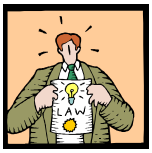
E-MANTSHI

A KZNJETCOM Newsletter

August 2008: Issue 31

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



New Legislation

1. Act No. 7 of 2008 the *Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act*, 2008 has been published in Government Gazette No. 31199 dated 27 June 2008. The Act, which came into operation on 29 June 2008, amends the *Repeal of the Black Administration Act and Amendment of Certain Laws Act*, 2005 by substituting the date of the repeal of the *Black Administration Act* with the date of 30 December 2009.

2. The *Administrative Adjudication of Road Traffic Offences Act*, 1998 (Act No. 46 of 1998) will come into operation on 1 November 2008 in the area of the City of Johannesburg Metropolitan Municipality. The notice which indicates this was published in Government Gazette No. 31197 dated 1 July 2008.

3. The Minister of Transport has in terms of section 34 of the *Administrative Adjudication of Road Traffic Offences Act*, Act No. 46 of 1998 revoked Government Notice No. R701 as published in Government Gazette No. 31183 of July 2008 and has published new regulations in Government Gazette No. 31242 of 16 July 2008. The regulations came into operation on the 16th of July 2008, except for Regulation 24, column 7 of Schedule 3 and Schedule 4 which deals with Demerit points and the penalty amounts. These provisions will only come into operation on a date to be determined by the Minister by notice in the Government Gazette.

Recent Court Cases

1. S. v. CHETTY 2008 (2) SACR 157 (WLD)

Judicial officers must ensure that s 112(2) of Act 51 of 1977 statements reveal enough material facts to present a full picture upon which a conviction can be based.

The appellant pleaded guilty in a regional court to a charge of fraud, and a document purporting to be a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 was handed in and after some further questioning by the magistrate the appellant was convicted. The fraud in question arose from the presentation by the appellant of a cheque to a bank.

Held, that the statement did not comply with the provisions of s 112. The statement amounted to a regurgitation of some of the allegations in the charge-sheet. It was necessary to refer to the facts admitted by the appellant, and not to conclusions drawn from such facts. Regarding the assertion that the cheque was a 'false cheque', it was not clear whether this meant that the cheque had been forged, or that it had been issued for a non-existent debt, or that it had been falsely endorsed. The trial court should have been properly appraised of these matters and a copy of the cheque should have been annexed to the statement. Furthermore, the allegation in the charge-sheet that someone was induced to 'accept' the truth of the representation regarding the cheque did not satisfy the requirement that the appellant had acted to the prejudice of someone. There was no allegation that the representee had been induced to act on the strength of the representation or that the accused had attempted to induce the representee so to act. It was also not clear whether the appellant had in fact handed the cheque to anyone at the bank for deposit, and if so, what that person's reaction might have been. There was no room, in this type of matter, for speculation or conjecture about what the appellant had done. Section 112(2) was peremptory and the statement must reveal the material facts upon which the conviction was based (At 159*i*-162*a*).

Held, further, that the appellant's admission said nothing concerning his state of mind when he effected the deposit: whether he had intended someone to suffer loss, or had realised that someone might suffer loss and had proceeded to effect the deposit regardless of this possibility. The concepts 'reckless' and 'careless', mentioned in his statement, were conclusions drawn from facts; they do not themselves constitute the facts from which a court could justifiably draw the conclusion that the appellant had had the necessary *mens rea*. The statement was a job done in haste, with no attention paid to detail. Judicial officers should ensure that what was presented to them was a full picture, not just a few discrete facts which, it was hoped, would fulfil the requirements of s 112. It followed, therefore, that there had been insufficient facts on record for the magistrate to have convicted the appellant, a situation that could have been avoided had defence counsel and the prosecutor worked together to prepare, in simple language, a comprehensive

statement of facts, devoid of legalese (At 162*d*-*e* and 164*a*-*b*).

Held, further, that ordinarily the matter would have had to be remitted to the trial court for it to comply with the provisions of s 112 or to proceed under s 113. However, the appellant had been sentenced in August 2004 and had been serving his sentence since then. There had been inexplicable delays in the prosecution of the appeal and it appeared that he would shortly be considered for release on parole. If the matter were to be referred back to the trial court he would in all probability be out of prison by the time it was dealt with again. It would be an injustice to apply the strict letter of the law; a better course was to proceed with the material available, bearing in mind that despite the procedural imperfections, the appellant had admitted his guilt. He had numerous previous convictions for fraud, and in the year of his last release from prison he had committed the present fraud. He was a career criminal. The sentence of eight years' imprisonment was an appropriate one (At 164*c*-*i*). Appeal dismissed.

2. S. v. LEO 2008(2) SACR 198 (CPD)

Evidence of the circumstances under which an accused is found in possession of a 'dangerous weapon' in contravention of section 2(1) of the Dangerous Weapons Act, Act 71 of 1968 is essential before a conviction can result.

Following a plea of guilty, the accused was convicted of contravening s 2(1) of the Dangerous Weapons Act 71 of 1968, in that he had been in possession of a knife. The accused admitted that he had had a few drinks and was outside in the street when the police stopped next to him. He threw his knife on the ground but was arrested. He was sentenced to six months' imprisonment, conditionally suspended for five years. Subsequently, the presiding magistrate sent the matter on special review on the grounds that the provisions of s 2(1) violated the accused's right to be presumed innocent, to remain silent and not to testify during proceedings. The magistrate was also of the view that, since the wording of the Act referred only to the male sex, the impression might be created that it applied only to male perpetrators. The magistrate was otherwise satisfied that the proceedings were in accordance with law.

Held, that the admitted facts contained in the accused's written explanation of plea were insufficient to justify a finding that all the material elements of the offence had been admitted. It was clear that the definition of 'dangerous weapon' in the Act was not aimed at weapons in general, but at objects that fulfilled two criteria: they must be likely to cause serious bodily injury, and they must be capable of being used in an assault. It was thus necessary to consider both the nature and qualities of the object, as well as its potential for use in an assault. Nowhere on the record did it appear that the nature, qualities or specifications of the knife had been determined, and neither did it appear that any evidence had been presented concerning the circumstances under which the accused had been found in possession thereof. In view of this paucity of facts, the magistrate should either have put clarificatory questions to the accused, or applied the provisions of s 113 of the Criminal Procedure Act 51 of 1977. In the result, the conviction was irregular and not in accordance with law (Paragraphs [10]-[16] at 201*b*-202*b*).

Held, further, that the matter was not ripe for a consideration of the constitutional issue raised by the magistrate. As to the suggestion that the language of the statute should refer to both sexes, the provisions of the Interpretation Act 33 of 1957 made it clear that words indicating the masculine sex included females (Paragraph [18] at 202*d*). Conviction and sentence set aside. Matter remitted to trial magistrate to be dealt with according to law.

3. S. v. DLAMINI AND ANOTHER 2008(2) SACR 202 (TPD)

If an attorney proceeds with a criminal trial after he was suspended (and therefore had no right of appearance anymore) the proceedings are irregular and constitute a failure of justice *per se*.

The two accused were represented at a trial by an attorney, M. After the conclusion of the defence case, but before judgment had been handed down, it was brought to the attention of the magistrate that M had been suspended by the relevant law society pending the outcome of an application to have him struck off the roll of attorneys. As a result of this suspension M had lost his right of appearance. The evidence that had been led after the suspension included that of a State witness called after the reopening of the State's case, part of the evidence of accused 1, and the whole of the evidence of accused 2. In addition, closing arguments had also been presented after the suspension. The magistrate was of the opinion that a gross irregularity had occurred, and referred the matter to the High Court on special review.

Held, that the participation in proceedings of a legal representative who lacked the right of appearance was an irregularity of such a nature that it constituted a failure of justice *per se*. The proceedings had been tainted to the extent that they had to be set aside in their entirety, and not just from the point at which M had been suspended. It would be for the Director of Public Prosecutions to decide whether or not to prosecute the accused *de novo* (Paragraphs [12] and [13] at 206*b* and 206*c-d*). Proceedings reviewed and set aside.

From The Legal Journals

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

   "Procedural Aspects of Judicial reviews"

   De Rebus August 2008 32

2. **Du Plessis, M.A.**

   "The National Credit Act: debt counseling may prove to be a risky enterprise."

   Journal for Juridical Science 2007 32(2) 76

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

Contributions from Peers

A note on the provisions contained in the Criminal Law (Sexual Offences and Related Matters) Regulations in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007 – Government Notice R. 561 of 22 May 2008

1. Provisions contained in sections and regulations not pertinently relevant are omitted from these notes.

The Application

2. ***Victim application*.** Regulation 3 gives effect to section 30 of the Act for a victim or interested person (subject to the qualifying provisions of sections 30 (1) (b)) on behalf of the victim to apply in the form and attested as prescribed, within 90 days after the alleged commission of a sexual offence (sections 30 (1) (a), 30 (2), 30 (3) and regulation 3 (1)), to a designated magistrate of the district in which the said offence is alleged to have been committed (see the definition of "magistrate" in regulation 1 and sections 30 (4), 31 (1) and paragraph 4 below), in chambers, for an order that –

(a) the alleged offender be tested for HIV, or

(b) the HIV test results in respect of the offender already obtained in terms of section 32 - paragraph 3(a) below - be disclosed to either applicant, as the case may be.

3. ***I/O application*.** Regulation 6 gives effect to section 32 which provides that an investigating officer (I/O) may, subject to section 32 (2) apply in the prescribed form to the designated magistrate of the magisterial district in which the sexual offence or offence is alleged to have occurred, in chambers, for an order that –

(a) the alleged offender be tested for HIV, or

(b) the HIV test results in respect of the alleged offender already obtained in terms of section 30 - paragraph 2(a) above - be made available to the I/O, or where applicable, to a prosecutor who needs to know the results for purposes of the prosecution of the matter in question or any other court proceedings.

4. In both instances above the regulations prescribe that the investigating officer or any member acting under his or her command (section 27), must place the application in a sealed envelope marked “confidential”, enter certain identifying particulars on it and lodge it with the designated clerk of the court not later than 2 working days of receiving it (see the definition of “clerk of the court in regulation 1 and regulations 3 (2) (a), (b) and 6).

5. The clerk of the court, in both instances, enters these identifying particulars in a register and a file marked “confidential” and submits the sealed application and the file forthwith to a designated magistrate for consideration in chambers as soon as is reasonably practicable (section 31(1) and regulation 3 (3). (The head of the office must put administrative measures in place to ensure their safekeeping (regulation 3 (4)).

Consideration of the Application

6. The magistrate may in considering a *victim application* in chambers, call for additional evidence as he or she deems fit, oral or on affidavit, “which must form part of the record of the proceedings” (section 31(1)). Such evidence by or on behalf of the alleged offender may be considered if to do so will not give rise to any substantial delay (section 31 (2) (a)) and such evidence may also be adduced in the absence of the victim if the magistrate is of the opinion that it is in the best interest of the victim to do so (section 31 (2) (b)). Regulation 4 provides details relating to the duties of the clerk of the court where the magistrate requires additional evidence to be called for.

7. In a *victim application* the magistrate must, if satisfied that all the relevant statutory requirements have been met, issue an order that the alleged offender be tested for HIV or that the HIV test results be disclosed (section 31(3)). The procedure is essentially the same in an *I/O application* (section 32(3)*).* It is of importance to note that even though there appears, at first, to be a material difference between the provisions of section 31 (3) and section 32 (3) insofar as the latter does not expressly require that the victim may have been exposed to the body fluids of the alleged offender, as does the former, both sections require the magistrate to be satisfied that there is *prima facie* evidence that a sexual offence has been committed against the victim by the alleged offender. The definition of “sexual offence” in section 27 “*means a sexual offence in terms of this Act in which the victim may have been exposed to body fluids of the alleged offender.*” The term “body fluid” is defined in section 27 as “*...any body substance which may contain HIV or any other sexually transmissible infection, but does not include saliva, tears or perspiration.*” In the result there is no difference in substance between the two provisions. It is submitted that in both instances covered by these provisions it would not be sufficient for satisfying the requirement for *prima facie* evidence to rely on a bare assertion that “*the victim may have been exposed to a body substance which may contain HIV or any other sexually transmissible infection*”, for that would amount to a mere allegation that the conclusion that is required to be drawn by the magistrate, has been satisfied. What is required is evidence which *prima facie* proves that the victim may have been exposed to a named body substance and

evidence which proves that it may contain HIV or any other named sexually transmissible infection. The term “may” in the context of these provisions, would appear to mean no more than that there is a possibility that there has been such exposure and that there is a possibility that the body substance contains HIV or other sexually transmissible infection. *Prima facie* e*vidence* in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges the onus.[1] It is doubtful whether judicial notice may be taken of these facts and it is suggested that they be established by way of expert documentary or oral evidence.

An *I/O application* may entail an “offence”, which is defined in section 27 as: “*…any offence, other than a sexual offence, in which the HIV status of the alleged offender may be relevant for purposes of investigation or prosecution.*” What has been previously postulated about evidence applies equally in this instance.

8. The magistrate is required (regulations 5(2) and 6(6)) to place the order, whether the application is granted or dismissed, in a sealed envelope, marked “confidential”, enter identifying particulars on it and hand the order and the file to the clerk, who then hands it to the investigating officer. Regulations 5 and 6 set out the judicial and clerical obligations and provide details relating to the preservation of confidentiality and the procedure to be followed in making and relaying the results of the victim application and I/O application, respectively, to their ultimate destination.

9. The basis of the confidentiality referred to above, must be the protection of the basic rights of privacy and dignity (preamble to the Act) of both the victim and the alleged offender and giving effect to the provisions of section 36 which prohibits communication to anybody except those persons stipulated, of the fact that an order for HIV testing has been granted. Regulations 7 (blood specimens) and 8 (test results) also prescribe the use of sealed envelopes, but these do not involve the clerk.

10. Regulation 10 (1) provides, *inter alia*, for the investigation officer to apply, in the circumstances contemplated therein, to the designated magistrate for a warrant of arrest simultaneously with an application for an order for HIV testing, or to the magistrate who previously issued such an order.(Form 9) and for a magistrate to issue such warrant (Form 10). In terms of regulation 10 (2) if the magistrate who issued the order in terms of section 31 (3) or 32 (3) is not available or able to consider the application, it may be considered by any other magistrate. In the context, the expression “any other magistrate” would seem to connote any non designated magistrate of the relevant district. See also section 33 (3) for the instances where the designated magistrate may issue a warrant for the arrest of the alleged offender.

11. Though these applications might be labeled as *ex parte*, it does not follow necessarily that the ancillary procedure applicable in other statutorily regulated *ex*

1 *Ex parte Minister of Justice: In re R v Jacobson and Levy* 1931 AD 466 at 478

parte procedures must or can be applied. This is so for the obvious reason that the provisions of one statute cannot be applied to another, unless expressly authorized by the latter[2]. It seems that such applications are *sui generis* in nature, bearing some resemblance to applications for a warrant of arrest or for search and seizure, but different therefrom in one material respect, namely that section 31 (2) (a) expressly permits the alleged offender to be heard. Section 32 (3) on the other hand, does not have a similar provision and no obvious reason is apparent for this distinction between these provisions.

Be that as it may, the real issue, however, is in what circumstances a magistrate would be inclined to receive evidence by or on behalf of an alleged offender and how and when to go about doing so. It seems highly unlikely that this would be done after an order is made and, moreover, regulation 4 (2) (a) (ii) prescribes the procedure to be followed in securing the attendance of the alleged offender at the proceedings. There is no indication in the prescripts that this procedure must be followed as a matter of course, in every application, thus it may be implied that it lies within the magistrate's discretion whether or not to receive evidence by or on behalf of the alleged offender in each instance. The objective of the proceedings is to determine the HIV status of the alleged offender and if the HIV status of the alleged offender might previously and privately already have been established, this prospect could be the basis for granting the alleged offender the opportunity to adduce evidence which might obviate the need to make an order, or result in an order for the disclosure of the test result. A difficult question to answer is whether it is necessary and as a matter of course, to embark on an enquiry into the merits of each application in order to afford the alleged offender the opportunity to contest the application, e.g. to cast a doubt on whether there is *prima facie* evidence that the victim may have been exposed to the body fluids of the alleged offender. The extreme nature of the limitation of the rights of the alleged offender to dignity, bodily integrity and privacy posed by the making of an order for HIV testing, coupled with the fact that he or she will not know of the application unless so informed and also considerations of fairness and impartiality inherent in the magisterial function, may incline a magistrate to exercise the discretion in favour of the alleged offender in each application, unless to do so will give rise to substantial delay. This proposition is made on the basis that whereas the provisions of PAJA[3] expressly exclude its application to a court or a judicial officer,[4] these considerations of *audi alteram partem,* fairness and impartiality

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2 Section 14 (1) of the Magistrates Act, No. 90 of 1993: "*A magistrate shall possess the powers and perform the duties conferred or assigned to him or her by or under the laws of the Republic*." Section 12 (1) (b) of the Magistrates' Courts Act, No. 32 of 1944 is virtually identical. These provisions confirm and accord with the Rule of Law or the principle of legality in the Constitution, which in effect mean that a public functionary may exercise no power and perform no function beyond that conferred by law.

3 The Promotion of Administrative Justice Act, No. 3 of 2000.

4 Section 1 of PAJA defines administrative action, inter alia, as: "…*any decision taken, or any failure to take a decision, by –*

(a) an organ of state…, but does not include –

(ee) *the judicial functions of a judicial officer of a court referred to in section 166 of the Constitution*.."; and the same provision of PAJA defines an "organ of state" as:

"(ix) *bearing the meaning assigned to it by section 239 of the Constitution."* Section 239 of the Constitution, in turn, defines an "organ of state"*, inter alia*, as:

apply to that function irrespective of whether it is classified as an administrative or a judicial function.[5]

12. As mentioned previously section 32 (3) makes no provision for the alleged offender to be heard. To answer the more difficult question of whether what has been postulated in paragraph 11 may be applied in certain circumstances in an *I/O application* we can venture no more than to invite attention to the judgment in *Powell NO and Others v Van der Merwe and Others* 2005 (7) BCLR 675 (SCA).[6]

(b) (ii) *any other functionary or institution exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer*."

5 See *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) BCLR 158 (CC) and the separate judgment of Sachs J at [142] – [159] in the context of the majority judgment. Of particular importance are the remarks at [146] and [147]:

"[146] I find myself in the pleasant but awkward position of agreeing with colleagues who disagree with each other. In my view the rationale of each of their judgments is essentially the same, even though they are framed in different conceptual matrices. Employing almost identical processes when weighing the facts they unsurprisingly arrive at the same outcome. This concurrence of result comes about not through happenstance, but because in substance, though not in form, they concur on the context, interests and values involved. Both judgments are animated by the same goal, which is to determine in a constitutionally proper way the standard of conduct that can be expected of a public official arbitrating a labour dispute in an open and democratic society based on human dignity, equality and freedom. I would add that, formal trappings aside, it is difficult to see how a reasonable commissioner can act unfairly, or a fair commissioner can function unreasonably.

[147] Thus, whether one labels the commissioner's work as performing a judicial function in an administrative context, or as fulfilling an administrative function in a judicial context, the activity is intrinsically the same. The commissioner must be impartial and basically fair and reasonable in the conduct of his or her work. This is so, whatever the technical description. To my mind, any attempt at pure classifications is doomed from the start. The reality is that the function of the commissioner is a hybrid one, composed of an amalgam of three separate but intermingling constitutional rights."

6 "[26] The judicial/administrative debate threatens to become the legendary fifth wheel on the coach. Far more productive I think it would be to have regard to the 'characteristics of the act in question', as Baxter puts it. As Schreiner JA said in Pretoria North Town Council v A1 Electric Ice-cream Factory (Pty) Ltd 1953 (3) SA 1 (A) at 11B-C:
'[O]ne must be careful not to elevate what may be no more than a convenient classification into a source of legal rules. What primarily has to be considered in all these cases is the statutory provision in question, read in its proper context'."

"[33] Are we to accept that there is a fundamental difference between a statute that refers to a judge and one referring to the High Court? If the one expression is used, is the decision to be open to review with the necessity for joinder, whereas if the other is used, it is not? Before answering these questions I would observe that by whichever name he is named a judge would surely be as little prepared to 'abandon the first principles of its ordinary practice', meaning audi alteram partem in the Zelter case, as was Tredgold CJ. In my opinion there should be no difference in result depending upon the expression used, that is, in the case of a judge of the High Court. A judge will behave like a judge should."

Ron Laue
Durban

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

At a meeting of the KZNJetcom held on 30 July 2008 the following issue was raised and it was decided that it should be brought to the attention of all Magistrates:

"(5.4) Peer Learning Feedback:

4.1.1 The fact that magistrates have to pay out of pocket for the first 500 km of travelling for official purposes per month is impacting negatively on peer learning initiatives. The problem is experienced in other provinces too and also applies to conferences and travelling abroad. It is also impacting on the decentralized training of Justice College in the province. It appears that magistrates are reluctant to travel to attend training because of this limitation. It is decided that the issue would also be included in the E-Mantshi newsletter."

A Last Thought

"The end goal of the whole system of criminal justice ought to be *social restoration* – in a double sense. It should be the restoration of the social order to wholeness from the disruption of which crime is both a symptom and an aggravation. It should also be an effort to restore each offender to an integral place in the society."
L. Harold DeWolf *Crime and Justice in America:A Paradox of Conscience*

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