation – but not necessarily found the happiness after which they have hankered. The Boomers have watched this process and many are already making changes early in their 50s to make sure that they do not repeat this pattern. They have realized that the cash and investments that they own will not be enough for the number of years they may live and that they need to take precautions to prepare for the high medical care costs. Many large corporations are also freezing pension benefits, which spells disaster for retiring workers as they do not have enough funds for retirement. In many countries the public pension system is inadequate to replace private plans when they disappear.

Due to these uncertainties, two major groups are starting to emerge amongst the Boomers. The first group will RETIRE at a prescribed age from their company. The second group will RE-TYRE. They are looking for new opportunities that may have no bearing on the work they have done for the past thirty to forty years. Professor Richard Johnson explains the change as follows: "The old retirement was a gradual slide away from the fullness of life whereas the new re-tyrement is an ever continuous cycle of exploration, mastery, mentorship and renewal." The decisions that the Boomers make about their future will have an impact on society.

Due to skills shortages in the workplace, Boomers have the opportunity to return to the workplace as consultants, coaches and mentors to up the skill level of others and build capacity within companies. Many corporations have already increased the formal retirement age because they want to make sure that they have access to the skills and knowledge that they need so that they can compete in the global market.

Men and women may face these challenges differently. Many men who have focused on their careers and climbing the ladder of success may battle with these changes. On the other hand, many women in their early fifties may see a second career as an opportunity to be grasped with both hands. Their commitment to raising children is over and they now have the time and energy to focus on new interests. They have also done much of the inner excavation in their first adulthood and so they are more equipped to cope with these changes. In Gail Sheehy's book, *New Passages*, this opportunity is called the "second adulthood", a second opportunity at life.

At fifty, it is possible to still have thirty good years ahead of us. In the light of that, there are

many opportunities for the Boomer generation to focus on if they choose to Re-Tyre instead of retire. Boomers will have worked for many years in a career choice that made financial sense. The sadness for many is that this means that it is not really an area of passion and they may regret the many hours that they have spent doing this type of work. In this second adulthood they now have an opportunity to choose a career or job that makes them happy. For some it may be dressmaking whereas before they were a bookkeeper. For another it may be picture framing whereas before they were an accountant. The greatest challenge here is not to use up all your savings on a new career but to supplement what you have with what you enjoy. The minute you start to look at using up your life savings to buy a guesthouse or coffee shop you may find yourself with no money and no second career.

One of the greatest human desires is to experience significance and make a difference. People in this second adulthood phase also have the chance to look at their lives and the skills they have, and to use them to leave a legacy. For those people who need to supplement their retirement income, opportunities will exist to earn money using their knowledge and experience. There will be some who will also be willing and able to offer their skills for free because they have saved what they believe to be enough to keep them comfortable in retirement. The true value is not the money received in exchange for your skills but the satisfied feeling of making a difference. Some groups who have a strong religious leaning may choose to work within their organization or join a short or medium-term mission group locally or in some other part of the world. The freedom to do this without having to consult your employer comes with this stage of life.

Today, we often read of people in there seventies who have just earned a degree or even a school qualification. Many people in Re-tyrement may choose to focus on learning and studying for knowledge and enjoyment rather than employment. Several scientific studies indicate that an active mind affords a person a much healthier outlook on life. The fact is a positive mindset will bring about change and encourage good health.

If we want to embrace re-tyrement we will need to balance many areas of our lives to achieve fulfillment and successfully navigate this period. Relationships and good health together with mental and spiritual development will enhance the cycle of continuous growth. Ultimately, the steps we take towards a satisfying future in our sixties will impact those who come after us. We are giving others who will follow the opportunity to choose a different future. Only time will tell if these new choices will benefit the Boomer generation and the ones who follow. Have you seen the wave coming? Are you ready for the change**?**