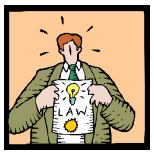
E - M A N T S H I

A KZNJETCom Newsletter

April 2006: Issue 1

Welcome to the first 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 – and these can be sent to RLaue@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. Judicial Matters Amendment Act, No. 22 of 2005. Date of commencement of ss 2, 3, 4, 5, 7, 8, 15, 16, 17 and 18: 11 January 2006 (GG 28391 dated 11 January 2006).

2. The National Credit Act, 2005, Act 34 of 2005 has been published in Government Gazette No. 28619 dated 15 March 2006. The Act will come into operation on a date to be fixed by the President.

Recent Court Cases

1. Seria v. Minister of Safety and Security and others (2005(5) SA 1.30 CPD

Domestic Violence protection order – The Act did not state that service of a final protection order was a condition for its validity: in providing for the issue of a final protection order the Act, in s 6, did not specifically hinge the validity and efficacy thereof upon its being served as it did in respect of an interim protection order. Section 5(6) expressly provided that an interim protection order would have no force and effect until it had been served on the respondent. The validity of a final protection order lay not in its being served but in its issue by the court. Once issued and valid it was the responsibility of the clerk of the court to effect service of a final protection order upon the respondent. Likewise the validity of a warrant of arrest lay in the authority for its issue being ordered by a court under s 8(1) (a) of the Act simultaneously with the issue of a protection order. In the case of a warrant in question, being undated and contrary to the regulations and prescribed form, whilst a serious omission, did not detract from its validity. The plaintiff's arrest occurred pursuant to a valid protection order and valid warrant of arrest as contemplated by s 9(1) of the Act. (At 143H-144B and 143E-G.)

2. S v. Kolobe 2006(1) SACR 118 (OFS)

A declaration of unfitness to possess a firearm in terms of s 103 of the Firearms Control Act 60 of 2000 is not competent as part of a sentence for possession of dagga.

3. S v. Smith 2006(1) SACR 307 (WLD)

S103(2)(a) required a court which convicted a person of a crime mentioned in Schedule 2 to the Act, and which was not a crime mentioned in s 103(1), to enquire and determine whether that person was unfit to possess a firearm. In casu, the crime committed fell within the offences listed in Schedule 2 and s 103(2) (a) was therefore applicable. An enquiry was an act of seeking information; a judicial officer was required to ask relevant questions in order to establish whether the accused's conduct or the circumstances of the crime justified depriving him of his right to possess a firearm. (Paragraphs [4] -] 7] at 308j -309d.)

4. S v. November and three similar cases 2006(1) SACR 213 CPD

Contravention of section 31(1) of the Maintenance Act 99 of 1998 – Sentencing of offenders. It was necessary for prosecutors and magistrates to inform themselves of the range of available sentencing options, including correctional supervision and periodical imprisonment. These officials should also acquaint themselves with the comprehensive range of procedures available in the Maintenance Act in order to ensure that the best interests of children were protected by the proper enforcement of maintenance orders. Section 40 of the Act provided for the granting of an order of recovery against a maintenance defaulter; likewise, a warrant of execution against the defaulter's property could be authorised after an enquiry held in terms of s 40(3). In addition, s 26 of the Act provided for the enforcement of maintenance orders by, inter alia, execution against the defaulter's property and by the attachment of emoluments or any debts owing to such person. These remedies were available without the defaulting party having to be convicted of contravening s 31(1). Where the defaulter was ordered to pay off the arrears the instalments should be set on the basis that maintenance was a primary obligation on him, not one ranking equally with his other expenses, and any conditions of suspension of sentence should take proper account of the defaulter's financial means. (Paragraph [11] – [13] at 213 a – g.)

From The Legal Periodicals

The South African Journal of Criminal Justice VOL 18 NO.3 2005 contains the following articles:

1. *The International Criminal Court and Victims of Sexual Violence* by Cherie Booth and Max du Plessis (p 241).

2. *Battered Woman syndrome: Should it be admitted as evidence in South African Criminal Law*? by Managay Reddi (p259)

3. *The Mushwana report and prosecution policy* by Mervyn E. Bennun (p279)

4. *The rise of "tik" and the crime rate* by Julie Berg (p306).

It also contains the usual case reviews on Criminal cases relating to General Principles of Criminal Law, Specific Offences, Criminal Procedure, Evidence, Sentencing and Constitutional Application

a) Hoctor, S: 'Dealing with death on the roads' 2.6. **2005 Obiter** 429

b) Kidd, M and Hoctor, S: 'Punishing perlemoen poaching – developments both recent and possibly future?' – 2.6. **2005 Obiter** 398.

c) Le Roux, J.: 'Vonnisoplegging by roof met verswarende omstandighede': 2005(1) **Journal for Juridical Science** (Faculty of Law: University of the Free State).

d) Snyman, CR: 'Die misdaad uitlokking (z) 2005 (68.4) **THRHR** 562.

e) Watney, M: 'Duplication of convictions in respect of simultaneous multiple robberies' 2005.4 **TSAR** 891.

Contributions from Peers

NON-CUSTODIAN PARENTS' RIGHTS TO CHILDREN

Some comments on the application of the General Law Further Amendment Act 93 of 1962 in the criminal law protection of non-custodian parents' rights to their children

Gerhard van Rooyen
Magistrate, Greytown

A child who is separated from one of his parents (because of a divorce, for example) has the right to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the child's best interest (a 9(3) of the United Nations Convention on the Rights of the Child, 1989). In terms of s 28(1) (b) of the Constitution, a child has the right to 'parental care', and in every matter concerning a child his 'best interests' are of paramount importance (s 28(2)). If the child's rights are being frustrated by a custodian parent who refuses the non-custodian parent access to the child because of hostility between the parents, a problem arises. South African courts have favoured the use of contempt proceedings, when a custodian parent has refused to abide by a court order allowing the non-custodian parent access to his or her child (see *Germani v Herf* 1975(4) SA 887 (A); *Oppel v Oppel* 1973 (3) SA 675 (T)).

An alternative solution to the problem – s 1 of the General Law Further Amendment Act 93 of 1962 (as amended)

A better solution may be the utilization of s 1(1) of the General Law Further Amendment Act 93 of 1962 (the Act) against the recalcitrant parent. The section was amended by Act 55 of 2002. Before the amendment the section only applied to a parent who had sole custody of a

child. (See S v. Amas 1995(2) SACR 735(N).) Because very few sole custody orders were being granted representations were made for the amendment of the Act which was eventually successful. The Section now reads as follows:

(1) Any parent having custody, whether sole custody or not, of his or her minor child in terms of an order of court, who contrary to such order and without reasonable cause refuses the child's other parent access to such child or prevents such other parent from having such access, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine.

It appears that the provisions of the Act are hardly ever used to solve the outlined problem. That, at least is the impression gained from the reported cases. The reason may well be that it is not well known and therefore not utilized to its full potential.

It is, first of all, important to note that the custody of the child must have been awarded to a parent in terms of an order of court (*W v S and Others* (1) 1988 (1) SA 475 (N) at 494 D-E). Once this has been established, such a parent commits an offence if he refuses the child's other parent access to the child without reasonable cause. Reasonable cause would include, for example, the situation in which the custodian parent has reason to believe that the other parent will abuse or kidnap the child. One must, however, bear in mind that the interests of the child and not those of the parents are the most important factors in this regard. The fact that the parents do not see eye to eye or that it is inconvenient for the custodian parent to allow such access will not suffice. Not only is the refusal of access disallowed, but also the prevention of the other parent from having such access. In this regard, the provisions of s 1(2) are of importance:

(2) Any parent having custody, whether sole custody or not, of his or her minor child in terms of an order of court whereby the other parent is entitled to access to such child shall upon any change in his or her residential address forthwith in writing notify such other parent of such change.

A breach of this subsection may in fact also amount to a contravention of s 1(1) (see *Botes v Daly and Another* 1976 (2) SA (N) 215 at 223 E-G). The reason for this is that withholding the residential address from the non-custodian parent in effect prevents him from exercising his right of access to his child.

S (1)(3) is the section which makes the provisions of s (1)(2) an offence and reads as follows:

(3) Any person who fails to comply with the provisions of subsection (2) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three months.

Advantages of applying s1 of the Act

One of the main advantages of utilizing the Act is the fact that the non-custodian parent does not have to institute contempt proceedings in the high court in order to enforce his rights of access.

The criminal law option is much cheaper for the non-custodian parent and should also be much faster if the best interests of the child are taken seriously. The fact that the State is now a party to the matter has the advantage that the non-custodian parent will not have to

fend for himself in a situation like this.

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

INDEPENDENT COMMISSION FOR THE REMUNERATION OF PUBLIC OFFICE BEARERS

22 March 2006

Ms Z Carelse

Magistrate's Office

KEMPTON PARK

Dear Ms Carelse

CONSULTATION ON BENCHMARKING OF PUBLIC OFFICE BEARER REMUNERATION

During a consultation with a representative group of members from your institution during December 2005, this Commission undertook to conduct a similar event during the course of February / March 2006, to discuss appropriate benchmarking and pay levels in respect of Public Office Bearer positions in your institution. This undertaking was made on the assumption that the Commission would be in a position to make comprehensive recommendations regarding the implementation of a "Total Cost to Employer" remuneration structure for all Public Office Bearers by the end of March 2006.

The Commission is unfortunately not in a position to do so by 31 March 2006 as a result of, amongst other factors, the complexity of finding the most appropriate benchmarking options. In the process of finding such a benchmark, the Commission is considering various benchmarking options in local and international public and private sectors.

While the Commission remains committed to complete its major review project regarding Public Office Bearer remuneration as a matter of urgency, it considers

the interim adjustment of Public Office Bearer remuneration on 01 April 2006, in response to CPIX and other relevant factors, important. For that reason the Commission resolved to make recommendations for an annual percentage adjustment to the remuneration of Public Office Bearers, with effect from 01 April 2006.

The Commission cannot at this stage disclose the percentile of its proposed recommendations, as it is in the process of mandatory and other consultations in this regard. It is however anticipated that these recommendations will be made and published at the end of March 2006.

We will communicate in due course with regard to rescheduling of the intended benchmarking consultations with all Public Office Bearer groups.

Yours faithfully

N. ULRICH

SECRETARY
