e-MANTSHI

A KZNJETCOM Newsletter

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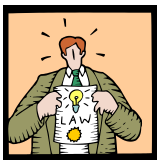
Welcome to the hundredth and twenty eighth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is now a search facility available on the Justice Forum website which can be used to search back issues of the newsletter. At the top right hand of the webpage any word or phrase can be typed in to search all issues.
Your feedback and input is important to making this newsletter a valuable resource and we hope to receive a variety of comments, contributions and suggestions – these can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. A code of conduct which applies to all legal practitioners (attorneys and advocates) as well as all candidate legal practitioners and juristic entities as defined, will come into operation when the Legal Practice Act, Act 28 of 2014 comes into operation in terms of section 120(4) thereof. The code of conduct was published in Government Gazette no 40610 dated 10 February 2017.One of the interesting aspects of the code is that Counsel shall now robe in all superior and lower courts, and shall robe in the same manner as they robe in superior courts.

2. Final Credit Life Insurance Regulations have been published in Government Gazette no 40606 dated 9 February 2017. These Regulations will come into effect six (6) months after the date of publication and will only affect credit agreements entered into on or after the commencement date. The regulations regulate the maximum prescribed cost of credit life insurance and the exclusions and limitations of cover.

Recent Court Cases

1. WICKHAM v MAGISTRATE, STELLENBOSCH AND OTHERS 2017 (1) SACR 209 (CC)

Although a victim has the right to participate in plea-and-sentence agreement matters the extent of the right does not including the grant of standing, nor an unqualified right to give evidence or hand up papers, nor the right to be heard on demand.

The applicant lost his son in a motor vehicle collision in which his son was a passenger in the vehicle driven by the fourth respondent. She was subsequently convicted and sentenced in a magistrates' court for culpable homicide in respect of the death of the applicant's son, as well as that of the occupant of the stationary vehicle with which she had collided. Despite the applicant having obtained accident-reconstruction reports by experts (these tended to show that the fourth respondent had driven the vehicle at speed), which were made available to the prosecution, and his regular engagements with the prosecution, the Director of Public Prosecutions (DPP) proceeded with a plea-and-sentence agreement with the fourth respondent. The DPP did, however, concede that the applicant could attach an affidavit stating his objections to the agreement, which would be given to the magistrate.

The DPP later changed its stance on the basis that the affidavit did not qualify as a victim-impact statement, and suggested that the applicant should instead be available to testify if the court required him. When the matter came before the magistrate, the applicant's attorney attempted to hand in the statement, but the prosecutor objected on the basis that he had no standing. The fourth respondent's attorney also so objected. The magistrate found that the applicant indeed lacked standing and declined to accept the statement. The fourth respondent was then convicted of two counts of culpable homicide and was sentenced to a fine of R10 000 or 12 months' imprisonment suspended for 3 years, and a further 18 months of correctional supervision.

The applicant then applied to the High Court for an order setting aside the plea-and-sentence agreement and remitting the matter to the magistrates' court for a new hearing before another magistrate. The High Court dismissed the application, holding that the applicant lacked standing to have the agreement set aside and that the magistrate's failure to exercise his discretion in terms of s 105A(7)*(b)*(i)*(bb)* of the

Criminal Procedure Act 51 of 1977 (CPA) could not be reviewed at his instance. The difficulty raised by the statement was that it was at odds with the facts on which the state and defence had agreed in the plea-and-sentence agreement. The applicant then applied for leave to appeal against this decision.

Held, that the Victims' Charter adopted in terms of s 234 of the Constitution, relied upon by the applicant, conferred neither standing nor an unqualified right to give evidence or hand up papers, nor a right to be heard on demand. (Paragraph [26] at 216*b*.)

Held, further, that a victim's right to participate in sentencing proceedings in relation to the plea-and-sentence agreement had to be read together with s 105A of the CPA, which dealt specifically with plea-and-sentence agreements and included the rights of the victim to participate in the process. Although the prosecutor was obliged to give the victim an opportunity to make representations, the prosecutor was not obliged to agree with the victim. The applicant's rights as a victim had been duly addressed through the extensive participation that he had been afforded by the prosecutor for the duration of the prosecution, and there was no reason to disagree with the High Court's reasoning and decision on this aspect. (Paragraphs [27]–[29] at 216*c*–*g*.)

Held, further, that the exercise of the victim's right, to place evidence before the court either by way of a statement or by oral evidence, was in terms of s 105A(7)*(b)*(i)*(bb)* of the CPA wholly within the court's discretion. (Paragraph [31] at 217*a*–*b*.)
Held, further, that during the proceedings the magistrate had been made aware of the factual inconsistencies with the applicant's statement by the accused's attorney, and exercised his discretion to refuse the statement. There was nothing on record to show that the magistrate improperly exercised this discretion, and the proceedings leading to the fourth respondent's conviction H and sentence were lawful, proper and just. (Paragraph [33] at 217*d*–*e*.)

Held, further, that the loss of the child was a terrible and difficult one to bear and the situation in which the applicant found himself commanded the court's sympathy. The High Court's observation that the magistrate could have exercised some degree of judicial maturity, civility and empathy to allow the applicant latitude to express his feelings at having lost his son, provided that this could be done without infringing the rights of the fourth respondent, had to be supported. (Paragraph [34] at 217*e*–*f*.) Application for leave to appeal was dismissed.

From The Legal Journals

Louw, A

"Revisiting the limping parental condition of unmarried fathers"

De Jure Volume 2 2016 193-212

Abstract
Until such time as section 21 is found to be unconstitutional and declared invalid it unfortunately remains central to determining the parental status of unmarried fathers. While the courts were initially slow to acknowledge the changing legal position of unmarried fathers, the judiciary seems to have become overzealous in its attempt to accommodate such fathers. The interpretational guidance provided by the courts will be of some use but it cannot, in the view of this author, compensate for the lack of objective criteria to determine the continued limping parental condition of unmarried fathers.

Bekink, M

"Kerkhoff v Minister of Justice and Constitutional Development 2011 2 SACR 109 (GNP): Intermediary Appointment Reports and a Child's Right to Privacy Versus the Right of an Accused to Access to Information"

***Potchefstroom Electronic Law Journal* 2017 (20)**

Abstract
General consensus exists that the adversarial nature of the South African criminal procedure with its often aggressive cross-examination of a witness, sometimes by an accused himself, will in most cases expose a child to undue mental stress or

suffering when having to testify in court. In confirmation of this fact and with a notion to shield child witnesses from the stress or suffering when having to testify in the presence of an accused the function of an intermediary was introduced with the insertion of section 170A into the Criminal Procedure Act 51 of 1977. In terms of section 170A(1) a court may if it appears to such court that it would expose any witness under the biological or mental age of eighteen years to undue mental stress or suffering if he or she testified at such hearing, appoint a competent person as an intermediary in order for the witness to give evidence through that intermediary. Section 170A(1) contemplates that a child complainant will be assessed prior to testifying in court in order to determine whether the services of an intermediary should be used. If the assessment reveals that the services of an intermediary are needed, then the state must arrange for an intermediary to be available at the commencement of the trail. The aforementioned procedure of section 170A(1) was followed in Kerkhoff v Minister of Justice and Constitutional Development 2011 2 SACR 109 (GP) and is the subject of this discussion.

Njotini, M N

"Re-Positioning the Law of Theft in View of Recent Developments in ICTS – The Case of South Africa"

Potchefstroom Electronic Law Journal **2016 (19) December**

Abstract

This article examines the impact of information and communication technologies (ICTs) on the development of the principles of theft. The Roman and South African law of theft forms the basis of such a study. This investigation is made against the background principle that the law of theft has to do with the traditional forms of property, for example corporeals and incorporeals. Therefore, it is enquired whether the non-traditional forms of property, for example information or data is or can be regarded as property that is capable of being stolen for legal purposes or not.

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

Contributions from the Law School

Similar Fact Evidence: A review of the basic principles

Similar Fact evidence is 'evidence which refers to the peculiar or immoral conduct of a party on an occasion or occasions other than the incident or occurrence in contention but which is also of such a character that it is pertinent to or in essentials similar to the conduct on the occasions which forms the issue or subject matter of the dispute.'[1]

Similar fact is usually adduced to show that he accused has behaved in the past in the same or substantially way to the way he has behaved in the past. However, similar fact can also be adduced in relation to a witness or complainant.[2] It also surfaces in civil cases.[3]

Similar fact evidence is generally inadmissible. Our courts have been reluctant to allow the prosecution to prove its case against an accused with evidence of the accused's prior conduct and/or bad character. Unfairness would arise if such proof were to be allowed as there would be a real danger that a judge would convict an accused on the basis of his bad character rather than on the details of the evidence of a particular charge. However in certain instances, evidence of the accused's prior bad acts has real probative value. For instance if it shows the accused to have peculiar habits or to engage in distinctive forms of misconduct. Where the issue in dispute relates to that sort of peculiarity, this kind of evidence is admissible under the rubric of 'similar fact evidence' providing its probative value outweighs its prejudicial effect. [4] The leading case on similar fact evidence is *Makin v Attorney General for New South Wales,* [5] where the court noted that the mere fact that the evidence adduced tends to show the commission of the crimes does not render it inadmissible if it is relevant and it would be considered relevant if it either supports or rebuts a defence that is raised by the accused. However, this formulation has been interpreted as establishing rigid categories in which similar fact evidence will be regarded as relevant. This approach has proved dangerous, and rigorous since:

'categorizing instances of admissibility … [may] lead to casuistry, to insoluble metaphysical problems as to the confines of the categories, and to the error of thinking that, because evidence slots into a category, it will be admissible.'[6]

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[1] S v M and Others 1995 (1) SACR 667 (BA) at 684 d-e
[2] S v Wilmot 2002 (2) SACR 145 SCA. S v Zuma 2006 (2) SACR 191 (W)
[3] Laubscher v National Foods Ltd 1986 (1) SA 553 (ZS)
[4] Ibid.
[5] [1894] A.C. 57 (PC).
[6] Schwikkard and Van der Merwe Principles of Evidence (4th ed) 2016 81.

Secondly, the formulation seems to suggest that similar fact evidence which simply suggests that the accused has a certain propensity to behave in a particular way is inadmissible. However, this is clearly problematic and there are instances where the court has admitted similar fact evidence to demonstrate such a propensity. In other words, the similar fact evidence showing the propensity is itself so highly relevant to the issue in a particular case, that it is admitted.[7] The classic example of this is the case of *R v Staffen* [8] where the accused was charged with murdering a young girl (L). The prosecution proffered evidence relating to two other young girls. All three of the girls had been strangled. However, no sexual assault occurred. In all three cases there was no apparent motive for the murder and no evidence of a struggle. There was also no attempt to conceal the body although concealment would have been easy. The accused had been charged with the murder of the other two girls but was found unfit to plead on the grounds of insanity and was institutionalized. He escaped from the institution and was seen near the place where L's body was discovered. During the time period he escaped, L had been murdered. Further evidence showed that he admitted to murdering the two other girls. Although the evidence of the previous crimes was admitted as it was relevant to identity, but it is clear that the probative value of the evidence was based on propensity: the accused possessed a propensity of a most unusual kind: he was strangler of small girls, in peculiar circumstances, and for no apparent motive. This peculiar propensity was highly relevant to an issue namely the identity of killer, which made the evidence admissible.[9]

In the case of *DPP v Boardman* [10] the *Makin* formulation was confirmed by the court. [11] The court noted that it was the application of principle that was of crucial importance, that is that similar fact evidence is only admissible where it probative value exceeds it prejudicial effect.[12] This formulation, or clarification of the *Makin* formulation, may also be seen as problematic because it leaves an enormous discretion in the hands of the presiding judge. The judge will be required to exercise a twofold discretion to admit the evidence if he in the first part thinks that the evidence is sufficiently relevant and if the second part he thinks that its probative value is not outweighed by its prejudicial effect. Although this is a point of some subtlety, it is of no means insignificant. First the judge is left to apply the test without objective referentials (factors such as frequency, regularity, unusual character of similar facts) which could be posited as objective considerations in determining admissibility. The rule is to be applied by the trial judge according to his personal dictates of fairness and expediency. Given the dramatic effect that similar fact evidence can have on the outcome of a trial, introduction of subjective standards to govern admissibility of evidence does little towards making the law predictable.

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[7] Schwikkard & Van der Merwe Principles of Evidence 4th ed (2016) 79.
[8] **[1952] 2 QB 911.**
[9] Schwikkaard and Van der Merwe supra (n 6) 79-80.
[10] 1975 AC 421.
[11] Schwikkard supra (n 6) 81.
[12] *DPP v Boardman* 1997 AC 421 at 442, 452.

Given that similar fact evidence rules have been formulated in accordance with the characteristics of a jury trial, and since the jury system has been abolished in South Africa, it is necessary to consider the desirability and necessity of this rule.[13] This issue was raised in the case of *Savoi and Others v National Director of Public Prosecutions and Another*. [14] The applicants in this case launched a constitutional challenge to various provisions of the Prevention of Organized Crime Act 121 of 1998 (POCA) with which they were charged on the basis of various offences: fraud, racketeering, corruption and money laundering. S 2(2) of the POCA provides that 'the court may hear evidence including evidence with regard to hearsay, similar facts or previous convictions relating to offences contemplated in subsection (1) notwithstanding that such evidence might otherwise be inadmissible, provided that such evidence would not render the trial unfair.' The applicants contended that it violate their right to a fair trial. That is whenever evidence excluded by an exclusionary rule of evidence was admitted in terms of POCA, it would always, automatically render the accused's trial unfair.[15] The applicants also alleged that s 2(2) contained no criteria for determining admissibility which was left entirely dependent on judicial discretion. The court dismissed the challenge, effectively holding that the South African rules of evidence as they stand are not a necessary condition for a fair trial, since the admission of evidence deemed inadmissible in terms of those rules may be fairly admitted in some cases.

Perhaps it is time for the legislature to consider applying its mind to codifying and clarifying the rules relating to similar fact evidence.

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[13] Schwikkard & Van der Merwe supra (n 6) 88.
[14] 2014 (1) SACR 545 (CC) at [59].
[15] Ibid at par [56].

Matters of Interest to Magistrates

Regional court to district court: Horizontal and vertical application

By Dr James Lekhuleni

Section 35 of the Magistrates' Courts Act 32 of 1944 (the Act) regulates the transfer of matters from one magistrate's court to another. A transfer of a matter can be in the form of consent by parties or on application by one of the parties in terms of r 55 of the Magistrates' Court Rules. The question whether a matter can be transferred from the district court to the regional court for hearing and *vice versa* has been a bone of contention in recent times, especially after the regional court was given civil jurisdiction in terms of the Jurisdiction of the Regional Courts Amendment Act 31 of 2008.

There are two schools of thought on this question. The first school of thought believes that s 35 applies both horizontally and vertically (ie, a case can be transferred from the regional court to another regional court and from the regional court to the district court and *vice versa*). The second school of thought believes that s 35 only applies horizontally (ie, from regional court to regional court and from a district court to district court). The views of the two schools of thought are discussed hereunder.

In terms of s 29(1)(*g*) read with s 29(1A) of the Act, the minister is empowered to determine different jurisdictional amounts in respect of district and regional courts. Such determination is aimed at delineating the monetary jurisdiction of the two courts respectively. The minister has since determined the minimum and the maximum monetary jurisdiction of the respective courts as R 200 000 for district courts and above R 20 000 up to R 400 000 for regional courts in terms of *GG*37477/27-3-2014. It will be shown hereunder that the determination of the minimum amount by the minister is of no consequence in so far as the monetary jurisdiction of the regional courts is concerned. To this end, a door has been opened for forum shopping between the regional courts and the district courts.

The first school of thought: Both horizontal and vertical application

In *Matlhasa v Makda and Another* (GJ) (unreported case no 2015/17438, 4-9-2015) (Mphahlele J) the plaintiff sued the defendant for damages in the regional court. The matter was defended. The parties agreed to transfer the matter from the regional court to the Vereeniging District Court. The application was granted by the regional court. The file contents were transferred to the district court. In other words, the

regional magistrate believed that there was nothing wrong to transfer the matter from the regional court to the district court (vertical application). When the matter appeared before the district magistrate, he refused to allocate a trial date as he held the view that there was no provision in our law specifically allowing any matter to be transferred from a regional court to a district court. He found that since the action was already instituted in the regional court, the matter could not be transferred subsequently to a district court. The plaintiff applied to the High Court to review the decision of the magistrate for refusing to allocate a trial date.

The High Court held that the finding of the magistrate – that there is no provision in our law allowing any matter to be transferred from the regional court to the district court – was unfounded and incorrect. The High Court found that the Act defines a court as a magistrate's court for any district or for any regional division. The High Court held that the regional court was correct in transferring the matter to the district court on the consent of the parties. The decision of the district magistrate to refuse to allocate a date was set aside and the plaintiff was allowed to proceed with the matter in the district court.

The implications of this case are that a regional court may transfer a matter to the district court by consent or on application by one of the parties in terms of s 35. If a matter is so transferred, the district court is bound to deal with the matter.

The second school of thought: The vertical application

In *Botha v Singh and Others* (GP) (unreported case no 30761/14, 21-5-2015) (Kganyago AJ) the plaintiff issued summons against the Road Accident Fund (RAF) for damages in the district court. The summons was issued in 2009 before the coming into operation of the Jurisdiction of the Regional Courts Amendment Act giving regional courts civil jurisdiction. Subsequent to the Jurisdiction of the Regional Courts Amendment Act coming into operation, the plaintiff engaged the services of an actuary to calculate damages. After the actuarial report was prepared, it was found that the damages suffered by plaintiff exceeded the jurisdiction of the district court. The plaintiff then amended the summons and the RAF did not object.

The plaintiff and RAF subsequently agreed to transfer the matter from the district court to the regional court as the claim now fell within the monetary jurisdiction of the regional court. Despite the agreement, the plaintiff still filed an application to transfer the matter in terms of s 35. The matter was duly transferred from the district court to the regional court in terms of a court order. At the regional court, the regional magistrate refused to allocate a date for the matter and informed the parties that the regional court did not have jurisdiction to deal with the matter. The applicant instituted an action in the High Court to compel the regional magistrate to allocate a date of trial. The applicant argued that the order transferring a matter to the regional court stood until it was set aside by court.

The High Court held that s 35 does not specify to which court the parties must transfer their action or proceedings to, but refers to any other court. The court held that what is important is that the parties must consent or any other party to the action or proceedings may bring an application for such purpose. The court found that the

order granted by the district magistrate to transfer a matter to the regional court was a valid order. The High Court then deprecated the conduct of the regional magistrate for refusing to allocate a date. The court held that the regional magistrate exercised powers of review, which he did not have when he refused to allocate a trial date. The regional magistrate was ordered to allocate a date of hearing within 60 days from date of the court order.

From this case, it is evident that litigants may transfer matters from the district court to the regional court by agreement or on application. In such cases, regional magistrates must comply with such orders of transfer. On receipt of cases from the district court, the regional magistrates must either allocate a date for the hearing of the matter or challenge the validity of the order of transfer through the right channels. It is, therefore, unmistakably clear that matters can be transferred from the regional courts to the district courts and *vice versa*. However, this will also be dependent on the substantive jurisdiction of the court. Regional magistrates and district magistrate have to respect orders transferring matters to their courts.

The district court or the regional court?

Ever since the coming into operation of the Jurisdiction of the Regional Courts Amendment Act, the view held by a number of regional magistrates was that the regional court does not have jurisdiction in matters falling within the monetary jurisdiction of the district court. This view was overruled by the Western Cape High Court in the case of *Minister of Police v Regional Magistrate Oudtshoorn and Others* (WCC) (unreported case no 15587/2013, 6-11-2014) (Binns-Ward J), in which the court held that parties are at liberty to institute actions in the regional court whether the district court had jurisdiction or not. In this case, the plaintiff instituted summons against the Minister of Police for payment of R 100 000 for unlawful arrest and detention. The plaintiff claimed R 20 000 for malicious prosecution against the Minister of Police. The defendant filed a plea and denied liability and prayed for the dismissal of the plaintiff's claim. After the closure of pleadings, the defendant amended its plea and raised a special plea of jurisdiction to the plaintiff's summons.

In its special plea, the defendant pleaded that the regional court did not have jurisdiction to try the matter as the monetary value of the plaintiff's claim fell within the jurisdiction of the district court and that the plaintiff should have instituted action in the magistrate's court. The regional magistrate found that the minister acted *ultra vires* when he determined the jurisdiction of the regional court in that the notice of the minister provides a minimum, as well as a maximum, which is in conflict with s 29(1)(*g*) of the Act. In terms of s 29(1)(*g*), the minister could only determine the maximum of the court's monetary jurisdiction. The regional magistrate dismissed the special plea on those grounds.

The applicant applied to review the decision of the magistrate particularly based on reasons the regional magistrate gave that the Notice of the Minister was in conflict with the Act and that the minister acted *ultra vires*.

The High Court considered s 29(1)(*g*) of the Act and found that the regional magistrate had to decide whether the claim fell within his monetary jurisdiction. The

court held that in determining his monetary jurisdiction, the regional magistrate was entitled to disregard the words, '[a]bove R 100 000 to' as of no operative effect. The court found that the words '[a]bove R 100 000 to' does not fit into the determination in terms of s 29(1)(*g*) of the Act. The court found that s 29(1)(*g*) has nothing to do with the determination of a lower limit to the magistrate's court's jurisdiction but the maximum limit. The court eventually found that an interpretation in terms of the determination by the minister leads to an absurd results.

The High Court eventually dismissed the application for review and also found that there was another reason for dismissing the special plea. The other ground was that the special plea was filed after *litis contestatio*, which is not permissible in law (*Zwelibanzi Utilities (Pty) Ltd Adam Mission Services Centre v TP Electrical Contractors CC* (SCA) (unreported case no 160/10, 25-3-2011) (Cloete, Heher, Snyders, Majiedt and Plasket AJA)). The court found that by failing to take the point before pleadings had closed, the applicant was taken to have submitted to the court's jurisdiction.

From the decision of the High Court, if follows that a plaintiff has a choice to issue summons in the regional court or in the district court for claims falling within the monetary jurisdiction of the district court. The determination by the minister that the monetary jurisdiction for the regional court is 'above R 200 000 to' has no operative effect.

Conclusion

This decision has a potential of encouraging forum shopping. The plaintiff may choose to issue summons in the regional court for claims falling within the monetary jurisdiction of the district court because the district court's court roll is clogged and the turnaround time for the enrollment of cases for trial is long. In the result, there is a great potential for the regional courts to be clogged with matters, which should have been dealt with by the district court. It remains to be seen how things will unfold in the near future. There is a sizeable number of cases observed in recent times falling within the monetary jurisdiction of the district court, which are instituted in the regional courts. It is doubtful whether it was the intention of the legislature to create a parallel jurisdiction between the regional court and the district court. I submit that in order to discourage forum shopping, regional courts should ensure that costs in those cases are granted in terms of the district court tariffs.

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(This article was first published in *De Rebus* in 2017 (March) *DR* 22.)

A Last Thought

"What sort of community is envisioned by the first-person plural 'we?' What do 'we' within this community hold in 'common' and how is that holding-in-'common' socially and politically organized? And what is meant by 'humanity' and its corollaries: 'the human,' 'humanism,' 'humane?' The anti-racist invocation of 'our' 'common' 'humanity' is evidence of a belief in – or more likely a longing for – a state of being that is deeper than and anterior to the imposition of race. If 'we' are all 'human' after all, then surely racism and racist violence are illegitimate; it will not do for one 'human' to oppress, exploit, torture, kill another."

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