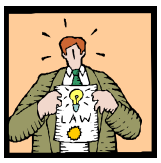
E-MANTSHI

A KZNJETCOM Newsletter

August 2006 : Issue 6

Welcome to the sixth 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. Draft National Credit Regulations 2006 was published in the Government Gazette No. 29026, dated 12 July 2006 on p3

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2. An Explanatory Summary of the *Children's Amendment Bill* has been published in Government Gazette No. 29030 of 14 July 2006 which is aiming to complete the Children's Act, 2005 (Act 38 of 2005) which was discussed in Issue 5 of *e-Mantshi*. The Bill envisages the following:

(a) further provide for the protection of children;
(b) provide for partial care of children;
(c) provide for early childhood development, prevention and early intervention services, foster care, child and youth care centres, shelters and drop-in centres for children in alternative care; and
(d) create certain new offences relating to children.

The Bill can be accessed on the Department of Social Development's website at: www.socdev.gov.za.

3. *The Repeal of the Black Administration Act and amendment of Certain Laws Amendment Act* 8 of 2006 was published in Government Gazette No. 29067 of 25 July 2006. The Act amends *the Repeal of Black Administration Act and Amendment of Certain Laws Act* 28 of 2005 and came into operation on 30 July 2006.

Recent Court Cases

1. S v. Williams; S v. Papier 2006(2) SACR 101 (CPD)

In both these cases the magistrate, relying on s 73(7)(c) of the Correctional Services Act 111 of 1998, ordered that a certain portion of the sentences had to be served before the accused could be considered for parole. The question on review was whether or not such an order was competent.

Held, that the range of penalties which a magistrate could impose was limited to those provided for in s 276 of the Criminal Procedure Act 51 of 1977, in any other statute, or by the common law. It was well established that interference by judicial officers in the statutory functions and competences of the Correctional Services Department was unacceptable. Even a recommendation regarding the length of time a convicted person should serve before being considered for parole was an undesirable incursion into the domain of another arm of State. The courts were not entitled to prescribe to the executive branch of government for how long a convicted person should be detained. (Paragraphs [6]-[8] at 104 i/j-106c.)

Held, further, that both ss 73(6)(a) and 73(7)(c) of the Correctional Services Act provided for a 'non-parole period', defined in s 1 of the Act as 'the period as defined in s 276B of the Criminal Procedure Act'. This section, in turn, allowed a court, in sentencing an accused to imprisonment for two years or more, to determine a period during which the accused could not be released on parole – such period could not exceed two-thirds of the total sentence or 25 years, whichever was the shorter. It followed that, where a court had prescribed a non-parole period in terms of s 276B, the prisoner could not be released on parole or correctional supervision until the expiry of the non-parole period. (Paragraphs [9]-[12] at 106d-107e.)

Held, further, that if a court wished to make an order regarding a non-parole period, it had to do so in terms of s 276B of the Criminal Procedure Act, and not in terms of s 73(6)(a) or 73(7)(c) of the Correctional Services Act. The latter merely provided for what had to happen where a court had, or had not, prescribed a non-parole period in terms of s 276 B. (Paragraph [13] at 107 fig-h.)

Held, further, that the provisions of s 276B would find application only in exceptional circumstances. It was not possible to spell out what would constitute such circumstances – the individual circumstances of every case would have to be considered. Regarding the present cases, the sentences imposed were fitting, but the purported ordering of non-parole periods was set aside. (Paragraphs [15] and [19] at 108 c/d-109c-f.)

2. S v. Waldeck. 2006(2) SACR 120 (NCD)

The prosecutor had informed the court at the outset that the case would involve the 'hearsay rule', and had referred to s 3 of the Law of Evidence Amendment Act 45 of 1988. While these references might not have been sufficient to avoid prejudicing an unrepresented accused, the appellant had been represented by an experienced

attorney and an advocate. The defence had not raised the slightest objection to the adduction of hearsay evidence by two witnesses; on the contrary, it had cross-examined them at great length on this evidence, in the process adducing further hearsay. (Paragraph [4] at 123 e/f.)

Held, regarding the magistrate's omission to make a ruling on the admission of the hearsay evidence at the close of the State's case, it was not clear from her judgment on what basis she had decided to admit this evidence. The matter had therefore to be approached as if no judgment had been given, or a major misdirection had occurred, and the evidence evaluated afresh. In applying the provisions of s 3 of the Act, the Court was to be mindful that there was an intuitive reluctance to permit untested evidence to be used against an accused; there should be compelling justification for doing so. In casu, various factors had to be considered. Firstly, the reason why the evidence had not been given by the person upon whose credibility its probative value depended was simply that that person was the deceased. Secondly, although the defence had not expressly consented to the introduction of the hearsay, it had not objected thereto, despite being aware of the State's intention to do so. It had also cross-examined the witnesses on their hearsay, adducing further hearsay. It had therefore at least acquiesced in the use of this evidence. Thirdly, the hearsay had been introduced for the vital purpose of showing that the appellant had perpetrated the assault which led to the death of the deceased, and there had been a pattern of assault over several years. Fourthly, the probative value of the evidence depended in the present case on the credibility of the deceased, and there was sufficient other evidence to establish that what she had said to the witnesses was reliable and complete. (Paragraphs [20.7], [21]-[26] and [30]-[31] at 132a/b, 132c-134d and 135f-j.)

3. S v. Kethani 2006(2) SACR 150 (CHC)

The accused was charged with theft, alternatively with contravening s 36, alternatively s 37(1), of the General Law Amendment Act 62 of 1955 (being in possession of or receiving into possession, stolen goods). She pleaded not guilty to the main charge and the second alternative, but guilty to the first alternative. Having questioned the accused in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977, the magistrate entered a plea of not guilty in respect of this charge, and the trial proceeded. The accused was found guilty of theft and sentenced to a fine of R800, or eight months' imprisonment. On review, the Court considered the fact that the record did not show that the prosecutor had accepted the guilty plea to the first alternative charge before the magistrate questioned the accused in terms of s 112(1)(b).

Held, that, in terms of s 112(1)(b), if a plea of guilty was made to an alternative charge, it was not a plea to the offence charged and, consequently, questioning of the accused was not authorised unless the prosecutor accepted the plea to the alternative charge. In casu, if the magistrate had been satisfied that the accused had correctly pleaded guilty after questioning, she would have convicted her on the alternative charge. This would not have been in accordance with justice. It was the function of the Director of Public Prosecutions to decide the charge on which the accused should be brought to trial; this function extended to the point at which a

plea was entered, and included the decision whether that plea was acceptable or not. (Paragraphs [12]-[14] at 152b-f.)
Held, further, however, that the accused was ultimately convicted on the evidence, and that she had not been prejudiced by the magistrate's questioning, especially since her rights had been explained to her before the questioning commenced. (Paragraphs [15]-[16] at 152g-h.) Conviction and sentence confirmed.

4. Louw v. Minister of Safety and Security 2006(2) SACR 178 (TPD)

In the absence of a warrant, an arrest was lawful only if it was effected in terms of s 40 of the Criminal Procedure Act 51 of 1977, and if the person arrested had committed a crime listed in Schedule 1 to the Act, or was reasonably suspected of having committed such a crime. In casu, the police could not reasonably have entertained such a suspicion. The real reason for the arrest was the desire of the arresting officer to teach the plaintiffs a lesson for what he regarded as their unacceptable behaviour towards the fourth defendant and his wife. The officer's failure to investigate the plaintiffs' explanation was a clear dereliction of duty. The fact that the police had abused their powers and had acted with ulterior motives was further demonstrated by the arresting officer's fraudulent attempt to substitute his first statement, which was clearly insufficient to support the lawfulness of the arrests, with another, bearing a false date and containing untrue information. This was a patent attempt to mislead both the plaintiffs and the court. (At 183e/f-184i/j.)
Held, further, that an arrest was a drastic interference with an individual's rights to freedom of movement and to dignity; it should be used only as a last resort in order to produce an accused person or a suspect in court. If an accused was not a danger to society, would stand trial, would not harm others or be harmed by them, and might be able and keen to disprove the allegations against him or her, an arrest would ordinarily not be the appropriate way of ensuring the accused's presence in court. As a matter of law, even if a crime listed in Schedule 1 to the Act had been committed, this did not itself justify and arrest forthwith. (At 185b-186b.)
Held, further, that an arrest must be justifiable according to the demands of the Bill of Rights. The police were obliged to consider whether there were no less invasive means of bringing the suspect before court than the immediate detention of the person concerned. Only if there were reasonable grounds to believe that the suspect would abscond if an application for a warrant was first made, or a summons issued, would an arrest be lawful. This did not place an undue burden on the police. If there was a legitimate fear that the suspect would evade justice, an arrest was obviously the correct option, but this test also made an arrest ultra vires where the suspect was willing to come to court on a warning, a notice or a summons. (At 186c-187g/g.)

From The Legal Periodicals

1. Terblanche, S.:

'Rape' sentencing with the aid of sentencing guidelines – *CILSA* – 2006 v. 39(1) p1.

2. Masanzu, K.:
'Of guns and laws': a South African perspective in light of the United Kingdom and United States gun laws – *CILSA* – 2006 v 39(1) p131.

3. Schulze, Heinrich:
"Are there exceptions to the *in duplum* rule: a rule on the running of interest considered – JUTA'S BUSINESS LAW (JBL) – 2006(2), v 14(1), p20.

4. Neetling, J
"The conflation of wrongfulness and negligence: is it always such a bad thing for the law of delict? – SALJ, v 123(2), p204.

5. Meintjes-Van der Walt, L.
"The International Criminal Court: Defining core crimes" 2005 19.1 SPECULUM JURIS 39.

6. Ncube, C.B.
"The legal regulation of identity theft in South Africa" 2005 19.1 SPECULUM JURIS 119.

7. Olivier, M:
"The appointment of an unqualified person as a temporary magistrate in terms of section 9(3) of the Magistrates' Courts Act 32 of 1944: Piedt v The State" 2005 19.2. SPECULUM JURIS 233.

8. Watney, M:
"Trial forum allocation for criminal proceedings in the lower courts" 2006 2 TSAR 405.

9. Labushagne, E:
"Die toelaatbaarheid van ontoelaatbare hoorsê-getuienis" 2006 2 TSAR 410.

10. Andersron, AM:
"Restorative justice, the African philosophy of ubuntu and diversion" 2005 19.1 SPECULUM JURIS 26.

11. ASHWORTH, A:
"Four threats to the presumption of innocence" 2006 123.1 SALJ 63.

12. Langa, Pius N.:
"A delicate balance": the place of the judiciary in a constitutional democracy: the separation of powers in the South African Constitution: 2006 SAJHR, v22(1), p2 .

13. Rautenbach, C: Du Plessis, W; Pienaar, G:
"Is primogeniture extinct like the Dodo or is there any prospect of it rising from the ashes?: Comments on the evolution of customary succession laws in South Africa"

2006 SAJHR, v22(1), p99.

Contributions from Peers

APPLICATIONS FOR THE AUTHORISATION OF EMOLUMENTS ATTACHMENT ORDERS IN TERMS OF SECTION 65J(2)(a) / 65J(2)(b) OF THE MAGISTRATE'S COURTS ACT, 1944 (ACT NO 32 OF 1944)

The requirements for the issuing of an emoluments attachment order are set out in Section 65J(2). It must be noted that provision is made for two alternative methods whereby a judgment creditor may cause the issuing of an emoluments attachment order – firstly by complying with the requirements of Section 65J(2)(a) or, alternatively by complying with the requirements of Section 65J(2)(b).

Section 65J(2)(a)

Section 65J(2)(a) makes provision for two possible scenarios:

- Where the judgment debtor had consented to the issuing of an emoluments attachment order in writing; or
- Where the court has authorised the issuing of an emoluments attachment order on application or otherwise.

The position where a judgment debtor had consented in writing to the issuing of an emoluments attachment order presents no problems in practice.

Prior to the enactment of Section 65A(6) judgment creditors faced the predicament that they were unable to force judgment debtors to appear on Section 65A(1) notices in order to hold a financial inquiry and to obtain an emoluments attachment order against such judgment debtor. Attorneys acting for judgment creditors then embarked on filing substantive applications for emoluments attachment orders in terms of Section 65J(2)(a). Notice was given to the judgment debtor and where a judgment debtor did not appear in court, applications were granted by default.

The question arises whether it is competent for a court to grant such an application by default. In the matter of **Minter NO v Baker and Another 2001(3) SA 175 (WLD)** it was held that "*a court would not authorise the issue of an emoluments attachment order unless it was satisfied that the judgment debtor is able to pay the judgment debt and costs in reasonable instalments.*" [at 183A-B].

The court (in the Minter case supra) made it clear that the judgment creditor bears the *onus* of placing evidence before the court to satisfy the court that the judgment debtor can afford to pay the judgment debt and costs in reasonable instalments. [at 184G-H]. This *onus* can only be discharged by evidence of fact and not by the mere submission of an opinion expressed by the judgment creditor or his attorney. The court has to make a factual finding in this regard.

It will be difficult for the judgment creditor to discharge this *onus* without a financial inquiry into the financial position of the judgment debtor. An averment in an affidavit by the judgment creditor of what the judgment debtor's monthly earnings are is not sufficient even if it is substantiated by a copy of his salary advice.

There are a number of factors that will influence a court's decision whether the judgment debtor will be able to afford a specific instalment. These may include but are not limited to the marital status of the judgment debtor, the number of dependents of the judgment debtor, the necessary monthly expenses of the judgment debtor, whether the judgment debtor is still employed at the time of the application, etc.

Section 65J(2)(b)
Section 65J(2)(b) contains two requirements both of which must be satisfied.

Firstly, the judgment creditor or his attorney must a **registered letter** to the judgment debtor advising him or her of the amount of the judgment debt and costs that are unpaid and warning him or her that an emoluments attachment order will be issued if the amount is not paid within 10 days of the date on which the registered letter was posted.

Secondly, the judgment creditor must file an affidavit or an affirmation or a certificate by his or her attorney setting out:

- the amount of the judgment debt at the date of the *order laying down specific instalments*;
- the costs, if any, which have accumulated since the date of the *order laying down specific instalments*;
- payments received since the date of the *order laying down specific instalments*;
- a declaration that the provisions of Section 65J(2)(b)(i) had been complied with.

The court has ruled in the **Minter-case** supra that *an antecedent order laying down specific instalments* is a requirement for the issuing of an emoluments attachment order under Section 65J(2)(b). Such orders may be made in terms of Sections 48(f); 57(2)(c)(ii); 58(1)(b)(ii) and 65 of the Magistrate's Courts Act, 1944.

It must be noted that in the earlier judgment of **University of Natal, Pietermaritzburg v Ziqubu 1999 (2) SA 128 NPD** Shearer J held that there was no *onus* on the applicant for an emoluments attachment order to show that the judgment debtor can afford the payment of the amount sought in the application for an emoluments attachment order. He also found that it was not a requirement to have an antecedent order laying down specific instalments before an application for an emoluments attachment order could be made.

The **Ziqubu-case** dealt with the provisions of Section 65J(1)(e) of the Magistrate's Courts Act, 1944 which has since been repealed.

Two possible arguments can be made out with regard to the question whether the **Ziqubu-case** has binding authority on judgments in the lower courts in Kwazulu Natal. Firstly, it can be argued that in view of the fact that the Ziqubu-judgment dealt with the now repealed provisions of Section 65J(1)(e), the lower courts in Kwazulu Natal are no longer bound by

that judgment. On the other hand, it may be argued that the wording of the repealed Section 65J(1)(e) is very similar to the wording of the present Section 65J(1)(a) and that for that reason judicial officers in the lower courts in KZN are still bound by the decision.

I would personally opt for the first argument. In his judgment at 129 I Shearer J remarked that the magistrate had confused Section 65J(1)(b) with Section 65J(1)(e) and remarked that Section 65J(1)(e) gave the court a free discretion with regard to the granting of emoluments attachment orders.

It is respectfully submitted that both the repealed Section 65 J(1)(e) and the current Section Section 65(1)(a) specifically states that **"subject to the provisions of subsection (2) ….."** which is clearly indicative of a restriction on the court's discretion. In my view Section 65J(1) gives authority for the issuing of emoluments attachment orders whilst Section 65J(2) lays down specific requirements that have to be met before an emoluments attachment order may be issued. The Minter-judgment in my opinion underlines this restriction.

Whether future judgments by the KZN high court bench will follow the wisdom of the WLD in this regard remains to be seen.

Alphons van der Merwe
Additional Magistrate, Ladysmith **18/07/2006**

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

Judges to be given chance to discuss reforms

The legal profession has scored another victory, with President Thabo Mbeki announcing that judges must buy into a new policy on transformation of the judiciary before judicial bills are processed.

Only when a new White Paper on judicial transformation has been finalised and widely debated in the profession will judicial reform bills be put back on the parliamentary agenda.

The Superior Courts Bill and proposed Constitution 14th Amendment Bill were stalled earlier this year after vehement objections from the judiciary, which believed its independence was under threat.

It is not clear how other bills, including that on the declaration of financial interests by judges and a mechanism for complaints against members of the Bench, will be affected and whether they will be changed fundamentally.

Mbeki said yesterday that a White Paper on the transformation of the judiciary had been discussed at last week's lekgotla. A White Paper or broad policy framework was necessary to generate broad public discussion.

"If any legislative matters need to be taken up this will come after public discussion."

Mbeki hoped the White Paper would be completed by the end of the year and put to the cabinet for finalisation before a wider debate in public.

He asked Justice Minister Brigitte Mabandla earlier this year to slow down the processing in parliament of the Superior Courts Bill and proposed constitutional amendment so judges could be consulted more widely.

This followed intense lobbying of the president and his aides by top jurists and others amid claims that the proposed constitutional amendment would be an assault on the judiciary's independence and a violation of the separation of powers doctrine.

The Superior Courts Bill, for example, has been 10 years in the making. Much of it is not controversial and necessary to transform the court system from its apartheid past.

The transformation of the judiciary was discussed at the ANC's Stellenbosch conference in December 2002 and followed up in the party's annual January 8 statement. It is likely to be discussed again at the ANC's policy conference in mid-2007.

While the executive and legislative arms of state have been transformed over the past 12 years, the judiciary has lagged behind in many respects.

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Mbeki said not everything that related to the judiciary would go into the White Paper, given that there was agreement on some matters between judges and the executive.

These included the need for a training institution for judges and magistrates separate from that for justice officials in the public service. It was also agreed that the Constitutional Court should be the top court.

Other proposals, however, including that the administration of the courts be controlled by the justice minister, have provoked condemnation.

"It is better that we reach agreement nationally about all of these issues affecting the judiciary. That is partly why we have taken a decision (to) do a White Paper on matters that are contentious, so we bring everyone into the discussion."

- **This article was originally published on page 4 of Cape Times on July 31, 2006**

Media Briefing by President Thabo Mbeki on mid-year cabinet lekgotla in respect of criminal justice system.

Reducing crime

The lekgotla noted the progress the police service is making in the fight against organised crime syndicates. The arrest of the “airport gang”, the Jeppestown gang and the solving of various bank robberies and heists were seen as evidence that the police are making progress in this regard. Co-operation between the police and the National Prosecuting Authority (NPA) is making a major contribution to these successes.

In pursuing its target of reducing contact crimes by 7–10% per year, the cluster will continue to integrate its work with programmes of government to eradicate the social causes of crime, and to implement the programmes to strengthen border control and reduce the number of illegal firearms. This will be complemented by recruitment of more officers and special operations to target areas with high crime incidence.

The lekgotla was briefed on recent analysis of social fabric crimes which highlighted the extent to which they involve people known to one another as well as alcohol and substance abuse, against a background of poverty. The nature of such crimes poses difficulties for normal policing methods, and requires the engagement of communities as well as a role for the Moral Regeneration Programme.

The Cabinet endorsed an initiative to engage the Centre for the Study of Violence and reconciliation in an enquiry in order to gain understanding of the violence which accompanies many crime incidents.

The lekgotla was briefed on, and endorsed, an initiative to strengthen the national response to crime. The Justice, Crime Prevention and Safety (JCPS) Cluster and Government Communications (GCIS) are working with Business Against Crime and other stakeholders to formulate a National Anti-Crime Campaign focused on community mobilisation and improving popular partnership with the criminal justice system. The lekgotla took the view that Community Police Forums should play a key role in such a campaign. This partnership will strengthen society's hand in the fight against crime

Transformation of the judiciary, including efficiency of the court system

Performance indicators show some improvements in the functioning of the court system. In order to address challenges in reducing backlogs, arising amongst others from an increase in the number of cases, the existing programme is being supplemented with urgent interventions at the main centres with backlogs. Alternative methods to reduce trial cases are also being pursued, such as plea and sentence agreements.

The lekgotla approved in principle a new approach to the management of awaiting trial detainees, aimed at reducing the number of such detainees being held in correctional centres and police stations. With regard to children awaiting trial, the approach will remain that they should be accommodated in secure facilities and not in remand detention facilities or police cells.

The lekgotla was briefed on progress in the drafting of a White Paper on transformation of the judiciary which takes into account the public debate on the Bills previously published. The White Paper, which will be tabled before Cabinet in the coming months for finalisation, is intended to initiate public discourse on substantive aspects relating to the transformation of the judiciary.