

E - M A N T S H I

A KZNJETCOM Newsletter

November 2007: Issue 22

Welcome to the twenty second 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. On the 28th of September 2007 the Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act, Act 13 of 2007 was promulgated in Government Gazette No. 30330. The Act came into operation on 29 September 2007 and amends the date on which the original Act, Act 28 of 2005 will be repealed, to 30 June 2008.
2. Draft Regulations in terms of section 34 of the Administrative Adjudication of Road Traffic Offences Act, 1998 (Act No. 46 of 1998) have been published in Government Gazette No. 30295 dated 28 September 2007. Interested persons are invited to submit written comments on the draft regulations within 30 days of their publication. The Regulations make provision for an adjudication procedure, representations and an enforcement order which is all dealt with by the Road Traffic Management Corporation which is established i.t.o. section 3 of the Road Traffic Management Corporation Act, Act 20 of 1999. It even makes provision for a penalty amount and a discount amount for certain traffic offences.
3. An Explanatory Summary of the Jurisdiction of Regional Courts Amendment Bill, 2007 has been published. According to the notice published in Government Gazette No. 30399 dated 22 October 2007 the Bill aims to amend the Magistrates' Courts Act, 1944 to confer on courts for regional divisions jurisdiction in respect of certain civil disputes, including matters currently regulated by section 10 of the Administration Amendment Act, 1929. (A copy of the Bill may be found on the following website www.pmg.org.za - access code doj885).

4. In a notice published in Government Gazette No. 30435 dated 2 November 2007 certain provisions of the Judicial Matters Amendment Act, Act 22 of 2005 were put into operation. These are sections 1 and 10 to 14 (excluding the provisions of section 14(c)). The provisions of section 1 amend section 9 of the Magistrates Courts Act, Act 32 of 1944 to make provision that magistrates who have not disposed of cases they were hearing when they vacated their offices shall continue to hold office until the cases have been disposed of. Sections 10 – 14 deal with amendments to the Debt Collectors Act, Act 114 of 1998.



Recent Court Cases

1. LEO MANUFACTURING CC v ROBOR INDUSTRIAL (PTY) LTD 2007 (2) SA 1 (SCA)

In an application for rescission of default judgment the applicant must set out the grounds of his defence even if the default judgment was void *ab origine*

“I will assume, without deciding the matter, that the default judgment granted in this matter was void *ab origine* by reason of non-service of the initiating summons upon the appellant. However, I am of the opinion that the second magistrate was correct when, after referring in his judgment to the cases of Cooper & Ferreira [1997] 1 ALL SA 420 (E) and Standard Bank of SA Ltd v El-Naddaf 1999 (4) SA 668 (W), he stated that:

*‘Now, following the rationale of those two decisions, it is totally unnecessary for the Court to rule whether the default judgment was void *ab origine* or not. The fact of the matter is, and this point has been taken by the respondent, that there is absolutely no mention of a defence set out in the initial affidavit and there is the mere mention of a possible defence in the replying affidavit. It certainly does not comply with the requirements that it be set out with sufficient particularity so as to enable the court to determine whether or not there is a valid and bona fide defence.’*

Put differently, the provisions of Rule 49(3) are peremptory when a court considers an application to rescind a default judgment. More particularly, the wording of the sub rule makes it clear that the grounds of the defendant’s defence to the claim must be set out. Where the objection is that the judgment was void *ab origine*, compliance with Rule 49(3) nevertheless involves further proof of the existence of a valid and bona fide defence to the claim.

Insofar as sub rule 49(8) may be relevant to the matter, in that it specifically refers to the rescission or variation of a judgment which is sought, *inter alia*, on the ground that it is void *ab origine* and requires the application to be served and filed within one

year after the applicant first had knowledge of such voidness, this, in no way, overrides the provisions of Rule 49(3). Rule 49(8) simply provides a different time period for the filing and service of an application for rescission of a judgment (not only a default judgment) on certain specified grounds. In their comment upon Rule 49(8), the learned authors Erasmus and Van Loggerenberg make the point that an applicant seeking rescission of a default judgment on the grounds that the judgment in question is void *ab origine* must (in terms of Rule 49(3)) set out a defence 'with sufficient particularity' so as to enable the court to decide whether or not there is a valid and *bona fide* defence."

2. S v B 2007 (2) SACR 489 (ECD)

A juvenile with previous convictions does not have to be sentenced to imprisonment as the only viable sentencing option
--

The appellant pleaded guilty to, and was convicted of, two counts of fraud and one of theft. He admitted two previous convictions for housebreaking with intent to steal and theft. Since he had been a juvenile at the time of the offence a correctional officer's report was obtained. This recommended that the appellant was a suitable candidate for correctional supervision in terms of s 276(1) (h) of the Criminal Procedure Act 51 of 1977. Despite this, however, the appellant was sentenced to 18 months' imprisonment, of which six months were conditionally suspended for five years. A month later, the suspended sentence imposed after one of the appellant's previous housebreaking convictions was put into effect; this meant that he was effectively incarcerated for 21 months. The appellant subsequently appealed against the sentence of 18 months, and against the putting into operation of the suspended sentence.

Held that the seriousness of the offences was beyond question. They had been planned in an amateurish manner that demonstrated his naivety and immaturity. The correctional officer had recognised that the appellant would benefit from the psychosocial and life-skills programmes envisaged in a sentence of correctional supervision, but this did not seem to have been properly considered by the trial court. (Paragraph [5] at 492c-e.)

Held, further, that the seriousness of the offences, coupled with the appellant's previous convictions, appeared to have been seen as aggravating, to the exclusion of any other viable sentencing option. However, when the previous offences had been committed the appellant had been a mere teenager, with little or no insight into his actions. To regard them as excluding a non-custodial sentence was a misdirection warranting interference with the imposed sentence. (Paragraph [5] at 492d-f.)

Held, further, that counsel were *ad idem* that the sentence should be set aside and the matter remitted to the trial court for reconsideration of sentence in light of the Court's comments on the appropriateness of a sentence of correctional supervision. (Paragraph [6] at 492i-j.)

Held, further, that the order whereby the suspended sentence had been put into

operation was not appealable. Properly construed, it was reviewable, and counsel for the State had conceded that it ought to be set aside. (Paragraph [6] at 492g-i.)

Sentence set aside and matter remitted to trial court for reconsideration of sentence. Order putting suspended sentence into operation set aside.

3. S v HEJI AND OTHERS 2007 (2) SACR 527 CPD

An attorney without a fidelity fund certificate is competent to appear in a criminal trial – as long as he/she is admitted as an attorney

During the course of a regional court trial it emerged that the attorney appearing for the accused had not been in possession of a fidelity fund certificate while he represented them. The magistrate, considering that the attorney's appearance might have been irregular, stopped proceedings and referred the matter to the High Court on special review.

Held, that the practitioner concerned had been properly admitted as an attorney, and as such had the right to appear in the regional court. His only disqualification at the relevant time had been his failure to possess a fidelity fund certificate. (Paragraph [13] at 531c.)

Held, further, that the primary object of s 41 of the Attorneys Act 53 of 1979 was to ensure that clients of an attorney received the benefit of the protection afforded by the Fidelity Guarantee Fund. The purpose of that fund was the reimbursement of persons who might suffer pecuniary loss as a result of theft committed by an attorney. The possession of a fidelity fund certificate had no relevant connection with the qualifications or competence of the attorney concerned. (Paragraph [14] at 531d-f.)

Held, further, that it was also important to note that ss 41, 42 and 83(10) of the Attorneys Act did not apply to all practising attorneys, but only to those who practised on their own account or in partnership; an attorney practising as a salaried employee of a firm of attorneys would not be affected by these provisions. (Paragraph [15] at 531f-g.)

Held, accordingly, that upon a proper construction of s 41 of the Act, therefore, the contravention thereof by the attorney concerned had not resulted in the invalidity of the criminal proceedings. (Paragraph [17] at 531 j-532a.)
Magistrate directed to proceed with the trial.

4. S v NKUNA AND ANOTHER 2007(2) SACR 532 TPD

The killing and eating of a dog does not in itself constitute a contravention of s 2(1)(a) of the Animals Protection Act, Act 71 of 1962

The two accused were convicted of contravening the provisions of s 2(1) (a) of the Animals Protection Act 71 of 1962, in that they had killed and eaten two dogs. They were each sentenced to two years' imprisonment. On automatic review,

Held, that the killing and eating of a dog did not in itself constitute a contravention of s 2(1) (a) of the Act, repulsive as the mere notion thereof might be to most South Africans. Thousands of animals, as defined in the Act, were killed and eaten everyday and it clearly could not have been the intention of the Legislature to criminalise such conduct. (At 534c-e.)

Held, further, that the mode of killing an animal might constitute a contravention of the section, but the evidence as to how the dogs had been killed was either hearsay or an inadmissible confession to a police officer. (At 534f-535a.)

Held, further, that the State had not proved that either of the accused had killed the dogs in a manner that contravened s 2(1) (a) of the Act, and they should not have been convicted. (At 535a-b.)

Held, further, that the maximum penalty for a contravention of s 2(1) (a) was 12 months' imprisonment. The sentence imposed by the trial court had exceeded that maximum. The accused were, respectively, 75 and 50 years old and they had been sentenced without any enquiry as to why they had eaten the meat and, in particular, whether poverty had been a factor. The need to enquire into the personal circumstances of accused persons could not be overemphasised; in *casu* a failure so to enquire had led to a sentence that was, on the face of it, shockingly inappropriate. (At 535b-d.)

Convictions and sentences set aside.



From The Legal Journals

ARTZ, L. and SMYTHE, D.

“Case attrition in rape cases: a comparative analysis”

SACJ 2007(2)
p 158

STEYN, ESTHER

“Plea-bargaining in South-Africa: current concerns and future prospects”

SACJ 2007(2)
p 206

LE ROUX, ANDRA

“Medico-legal aspects regarding drink driving”

SACJ 2007(2)
p 220

TERBLANCHE, SS.

“Sentencing a child who murders – DPP, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA)”

SACJ 2007(2)
p 243

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

VAN LOGGERENBERG, D, DOCKER, L & MALAN J.

“Civil Procedure: The New Children’s Act”

De Rebus, November 2007

DICKER, L.

“The effect of the New Children’s Act on prescription”

De Rebus, November 2007

(Both these articles can be accessed on the website of De Rebus at www.derebus.org.za under Practice Notes.)



Contributions from Peers

HOME-BASED SUPERVISION

DEFINITIONS

Section 1 of the Probation Services Act, 1991 (Act No.116 of 1991):

- **‘home-based supervision’** means supervision under certain condition where an arrested, accused, convicted or sentenced child in the care of his or her parents or guardian or in the custody of any other person, is monitored by an assistant probation officer;
- **‘child’** means any person under the age of 18 years;
- **‘assistant probation officer’** means a person appointed under section 4A and who assists and works under the supervision of a probation officer;
- **‘probation officer’** means a person who complies with the prescribed requirements and who has been appointed under section 2;
- **‘supervision’** means supervision of a accused, convicted or sentenced person by a probation officer in terms of the provisions of any law;

- **'diversion'** means diversion from the formal court procedure with or without conditions;
[Definition of 'diversion' inserted by section 1(c) of Act 35 of 2002]
- **'diversion programme'** means a programme within the context of the family and community –
 - (a) in respect of a person who is alleged to have committed an offences; and
 - (b) which is aimed at keeping that person away from the formal court procedure;

OBJECTIVES

- The aims of *home-based supervision* are:
 - To place high risk or children in trouble with the law under a very strict form of supervision at their home within the community.
 - To reduce re-offending.
 - To decrease the population of children awaiting trial in prisons or places of safety.
 - To ensure a sustainable service for children in trouble with the law that is cost-effective.
 - Where applicable, to assist the child to change his or her behaviour in the family setting with parental assistance.

LEGAL FRAMEWORK FOR HOME-BASED SUPERVISION

1. The Constitution (Act No. 108 of 1996)

Section 28(1) (g) stipulates that no child shall be detained except as a measure of last resort and then for the shortest possible period of time.

2. Criminal Procedure Act, 1977 (Act No. 51 of 1977) (The CPA)

Awaiting trial juveniles:

The CPA does not make specific reference for home-based supervision. However, section 71 provides that an arrested child (person under the age of 18 years) can be placed under supervision of a probation officer whilst awaiting trial. In terms of section 72(1) an arrested child can be placed in the care of a person in whose custody he is and warn such person to bring the accused to court. The court may impose any condition referred to in section 62. Supervision by a probation officer and home-based

supervision are such conditions. See also section 50 of the CPA read with section 29 of the Correctional Services Act, No. of 1959.

Convicted juveniles:

In terms of section 297 of the CPA the court may postpone or suspend a sentence under certain conditions. Home-based supervision could be such a condition.

3. Probation Services Act, 1991 (Act No. 116 of 1991)

This Act introduced home-based supervision, and spells out the role of the assistant probation officer. Home-based supervision is one of the duties stipulated in section 4A (2) (a) of the said Act to be performed by the assistant probation officer.

4. Home-based supervision is supervision under certain conditions. These conditions have to be determined by the court after a recommendation by the probation officer. The supervision with conditions forms the basis of home-based supervision.
5. It should be noted that section 4B provides that any arrested child who has not been released shall be assessed by a probation officer as soon as reasonably possible, but before his or her first appearance in court in terms of section 50(1)(c) of the CPA: Provided that if the child has not yet been assessed when brought before the court, the court may authorize the extension of the period within which the assessment must take place by a period not exceeding seven days at a time following his or her first court appearance.

HOME-BASED SUPERVISION AS AN ALTERNATIVE TO DETENTION WHILST AWAITING TRIAL

1. The Probation Services Act, 1991 provides that arrested children are to be assessed. After assessing the child the probation officer may make a recommendation to the court that instead of being referred to prison or some other residential facility such as a secure care facility, the child may instead be placed under supervision of a probation officer.
2. The court may impose a condition that the child submits to home-based supervision and order him/her to submit to certain conditions. This is suitable for children who are considered to be at risk of absconding or getting into further trouble if they are simply released to their families.
3. Home-based supervision ensures that the child remains at home, attends school and other activities whilst being away from negative influences that he may be exposed to in prison. It also ensures that the child returns to court to stand trial, as the risk of absconding is substantially reduced whilst the child is

under home-based supervision.

4. At the same time the assistant probation officer who monitors the supervision can get to know the family through home visits, and is able to provide support to the child and family in relation to more general behavioral problems if they are identified and where this is considered appropriate.

Jan Venter
Magistrate/Ladysmith

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

New Publication:

The 2nd edition of Prof. S.S. Terblanche's "Guide to Sentencing in South Africa" has been published in 2007. The book has been thoroughly updated since the 1st edition was published in 1999.

The following changes are of specific relevance:

- a) A separate chapter is now devoted to the minimum-sentences legislation;
- b) A new section on restorative justice has been added.
- c) The chapter on the discretion with regard to sentence has been entirely rewritten;
- d) The chapter on correctional supervision has also been rewritten in view of the New Correctional Services Act, 1998.

The book reflects the law as on 30 June 2006 and is the only substantial contribution to sentencing. Every magistrate should have access to a copy when sentencing an offender.

Gerhard van Rooyen
Greytown



A Last Thought

“One of the major dilemmas we face both as individuals and as a society is simplistic thinking – or the failure to think at all.

It isn't just a problem, it is *the* problem...

[An] all-too-common flaw is that most believe they somehow instinctively know how to think and to communicate.

In reality, they usually do neither well...”

Scott M Peck *The road less travelled and beyond* (1997) 1-2

Back copies of e-Mantshi are available on

<http://www.justiceforum.co.za/JET-LTN.asp>

For further information or queries please contact RLaue@justice.gov.za