E-MANTSHI
A KZNJETCOM Newsletter
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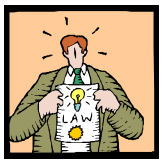
Welcome to the fourteenth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Since the inception of the newsletter we have received numerous comments from magistrates. One example is a comment from Graham Cupido, magistrate from Bredasdorp in the Western Cape which reads as follows: "*I am a magistrate at a one-person office in a rural area in the Western Cape, where resources, especially library resources are very scarce. Your newsletter is therefore like an oasis in the desert. I really do appreciate your contribution to your colleagues, especially us here in the rural areas. Thank you for an excellent piece of work and keep it up. Hope the other provinces will take note and follow your groundbreaking and innovative work. Keep it up.*" 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. In Government Gazette No. 29661 of 26 February 2007 the annual finance charge rates in terms of the Usury Act, Act 73 of 1968 were determined by notice as follows:

" For the purposes of this Notice the Repo Rate is the Repurchase Rate as determined by the Monetary Policy Committee of the South African Reserve Bank.

1. For the purpose of section 2(1), (2) and (3) of the Usury Act, 1968 (Act No. 73 of 1968), the different percentages contemplated in that section shall be calculated as follows:
   - (a) For transactions not exceeding R10 000, the Repo Rate plus one third thereof, plus 11 percentage points;
   - (b) For transactions exceeding R10 000, the Repo Rate plus one third thereof, plus 8 percentage points; and
   - (c) Where the percentage as calculated per paragraph 1(a) or 1(b) does not result in a whole number, such percentage must be rounded down to the closest whole number without any decimals.

2. The different percentages as calculated in terms of paragraph (1) become effective –

(a) seven days after the date of this notice; and

(b) thereafter, seven days after any change in the Repo Rate."

Recent Court Cases

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1. Shinga v. State; O'Connell and others v. State (Constitutional Court Judgment delivered on 8 March 2007). CCT 56/06; CCT 80/06.

Unconstitutionality of leave to appeal procedure confirmed with a few changes.

The first issue was whether section 309(3A) of the Criminal Procedure Act, 51 of 1977, which requires a High Court to decide an appeal in chambers without hearing oral argument, unless the court is of the opinion that the interests of justice require it to be heard in open court, was unconstitutional. Yacoob J, writing for a unanimous court, held that hearing appeals in open court is an important aspect of a fair trial procedure. It fosters judicial excellence and enhances public confidence in

accordingly found subsection 309(4) (c) to be inconsistent with the right to a fair trial. The exceptions to the rule requiring the furnishing of a record were severed from the provision with the effect that a full record must now be furnished in all applications for leave to appeal under section 309C.

The third issue related to a rule that the number of judges who would consider an application for leave to appeal would be reduced from two judges to one judge except in special circumstances. The Court held that there are powerful reasons for requiring more than one judge to consider an application for leave to appeal. It emphasized the importance of collegial discussion in affording an adequate and fair reappraisal and pointed to the fact that a refusal of leave to appeal is the end of the road for an accused. It accordingly ordered that subsection 309C(5)(a) should be declared invalid to the extent it requires only one judge to consider an application for leave to appeal and remedied the unconstitutionality by a declaration of invalidity coupled with an order to read the section as providing for two judges.

Finally, the court rejected the conclusion of the Pietermaritzburg High Court that the application for leave to appeal procedure was bad in its entirety. The effect of the orders is that a person seeking to appeal his or her conviction now has the right to have the record from their previous trial sent to the court of appeal; to have the application for leave to appeal considered by two judges; and, if leave to appeal is granted, to argue the appeal in an open hearing in the High Court.

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2. Transnet Ltd v. Nyawuza and others 2006(5) S.A. 100 (D + CLD)

Court only to exercise its discretion to grant or refuse an eviction order in terms of PIE and not in relation to any procedure – factors court should take into account.

As a matter of interpretation, s 4(6) and 4(7) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) confer a discretion on courts to order or to refuse the eviction of occupiers of land, even if such occupation is unlawful. Both s 4(6) and 4(7) of PIE oblige the court as a matter of substantive law to exercise its discretion only in relation to the grant or refusal of an eviction order. The procedural requirements are contained in other provisions of the Act. Once the discretion is exercised in favour of the applicant, the court 'must' grant an order for the eviction of the unlawful occupier under s 4(8). A further (second) discretion in relation to how and in what manner the eviction order is to be given effect to is then given to the court under s 4(8)(a) and (b), (9), (10), (11) and (12) of PIE. On this

interpretation of the Act, the following emerges: (a) the provisions of s 4(2), (3), (4) and (5) relate to procedural matters to be complied with before an ejectment order can be claimed; (b) the provisions of s 4(6) and 4(7) are matters of substantive law to be complied with in the consideration of the grant or refusal of an ejectment order, (c) the provisions of s 4(8) are also matters of substantive law in relation to the grant or refusal of an ejectment order, save for s 4(8)(a) and (b), which relate to the implementation of an eviction order *after* it is granted. The Court is therefore obliged to exercise the discretion under s 4(6) and 4(7) only in relation to the grant or refusal of the eviction order, and not in relation to any procedure either before or after the grant of the order of eviction. (At 105C-G and 107C/D.)

There is in s 4(7) of PIE no overriding requirement that alternative land must be made available as a prerequisite before a court may grant an ejectment order. The constitutional duty on a municipality to provide housing and the respondents' right to housing is not an absolute right or duty. Further, there is no such constitutional duty on a private landowner whose property has been invaded by squatters, or any other duty to provide the unlawful occupiers with alternative housing before it becomes entitled to an eviction order. The absence of alternative accommodation is simply a consideration (albeit an important consideration) which a court is obliged to take into account in considering the grant or refusal of an eviction order. (At 112C-E.)

In the Court's wide and general discretion to determine what is just and equitable as contemplated in s 4(7) of PIE, the right of the general public to a clean and safe environment; the right of the general public to protect ecologically sensitive areas; the right of neighbouring communities not to be exposed to unnecessary health risks; the right of the general public to safe train services (the land unlawfully occupied in the present case being railway land); the duty of municipalities to provide services such as clean water, electricity, refuse removal, medical and emergency services which cannot be rendered to the respondents in view of the nature and location of the land; and the right of neighbouring communities to a crime-free, clean and unpolluted environment must also be taken account. (At 112F-H.)

Semble: The owner's right to property under s 25 of the Constitution of the Republic of South Africa, 1996, is not an absolute right. When weighed against other constitutional rights it may or may not, depending on the circumstances, be a protectable right. If found not to be a protectable right, the refusal of eviction from property can never amount to an 'unlawful' expropriation of the owner's property. The right to property is no stronger or weaker than any other right; whether it is a real right, a personal right, contractual, delictual or a constitutional right. The Constitution enjoins courts, when interpreting any legislation (in the present case PIE) tto promote the spirit, purport and objects of the Bill of Rights, in this case s 26(3) of the Constitution. As such, the right to immovable property may not be elevated to a status higher or stronger than any other right. (At 106E-F and 106I-107A.)

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Contributions from Peers

RIGHT COURSES FOR RIGHT HORSES

This is a discussion document. Inputs are invited from colleagues within and outside our province to enrich our cause for justice.

African tradition demands of me to seek the premise from pronouncements by my elders to strengthen the foundation from which I stand. This takes me to the accused dock in Pretoria in the 1960's when the world's most famous prisoner, number 466 of 1964, Nelson Mandela addressed the court:
"I regard it as a duty which I owed, not just to my people, but also to my profession, to the practice of law, and to justice for all mankind, to cry out against discrimination which is essentially unjust …
I believed that in taking up a stand against this injustice I was upholding the dignity of what should be an honourable profession …
The law as it is applied, the law as it has been developed over a long period of history and especially a law as it is written and designed … is a law which, in our view, is immoral, unjust and intolerable.
Our conscience dictates that we must protest it, that we must oppose it, and that we must attempt to alter it."

It is immoral, unjust and intolerable that accused persons who stand arraigned in the district court, or the regional court for that matter, for charges triable in the regional court should spend generally at least two years awaiting trial, sometimes even more than that.
Johannesburg Prison has an accused person arraigned in Johannesburg regional court who is awaiting trial for the past seven years. A child born at the time of his arrest is now in Grade two.

In his book, *Long Walk to Freedom,* our own political, social and economic prophet mentions that he knows of nothing that grinds slower than the criminal justice system in this country.

By the whim and paradox of history, we are the ones ordained to correct the wrongs we inherited from our past, some of which we are fortunate in that he has identified for us. We must draw up a programme of action which we must faithfully pursue instead of meekly reacting to the flow of business as usual.

We have to immediately stop this injustice because it is an immediate need of the accused. It is their demand.

The practice of having matters destined for the regional court generally around 18 months on the roll of the district courts is an unjust practice. Paraphrasing Robert Mangaliso Sobukwe, *'without wishing to impugn on the personal honour and integrity of the Magistrate, he/she cannot apply an unjust* ***practice*** *justly'.*

There is no explicable reason why as a rule accused persons may not appear for the first time in the regional court in matters destined for the regional court where there

is a regional court permanently in session.

First appearance of accused destined for trial in the regional court not only places the regional court prosecutor under a duty to justify every postponement that the State seeks to the regional magistrate, but also capacitates the regional magistrate to direct and control the management of a particular case from the earliest practically possible time.

At the moment, the current practice places the regional magistrate in the position of an interested party with no power to participate actively in the management of a case destined for his determination for a period of over a year and a half. The damage is done with her as a hopeless spectator pretending not to see and hear. The regional magistrate has sight, but no vision and has ears but cannot hear. He/She is more or less in the position of an unmarried father of an unborn child; whether the expectant mother acts in a manner that may lead to an abortion, he can only hope for the best. The regional magistrate is impotent.

On the other hand, the district court magistrate is generally a super-graced clerk, except for the bail application. Generally he/she is simply turned into some secretary for the National Prosecuting Authority, keeping notes and writing minutes until the initial pages of the court record are in tatters and he/she decides enough is enough.

Worse still, the public prosecutor who addresses the district court magistrate is simply a messenger, most often not even having read the docket him/herself and therefore generally unable to present potent arguments or counter-arguments without consulting some principal first.

For two years generally, an accused in effect appears before some pseudo-prosecutor and some half-baked decision maker in some (ostensible, mostly) trial-warm-up sessions.

Where the regional court is not in session every day, it goes without saying that the exception as sanctioned by section 50 is available to make sure that the poor suspect is not detained indefinitely without knowledge of and intervention of the Court.

This section is meant to '*guard against the accused being detained on unsubstantial or improper grounds and to ensure that his detention is not unduly extended'.* It is no authority for every matter destined for the regional court to start as a matter of law in the district court.

In the exceptional cases where the matter destined for the regional court has to start in the district court, the district court has to determine the extension or otherwise of the detention. This entails entertaining what we generally call the bail application. Thereafter, there is no conceivable reason why the matter should still remain on the district court roll and unnecessarily occupy trial time for deserving cases.

The matter must, in these exceptional cases, go before the regional magistrate as

soon as the status of the accused is determined. This will be in line with the *Practical guide, Court and Case Flow Management for South African Lower Courts,* page 22 the second sentence which reads:
"There can be no abdication of control of the court or shared responsibility regarding accountability for the conduct of court proceedings".
This will also assist regional magistrates to comply with bullet 5 on the same page as well as bullets 8, 9 and 10 on page 23 which read:
"5. Hold prosecutors and SAPS accountable for the conduct of the investigative process and to initiate delay management in accordance with section 342A CPA where applicable. Similarly, all role players must be held accountable for unreasonable delays during the conduct of court proceedings.
8. Identify and intervene in all cases on the roll for over 90 days.
9. Monitor progress of the case at every stage of proceedings.
10. Manage the court and the court roll.

Section 75 of the CPA also supports these views. I have found nothing therein which authorizes the keeping of the matter on the district court roll once the status of the accused has been determined in the exceptional cases where a matter destined for the regional court had to be enrolled in the district court as a court of first appearance.

Section 122A, in my view, does not support the keeping of the matter on the district court roll either.

No doubt matters destined for the regional court are serious cases and most often require arrest, the most drastic method to be employed for ensuring the accused's attendance at her/his ***trial.***
Once the district court magistrate has made an order that the accused be released, whether on bail or otherwise, or that she be further detained with a view to her trial, the regional court has to take control of the management of the case.

Where the regional court is in session every day, Heads of Courts, must be implored to apply the letter and spirit of the *Practical Guide* which unequivocally, unambiguously and clearly places them at the helm of placements of cases through ordering that matters destined for the regional court must be placed in the regional court as a court of first appearance. Section 75 (1) (a) supports them.

District court magistrates must be urged, as soon as the bail application is finalized and/or the status of the accused in respect of detention is determined, in cases where the regional court is not in session every day and the accused had to appear in terms of section 50 on a day on which the regional court is not in session, to refer such accused to the regional court. Section 75 (3) supports them.

Maybe the time has also arrived where we have to ask whether it is still necessary to manage the Lower Courts through legislation. Or put otherwise, are Heads of Courts as Judicial Managers incapable of determining which Magistrates may be exposed to which matters based on their training, experience, competencies and skill, to the extent that we need an Act of Parliament to manage the Lower Courts in respect of

human resource allocation?

We need to ask ourselves in whose interest are we doing business as usual where you have a regional magistrate of 25 years experience but who is functionally illiterate to consider a civil claim for goods sold and delivered or a claim for R100-00 lent and advanced.

In whose interest are we acting when we allow Legislative Management of our courts to the extent that a Maintenance litigant or Domestic Violence litigant is denied the 'experience' of a regional magistrate, even if the Head of Court holds the view that he is the appropriate candidate because of the complexity of a given matter.

At the moment, a matter which is on the regional court roll at a courthouse where there is a single regional court in session, presents problems when the accused person then decides to lodge an application for bail.

All these problems are simply there because in South Africa the Legislature manages the Lower Courts Judiciary. Heads of Courts are simply in office, but not in control.

If magistrates were to position themselves as a vanguard of the instruments of Justice, we have to ask ourselves these questions, even if they may cost us friendships.

Daniel Thulare
Provincial Chairperson
JOASA Gauteng
March 2007

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

Magistrates must respect collegial relationship

Over the years I had understood that the practice of law involves a relationship of a collegial nature between those who practice in the field, in other words advocates, attorneys, prosecutors,

etc. This relationship has been and is still accepted, respected and understood by our courts and those sitting on the bench. I assume the courts will interfere only if the arrangement between the practitioners is contrary to the ethical standards or interferes with the smooth running of the court(s).

Those who, like me, practice in the Magistrate's Court would agree with me that this is no longer the position. It has become accepted practice of the magistrate(s) to interfere with the arrangements made by the parties and colleagues. Some of us have been present in court when comments like 'I've never seen a confused attorney like you', 'I don't know why the Fund [RAF] always instructs incompetent attorneys' are made to the attorneys by the bench. In my view, this is vulgar and unacceptable. One cannot even take the risk of sending a candidate attorney, as part of his training, to remove or postpone a matter in this court.

It is important to state that civil trials in this court start with a roll call at 08:30 and all the matters on the roll, except for those that are partly heard (unlike in other courts such as in Pretoria where matters are immediately allocated) are stood down for allocation at any time between 09:00 and 10:00 to trial or *ex parte* application magistrates. During this time the attorneys endeavour to address and narrow contentious issues or even settle matters. It has become practice in this court that attorneys are bullied by magistrates into dismissing actions or taking default judgments against litigants, despite prior arrangements and agreements between the attorneys having been made to stand matters down to finalise settlement discussions or for another attorney to stand in for a colleague at roll call, etc. I have had the benefit of appearing in a number of High Court divisions and other magistrates' courts where collegial arrangements are well accepted.

One accepts that magistrates enjoy the privilege of adjourning matters for as long they consider appropriate disregarding the fact that the representatives/professionals before them are equally or even more qualified and experienced than they are. I will be pleased if the bench could recall, note and live with it, that as attorneys and advocates in this profession, we treat each other with respect and are ethically bound to practice as colleagues even if we are on opposite sides. If the same cannot be said about the bench, it is my request that the bench's attitude, which is aimed at creating hostility between firms and colleagues, should not contaminate our healthy profession.

Mafanela Mashaba,
attorney, Johannesburg

(This letter appeared in the **De Rebus** of November 2006. I have deleted the name of the Magistrates Court.)