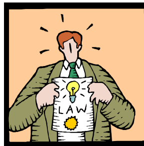
E-MANTSHI

A KZNJETCOM Newsletter

June 2008: Issue 29

Welcome to the twenty ninth 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. The South African Law Reform Commission has been mandated with the task of revising all legislation administered by National Government Departments with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the right to equality in the 1996 Constitution, or that are redundant or obsolete. As part of its ongoing investigation into statutory law revision (Project 25), the South African Law Reform Commission released a Discussion Paper 114 containing proposals for the repeal or amendment of statutes currently administered by the Department of Transport for general information and comment.

   The repeal proposals contained in the Discussion Paper have been developed after a thorough analysis of all the statutes administered by the Department of Transport. Furthermore, the Discussion Paper includes a proposed Repeal Bill which, if enacted, will repeal 54 statutes and partially repeal 19 statutes covering areas such as railway construction, national roads and transport services, and shipping. The statutes contained in the draft Repeal Bill have been selected on the basis, among others, that they are no longer practical, they are spent, unnecessary or obsolete, are inconsistent with the right to equality entrenched in section 9 of the 1996 Constitution, or the purpose for which they were enacted no longer exists.

   Comments should reach the Commission by 31 August 2008.

   The Discussion Paper is available on the internet at the following site: http://www.doj.gov.za/salrc/dpapers.htm .

2. A National Road Traffic Act Amendment Bill, 2008 is going to be introduced into Parliament during the third term of 2008. The notice in this regard was published in government gazette No 31058 dated 15 May 2008. The objects of the Bill are as follows:

   To –

   Amend the National Road Traffic Act, 1996, so as to insert certain definitions and to amend others; to prohibit the unauthorised use of an authorised officer's infrastructure number; to provide for visible display of nametags by traffic officers; to regulate the conduct of traffic officers in relation to the examination of the loading of motor vehicles; to prohibit the impersonation of traffic officers and the wearing of a traffic officer's uniform without official written permission; to create new offences; to empower the Minister to prescribe training procedures and qualifications of persons appointed as national inspectors at driving licence testing centres and testing stations; to make new provision regarding the process by which driving licences are issued; to recognise documents relating to road worthiness issued in a prescribed territory; to empower the Minister to prescribe the manner and form of accident reporting; to provide for circumstances when emergency vehicles may ignore road traffic signs and speed limits; to provide for liability of managers, agents and employees; to empower the Minister to set fees; to delete obsolete provisions; and to provide for matters connected therewith.

3. A Draft Repeal of the Black Administration Act and amendment of Certain Law Amendment Bill, 2008 has been published in Government Gazette No. 31088 dated 23 May 2008. The objects of the Bill are as follows:

   Section 1(3) of the Repeal of the Black Administration Act and Amendment of Certain Laws Act, 2005 (the Act), provides that the remaining provisions of sections 12 and 20 and the Third Schedule of the Black Administration Act, 1927 (Act No. 38 of 1927), will be repealed on 30 June 2008 or on such date as national legislation to further regulate the matters dealt with in these provisions has been implemented, whichever occurs first. These sections deal with the judicial functions of traditional leaders.

   The Traditional Courts Bill, which regulates the matters dealt with in sections 12 and 20 and the Third Schedule of the Black Administration Act, 1927, is currently before the Portfolio Committee on Justice and Constitutional Development. It is foreseen that the Traditional Courts Bill would not be signed into law by the deadline of 30 June 2008. The Bill consequently intends extending the date of the application of the provisions of sections 12 and 20 and the Third Schedule of the Black Administration Act, 1927 to 30 December 2009.

   The same deadline has been determined in section 1(2), (4), (5) and 6 of the Act in respect of legislation which is administered by other Departments, namely the Departments of Land Affairs and Provincial and Local Government. These deadlines are, likewise, being extended from 30 June

2008 to 30 December 2009.

4. Regulations have been published i.t.o. section 39 and 53 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) in Government Gazette No. 31076 dated 23 May 2008.

   The Regulations are arranged as follows:

   1. Definitions

Part I: Regulations on services for victims of sexual offences and compulsory HIB Testing of alleged sex offenders.

2. Reporting of an alleged sexual offence and services for victims.
3. Application by victim or interested person for HIV testing of alleged offender.
4. Consideration of application and evidence.
5. Order by magistrate for HIV testing in terms of section 31 of the Act.
6. Application by investigating officer for HIV testing of alleged offender and order by magistrate for HIV testing in terms of section 32 of the Act.
7. Taking of prescribed specimens.
8. Recording, retaining and confidentiality of test results.
9. Retaining of test results by investigating officer.
10. Warrant of arrest.
11. Register of applications and orders.

Part II: Regulations on National Register for Sex Offenders

12. Establishment of National Register for Sex Offenders and designation or appointment of personnel of Registrar.
13. Powers, duties and functions of Registrar.
14. Contents of Register.
15. Manner in which particulars must be forwarded to Registrar: Establishment of Register and related matters.

16. Manner in which particulars must be forwarded to Registrar and related matters.

17. Persons entitled to apply for certificate.

18. Processing of applications.

19. Removal of particulars from Register.

20. Offences and penalties.

Part III: General

21. Short title and commencement.

Annexure A Forms: Services for victims of sexual offences and compulsory HIV Testing of alleged sex offenders.

Annexure B Forms: National Register for Sex Offenders.

Recent Court Cases

1. S. v. DANIELS 2008(1) SACR 597 NPD

If a medical doctor abused his position as medical doctor it will be an aggravating circumstance if he has to be sentenced.

The appellant, a medical doctor, was charged with rape. It was alleged that he had had surreptitious sexual intercourse with a patient while conducting a gynaecological examination. The appellant denied rape, but admitted that he had masturbated and that some of his semen had ended up on the complainant's clothes and genital area. The state accepted a plea of guilty to indecent assault and, upon conviction, he was sentenced to three years' imprisonment in terms of s 276(1)(*i*) of the Criminal Procedure Act 51 of 1977. The appellant appealed against this sentence. At trial, expert evidence was led on his behalf that he had been suffering from 'behavioural dyscontrol', which had been brought on by exposure to a great deal of stress and long hours on duty. This behavioural dyscontrol had manifested itself, on the day in question, as a lack of control of behaviour as a result of a lack of awareness or a lack of judgment at the relevant time.

Held, that in the absence of evidence from the appellant, the only reasonable inference to be drawn from his conduct flowed from the complainant's evidence. It was clear beyond reasonable doubt that his so-called medical examination had been a ruse to enable him to satisfy his sexual desires; it had been calculated and

executed step by step. The opinion that he had been suffering from behavioural dyscontrol had to be evaluated against this background. According to the expert, one of the essential features of this condition was the 'precipitous onset of the behaviour'. However, there was no suggestion of a sudden rapid or swift action to be found in the complainant's evidence. The inference was irresistible that the steps taken by the appellant to give effect to his sexual desires could not be described as unexpected, without warning, unanticipated or unforeseen. He had been aware of his sexual desires and fantasies and yet had chosen to place himself in a position where he could give vent to them. All that he needed to do to protect himself and his patient was to ensure that the examination of the complainant took place in the presence of a female nurse. Accordingly, it could not be concluded that the appellant had been suffering from behavioural dysfunction. (At 601*b*-601*i*.)

Held, further, that the fact that the appellant had abused his position as a medical doctor, in breach of both his own ethical rules and the trust which the complainant must have had in him, was an aggravating factor. While the fact that he had been struck off the roll of medical practitioners was in itself a punishment, this did not mean that a term of imprisonment was not required. There had been no misdirection on the part of the magistrate, and it was to be noted that the sentence made provision for the appellant to be placed under correctional supervision at the discretion of the Commissioner of Correctional Services. (At 601i-603d.)

Appeal dismissed.

2. S. v. THOBELA 2008(1) SACR 605 WLD

If a presiding officer is unavailable to continue a part heard trial where evidence has been adduced it may be in the interest of justice to acquit the accused.

The accused was charged with assault with intent to do grievous bodily harm, and made his first appearance in a magistrates' court in May 2001. On 12 July 2001, at the conclusion of the defence case, the magistrate reserved judgment and postponed the matter until 17 July 2001. On that day the matter was once again postponed until 23 July, on which day the accused failed to appear and a warrant of arrest was authorised. Some five years and five months later, in October 2006, the accused was once again brought before court. The matter was postponed in order to secure the attendance of the original trial magistrate and eventually, in November 2006, the accused was informed that the magistrate was no longer available, as he had left the service of the Department of Justice, and that the matter would be referred to the High Court on special review. A further delay of more than six months occurred before the matter was placed before a judge. Both the referring magistrates and the Director of Public Prosecutions were of the view that the proceedings should be set aside and that the accused should be tried *de novo* before another magistrate.

Held, that the Criminal Procedure Act 51 of 1977 made no provision for the further conduct of a part-heard matter, in which there had been no conviction, and in which the presiding officer had become unavailable for whatever reason. (The court

proceeded to review a number of authorities dealing with the consequences of the non-availability of presiding officers in part-heard trials.) The case law in the different divisions showed that different approaches had been followed. In certain instances the proceedings had been regarded as a nullity, leaving it open to the authorities to prosecute the accused afresh. This raised the issue, however, of whether the ends of justice would be promoted should the accused again be put through the agony, anxiety, expense and time of a retrial; put differently, whether the accused would have a fair trial should the proceedings commence afresh. (Paragraphs [9]-[12] at 608*i*-611*e*.)

Held, further, that s 35(3)(d) of the Constitution of the Republic of South Africa, 1996, entrenched an accused person's right to have his trial begin and conclude without unreasonable delay. *In casu*, although the accused was partly to blame for the delay by virtue of his having absconded during the trial, the inordinate delays after November 2006 were particularly disconcerting. No explanation had been given for the fact that it had taken four months for the review application to reach the registrar; this had had nothing to do with the accused. It was also to be noted that the obligatory enquiry into the accused's failure to appear had not been held when he eventually reappeared in October 2006. Consequently, there was no conclusive evidence that he had stayed away from proceedings intentionally; there may have been a plausible explanation for his default. As to the merits of the matter, that there was no medical evidence to support the submission of the Director of Public Prosecutions that the assault in question had been an especially serious one. In addition, it was conceded by him that there might be difficulty in tracing witnesses in the event of a trial *de novo*. The accused had already suffered substantial prejudice and a new trial would inevitably result in further prejudice to him. Accordingly, the interests of justice would be properly promoted if the accused were acquitted. (Paragraphs [13]-[18] at 611*f*-613*d*.)

Accused found not guilty and discharged.

From The Legal Journals

1. **Stadler, S.**

   "Debt review applications in terms of the National Credit Act"

   De Rebus June 2008

2. **Van Loggerenberg, D, Dicker, L and Malan, J.**

   "What constitutes a real genuine or *bona fide* dispute of fact in motion proceedings?"

   De Rebus June 2008

3. **Dicker, L.**

   "New Tariff of witness fees in civil cases.

   De Rebus June 2008

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

4. **Hoctor, S**

   "Attempted housebreaking with intent to commit a crime"

   2007 *Obiter* 600

5. **Snyman, CR**

   "Extending the scope of rape – a dangerous precedent"

   2007 *SALJ* 677

6. **Watney, M**

   "Forum allocation for bail proceedings in the lower courts"

   2008(1) *TSAR* 165

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

Contributions from Peers

DETENTION OF UNCONVICTED PERSONS AND WOMEN – SECTION 29 OF THE CORRECTIONAL SERVICES ACT NO. 8 OF 1959

In the *e-Mantshi* issue 26 of March 2008 the issue of the granting of bail was discussed (including the issue of the release of a child of 13 years). What became apparent after the publication of the article is that there are many magistrates who are not aware of the existence of section 29 of the Correctional Services Act, No. 8 of 1959. Although this Act was repealed section 29 was left intact. The section

deals with the detention of unconvicted young persons.

Section 29(1) and (2) reads as follows:

(1) <u>Notwithstanding anything to the contrary in any law contained</u> –

(a) but subject to subsection (2), an unconvicted person under the age of 14 years;

(b) but subject to subsections (2) and (5), an unconvicted person who is 14 years or older but under the age of 18 years,
shall not be detained in a prison or a police cell or lock-up.

(2) A person referred to in paragraph (a) or (b) of subsection (1) may be detained in a police cell or lock-up after his or her arrest until he or she is brought before a court within a period not exceeding 24 hours in respect of a person referred to in paragraph (a) of that subsection and not exceeding 48 hours in respect of a person referred to in paragraph (b) of that subsection, if –

(a) such detention is necessary and in the interests of justice; and

(b) the person concerned cannot be placed in the care of his or her parent of guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983), for the period in question.

The impact of these sections are as follows:

(a) an unconvicted person under the age of 14 years can only be held in a police cell or lock-up for 24 hours if the detention is necessary <u>and</u> in the interests of justice and the person cannot be placed in the care of a parent or guardian or a place of safety as defined in section 1 of the Child Care Act, Act 74 of 1983.At the expiration of the 24 hour period the person <u>must</u> be brought before a court (even if this is on a weekend).

(b) In the case of an unconvicted person who is between 14 and 18 years old he or she may be held in the police cell or lock-up for 48 hours before being brought to court. Otherwise the same conditions apply as in (a) above.

Section 29(3) and (4) requires the member of the SAPS or the peace officer who ordered the detention to provide the court with a written report in which must be set out the reasons for the detention and an explanation as to why it was necessary to detain the person in a police cell or lock-up. If the young person is released before appearing in the court the report must still be submitted to the magistrate not later than one court day after the release of the person.

Section 29(5) refers specifically to persons between the ages of 14 and 18. Such an unconvicted person may only be detained in a prison or a police cell or lock-up if the magistrate has reason to believe that his detention is necessary in the interests of

the administration of justice and the safety and protection of the public and no secure Place of Safety is available within a reasonable distance from the court. If such a person has committed an offence mentioned in schedule 2 of the Act she may only be detained in a prison (not a police cell or lock-up) and then only after oral evidence has been produced by the state with regard to the factors mentioned.

The offences listed in schedule 2 are the following:

Schedule 2: Murder; Rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; Robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved; Assault with intent to commit grievous bodily harm, or when a dangerous wound is inflicted; Sexual assault, compelled sexual assault or compelled self-sexual assault as contemplated in section 5, 6 or 7 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; Kidnapping; Any offence under any law relating to the illicit conveyance or supply of dependence producing drugs; Any conspiracy, incitement or attempt to commit any offence referred to in this Schedule.

Such a person must be brought before a court every 14 days to enable the court to reconsider the said order (by hearing evidence in this regard again).

The court must also take the following factors into account in considering whether the interests of the administration of justice and the safety and protection of the public necessitate the detention of such a person:

(i) the substantial risk of absconding from a place of safety;

(ii) the substantial risk of causing harm to other persons awaiting trial in a place of safety; and

(iii) the disposition of the accused to commit offences.

If a woman under the age of 18 is detained she shall be under the care of a woman.

It is also important to note that there is no provision for an unconvicted person under the age of 14 to be held in a police-cell or lock up after the initial 24 hour period mentioned in section 29(1). Thereafter the only place where such a person can be detained, if necessary is in a place of safety or institution mentioned in section 1of the Child Care Act, Act 74 of 1983.

Gerhard 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

The Institute for Security Studies

ISS TODAY

3 June 2008: **Concerns About South Africa's Proposed Directorate for Priority Crime Investigations**

In May 2008 South Africa's cabinet approved two Bills designed to dissolve the Directorate for Special Operations (DSO) - otherwise known as the Scorpions - and to replace it with a new Division within the South African Police Service (SAPS). The proposed division would be called the Directorate for Priority Crime Investigation (DPCI).

The General Law Amendment Bill spells out details relating to the DPCI, while the National Prosecutions (NPA) Amendment Bill mainly serves to delete specific sections from the NPA Act of 1998 that provide for the existence and work of the DSO. While the Bills are yet to go through parliament, it is necessary to reflect on some practical areas - specifically of the General Law Amendment Bill - that might be the centre of much debate.

The purpose of the General Law Amendment Bill is to amend the *South African Police Service Act of 1995* to provide for the establishment of a DPCI within the national police. The stated objective for establishing the DPCI is to 'enhance the

investigative capacity' of the police in relation to 'organised and serious crime'. These will include matters that require specialised knowledge or are of an international nature.

According to the Bill, the DPCI will consist of 'selected' members of the DSO, as well as 'selected' members from the police's Organised Crime Unit and the Commercial Branch. To these can be added other 'selected' members who, on the basis of training, experience and expertise in the field of combating and investigating crimes that will be the focus of the DPCI, can be transferred to this division (or directorate). Furthermore, the Bill provides for the consideration of any other person, who passed a security check, for appointment to the DPCI.

Prosecutors who served with the DSO (immediately before this Bill becomes law) are expressly excluded from being appointed to the DPCI. However, members of the DSO who are involved in 'intelligence' work may be considered for deployment to the police's Crime Intelligence Division.

Considering this, there are a number of practical issues that are either not adequately addressed in the Bill or require further clarification.

It is not stated in the Bill whether the envisaged DPCI would take over all current responsibilities of the Organised Crime Unit and the Commercial Branch. Unless expressly pointed out, there would be room for continued speculation as to the status of these two Units. Given that only 'selected' members from these units would join the DPCI, a question naturally arises: What would happen to the members not selected? If this question is left unattended, the likelihood of insecurity and confusion among members cannot be ruled out.

Furthermore, the critical issue of oversight does not seem to have been given sufficient attention in the Bill. Given the wide criticism levelled at the DSO in this regard, the gap in terms of accountability is worrying. The question is: who would investigate the investigator? With both the SAPS and the DSO having investigative and law enforcement powers, they, in spite of their poor relations, acted as a counterbalance to the abuse of power or the inherent room to protect 'one of their own'. Once the Bill is passed into law, it will become a case of "all eggs in the same basket" and that seems ominous. The weaknesses that currently bedevil the Independent Complaints Directorate (ICD) are also a cause for concern.

While the Crime Intelligence Division seems poised to provide intelligence and analytical support to the DPCI, the silence of the Bill in this regard is striking. There is also no provision for the development of regulations in this regard. Related to this is the role of the Legal Services Division. While this Division might be able to provide legal assistance, this would be something completely different from the guidance and support that a dedicated prosecutor would do in the context of the DSO. This raises serious questions about the effectiveness of the DPCI, given the abandonment of the prosecution-led approach.

Finally, the all-powerful position that the Bill creates for the National Commissioner

of SAPS should be a matter of concern. In terms of the Bill, he would have the authority to 'hire-and-fire' members of the DPCI and, as overall commander of the police, would be in a position to influence the outcome of almost all DPCI investigations. Considering our recent past, it would appear prudent for legislation to guard against concentrating such enormous powers in one office; that of the National Commissioner!

Johan Burger, Senior Researcher, Crime, Justice and Politics Programme, ISS Tshwane (Pretoria)

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http://www.issafrica.org Date: 09/06/2008

A Last Thought

The ultimate weakness of violence is that it is a descending spiral, begetting the very thing it seeks to destroy. Instead of diminishing evil, it multiplies it. Through violence you may murder the liar, but you cannot murder the lie, nor establish the truth. Through violence you may murder the hater, but you do not murder hate. In fact, violence merely increases hate. So it goes. ... Returning hate for hate multiplies hate, adding deeper darkness to a night already devoid of stars. **Darkness cannot drive out darkness: only light can do that. Hate cannot drive out hate: only love can do that.**

Martin Luther King

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