e-MANTSHI

A KZNJETCOM Newsletter

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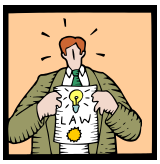
Welcome to the hundredth and thirty fifth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. 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. The prescribed rate of interest in terms of the Prescribed Rate of Interest Act (Act 55 of 1975) has been decreased to 10,25% pa with effect from 1 September 2017.The notice to this effect was published in Government Gazette no 41082 dated 1 September 2017. The notice can be accessed here: http://www.justice.gov.za/legislation/notices/2017/20170901-gg41082-gon924-InterestRate.pdf

2. New increased tariffs for the payment of witnesses in criminal, civil and maintenance cases has been promulgated in Government Gazette no 41096 dated 6 September 2017. The notice can be accessed here: https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41096-dated-2017-09-06.pdf

Recent Court Cases

1. S v Cacambile (CA&R19/17, 22/17) [2017] ZAECBHC 6 (14 September 2017)

Section 77(6)(a) of Act 51 of 1977 information or evidence it deems fit must be placed before the court in order to assist it to determine whether the accused has committed the offence charged with (in a case where there was a finding in regards to the accused's mental condition that he was unable to follow court proceedings so as to make a proper defence). In the absence of such information or evidence, any finding constitutes a material misdirection which has the effect of vitiating the proceedings.

Stretch J:

[1] On 16 August 2017 the Alice magistrate convicted the accused of assault with intent to do grievous bodily harm, and, applying the provisions of section 77(6)(a)(i) of the Criminal Procedure Act 51 of 1977 ("the Act"), ordered that he be detained at Fort Beaufort Mental Hospital pending a decision by a judge in chambers in terms of section 47 of the Mental Health Care Act 17 of 2002. The court recorded that the matter was subject to automatic review, as provided for in section 302 of the Act.

[2] This is not correct. An order for the detention of an accused person pending a judge's decision is not a sentence and as such is not automatically reviewable. If, however, a magistrate has reason to believe that there may be a problem in a particular case, he is free to submit the matter for review and the High Court will exercise its powers of review if necessary (*S v Zondi* 2012 (2) SACR 445 (KZP)).

[3] In the matter before us the magistrate sent the matter on automatic review under cover of an opinion that the proceedings were not in accordance with justice. For the reasons which follow, I agree that the proceedings were not in accordance with justice. In the circumstances the magistrate's assumption that the matter is automatically reviewable, is irrelevant.

[4] The magistrate's order is based on a psychiatric report dated 26 May 2017 signed by three psychiatrists who apparently observed the accused at Fort England Hospital during the period 11 to 22 May 2017.

[5] At the conclusion of the period of observation, they diagnosed the accused as schizophrenic with alcohol and cannabis abuse. In terms of section 79(4)(c) of the Act, they found that the accused was unable to follow court proceedings so as to make a proper defence. In terms of section 79(4)(d) they also concluded that although the accused was able to appreciate the wrongfulness of his conduct at the time of the alleged offence, he was unable to act in accordance with an appreciation of the such wrongfulness. Accordingly, they recommended that the accused be admitted to Fort England Hospital as a State patient in terms of chapter VI of the Mental Health Care Act.

[6] The magistrate criticises the proceedings on a number of grounds. In my view some of these are perhaps unduly self-critical and do not necessarily render the proceedings not to have been in accordance with justice. I intend only to deal with those which do, in my view have the effect of vitiating the proceedings. They are the following:

There is no indication whether the content of the report and the findings of the panel were accepted or disputed by the accused

[7] Section 77(2) of the Act reads as follows:

(a) If the finding contained in the relevant report is the unanimous finding of the persons who under section 79 enquired into the mental condition of the accused and the finding is not disputed by the prosecutor or the accused, the court may determine the matter on such report without hearing further evidence.

[8] It is indeed so that although the prosecutor gave the magistrate the assurance that the accused had been informed of the contents of the report, the enquiry appears to have ended there. The accused's attitude to the findings of the panel is not recorded. Indeed, it appears that he and/or his family members were not invited to comment. This is a misdirection.

[9] Had the accused been legally represented at the time, the misdirection may not have been of such a serious nature, so as to vitiate the proceedings. However, there is no indication that he was legally represented when the order was made. On the contrary, it appears from the record that he was not, despite the Acting Director of Public Prosecutions having given a written directive (which was before the court at the time) that the accused 'must be legally represented during the enquiry', in terms of the decision in this Division of Judge Hartle in *S v Matu* 2012 (1) SACR 68 (ECB), where it was held that

the court has a duty to establish whether the report is disputed by either the prosecutor or the accused, and to note their responses in this regard on the record. In that matter Hartle J went further and observed as follows (at [28]):

'In my view, substantial injustice has resulted by virtue of the fact that the accused was unrepresented at the enquiry. In the result I propose to set aside the order (and both template orders issued pursuant thereto), and remit the matter back to the magistrate to determine the matter afresh, even if the input of a legal practitioner turns out to be perfunctory only in such proceedings. The object of this order, however, is to ensure that the fundamental rights of the accused are respected in that process. In enquiries such as these, where much store is set by the assurances given that there is evidence available to justify a finding that the act in question has been committed and that it involves serious violence – putting it into the category of complaints that require the more drastic directive referred to in s 77(6)(a)(i) – legal assistance is not merely desirable but necessary.'

[10] This brings me to a further, and to my mind fatal criticism of the proceedings:

Whether the court was informed of the nature and extent of any admissible evidence available in the docket linking the accused to the offence

[11] The relevant portions of section 77(6)(a) state that the court may, if it is of the opinion that it is in the interests of the accused (taking into account the nature of the accused's incapacity and unless it can be proved on a balance of probabilities that the accused committed the act in question), order that any information or evidence it deems fit be placed before the court in order to assist it to determine whether the accused has committed the offence. With respect to a charge involving serious violence or if the court considers it to be necessary in the public interest, once the court has found that the accused committed the act, the court shall direct that the accused be detained in a psychiatric hospital or a prison pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act.

[12] These steps were carefully, clearly and categorically set out in the Acting Director of Public Prosecutions' letter which was placed before the court. Indeed, the instruction emphasises the prosecutor's duty to inform the court of 'what *admissible* evidence is available in the docket linking the accused to the offence, in order to enable the Court to determine whether the accused committed the act'.

[13] The magistrate in these proceedings made a factual finding that the accused committed the offence of assault with intent to do grievous bodily

harm. There is nothing before me to suggest that the magistrate did so as a consequence of having been informed about any admissible evidence to support such a conclusion. Indeed, it seems that no such information was placed before the court. In the absence of such information or evidence, the finding constitutes a material misdirection which has the effect of vitiating the proceedings.

[14] The record must show whether any facts were presented to the presiding officer, enabling him to determine and find whether the accused committed the *actus reus* complained of (see *S v Sika* 2010 (2) SACR 406 (ECB) at 408a-b). It seems to me from the ruling, that the magistrate did not convict the accused as recorded in the J4 but merely found that he committed the offence in question. This finding would have been a proper one had the court been apprised of information or evidence to support such a finding. Not only was this not done, but the review cover sheet suggests that the accused was convicted and sentenced. This is confusing. The portions of the standard form J4 for review proceedings relating to conviction and sentence should not be completed by rote in matters of this nature.

[15] A last aspect that deserves mention is the wording used in the ruling, the charge sheet and the review referral cover sheet. Throughout, reference is made to the accused being detained at a 'mental' hospital pending a judge's decision in terms of section 47 of the Mental Health Care Act [or] until a further lawful order is given for the accused's 'disposal'. Lawyers are encouraged to use the term 'psychiatric hospital' or 'institution' instead. I am not sure what the word 'disposal' is intended to convey. My interpretation is that is simply offensive. The literal meaning of the word as a noun is the action or process of getting rid of something, especially by throwing it away. It is inappropriate to use such wording with respect to a person.

[16] I make the following order:

(a) The magistrate's order dated 16 August 2017 recorded on the face of the J15 is set aside.
(b) The matter is remitted to the magistrate to make a determination pursuant to the relevant provisions of section 77 of the Criminal Procedure Act 51 of 1977, and to issue such order and directive thereupon as is appropriate in the circumstances.
(c) Arrangements must be made for the accused to be provided with the services of a legal practitioner as envisaged in section 77(1A) of Act 51 of 1977.

2. S v D D Mlotshwa (KZN High Court Pietermaritzburg : Case RC 188/14 Review 11/2017)

Where section 270 of the Criminal Procedure Act, 51 of 1977 is applied the enquiry should be whether the essential elements of the alleged 'competent verdict' were included in the original charge.

REVIEW JUDGMENT

CHETTY J:

[1] The accused was charged in the Regional Court, Vryheid with robbery with aggravating circumstances and attempted murder. These offences were alleged to have been committed on 31 December 1997 in the district of Paulpietersburg, KwaZulu-Natal. While awaiting trial on the above two offences, the accused on 21 February 1998 is alleged to have escaped from custody. Consequently, an additional charge of contravening s 117(a) of the Correctional Services Act 111 of 1998 (the 1998 Act) of escaping from custody was proffered against the accused.

[2] At the commencement of his trial, in which he was legally represented, the accused pleaded not guilty to the first two counts. In respect of the count three, the accused pleaded guilty to the offence as set out in the charge sheet and made the following admissions in a written statement:

'i. During or about 21 February 1998 and at about 23h30 I was in the cell with eight other prisoners;

ii. At that time one of the prisoners known to me as Mandla had an instrument resembling a file, cut through the top of the cells and accessed the outside;

iii. He, together with two other prisoners jumped through the roof of the cell and demanded that I leave with them as I saw all that they did and as the other prisoners were asleep and I would tell the police what I saw;

iv. Mandla was bigger in size than me and so were the other two prisoners.

v. I feared for my life and left with them

vi. We walked to Newcastle and ended up at the rank. Mandla and his friends took a taxi and left.

vii. I took a taxi to Johannesburg with money from Mandla;

viii. I did not report the matter to the police and as the years elapsed I thought I would never be caught.

ix. My failure to report to the police was as a result of fear.

x. I was eventually arrested in 2014.'

[3] Proceedings commenced on 20 February 2017 and the trial court proceeded to hear evidence on counts one and two, having reserved judgment on count three in light of the admissions made by the accused.

[4] On 9 March 2017 the accused was found not guilty and acquitted on counts one and two. In light of the accused's unequivocal acknowledgement of guilt in respect of all the essential elements of the offence of escaping from custody, the court duly convicted the accused.

[5] When the matter came before the court on 13 March 2017 for the purpose of sentencing, the legal representative of the accused submitted that the accused had been erroneously convicted on the count of escaping from custody in that the provisions of s 117(a) of the 1998 Act only came into operation on 19 February 1999. As such, the offence committed by the accused on 21 February 1998 preceded the coming into operation of the provisions of the Act under which he had been charged. Relying on the dicta in *S v Williams* (C512/11) [2012] ZAWCHC 246 (21 December 2012) the learned magistrate was of the opinion that the accused was convicted for an offence in terms of an incorrect Act. It is on this basis that the proceedings in the Regional Court was halted and the matter was referred to this court in terms of s

304A of the Criminal Procedure Act 51 of 1977 (the CPA), after conviction but before sentence, where the magistrate is of the opinion that the conviction is not in accordance with justice.

[6] In light of the accused having been charged with a statutory offence, where the statute in question had not yet come into operation, the learned magistrate was of the view that the principle *nulla poena sine lege* was applicable and that the accused could not be found guilty of a crime which did not exist at the time. In the magistrate's view, the accused had been 'erroneously' charged as the provisions of s 117(a) were not operational at the time of the commission of the offence. The magistrate is of the view that the conviction cannot stand.

[7] It is correct that a statute cannot apply retrospectively, unless it is expressly stated, or implied. See *Landgraf v USI Film Products et al* 511 US 244 (1994) at 265, quoted with approval by Farlam AJA in *National Director of Public Prosecutions v Carolus & others* 2000 (1) SA 1127 (SCA) which made reference in para [60] to '*the legal culture leaning against retrospectivity where there is unfairness*'. The rationale for the rule against the retrospective operation of statutes lies in the 'ability to arrange one's affairs in the shadow of the law is an essential requirement to the rule of law'. (See *Bareki NO & another v Gencor Ltd & others* 2006 (1) SA 432 (T) at 439C-D). The point was made by the US Supreme Court in *Papachristou v City of Jacksonville* 405 US 156 (1972) at 162:

> 'Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta v New Jersey* 306 US 451, 453.'

Justice Mokgoro in *President of the Republic of South Africa & another v Hugo* 1997 (4) SA 1 (CC) para 102 noted:

> 'The need for accessibility, precision and general application flow from the concept of the rule of law. A person should be able to know of the law, and be able to conform his or her conduct to the law.'

[8] The issue which arises from the referral in terms of s 304A is whether the conviction of the accused, based on his plea explanation, can stand despite the offence taking place prior to the commencement of the 1998 Act, in terms of which the charge is framed. Put differently, would it be in accordance with justice for the accused to be convicted of an offence framed in terms of an Act which was not in place at the time when the alleged offence was committed?

[9] A starting point must be the existing legislative framework in terms of which the charge against the accused was brought. Section 117 of the 1998 Act provides:

> '117 Escaping and absconding
>
> Any person who-
>
> *(a)* escapes from custody;
>
> *(b)* conspires with any person to procure his or her own escape or that of another inmate or who assists or incites any inmate to escape from custody;
>
> *(c)* is in possession of any document or article with intent to procure his or her own escape or that of another inmate;
>
> *(d)* in any manner collaborates with a correctional or custody official or any other person, whether under the supervision of such correctional or custody official or person or not, to leave the correctional centre without lawful authority or under false pretences; or
>
> *(e)* is subject to community corrections and where he or she absconds and thereby avoids being monitored,
>
> is guilty of an offence and liable on conviction to a fine or to incarceration for a period not exceeding ten years or to incarceration without the option of a fine or both.' (My emphasis)

[10] In contrast, s 48 of the old Correctional Services Act 8 of 1959 (the 1959 Act) provided that:

> '48 Penalty on prisoners for escape or attempting to escape
>
> (1) Any prisoner who-
>
> (a) escapes or conspires with any person to procure the escape of any prisoner, or who assists or incites any other prisoner to escape from the prison in which he is placed, or from any post or place where or wherein he may be for the purpose of labour or detention, or from hospital, or while in course of removal in custody from one place to another; or

(b) makes any attempt to escape from custody; or

(c) is in possession of any instrument or other thing with intent to procure his own escape or that of another prisoner; or

(d) in any manner collaborates with a correctional official or any other person, whether under the supervision of such correctional official or person or not, to leave the prison without lawful authority or under false pretences,

shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding five years.' (My emphasis)

[11] In my view the reliance by the accused on *Williams* (supra) does not assist him. That case concerned an offender who escaped from a place of safety. He was charged under s 117(a) of the 1998 Act and pleaded guilty. On review it was noted that the section under which he was charged was incorrect as he was not a prisoner at the time of the offence but rather a youth offender as contemplated in the Child Justice Act. It was correctly noted that courts do not have the power to create new crimes. The court went on to add:

'Whilst it is of vital importance that criminal conduct be discovered and the perpetrator punished, it has been equally recognised that where conduct of an accused person is not recognised by the law as a crime, in line with the principle of legality, commonly known as *nullum crimen sine lege,* he or she cannot be found guilty of any offence. Similarly, "the nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law; the principle of *nulla poena sine lege* requires this". [See *S v* Dodo 2001 (1) SACR 595 (CC) at 604e-f]. *Snyman* [*CR Snyman,* Criminal Law, 4th page 39] succinctly summarises the application of these principles and states that:

"An accused may not be found guilty of a crime and sentenced unless the type of conduct with which he is charged
(a) Has been recognised by the law as a crime,
(b) In dear terms,
(c) Before the conduct took place
(d) Without the court having to stretch the meaning of the words and concepts in the definition to bring the particular conduct of the accused within the compass of the definition, and
(e) After the conviction the imposition of punishment also complies with the four principles set out immediately above."'

[12] *Williams* is distinguishable from the facts in the matter in that it held that the provisions of s 117 do not make escaping from a place of safety, a criminal offence. On the other hand, escaping from custody was an offence both under the 1959 Act and under its successor, the 1998 Act. The only issue is whether the charge against the accused was lawful. In my view one must have regard to the plea explanation tendered by the accused. The accused has admitted fully in his plea to all of the *essentialia* of an offence under s 117(a) of the 1998 Act, even though it was not in operation when he committed the offence. However, the explanation also admits to all the elements of the offence of escaping from custody as contemplated in s 48 of the 1959 Act. The issue is what prejudice has been occasioned to the accused arising from his conviction? While it is clear that the charge and conviction under the 1998 Act was wrong, the accused did escape from custody together with other prisoners while awaiting trial. He admitted to all the elements of the offence of escaping from custody.

[13] The solution to the problem confronting the magistrate is to be found in s 270 of the CPA which provides:

> 'If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.'

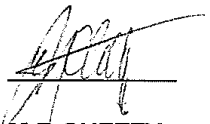
[14] This provision is referred to in *Hiemstra's Criminal Procedure* at Chapter 26: 26-27 as an 'omnibus provision' catering for cases not covered in the preceding sections where the offence charged cannot be proved, but all the elements of another offence are proved. In *S v Busuku* 2006 (1) SACR 96 (E) Dambuza AJ (as she then was) considered on review a matter where the accused escaped from custody while awaiting trial. He was charged under s 51(1) of the CPA. The reviewing judge initially enquired whether the accused should not have been charged with contravening the provisions of s 48 of the 1959 Act. It was concluded that the accused had been incorrectly charged and convicted, and that he ought to have been charged with a contravention of s 117(a) of the 1998 Act, and that the gateway to this lay in the provisions of s 270 of the CPA, the enquiry being whether

the essential elements of the alleged "competent verdict" were included in the original charge [see para 12].

[15] I am satisfied that no prejudice was occasioned to the accused by virtue of his conviction under the provisions of the 1998 Act. He ought to have been charged under the provisions of the 1959 Act, and it is evident from his plea explanation that he admitted to all the essential averments necessary to prove the offence of escaping from custody. In my view, and guided by the approach in *Busuku*, the accused stands to suffer no prejudice by the alteration of his conviction to a contravention of s 48 of the 1959 Act. It should be borne in mind that the punishment to be meted out for such an offence cannot exceed that which would be applicable in the 1959 Act, in other words, a period of five years as opposed to the 1998 providing for a maximum penalty of ten years..

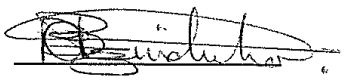
[16] I accordingly order that:

1. The order of the court a quo is amended as follows:
   'The accused is convicted of escaping from custody in contravention of section 48 of the Correctional Services Act 8 of 1959.'
2. The matter is remitted to the Regional Court, Vryheid for sentencing in accordance with the provisions of the above section.



M R CHETTY
Reviewing Judge

I concur,



Judge P Bezuidenhout

Comments by Basil King (Senior Magistrate Port Shepstone).

An interesting factual situation and while I see some merit in a comment about the accused lacking *mens rea*; a question or two could have clarified that issue or, if not, a plea of not guilty could have been entered. I won't get into the debate about the *mens rea* bit here because it's the 'procedural' aspect that I wish to address.

Firstly, why on earth did the acting Regional Magistrate decide to bother the High Court with a so-called 'special review'?

When the 'non-existence' of the legislative provision was pointed out to him prior to sentence he should then have applied section 113 and entered a plea of not guilty. He appeared then not to be satisfied as to the accused's guilt to an apparent non-existent offence, and correctly so; – how can you be guilty of an offence that doesn't exist?

Had he applied section 113, being in doubt as to whether the accused was guilty of any offence, any 'wide-awake' prosecutor would then have applied for an amendment of the charge in terms of section 86 of the CPA, i.e. to amend the statutory reference to that of the old Act, namely that the brief preamble to the charge refers to section 48(1)(a) of Act 8 of 1959 instead of section 117(a) of Act 111 of 1998.

The question to be asked at the 'amendment' stage is whether the accused would suffer any prejudice thereby.

The answer has to be a resounding 'No'. The allegations and elements remain exactly the same, the very elements which he admits, so there can be no prejudice. See R v Myende 1959 (4) SA 135 (N). [*Charge - Statutory provision - Incorrect reference - Accused charged under Act not yet in force - Amendment of charge creating no prejudice.* It coincidentally also happened to relate to escaping].

That done, the State could have merely closed its case (or led any evidence it may have thought necessary to discount the 'fear' factor).

The court could then have moved on to sentencing the accused and no review or apology for going about the matter the wrong way would have been necessary.

Now, returning to the actual 'special review' that took place: with the greatest of respect to the Honourable Reviewing Judges, their reliance on or finding a solution to the matter by way of the use of section 270 is sorely misplaced.

If we accept that the Regional Magistrate didn't think of or allow the amendment referred to above and the matter went on review, nothing prevented the High Court making the very same amendment to the charge during the review proceedings. There is case law to back this up. If they had done that it would have been unnecessary to do the word twist involving section 270. I say 'word twist' deliberately because a mere reading of section 270 indicates that there has to at least be an 'offence' charged. If an Act is not yet in operation there can be no question of an 'offence <u>so charged</u>' so the section can't come into play. The case they quote and the circumstances in it (Busuku) are exactly the same as those in Nkosi 1990(1) SACR 653(T) and in both those matters section 270 was correctly applied but it really wasn't appropriate in this case.

From The Legal Journals

Magobotiti, C D

"An assessment of life sentence without parole for people convicted of killing police officers on duty in South Africa."

Journal for Juridical Science, Volume 42 Number 1, Jun 2017, p. 62 - 76

Abstract

Like many societies, South Africa seeks to respond to the increasing killing of police officers, by exploring possible tough sentences. This article shows that sentencing does not take place in a socio-historical vacuum. It is concerned about sentencing proportionality as a limiting principle against possible excessive penal measures. In this article, life sentence without parole is assessed in terms of its justification and appropriateness. The article views life sentences as measures that require necessary parameters. It demonstrates that judicial decision-making is informed, inter alia, by different sentencing theories, and remains complicated.

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

Contributions from the Law School

Lesson for landlords who supply electricity to tenants

The judgment in *Young Ming Shan CC v Chagan NO and Others* 2015 [2015] 2 All SA 362 (GJ) contains a valuable lesson for landlords who supply electricity and related services to their tenants with the view to levy a charge for such services. In essence, the judgment explains whether landlords are entitled to levy the said charge particularly in terms of the Electricity Regulation Act 4 of 2006. This case concerned the review, brought by the applicant (the landlord), of the decision of the Gauteng Housing Rental Tribunal (the first respondent) based on the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The second respondent, the tenants of the building owned by the applicant/landlord, had applied successfully to the Tribunal seeking to have the landlord's levying of an electrical service charge declared an 'unfair practice' in terms of the Gauteng Unfair Practices Regulations (Notice 4004 of 2001, 4 July 2001) and therefore unlawful. The levying of the charge in question came after the electricity service provider, City Power, levied a similar charge against the landlord for the entire building, but the landlord charged a similar amount from each tenant (see paras 1-24).

Having satisfied the court that the decision of the Tribunal was administrative action in terms of the PAJA, the landlord relied on various grounds in its quest to have the finding of the Tribunal reviewed and set aside (paras 44-45). For present purposes, focus will only be on the arguments and findings based on the Electricity Regulation Act (the Act). The landlord advanced arguments based on the Act mainly to support its case for the review of the Tribunal's findings on the ground that these were so unreasonable that no reasonable person would have come to the same conclusion (see particularly paras 61-84). In support of this ground of review, the landlord first argued that it was entitled to levy an electrical service charge because it was in fact a 'reseller' and/or a 'supplier' of electricity in terms of the Act, although it, by its own admission, did not necessarily make a profit from it's buying or selling of electricity. Therefore, like any licensee who, in terms of section 15(1)(a) of the Act, is allowed to recover the full costs of its licenced activities 'including a reasonable margin or return', the landlord argued that it was entitled to charge the electrical service charge for electrical services it renders to tenants. However, since the landlord did not have the requisite licence, it was argued that the landlord was exempt from having a licence in terms of section 7(2) read with Schedule 2 item 3 of the Act. The court found that there were insufficient averments made by the landlord to establish that the provisions of the Act applied to it. The court added further that there was no evidence of exemption from having a licence, neither was there evidence that the

landlord was registered with the National Energy Regulator of South Africa (NERSA) as required in terms of the Act. Therefore, the argument that the landlord was entitled to levy an electrical charge because it was a reseller or supplier of electricity had to fail.

Upon closer scrutiny of the Act, the court reasoned that what the landlord was suggesting when it argued that it was exempt from being licenced for its alleged supply or resale of electricity is that it (the landlord) was operating a 'non-grid connected supply of electricity except for commercial use' and that was clearly not true. In fact, the court found that as per the NERSA concept paper, it is clear that the electricity supply activity, such as that which the landlord was allegedly engaged in, was unregulated and therefore 'fell outside the radar screen' of the Energy Regulator. The court acknowledged the concern expressed in the NERSA concept paper about this unregulated aspect and the fact that tenants are at the mercy of landlords who are 'resellers' or 'suppliers' of electricity and that tenants may be charged exorbitant prices with minimal prospects of recourse.

On whether the landlord could be a 'distributor' of electricity since distribution is defined in the Act as 'the conveyance of electricity through a power system excluding trading,' the court found that the landlord failed to prove its case that it was operating a distribution facility (i.e. a power system). The court held further that the landlord could not succeed with the argument that it was involved in the 'transmission' of electricity from the service provider (Council/City Power) to it as the landlord and finally to the tenants. This is because although the NERSA concept paper equates the 'transmission' of electricity to 'trading' in electricity (which activity requires a licence), by its own admission the landlord was not trading in electricity, neither did it have the requisite licence to do so. Even if the landlord had averred that it was 'trading' in electricity, it would not have succeeded because it was clear from its founding affidavit that it was not supplying electricity as a commercial activity (that is, making a profit from buying and selling electricity) which is required to complete the definition of 'trading'. The definition of trading (i.e. 'the buying and selling of electricity as a commercial activity') clearly envisages the making of a profit.

In connection with the landlord's argument that it performed a similar service as the Council in respect of the supply of electricity, the court found that the landlord did not establish that it was a 'service provider' in terms of the Act. In terms of the Act, 'service provider' means "a person or institution or any combination of persons or institutions which provide a municipal service in terms of a service delivery agreement." The envisaged service delivery agreement refers to "an agreement between the municipality and an institution or person providing electricity reticulation, either for its own account or on behalf of the municipality." Section 28 of the Act regulates the conclusion of such agreements and lays down strict requirements. It was accordingly held that the landlord did not argue that it concluded such an agreement with the Council. In light of the aforementioned findings, the court concluded that that the finding of the Tribunal (to the effect that the levying of an electrical service charge was not permitted in terms of the Act) were not so unreasonable that no reasonable person could have made it.

The court's decision therefore upholds the Tribunal's finding that there is no basis in the Act for a landlord to levy a separate charge for its supply of electricity to the tenants, such as the charge for billing the tenant, or for the maintenance of the electricity network, or for the performance administrative tasks relating to the payment and collection for the supply of electrical services. The view of the Tribunal, supported by the court, was that such a charge had to be factored into the rental to be paid by the tenant. Allowing the levying of a separate charge for electrical services was susceptible to abuse by landlords to the detriment of the tenants because these charges were not regulated by the Act or NERSA. Therefore, it is clear that the only electrical charge the tenant is obliged to pay is the amount of the actual electricity consumed and the *pro rata* share of the service charge which can only be lawfully charged by the Council against the landlord for the entire building. It does not matter that the Council could have levied this amount against each tenant in the building. The fact that the Council has not levied a charge against each tenant does not entitle the landlord to recover this amount from each individual tenant, even if the landlord could show, like it did in this case, that it was entitled to levy these charges in terms of the lease agreement, or that the profits it makes are directed towards maintaining the building.

Khulekani Khumalo
School of Law,
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

Debt review: Points on orders
***Nedbank Ltd v Jones and Others* 2017 (2) SA 473 (WCC)**

The South African economy has predominantly been spared from the horrible truths of reckless and abundant credit based on derivatives and speculation without value. Thankfully the South African regulatory systems made sure of that, and we should be grateful for these systems that have been put in place by legislation and have been overseen by the Reserve Bank (notwithstanding the recent misguided attempt by the

Public Protector of all institutions to alter its primary function), the Ministry of Finance and credit providers themselves.

From a legislative point of view, the main driver of these systems is the National Credit Act 34 of 2005 (the Act), a piece of legislation that was promulgated in 2007 and that significantly and forever changed the way consumers and credit providers approach the applying for, and granting of, credit in South Africa (SA). The Act promotes (among others) the development of a credit market that is accessible to all South Africans, the consistent treatment of different credit products and different credit providers, responsibility in the credit market by encouraging responsible borrowing and avoiding over-indebtedness, and discouraging the granting of reckless credit and contractual defaults by consumers (s 3 of the Act).

As noble as the promotion of these notions are, it remains inevitable that consumers will run into financial difficulty, and when they do, they invariably default on their monthly credit repayments. For this eventuality the Act introduced us to the concept of debt review – an application that is (as a rule) brought by a debt counsellor (DC) after a consumer has applied to have his or her debts that exist in terms of a credit agreement reviewed in terms of s 86 of the Act. Such an application is brought after the DC has satisfied himself or herself that the consumer is over-indebted, namely, that based on the preponderance of available information available at the time, the consumer is/will be unable to satisfy his or her obligations under all credit agreements to which he or she is a party in a timely manner after considering the consumer's financial means, prospects and obligations (s 79 of the Act).

After considering such an application, a magistrate's court may (among others) make an order rearranging the consumer's obligations in any manner contemplated in s 86(7)(*c*)(ii) (s 87(1)(*b*)(ii)). Simply put, the magistrate may make an order –

- extending the period of the credit agreement and reducing the amount of each payment due;
- postponing the dates of which payments are due under the credit agreement; and/or
- recalculating the consumer's obligations because of contraventions of certain parts of the Act.

So what happens if a magistrate's court makes orders it is not empowered to make by the Act? The judgment of *Nedbank Ltd v Jones and Others* 2017 (2) SA 473 (WCC) dealt specifically with this question.

Brief summary of the facts

In this case, the first and second respondents (the consumers) were in dire financial straits, they being indebted to more than ten different creditor providers, including the applicant (the bank).

The bank had concluded a home loan agreement with the respondents for the amount of R 1,1 million, which had to be repaid over a period of 336 months in instalments of R 10 491 at a variable interest rate of 10,9% per annum.

Having considered their financial predicaments, the consumers' DC brought an application to the magistrate's court to review their debts.

After finding that the consumers are indeed over-indebted, the magistrate, ostensibly relying on s 87, proceeded to re-arrange their debt owed to the bank by varying the monthly instalments (to R 4 007,06) and the fixed interest rate (to 10,4%), and made provision for an open-ended repayment period.

Perturbed, the bank (some five years later) applied to have the magistrate's court order rescinded on the basis that the magistrate exceeded the scope of his powers in re-arranging the consumer's debt.

The High Court was not persuaded by the bank's application for condonation for the late launching of the rescission application; it held that it would not be in the interest of justice to do so, as doing so would create a commercial nightmare and be prejudicial to the consumers.

However, the High Court did entertain the raised issue of *ultra vires* insofar as the magistrate's courts application of s 87 of the Act is concerned, and whether the magistrate exceeded the scope of his powers.

The following orders were made:

- A magistrate's court hearing a matter in terms of s 87(1) of the Act, does not enjoy jurisdiction to vary (by reduction or otherwise) a contractually agreed interest rate determined by a credit agreement, and order containing such a provision is null and void.
- A re-arrangement proposal in terms of s 86(7)(*c*) of the Act that contemplates a monthly instalment, which is less than the monthly interest, which accrues on the outstanding balance does not meet the purpose of the Act. A re-arrangement order incorporating such a proposal is *ultra vires* the Act and the magistrate's court has no jurisdiction to grant such an order.

Observational remarks

Many attorneys when launching actions or applications for the foreclosure on immovable properties or the repossession of motor vehicles have been confronted with the defence by consumers in either applications opposing summary judgment or in opposing papers that the credit agreement relied on is under debt review. Invariably, this defence has been upheld. No more. The effect of this judgment is that such a defence will not pass muster. Great news for credit providers?

Maybe, and maybe not. Many credit providers, especially commercial banks, take greater pride in their reputation than in their success rate in foreclosing on immovable properties or their ability to repossess vehicles. For it is not the business of credit providers – and specifically commercial banks – to sell immovable properties in execution or store vehicles for the purpose and the *spes* of auctioning them off.

So what must credit providers do? We suggest that credit providers give consumers an option: Either the consumer consents to a variation of the order, thereby increasing the interest rate and monthly instalments to the satisfaction of the credit provider, or the credit provider collects on the credit agreements in the manner it sees fit. In doing so, the credit provider upholds the moral high ground without coming over as weak. Because consumers should have a sense of security and

comfort when dealing with credit providers, but in the same vein, credit providers should feel comfortable in exerting their security.

Bouwer van Niekerk *BA (Law) LLB (Stell) Post Grad Dip Labour Law (UJ) Cert Business Rescue Practice (UNISA & LEAD)* is an attorney and Ashley Seckel *LLB (UJ)* is a candidate attorney at Smit Sewgoolam Inc in Johannesburg.

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A Last Thought

"Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School 2008 (5) SCA 1(para 16-18)* . The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against,

the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

Per Wallis J A in N*atal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at Para 18*