E-MANTSHI

A KZNJETCOM Newsletter

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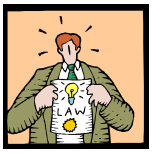
Welcome to the thirtieth issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we 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 Criminal Procedure Amendment Bill 2008 is being introduced in the National Assembly . The explanatory summary was published in Government Gazette No. 31115 of 2 June 2008.

   The Bill is intended to amend the Criminal Procedure Act, 1977, so as to provide for the postponement of certain criminal proceedings against an accused person in custody awaiting trial via audiovisual link or audio link; to provide for the expungement of criminal records of certain persons in respect of whom certain sentences have been imposed after the compliance with certain requirements and the expiry of a fixed period; and to provide for matters connected therewith.

2. The Judicial Matters Amendment Bill, 2008 will also be introduced in the National Assembly . The explanatory summary was published in Government Gazette No. 31117 of 2 June 2008.

   The Bill is intended to amend the General Law Amendment Act, 1935, so as to prohibit the unlawful disposal of the body of a newly born baby; to amend the Administration of Estates Act, 1965, so as to regulate the calculation of interest payable in respect of certain moneys paid into the Guardian's Fund and substitute obsolete terminology; to amend the Medicines and Related Substances Act, 1965, so as to effect a technical correction in the Afrikaans text; to amend the Criminal Procedure Act, 1977, so as to substitute obsolete references; so as to further regulate the payment of admission of guilt fines; to further regulate the release of an accused person on bail; to further regulate the appointment of psychiatrists in cases involving the mental

capacity of an accused person; to provide for the prosecution of persons who commit offences while doing diplomatic duty outside of the Republic; to further regulate the imposition of periodical imprisonment; and to further regulate appeals in criminal proceedings from a magistrate's court to a High Court and from a High Court to the Supreme Court of Appeal; to amend the Attorneys Act, 1979, so as to extend the category of persons entitled to engage candidate attorneys; and to increase the penalties that may be imposed on attorneys for improper conduct; to amend the Admiralty Jurisdiction Act, 1983, so as to further regulate the form of proceedings relating to maritime claims; to amend the Matrimonial Property Act, 1984, so as to remove a discriminatory provision; to amend the Intestate Succession Act, 1987, so as to regulate the position of permanent same-sex life partners; to amend the Criminal Law Amendment Act, 1997, so as insert certain serious offences in Part 1 of Schedule 2; to amend the Debt Collectors Act, 1998, so as to further regulate the number of the members of the executive committee of the Council for Debt Collectors; and to further regulate the trust accounts of debt collectors; to amend the Promotion of Access to Information Act, 2000, so as to extend the period within which to make rules of procedure for judicial review; to extend the period within which the code of good administrative conduct must be made; and to effect a technical correction in the IsiXhosa test; to amend the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000, so as to further regulate the remuneration and allowances payable to members of the Equality Review Committee; to amend the Judges' Remuneration and Conditions of Employment Act, 2001, so as to further regulate the service of judges after discharge from active service; to amend the Prevention and Combating of Corrupt Activities Act, 2004, so as to further regulate penalties; and to provide for matters connected therewith.

A copy of both the above bills can be obtained at www.pmg.org.za .

3. In terms of section 171 of the National Credit Act, Act 34 of 2005 the regulations published in Government Notice No. R489 of 31 May 2006 were amended on the 29th of May 2008. The amendments were published in Government Gazette No. 30713 of 29 May 2008.

   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"

   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, plus R1,00 per page for copies of each page of such document, the sum of which must not exceed R50,00."

4. Draft Regulations under the Children's Act, 2005 (including the Children's Amendment Act, 2007 have been published in Government Gazette No. 31165 of 27 June 2008. Interested parties are invited to submit comments on the draft regulations within 45 days of the publication of the notice. The draft regulations are also available on the website at www.dsd.gov.za

5. In terms of section 36 of the Administrative Adjudication of Road Traffic Offences Act, 1998 (Act No. 46 of 1998) certain sections of the Act has come into operation in the City of Tshwane Metropolitan Municipality from 1 July 2008. The notice in this regard was published in Government Gazette No. 31198 dated 1 July 2008.

   On the same day Regulations in terms of the Act was published in Government Gazette No. 31183. These regulations were published in terms of section 34 of the Act, Act 46 of 1998.

Recent Court Cases

1. S. v. PHIRI 2008(2) SACR 21 TPD

A presiding officer must not be discourteous to witnesses in court or to a high court when answering queries

The court has the right to question any witness at any stage of the proceedings, the main purpose being to clarify and clear up points which are still obscure. However, the taking over of any examination or cross-examination of a witness by the court does not conform to generally accepted norms. (At 24*c-d*.)

The magistrate in the court *a quo* constantly criticised the police, the prosecution, the defence and a higher court which sought answers to queries concerning the conduct of a trial. Such conduct was unbecoming and was to be discouraged at all costs. Discourtesy to witnesses and insults hurled with impunity *in facie curiae* could not be condoned. Such conduct rendered the proceedings irregular. (At 25*i*-26*a*, paraphrased.)

2. S. v. NAICKER 2008(2) SACR 54 NPD

The fact that a Regional Magistrate had not appointed lay assessors in terms of section 93ter(1)(a) of Act 32 of 1944 to assist in a murder trial does not always mean that such an irregularity prejudices an accused

The appellant was convicted in a regional court of murder and sentenced to 18 years' imprisonment. On appeal against the conviction and sentence two main contentions were made on his behalf. Firstly, it appeared that, contrary to the provisions of s 93*ter*(1)(*a*) of the Magistrates' Courts Act 32 of 1944, the trial magistrate had conducted the trial without the assistance of assessors and without the accused having requested that there be no assessors. This, it was argued, was an irregularity that had tainted the entire proceedings, with the result that the conviction and sentence should be set aside.

Held, that the proviso to s 93*ter*(1)(*a*) was couched in peremptory terms and, therefore, that the failure by the trial court to apply the relevant provisions amounted to an irregularity. The issue which was to be determined, however, was what effect that irregularity had had on the proceedings. It appeared that the policy consideration underlying the compulsory appointment of assessors in regional court murder trials (absent a request by the accused that there be no assessors), was one of facilitating the participation of lay assessors from other racial groups in the administration of the criminal-justice system, which had hitherto been perceived as the preserve of predominantly white judicial officers. It was not a requirement of the Act that the assessors should have experience in the administration of justice; accordingly, it was evident that the assessors would not necessarily be of real assistance to a regional court in reaching a final decision in factual issues relating to the guilt or innocence of an accused person. Having regard to the purpose and history of the system of trial by assessors in the lower courts, it could not be said – despite the peremptory wording of s 93*ter*(1)(a) – that failure to comply therewith was so serious and fundamental as *per se* to vitiate the proceedings. (At 57*i*-58*a*; 60*c*-*g* and 61*h*-62*a*.)

Held, further, that it next needed to be determined whether, even though the irregularity was not one which had led *per se* to a failure of justice, there was a reasonable possibility that it had affected the outcome of the trial. Put another way, it must be established whether a reasonable trial court would inevitably have convicted the accused, in spite of the irregularity. It was common cause that the regional court magistrate and the accused belonged to the same racial group. It followed, therefore, that the cultural gap which was apparently the reason behind the provisions of s 93*ter* had not existed in the trial. Accordingly, the irregularity could not have prejudiced the accused and had not led to a failure of justice. (At 62b-e.)

3. S. v. MLIMO 2008(2) SACR 48 SCA

Formal qualifications is not a sine qua non for evidence of a witness to qualify as an expert witness

The appellant attacked his convictions for murder and attempted murder on three

grounds: amongst others on the ground that the trial court had erred in accepting that a police officer, S, was a ballistics expert and, consequently, in accepting his evidence.

Held, that there had been every reason to accept S as an expert witness. Although he had not yet completed his diploma course in ballistics, a qualification was not a *sine qua non* for the evidence of a witness to qualify as expert evidence. A court might well be satisfied in a given case that, despite the lack of a formal qualification, a witness was capable of giving expert testimony. S had been involved in over 3 000 cases involving ballistics testing over a six-year period. This vast experience qualified him as an expert and the trial court had been justified in accepting his evidence. As to the argument that S had appeared to seek guidance or approval from another official, it was clear that he had conducted the test himself and arrived at his own conclusion. In any event, there was nothing wrong with officers working in tandem when investigating cases. (Paragraphs [13]-[15].

4. S. v. MOLIMI 2008(2) SACR 76 CC:

The admissibility of hearsay evidence must be considered in the light of all the factors mentioned in section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988 and the accused's fair trial rights

The applicant stood trial in the High Court as the second of three accused, and was ultimately convicted of robbery, two counts of murder, attempted murder and related firearms charges. The crucial evidence implicating the applicant was contained in two statements, made after their arrest by accused 1 and 3, respectively. According to these statements, the applicant – who was the manager of the store which had been robbed – had been intimately involved in the planning and execution of the offences. The admissibility of both these statements was contested in the trial court on the grounds that they had not been made freely, voluntarily, and without undue influence but, following trials-within-a-trial, both were admitted. In its judgment, the trial court admitted the statements against the applicant on the basis of their probative value and that it was in the interests of justice to do so.

The applicant challenged his conviction in the Supreme Court of Appeal (SCA) on the grounds that the two statements ought not to have been admitted against him because of their hearsay character. The SCA set aside certain of his convictions but upheld, others, concluding that there had been no prejudice to the applicant, nor had the fairness of trial been compromised.

In a further appeal to the Constitutional Court the following points arose for determination: whether the statements made by accused 1 and 3 were confessions or admissions; whether the statements were admissible against the applicant; whether the trial court and the SCA had complied with s 3(1)(*c*) of the Law of Evidence Amendment Act 45 of 1988 (the Act); and what the appropriate consequence was.

Held, that, while the statement of accused 1 had been understood at the trial as constituting a confession, the SCA had dealt with both this statement and that of

accused 3 as extra-curial admissions. However, a perusal of accused 1's statement, read with his warning statement, clearly established that it was an unequivocal admission of guilt and, accordingly, a confession. Since s 219 of the Criminal Procedure Act 51 of 1977 provided that no confession made by any person was to be admitted as evidence against another person, accused 1's confession should have been excluded by both the trial court and the SCA when determining the guilt or otherwise of the applicant. As to the statement of accused 3, objectively viewed it amounted to an admission. It showed that accused 3 had not taken an active part in the robbery, and it had been open to him to raise a defence of dissociation from the common purpose to rob: it could not, therefore, be said to have amounted to an unequivocal acknowledgment that he had participated in the robbery. Accused 3's statement was an admission, rather than a confession, and had been correctly accepted as such by both the trial court and the SCA. The question then arose as to whether accused 3's admission ought to have been admitted against the applicant in terms of s 3(1) of the Act. (Paragraphs [29]-[32] at 91*b*-94*b*.)

Held, further, that the preconditions laid down in the Act for the reception of hearsay evidence were designed to ensure that such evidence was received only if the interests of justice required its reception. A court determining whether it was in the interests of justice to receive hearsay evidence must have regard to all the factors mentioned in s 3(1)(c) of the Act, and must also be careful to ensure respect for the fair trial rights set out in s 35(3) of the Constitution of the Republic of South Africa, 1996. *In casu* the SCA had hardly dealt with the factors listed in s 3(1)(c) of the Act, and had paid attention only to certain of the safeguards laid down by that court in *S v Ndhlovu and Others* 2002 (6) SA 305. It had also paid insufficient attention to the applicant's fair trial rights. While it had correctly acknowledged that vague provisional rulings on the admission of hearsay might be prejudicial to an accused, it had found that the 'inexplicit' and late admission of the hearsay *in casu* had not been prejudicial to the applicant. Paragraph [35]-[38] at 94*f*-96*e*.)

Held, further, that the SCA had been incorrect in observing that counsel for the applicant should have asked the trial judge for clarity regarding the admissibility of the hearsay evidence before deciding whether his clients should testify in their defence. The statement had not been admitted against the applicant, and counsel had no duty to ask for clarification. It was the prosecutor and the trial judge who had failed to discharge their legal duties – a timeous and unambiguous ruling on the admissibility of evidence in criminal proceedings was a procedural safeguard. (Paragraphs [39]-[41] at 96*f*-*i*.)

Held, further, that it was beyond question that a ruling on the admissibility of evidence after the accused had testified was likely to have an adverse effect on the accused's right to a fair trial. Proceedings in which little or no respect was accorded to the fair trial rights of the accused had the potential of undermining the fundamental adversarial nature of judicial proceedings and could threaten their legitimacy. In order for the applicant to have received a fair trial he must have known what the case against him was; he must have been able to cross-examine the authors of the statements to test their credibility and truthfulness; and he ought not to have been expected to challenge hearsay evidence that was not only

inadmissible against him, but which had been disavowed under oath by those who had given it. Accordingly, neither the trial court nor the SCA had complied with the approach enunciated in *Ndhlovu* nor with the requirements of s 3(1) of the Act. The improper admission of inadmissible evidence had resulted in fundamental prejudice to the applicant. Rather than having been admitted, everything said out of court by accused 3 incriminating the applicant ought to have been disregarded entirely. (Paragraphs [42]-[44] at 97*c*-98*b*.)

Held, further, that the remaining admissible evidence did not amount to a complete mosaic justifying the applicant's conviction. The evidence contained in cellphone records, while incriminating, could not, without further evidence, create a sufficient basis upon which to convict the applicant. In the result, no matter how strong the suspicion of the applicant's complicity in the commission of these crimes might have been, his conviction had to be set aside. (Paragraphs [51]-[54] at 100*c*-*i*.)
Appeal upheld. Conviction and sentence set aside.

From The Legal Journals

Mujuzi, J.D.

"The prospect of rehabilitation as a 'substantial and compelling' circumstance to avoid imposing life imprisonment in South Africa: A comment on S v Nkomo"

2008 *SACJ* 1

Meintjes-Van der Walt, L.

"An overview of the use of DNA evidence in South African criminal courts"

2008 *SACJ* 22

ILLsey, T.

"The defence of mistaken belief in consent"

2008 *SACJ* 63

A copy of any of the above articles can be requested from gvanrooyen@justice.gov.za .

WARDLE, B.

"Not too different now are they? Examining the Traditional Courts Bill."

De Rebus July 2008

CHADWICK, I.

"SCA Rules servitude can change – Linvestment CC v Hammersley and Another."

De Rebus July 2008

SCHULZE, H.

"The Law Reports" (a discussion of the latest law reports).

De Rebus July 2008

The above articles can be accessed on the *De Rebus* website at www.derebus.org.za .

Contributions from Peers

Notes on *S v Mgabhi* [2008] JOL 21734 (D)

The purpose of this note is mainly to air my views on the *Mgabhi* case because, if the report is read hastily (don't we all?), the reader or an inexperienced reader might repeat the errors in or make incorrect inferences from the judgment.

The review court in this matter was satisfied that the accused had been rightly convicted of the offences of driving a motor vehicle without a driver's licence (contravention of section 12(1) of the National Road Traffic Act, 93 of 1996) and negligent driving (contravention of section 63(1) of this Act). The review court also had no quarrel with the sentence of a fine of R2000 or, in default of payment, six months imprisonment, with an order that the two counts be treated as one for the purpose of sentence and with the imposition of a further suspended sentence of imprisonment.

It interfered, however, with the period of imprisonment of the further suspended sentence by reducing the three years imprisonment imposed to one year. It also set aside the condition of suspension, namely, that the accused compensated the complainant in an amount of R30 000. Incidentally, the trial court failed to indicate the period of suspension of the sentence.

In the circumstances of the case the review court took the view that the trial court awarded compensation in terms of section 300 of the Criminal Procedure Act, 51 of 1977. Because it is settled law that such an award may not be subjected to a condition upon which the suspension of a period of imprisonment depended (or for that matter, any punishment) as well as other reasons not relevant here, the award was set aside.

Firstly, it should be noted that the judgment does not exclude the fact that

compensation may in appropriate cases be a condition of a suspended sentence. This is being done regularly and discussed in text books on the subject. The review court probably did not consider this possibility as the accused, being a learner, was not in a position to pay compensation.

Secondly, where it would be permissible to take offences together for sentence, the sentence imposed may not be higher than the penalty prescribed for a single offence – *S v Leith* 1972 (4) SA 262 (K) and *S v Van Zyl* 1974 (1) SA 113 (T). In *Leith* the court remarked -

> "It seems to me that when a court imposes such a globular sentence it is in effect decreeing that the single sentence imposed is to be regarded as the punishment for each of the singular offences of which the accused is convicted. If that be so, then it would seem to follow that it is not competent to impose such a sentence where the severity thereof is such that it exceeds the jurisdiction of the court in respect of one or more of the counts which have been taken together for purposes of sentence."

Therefore, for driving without a licence the accused was effectually sentenced to a fine and imprisonment totalling one year and six months. The maximum imprisonment is for this offence is, however, one year – section 89(6).

Finally, the imposition of a suspended imprisonment of one year must be questioned. Section 89 of the National Road Traffic Act, 93 of 1996, provides different penalties for the various offences, but they have thing in common: they all provide that an accused "shall be liable to a fine or to imprisonment for a period not exceeding … years." In an unreported judgment, *S v Mkhize and Six other Review Matters,* reference AR 807/03, etc, dated 4 March 2004, the provisions of section 89 came under the scrutiny of the full bench of the Natal Provincial Division. The court decided that section 1(1)(b) of the Adjustment of Fines Act, 101 of 1991, does not authorize the imposition of a fine and a further suspended sentence of imprisonment. The court in *Mgabhi* seems to have been unaware of the *Mkhize* decision, but magistrates are, of course bound to it.

Mias Nieuwoudt

Additional Magistrate/Durban

Matters of Interest to Magistrates

The "**Commentary on the Children's Act**" edited by C.J. Davel and A.M. Skelton was published in 2007 by Juta & Co. Ltd.

It is a loose-leaf publication intended to assist Judicial Officers to grapple with the Children's Act and its regulations. The Children's Act 38 of 2005 has already been incorporated in the work and the Children's Amendment Bill will as soon as it is approved by parliament also be included in the work. Each section of the Act is followed by a commentary on the section. It is written by a team of experts who were actively involved in the drafting of the Bill.

References to comparative and international sources are provided throughout the work and it also includes international charters and conventions on children. The publication is a must have for all magistrates who will be dealing with children and since it is a loose leaf publication it will be updated regularly.

A Last Thought

- We must encourage [each other] once we have grasped the basic points to interconnecting everything else on our own, to use memory to guide our original thinking, and to accept what someone else says as a starting point, a seed to be nourished and grown. **For the correct analogy for the mind is not a vessel that needs filling but wood that needs igniting no more and then it motivates one towards originality and instills the desire for truth**. Suppose someone were to go and ask his neighbors for fire and find a substantial blaze there, and just stay there continually warming himself: that is no different from someone who goes to someone else to get to some of his rationality, and fails to realize that he ought to ignite his own flame, his own intellect, but is happy to sit entranced by the lecture, and the words trigger only associative thinking and bring, as it were, only a flush to his cheeks and a glow to his limbs; but he has not dispelled or dispersed, in the warm light of

philosophy, the internal dank gloom of his mind.

- **Plutarch,** On Listening to Lectures
