E-MANTSHI

A KZNJETCOM Newsletter

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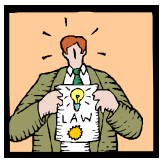
Welcome to the eight issue of our KwaZulu-Natal Magistrate's newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Your feedback and input is key to making this newsletter a valuable resource and we hope 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 "Strategy for the restructuring of the Road Accident Fund as compulsory social insurance in relation to the Comprehensive Social Security Systems" has been published for public comments in Government Gazette No. 29017 dated 8 September 2006.

2. A Notice in terms of section 15(4) of the Magistrates' Courts Act, 1944 (Act 32 of 1944) has been published in Government Gazette No. 29204 dated 15 September 2006. In terms of this notice all employees of the South African Revenue Service occupying a post on a level of grade 2 or higher in SARS shall be competent to serve any process of the court or any other document in a case in which a prosecution takes place for an offence listed in schedule 1 to the South African Revenue Services Act, 1997 (Act No. 34 of 1997).

3. Draft National Credit Regulations in terms of section 73 of The National Credit Act, Act 34 of 2005 has been published for public comment in Government Gazette No. 29246 dated 21 September 2006.

4. Regulations in terms of the National Credit Act, 2005 (Act No. 34 of 2005) were published in Government Gazette No. 29245 dated 21 September 2006. These regulations deal with the prescribed Time Frame for Free Credit Records and the Determination of Application and Registration Fees.

5.The KwaZulu-Natal Pound Act, 2006 (Act No. 3 of 2006) has been promulgated in Provincial Gazette No. 0513 dated 10 October 2006. The Act can be accessed online at www.lawsoc.co.za/kznprovince/index.htm. This Act repeals the 1947 Pound Ordinance, Ordinance 32 of 1947.

Recent Court Cases

1. S. v. JOAZA 2006(2) SACR 296 (TPD)

The accused was convicted in a district court on two counts of housebreaking with intent to steal and theft, and sentenced to two years' imprisonment.

On automatic review the High Court confirmed the convictions and sentence, but commented on two disturbing aspects of the matter. First, that the accused should have been tried in a regional court, rather than a district court. It was held to be of critical importance that prosecutors ensure that persons were charged in the most appropriate forum for the specific offence or, if necessary, that they be transferred to a regional court for sentencing. Secondly, the accused had been sentenced without a list of any previous convictions having been made available to the court. The Court commented that previous convictions played an important part in the assessment of a fair and just sentence and simply to regard convicted persons as first offenders was to invite public disdain for the criminal justice system. Thus, while it was within the discretion of the prosecution to place such a list before the court, it was prudent to do so in every case, thereby ensuring correct and judicious sentences. (At 297b-i.)

2. S. v. MASIYA 2006(2) SACR 357 (TPD)

The accused was tried in a regional court on a charge of raping a 9-year-old girl. At the close of the defence case, the accused having elected not to testify, the facts accepted by the magistrate were such as to establish the commission of indecent assault, in that the accused had anally penetrated the complainant. However, the magistrate extended the definition of rape to include anal penetration and convicted the accused accordingly. The matter was then referred to the High Court for sentencing in terms of s 52 of the Criminal Law Amendment Act 105 of 1997.

***Held*, amongst others, that, having regard to the relevant provisions of the Constitution of the Republic of South Africa, 1996, magistrates' courts were not explicitly excluded from enquiring into the validity of the common law. Magistrates' courts were bound to apply the Bill of Rights and to interpret all laws in a manner that promoted the Bill of Rights. If such a court finds that a common-law rule or principle is invalid, it must allow a competent authority to correct the defect. That authority was the High Court, which had inherent power to develop the common law to bring it in line with constitutional imperatives. (Paragraph [60] at 375c.)**

***Held*, further, that indecent assault, as a competent verdict on a charge of rape, had been viewed historically and hierarchically as a lesser crime. As a result, persons convicted of anal rape had been sentenced far more leniently even though, as a common law crime, a maximum sentence of life imprisonment was possible. Victims of sexual assaults were subjected to degrading examinations to establish which orifice had been penetrated, so that the precise form of indecent assault could be established**

and the minimum sentence legislation correctly applied. Where the victim, due to youthfulness or mental disability, was unable to convey exactly which orifice had been penetrated, the accused would receive the benefit of the doubt and a lighter sentence. A real distinction existed in law even when an accused, bent on carnal intercourse irrespective of which orifice was penetrated, happened fortuitously to penetrate the anal orifice, simply because it was in such close proximity to the vaginal one. However, it was clear from a review of recent authorities on the point that the High Courts already regarded anal rape as being as serious as rape proper, and that the distinction was not warranted. (Paragraphs [61]-[68] at 375h-377h.)

***Held*, further, that there was indisputably a strong case to be made out that the definition of rape was archaic and based on social values that were no longer valid;the common-law limitation of rape to vaginal penetration was anachronistic and offensive. Constitutional and international imperatives of due protection of all children and the equal upholding of the dignity and respect of all persons, were negated by this definition. It was unfairly discriminatory with reference to the offender, the victim and the type of deeds (anal and vaginal penetration) which constituted equally severe attacks on the personal integrity and *dignitas* of the victims. Limiting the offence of rape to penile penetration of the vagina could not be held to promote the equality of the previously disadvantaged group (females) and thus to pass the limitation test set out in s 36 of the Constitution. It was not a justifiable limitation in an open and democratic society based on human dignity, equality and freedom. (Paragraph [71]-[72] at 378g-379c.)**

***Held*, accordingly, that the common law definition of rape was unconstitutional and the definition was extended to include acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person. The provisions of the Criminal Law Amendment Act 105 of 1977 and its Schedules, and of s 261(1)(e), (f) and (2)(c) of the Criminal Procedure Act 51 of 1977, and of the Schedules to the latter Act dealing with bail provisions, were declared to be invalid and inconsistent with the Constitution, to the extent that they were gender specific. Wherever these provisions were gender specific, the word 'person' was to be read in for references to a specific gender. Proceedings in the court a quo were determined to be in accordance with justice. Sentencing of the accused was postponed until a determination of a declaration of constitutional invalidity made by the Constitutional Court.**

3. S. v. MSIBI 2006(2) SACR 387 (TPD)

The accused was convicted of contravening s 39(1)(m) of the Arms and Ammunition Act 75 of 1969, in that he had handled a firearm while under the influence of alcohol. On his arrest for drunkenness a firearm had been found in a sheath in his trousers. The relevant subsection referred to used the words 'handles an arm while ... under the influence of liquor...', accordingly, the question that arose on review was whether merely having a firearm on one's person while under the influence constituted handling it. Subsection (j) and (k) employed phrases such as 'carried on his person', 'under his direct control' , and 'on his person or under his direct control. If the Legislator had wanted to criminalize behaviour such as that of the accused it could have used similar expressions. "Handle' meant, literally, to take a movable thing in one's hands, and this the accused had not done. In the result, the conviction was set aside.

From The Legal Periodicals

CURLEWIS, L.

"Maintenance inquiries during divorce actions". De Rebus, September 2006 p20.

HOPKINS, K.

"Age Discrimination" De Rebus, September 2006 p24.

SMITH, C.

"Security in the Magistrate's Court". De Rebus, October 2006 p37.

LETSEBE, L.

"The Right to a fair trial – affording the accused opportunity, to present heads of argument." De Rebus, October 2006 p47.
(These articles in De Rebus can be accessed via their website at www.derebus.org.za .

DE VILLIER, W.P.

"Ineffective assistance by counsel during plea negotiations: An agreement lost" 2006 v 69(3) THRHR 484.

VAN DER MERWE, A.

"A critical evaluation of the use of victim impact statements on child sexual abuse cases" 2006 39.2 De Jure 422.

SIMON, J.

"Pre-recorded videotaped evidence of child witnesses" 2006 19.1 SACJ 56.

ESSER, I – M

"The position of Street Children in South African legislation" 2006 39.2 De Jure 385.

VESSIO, M.L.

"A limit on the limit on interest? The in duplum rule and the public policy backdrop" 2006 39.1 De Jure 25.

KNOBEL, J.C. and KRUGER, H.

"The nasciturus fiction and delictual liability for pre-natal injuries" 2006 v 69.3 THRHR 517.

(Any requests for copies of the abovementioned articles can be forwarded to

gvanrooyen@justice.gov.za .)

Contributions from Peers

Issuing of Emoluments Attachment Orders in Maintenance Matters

To enforce a maintenance order against a person who has failed to make payments in terms of an existing order in terms of section 26 of the Maintenance Act, Act 99 of 1998 (the Act) provides, amongs others, that an emoluments attachment order may be authorized.

Section 28(1) of the Act provides as follows in regard to when the court may make such an order:

(1) A maintenance court may -

(a) On the application of a person referred in section 26(2)(a); or

(b) When such court suspends the warrant of execution under section 27(4) (b),

make an order for the attachment of any emoluments at present or in future owing or accruing to the person against whom the maintenance or other order in question was made to the amount necessary to cover the amount which the latter person has failed to pay, together with any interest thereon, as well as the costs of the attachment or execution, which order shall authorize any employer of the latter person to make on behalf of the latter person such payments as may be specified in the order from the emoluments of the latter person until such amount, interest and costs have been paid in full.

Once the emoluments attachment order has been granted the provisions of section 29 of the Act become applicable:

29. **Notice relating to attachment of emolument -**

(1) In order to give effect to an order for the attachment of emoluments referred to in section 28(1), the maintenance officer shall, within seven days after the day on which such order was made by the maintenance court or whenever it is afterwards required, in the prescribed manner cause a notice, together with a copy of such order, to be served on the employer concerned directing that employer to make the payments specified in the notice at the times and in the manner so specified.

(2) Whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he or she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made.

(3) Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.

(4) If any employer on whom a notice has been served for the purposes of satisfying a maintenance

order has failed to make any particular payment in accordance with that notice, that maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of the employer, subject to that employer's right or the right of the person against whom that maintenance order was made to dispute the validity of the order for the attachment of emoluments referred to in section 28(1).

In S v Raseemela 2000(2) SACR 98 (TPD) the court considered the provisions of section 29 of the Act. In this regard the following was said at 99 e-g:

"The phrase 'give priority', as used in ss (3), is the only indication of the status of a maintenance order when weighed up against other deductions. Subsection (3) only regulates the status of court orders requiring an employer to pay creditors from the emoluments due to his employee.

In matters falling outside ss (3) the employer is placed in an invidious situation. Remembering what can happen to him in terms of ss (4) the employer is called upon to juggle with the claims against his employee's emoluments. For example does he prefer the claims of the fiscus or the mortgagee or the pension fund or the medical aid scheme above the maintenance order?

The failure to juggle correctly with the competing claims can obviously result in disastrous financial consequences to the employee and consequently his dependants, the very persons whose rights the Act so stridently protect. Here I may refer to the preamble to the Act.

In my judgment a magistrate, contemplating an order in terms of s 28(1), should afford an employer an opportunity to comment upon the feasibility of such an order. As the employer, in truth, is made a party to the matter, he is entitled to be heard. I again refer to the provisions of ss (4) which can be used to punish the employer."

From the above it is clear that no emoluments attachment order in terms of section 28(1) of the Act may be made without the employer being afforded an opportunity to be heard. The following notice has been drafted and used at this office to comply with the provisions of this decision.

Telephone/Fax No.: 033-4131122

The Magistrate
Private Bag X5561
GREYTOWN
3250

Enquiries: ……

IN THE MAINTENANCE COURT FOR THE DISTRICT OF UMVOTI
HELD AT GREYTOWN

REFERENCE NO.: 14/3/2-……

IN THE MAINTENANCE MATTER BETWEEN:

…… APPLICANT

and

……**RESPONDENT**

NOTICE TO EMPLOYER OF RESPONDENT

Name and Address of Employer:

……

……

……

You are hereby notified that an application for an emoluments attachment order for R…….. per month (R……..…….. maintenance *plus* **R…… arrears) has been lodged against the respondent who is in your employ (Reference/employee number ……). This application will be heard on ……..**

Your attention is drawn to the provisions of section 29 of the Maintenance Act, 1998 which reads as follows:

29. (1) In order to give effect to an order for the attachment of emoluments referred to in section 28(1), the maintenance officer shall, within 7 days after the day on which such order was made by the maintenance court or whenever it is afterwards required, in the prescribed manner cause a notice, together with a copy of such order, to be served on the employer concerned directing that employer to make the payments specified in the notice at the times and in the manner so specified.

(2) Whenever any person to whom the notice relates leaves the service of the employer, that employer shall, within seven days after the day on which he or she so leaves the service, give notice thereof in the prescribed manner to the maintenance officer of the court where the order in question was made.

(3) Any employer on whom a notice has been served for the purposes of satisfying a maintenance order shall give priority to the payments specified in that notice over any order of court requiring payments to be made from the emoluments due to the person against whom that maintenance order was made.

(4) If any employer on whom a notice has been served for the purposes of satisfying a maintenance order has failed to make any particular payment in accordance with that notice, that maintenance order may be enforced against that employer in respect of any amount which that employer has so failed to pay, and the provisions of this Chapter shall, with the necessary changes, apply in respect of that employer, subject to that employer's right or the right of the person against whom that maintenance order was made to dispute the validity of the order for the attachment of emoluments referred to in section 28(1).

If you have any objection to the emoluments attachment order being granted you are kindly requested to lodge your objection with the maintenance officer at this court on or before ……...

MAINTENANCE OFFICER/GREYTOWN DATE

I have also amended the emoluments attachment order to make provisions for arrear maintenance to be deducted. Paragraph 4 is the relevant paragraph in this regard.

FORM O
(Regulation 20)

NOTICES TO AND BY EMPLOYER IN TERMS OF SECTION 29 OF THE MAINTENANCE ACT, 1998 (ACT NO. 99 OF 1998)

Reference No.: …….

In the Maintenance matter between:

……(person in whose favour order for attachment of emoluments was made)

and

…… (person against whom order for attachment of emoluments was made)
(quote clock number)

A. Notification in terms of section 29(1)

(This notice shall be served on the person concerned within seven days on which the order was made.)

To: ……
(the employer of the person against whom order for attachment of emoluments was made)

of: ……

……. (address)

1. **You are hereby informed of the attached order of court in terms of which you are directed to make the payments as specified. Please note that these payments must be given priority over any other order of court requiringg payments to be made from the emoluments due to the person against whom the maintenance order was made.**

2. **If the person against whom the order for attachment of emoluments was made leaves your service, you shall within 7 days after the day on which he or she left your service, give notice thereof on Part C of this form to the maintenance officer of the court where the attached order was made. This notice may be submitted to the maintenance officer in any manner convenient to you, but you must keep record of the manner in which the notice was submitted.**

3. **Warning:**

   If you –

   (a) fail to make the payments as specified below you may be held liable for the payment; and

   (b) without good reason cause, refuse or fail to –

(i) make payments specified below; or

(ii) furnish the maintenance officer with the notice provided for in Part C of this form you shall be guilty of an offence and may be sentenced to a fine or to imprisonment for a period not exceeding six months.

4. **The following amounts are to be deducted from the person's salary:**

   a) R…… per week/month

   b) R…… per week/month in respect of arrear maintenance.

   Total amount of arrear maintenance to be deducted is R……...
   (Please note once the arrears have been paid up to date only the amount as per 4(a) is to be deducted.)

Dated at GREYTOWN **this …… day of ……**

MAINTENANCE OFFICER/CLERK OF THE MAINTENANCE COURT
GREYTOWN

G.H. VAN ROOYEN
MAGISTRATE/GREYTOWN

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

11 October 2006: South Africa: Is the Administration of Justice Under Threat?

The recent trials of Jacob Zuma among other things witnessed large groups of people demonstrating support outside the courts in which he appeared. This is true for both his rape trial in Gauteng and the corruption trial in Kwa-Zulu Natal. There is not doubt that the demonstrators were exercising their constitutionally entrenched right to demonstrate. Also noteworthy is the fact that none of the presiding officers complained about the presence of these demonstrators outside the court building. The question, however, is: are such demonstrations conducive for the administration of justice?

The recent cases of the ANC Deputy President, Jacob Zuma, were characterized by huge gatherings of changing and praise-singing multitudes of political supporters. These supporters gathered in the vicinity of the courts to demonstrate their unwavering political support for Zuma. Many of them believed, rightly or wrongly, that he was treated unfairly and that the state institutions were being used to harass him. They also wanted to unequivocally express their belief that the court actions against him were a political ploy aimed at hindering his ascent to the top position in the organization and consequently in the country.

It is true that in a democratic state, such as South Africa, the right to gather and to demonstrate is entrenched in the Bill of Rights. Equally true, however, is the fact that our Constitution makes a clear call upon all state organs to respect and support the courts. Moreover, the need to respect and support the courts, applies to individuals and organizations in the interest of proper administration of justice. The ultimate aim is to ensure that the courts are safe and protected so as to provide an atmosphere of tranquility and dignity that is conducive to the onerous task of dispensing justice without fear, bias and favour. The respect for the courts suggests that they must be given space to do their work without interference of whatever kind and without ridicule of their activities.

While the gatherings which took place in the precincts of the courts where Mr. Zuma appeared may have been authorized, the question that begs answering is whether actions of this nature are conducive to the administration of justice. Were these actions not tantamount to putting not so subtle, and very real, pressure on the judges not to rule against Mr. Zuma? Under such circumstances, can a court carry out its duties free of duress? Does there exist a possibility that the pronouncements of the court may lead to eruption of chaos, mayhem and bloodshed? This question becomes more relevant if one considers that the court appearance were often followed by political meetings and speeches in that one does not know what the reaction of the supporters would be should the outcome not be the popular or expected one.

The independence of the courts in the administration of justice is jealously guarded in law. In section 165, the Constitution assures the courts of their independence in the administration of justice, and prohibits any person or organ of state from interfering with the functioning of the courts. The Constitution further obliges other organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. Whether, by allowing scenes like we witnessed during

these appearances, the authorities were complying with these provisions of the basic law is questionable. The Constitution empowers organs of state “through legislative and other measures” to protect and assist the courts. One can only hope something positive will be done before the situation gets out of hand.

The fact that the courts did not publicly complain about these incidents might mean that they (the courts) saw them as the exercise of legitimate rights, especially as other state organs appeared to have permitted or even endorsed them. Even with that silence from the courts, there cannot be any doubt that these actions created an atmosphere of unease around the courts. The courts are not called upon to admit that there was a measure of fear or intimidation, no matter how subtle, but to deny that there was any such feeling would be disingenuous.

Jake Moloi, Crime and Justice Programme, ISS Tshwane (Pretoria) Office

10 October 2006: Why So Much Violence in South Africa?

…A 78-year-old woman managed to identify the men who raped her and then set fire to her body before she died. The brutal rape and murder of the woman and her niece on Tuesday last week have left the Grahamstown community shocked and angry…" (1).

Last week in Grahamstown, there were a series of brutal rapes and murders reported. In any given week, reports of men murdering their spouses or raping women dominate the newspaper headlines here in South Africa.

Although it has one the most progressive constitutions in the world for gender equality where the constitution guarantees the right to bodily integrity, South Africa has one of the highest levels of gender violence in the world. Whatever the statistics, one rape is one too many, and the South African court system is oft overwhelmed in dealing with rape cases quickly and sensitively. 50% of all cases heard before courts are those of rape. It is undeniable that the government takes this issue seriously and has made some progress on reducing violent crime rates.

Between 2002 and 2005, the SAPS trained 17,475 detectives and in keeping with the requirements of Domestic Violence Act, 1,148 police officers were trained in the protection of domestic violence victims. Nevertheless, while murders have decreased by 5.6% and attempted murders by 18.8% since the end of 2005, sexual crimes increased in 2004/05, with rape up by 4% and indecent assault by 8%. While SAPS credited this increase to the effective reporting mechanisms now in place, it is undeniable that violent crime directed at women is still alarmingly high.

The root cause of violence in South Africa has not changed much since the apartheid era and the current high rate of violent crime is just as related to economic and social marginalization as it was during the 1980s. Nonetheless, this is true for most African countries where the gap between the rich and poor has widened and the youth face a lack of social and economic opportunities. One may question whether there is any peculiarity to explain why South Africa has such high rates of domestic violence and rape and violent crimes in general.

In addition to high levels of poverty, unemployment and inequity, factors such as the easy access to and availability of small arms and the strains in political power are at the root of this endemic problem in South Africa. The dismantling of apartheid has created new power bases and destroyed old ones and this shift in power is a very significant factor in the violence - and one perhaps that is underestimated. In addition there are other factors that help make a life of crime very attractive to a small but significant group of marginalized youth who are often (but not always) linked to these crimes. The career criminal in South Africa becomes immersed in a particular culture and an elaborate system of deviance with its own symbols and language. Young men who turn to crime as a way of life refer to their activities as "going on duty" or "keeping up the syllabus." The terms they use reflect the fact that crime is seen as a way to gain status and opportunity. In

fact, from a certain perspective, youth involvement in gangs can actually be an expression of youth resilience and a sense of belonging — a social response to marginalization. Understanding marginalization is very important to understanding the patterns of violence in South Africa. “In crime, there is a hierarchy,” says a young man interviewed by CSVR, (2) “you grow from strength to strength until you are up there doing the business where there is a lot of money. When you are there, we respect you, and to us, you are like someone working on the Johannesburg Stock Exchange.”

Blame it on nature, nurture or environmental and/or social construction, domestic violence and rape in this country is a reality and all factors that propagate it need to be examined and addressed by the government, the judicial system, the correction services and the police service in an attempt to bring an end to this violence against women.

Carole Njoki, Training for Peace Programme, ISS Tshwane (Pretoria) Office

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1. Mail and Guardian, 06 October 2006
2. Centre for the Study of Violence and Reconciliation