e-MANTSHI

A KZNJETCOM Newsletter

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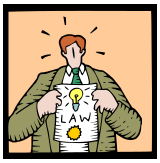
Welcome to the hundredth and thirty ninth issue of our KwaZulu-Natal Magistrates' newsletter. It is intended to provide Magistrates with regular updates around new legislation, recent court cases and interesting and relevant articles. Back copies of e-Mantshi are available on http://www.justiceforum.co.za/JET-LTN.ASP. There is 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.
"e-Mantshi" is the isiZulu equivalent of "electronic Magistrate or e-Magistrate", whereas the correct spelling "iMantshi" is isiZulu for "the Magistrate". The deliberate choice of the expression: "EMantshi", (pronounced E! Mantshi) also has the connotation of respectful acknowledgement of and salute to a person of stature, viz. iMantshi."
Any feedback in respect of the newsletter can be sent to Gerhard van Rooyen at gvanrooyen@justice.gov.za.



New Legislation

1. The Regulations to the *Extension of Security of Tenure Act, 1997* (Act No. 62 of 1997) has been amended as follows:

Regulation 2 of the Regulations is hereby amended by the substitution for subregulation (1) of the following subregulation:

"(1) The prescribed amount for the purposes of paragraph (c) of the definition of "occupier" in section 1(1) of the Act shall be an income of R13, 625.00 per month."

The amendment was published in Government Gazette no 41458 dated 23 February 2018.

Recent Court Cases

1. SULANI V MASHIYI AND ANOTHER CASE 246/2018 (2 February 2018) (ECPEHC)

The provisions of section 67 (1) (b) of Act 51 of 1977 does not preclude a court from staying execution of a warrant of arrest in appropriate cases.

Dawood, J:

1. The Applicant herein brought an application against the Respondent in the following terms:

"[1] Declaring the application to be one of urgency as contemplated in Rule 6(12) of the rules of the above Honourable Court and dispensing insofar as is necessary with the usual forms and service provided for in the said rules.
[2] Reviewing and setting aside the order made by the First Respondent in Port Elizabeth's Court case no 27/1497/17 on 29 January 2018 declaring the Applicant's bail provisionally cancelled and her bail money provisionally forfeited to the State and issuing a warrant for the Applicant's immediate arrest.
[3] Re-instating the Applicant's bail of R2000 in Port Elizabeth Magistrate's Court case no. 27/1497/17.
[4] Granting the Applicant further and/or alternative relief".

2. The facts of the matter are briefly as follows:
   a) The Applicant resides in Durban.
   b) The Applicant was represented at the hearing on before the First Respondent 29th January 2018 by Mr P Daubermann.
   c) The Applicant was unable to attend the hearing of the matter on the 29th of January 2018.
   d) The reasons furnished for her non-attendance by her legal representative was that she had given birth by caesarean section and was not in a position to travel due to her medical condition.
   e) A medical certificate by Dr Mashiloqne was produced and accepted that she was unfit to travel on the 29th of January 2018 due to caesarean operation.
   f) The prosecutor accepted the authenticity and correctness of the medical certificate and it was handed up as an exhibit.

g) The Magistrate nonetheless was of the view that she was bound by four corners of the statute and did not have a discretion to stay execution of the warrant of arrest and provisionally estreat bail.
h) She accordingly made an order in the following terms insofar as it is relevant to these proceedings :

"A warrant of arrest is authorised forthwith for accused no. 2 who is absent; her bail money is provisionally [indistinct] to the state and for her final forfeiture of bail; it is postponed until the 13th of February this year."

g) The Magistrate as well as the state prosecutor appear to have based their interpretation on the provisions of section 67 of the Criminal Procedure Act which reads as follows:

"67 Failure of accused on bail to appear
(1) If an accused who is released on bail—
(a) fails to appear at the place and on the date and at the time—
(i) appointed for his trial; or
(ii) to which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
(b) fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending ***shall declare the bail provisionally cancelled and the bail money provisionally forfeited to the State, and issue a warrant for the arrest of the accused****.*
(2) (a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, unless the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.
(b) If the accused satisfies the court that his failure was not due to fault on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

h) The learned Magistrate appears to have furthermore relied upon the conclusion reached in **S v Lerumo**[1] for her finding, Hendricks J held *inter alia* as follows:

"[16] … The presiding magistrate is correct and the matter is therefore not reviewable.
[17] I am of the view that the practice of issuing warrants of arrest for accused persons and ***staying the execution thereof is not in accordance with the prescripts of section 67*** *of the Criminal Procedure Act, and* ***should be done away***

[1] (08/2017) [2017] ZANWHC 63; 2018 (1) SACR 202 (NWM) (10 August 2017)

***with**, unless the legislature amend the said section. Until then, this practice must be stopped."(my emphasis)*

3. **Issue for determination**.

3.1 The crisp issue for determination is whether or not the provisions of section 67 (1) of the Criminal Procedure Act compelled the learned Magistrate to issue a warrant for the immediate arrest of the Applicant or whether the Magistrate was able to stay execution.

3.2 The Respondents filed a notice to abide by the decision of this court.

3.3 Mr Daubermann referred this court to inter alia the provisions of section 12 (1) (a) of the constitution and Bertie's case in support of his argument for the relief sought:

a) Sub-section 12 (1) (a) of the Constitution provides as follows*:*

"12. (1) Everyone has the right to freedom and security of the person, which includes the right-

(a) not to be deprived of freedom arbitrarily or without just cause";

b) In Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others[2] the Constitutional Court held as follows:

"[20] The Constitution requires courts deciding constitutional matters to declare any law that is inconsistent with the Constitution invalid to the extent of its inconsistency. However, the Constitution in section 39 (2) also provides that:

*"When interpreting **any legislation**, and when **developing the common law** or customary law, every **court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights**."*

*"The Constitution requires that judicial officers read legislation, where possible, in ways which give **effect to its fundamental values. Consistently with this**, when the **constitutionality of legislation is in issue, they are under a duty to examine the objects** and purport of an Act and to read the provisions of the legislation, **so far as is possib**le, in **conformity with the Constitution**."*

"The technique of paying attention to context in statutory construction is now required by the Constitution, in particular, s 39 (2). As pointed out above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.'"

[2] (CCT 77/08) [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) (7 May 2009) paras [20] to [23]

[23] This Court has recognised that the process of determining the constitutionality of legislation requires a resolution of the following inherent tension:
On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. ***There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional****, is reasonably capable of* ***being read 'in conformity with the Constitution****'. Such an interpretation should not, however, be* ***unduly strained****."(my emphasis)*

3.3 Section 67 (1) (b) of the Criminal Procedure Act is silent with regard to the execution of the warrant it merely makes provision for the issuing of a warrant of arrest but does not provide that it has to be executed immediately.

3.4 The Act gives the accused a grace period of at least 14 days to state why the bail should not be finally estreated it is unlikely that the drafters did not envisage a situation where the same grace period should not be applicable with regard to the execution of a warrant of arrest where applicable.

3.5 Section 67 (1) (b) is accordingly capable of being interpreted in conformity with the Constitution.

3.6 I am in agreement with the dicta in **Terry v Botes and another**[3] where the following was stated by Foxcroft J:

"What is quite clear from these provisions is that an accused person may, either himself or through his legal representative, satisfy the Court that his failure under s 67(1) was not due to fault on his part, and also that the Court may receive any evidence as it considers necessary in order to determine this question. ***Nowhere is it stated that a warrant of arrest must be executed before an accused in these circumstances may be heard, nor is it stated that an accused person is obliged to give evidence and that his attorney may not address the Court in regard to this question. (my emphasis)***

3.7 On my reading and interpretation of the relevant portion of the Act the section of the Act does not preclude the Magistrate from staying the execution of the warrant of arrest until a future date. It is in fact silent with regard to the issue of execution.

3.8 A Magistrate would accordingly not be acting outside the four corners of the statute in the event that he or she orders a stay of the execution upon the issuing of the warrant of arrest.

[3] 2003 (1) SACR 206 (C)

3.9 The Magistrate in my view accordingly was not compelled to order the immediate execution of the warrant.

3.10 The learned Magistrate had no discretion in issuing the warrant because that is expressly provided for in the Act, however she had to have regard to the representations made to determine whether or not to order the immediate execution thereof.

3.11 Section 67 does not preclude her from determining whether or not the warrant should be executed immediately or stayed until a further date, due to its silence on the issue.

3.12 The learned Magistrate failed to have regard to the facts placed before her in order to consider whether or not to stay execution of the order.

3.13 The factors set out by the Applicant's attorney in my view were sufficiently cogent to warrant a stay of the execution of the warrant in this case.

3.14 The learned Magistrate was presented with the fact that the Applicant had delivered a baby by caesarean section 15 (fifteen) days prior to the hearing. A medical certificate from a gynaecologist was provided to court and accepted by the Magistrate and the prosecutor as being correct that the Applicant was unable to travel from Durban to Port Elizabeth as a result of the caesarean section and was accordingly unable to attend court for a legitimate justifiable reason.

3.15 There was no reason to gainsay what was put on her behalf nor was the veracity of the averments challenged.

3.16 In this case it is not just the question of the liberty of an accused person who has just delivered a baby by caesarean section but also the rights of a 15 (fifteen) day old child that needed to be considered in determining whether or not to have her arrested immediately and brought to court two (2) weeks hence.

3.17 Our law provides that even where an accused person has been convicted the rights of her minor children are considered where she is the primary care giver of minor children in determining whether or not to impose a custodial sentence.

3.18 It would be unfathomable that this factor would play no role in determining whether or not to order the immediate execution of a warrant of arrest which would mean the mother of a 17 day old child being incarcerated for a possible 2 week period of time without any regard being had for the rights of this vulnerable extremely young child that is completely dependent on her mother for her care. These factors were not presented but the fact that she has a 17 day old child alone would prompt such an inquiry.

3.19 This is an untenable situation and is clearly not what would have been envisaged by the legislature as a possible consequence of the relevant provision.

3.20 The restrictive interpretation placed on the provision of section 67 by the learned Magistrate, if it indeed could be read to direct the immediate execution of the warrant execution of the warrant of arrest in all cases irrespective of the peculiar personal circumstances of the individual accused person, would clearly be unconstitutional as it will fall foul of a number of provisions of the constitution particularly in this case.

3.21 This clearly would amount to a grave injustice and a contravention of numerous constitutional rights not only of the Applicant but of her young infant as well.

3.22 It is evident that the Applicant's non-appearance was not contemptuous but based on a legitimate medical condition that precluded her from travelling to Port Elizabeth.

3.23 This clearly is an exceptional case that militates against the immediate execution of the warrant of arrest and requires that the right of liberty, dignity and family life come to the fore in considering the peculiar circumstances of this case.

3.24 The Magistrate's failure to consider these factors and her restrictive interpretation of the relevant provision of the Act is incorrect and in the circumstances of this case amounts to a gross irregularity warranting the inference of this court[4].

3.25 I have taken cognisance of the fact that the Applicant may not be able to attend on the 13th of February 2018 but that can be dealt with at that time and an extension of the date applied for as is provided for in the Act.

3.26 The Magistrate was not constrained to order the immediate execution of the warrant of arrest in terms of section 67 she can with respect in appropriate cases stay execution. This clearly was one of the cases that cried out for a stay of execution.

3.27 The Magistrate's decision with regard to the immediate execution of the warrant is accordingly wrong and is hereby reviewed and set aside and replaced with an order staying the execution of the warrant of arrest.

3.28 The provisional cancellation and forfeiture of the bail money are pre-emptory provisions that the Magistrate is obliged to make due to no-appearance and that accordingly cannot be set aside nor can the decision to issue a warrant of arrest. The only part of the order that is reviewable and falls to be set aside is the ordering of the immediate execution of the order.

[4] Section 22 of the Superior Courts Act no 10 of 2013

3.29 As is apparent from the aforegoing I with all due respect disagree with the restrictive interpretation placed on the provisions of section 67 (1) (b) of Act 51 of 1977 in Lerumo's case supra.

3.30 I am of the view that the provision of section 67 (1) (b) does not preclude a court from staying execution in appropriate cases for the reasons already set out above and upon a reading of the Act the conformity with the constitution.

4. Order

I accordingly make the following order:

4.1 The Applicant's bail is provisionally cancelled;

4.2 The Applicant's bail money is provisionally forfeited to the state;

4.3 A warrant of arrest is authorised as against Ms Lusanda Sulani, the Applicant herein; and

4.4 The order granted by the First Respondent that the warrant of arrest is authorised forthwith in respect of the Applicant is set aside and replaced with the following order:

a) The execution of the warrant of arrest is to be stayed until the 13th of February 2018 or such further extended dates as may be agreed upon for the finalisation of the inquiry pertaining to the provisional cancellation of the bail and the provisional forfeiture of the bail money.

From The Legal Journals

Albertus, C

"Remand detainees who are terminally ill: Does the law offer adequate opportunities for their release?"

2017 SACJ 145

Abstract
Section 49E of the Correctional Services Act 111 of 1998 (CSA) permits the release of remand detainees who are terminally ill to ensure that they receive appropriate health care. It may therefore appear that, the provision in itself is a panacea for the challenges faced by terminally ill inmates. The Legislature, after all, introduced it after the old s 79 of the CSA, which dealt with the release of terminally ill sentenced inmates, attracted endemic criticism for the inroads that it had made inter alia to the right to dignity and right to health care of terminally ill sentenced inmates. The expectation of a more humane regime for all categories of terminally ill detainees has, however, unfortunately not ensued. This article consequently asserts that an overhaul of the legal framework is necessary. Whilst the specificities of such a framework may require vast expertise and resources, it can be proffered that it must of necessity be much less reliant on the discretion of heads of correctional centers who are evidently not medical experts. Importantly, palliative care should be available to every detainee diagnosed with a terminal illness from the moment that such diagnosis is made.

Anderson, A

“Disposal of criminal disputes by informal mediation: A critical analysis”

2017 SACJ 162

Abstract
The traditional response to an offence is that the state brings criminal charges against the perpetrator and a court imposes punishment upon conviction. In recent years there has been a move away from trial as the only manner of dealing with criminal conduct through the introduction of alternative methods, which are usually based on consensus. In addition to restorative justice and diversion from prosecution, the National Prosecuting Authority (NPA) uses informal mediation as a means to finally dispose of criminal cases. Almost a quarter of all cases finalised in 2015/16 were resolved by informal mediation. This article provides a description and critical analysis of the notion of informal mediation as applied by the NPA; followed by a concluding suggestion that more detailed rules and standards for informal mediation must be developed and that the method must be widely publicised in order to give it legitimacy.

Mollema, N & Terblanche, S S

“The effectiveness of sentencing as a measure to combat human trafficking”

2017 SACJ 198

Abstract
Human trafficking is a major global problem. The criminal justice system is only one of the measures available to curb the crime, and is usually employed when all other efforts have failed. The imposition of a sentence is one of the final elements of this control system. Sentences for human traffickers must be sufficiently severe, it is generally agued, to have a sufficient deterrent effect. This contribution considers the extent of this argument and its foundations, in order to compare relevant counter-arguments. In this process, an overview of the offences created in the South African anti-trafficking legislation is considered, with their prescribed sentences. A number of foreign jurisdictions are also briefly compared with the South African position. The article concludes that sentences in South Africa are much more severe than is considered necessary to achieve deterrence. In addition, the potential of increased sentences to deter crime is unproven, and the overcrowded South African prisons cannot accommodate such long sentences.

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

Contributions from the Law School

S v Lerumo and Others **(08/2017) [2017] ZANWHC 63; 2018 (1) SACR 202 (NWM) (10 August 2017)**
vs
Sulani v Mathiya and Another **(246/2018) [2018] ZAECPEHC 2 (2 February 2018)**

Warrants of arrest form part and parcel of the daily practice of a magistrate in the criminal justice system. When a person is scheduled to attend court and does not, the law is pretty clear that a magistrate must then issue a warrant of arrest and order its execution. In *S v Lerumo and others* (cited above), the following question arose: does a magistrate have a discretion to stay the execution of a warrant of arrest? If your knee-jerk reaction was “yes, I do it all the time”, read further.

Facts of Lerumo

This case came on special review to the North West High Court of Mafikeng, having been referred on by the magistrate's court. Accused number 4 had been released on bail and was due to appear in court again on 5th May 2017. However he did not attend as he was at initiation school[5]. His legal representative communicated this to the court; the magistrate subsequently issued a warrant for his arrest. The legal representative argued for the execution of the warrant of arrest to be stayed. The court did not do so, and in addition, the bail money was provisionally forfeited and the matter then remanded to the 19th of May 2017.

The senior magistrate then asked the presiding magistrate to provide him with reasons for her failing to stay the execution of the warrant of arrest. She replied stating that she 'does not have a discretion to stay the execution of the warrant of arrest'. The senior magistrate then referred the matter to the High Court for special review, stating that 'a rule of practice was developed over the years where the execution of a warrant of arrest is stayed in situations where the accused person is unable to attend the court proceedings due to illness, hospitalization and other unforeseen and compelling circumstances.'[6]

Facts of Sulani

The applicant is a resident in Durban (KZN). She was unable to attend her hearing on the 29th of January 2018, as she had given birth by caesarean section and was unable to travel as a result. This was (as in *Lerumo*[7]) communicated to the presiding magistrate, and further a medical certificate to confirm same was produced and accepted by prosecutor as being both authentic and correct and handed this certificate up to the court as an exhibit.[8] The Magistrate appears to have relied on the decision in *Lerumo*[9] and, despite accepting as accurate and correct, nonetheless issued a warrant of arrest for the accused[10] thusly:

"A warrant of arrest is authorised forthwith for accused no. 2 who is absent; her bail money is provisionally [indistinct] to the state and for her final forfeiture of bail; it is postponed until the 13th of February of this year."

As in *Lerumo*[11] the issue 'for determination is whether or not the provisions of section 67(1) of the Criminal Procedure Act compelled the learned Magistrate to issue a

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[5] *S v Lerumo and Others (08/2017) [2017] ZANWHC 63; 2018 (1) SACR 202 (NWM) (10 August 2017) at para 1*

[6] Supra at para 2

[7] supra

[8] Supra at para 2

[9] supra

[10] Supra at para 2 (h) (page 4) and (page 3)

[11] supra

warrant for the immediate arrest of the Applicant or whether the Magistrate was able to stay execution."[12]

Bail as a feature of the Criminal Justice System – Origins and purpose

Bail is the compromise between the interest of the state to have an accused person stand trial and the interest of the accused person not to be unfairly or unjustly imprisoned pending the outcome of his or her trial. The payment of a sum of money or the furnishing of some other kind of guarantee, serves as that guarantee and promise that the accused will not abscond and thereby not obstruct the course of justice. Chapter 9 of the Criminal Procedure Act 51 of 1977 is dedicated to the topic of bail, and regulates the process. The Act also thus caters for situations where an accused does in fact flaunt his or her bail terms and does not appear in court on the prescribed date.

Practically, and unavoidably, there is a time lapse between the initial arrest of an accused person and the final verdict determining the outcome of his trial. This is due to several contributing and compounding factors including congested criminal court trial rolls and ongoing police investigations. And although an accused is entitled to a swift and speedy trial, he should also not fall foul of an overly hasty trial process which prevents him for being adequately prepared to make his defence.

Given that this can take months, even years in some cases, it then also is undesirable for an accused person to remain in custody during this time – especially where a court has yet to pronounce a verdict, after all, one is innocent until proven guilty. What needs to be avoided from a human rights as well as a due-process point of view, is pre-trial incarceration which is tantamount to pre-verdict punishment. Bail is that compromise between the states interest in an accused standing trial and the accused's liberty rights over the duration of his trial. Once an accused has been granted bail, the duty rests on him to ensure that he abides by the bail conditions set (if there are any) and most importantly, that he does in fact, honour the trust afforded to him by the court, by attending his trial.

In *Lerumo* the court was faced with a situation where an accused had been granted bail, and then failed to attend court on the date prescribed. What then are the consequences for failure to attend? What does it mean for the accused? What are the consequences? The same situation arose in *Sulani*[13], except that in that judgement we see that the reason for the accused's absence was accepted by the court as valid and not due to her 'own fault'[14]

Section 67 of the Criminal Procedure Act

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[12] Sulani @ para 3.1
[13] supra
[14] S67(2) of the Criminal Procedure Act

Section 67 of the Criminal Procedure Act[15] caters for this situation in the creation of temporary forfeiture of the bail amount and execution of a warrant of arrest.

S67 states:
"(1) if an accused who is released on bail-
(a) Fails to appear at the place and on the date and at the time –
(i) Appointed for his trial; or
(ii) To which the proceedings relating to the offence in respect of which the accused is released on bail are adjourned; or
(b) Fails to remain in attendance at such trial or at such proceedings, the court before which the matter is pending *shall* declare the bail *provisionally cancelled* and the bail money *provisionally forfeited* to the State, and *issue a warrant for the arrest* of the accused."

I have added emphasis to some of the words in the subsection to make the following points:

Firstly, the use of the word 'shall' makes the direction to the presiding court mandatory, as the word itself is peremptory. A magistrate in this instance has no discretion, and must do as directed to in terms of the Act. This means that a magistrate who is faced with a situation where an accused has not presented himself for court on the day and time prescribed, must (not may) provisionally cancel the bail, and further to this, the consequence is that the bail amount is provisionally forfeited to the state. And further, the magistrate must (not may) issue a warrant for the arrest of said accused.

Now, we understand, and as has been pointed out in the *Lerumo* decision, that magistrates have traditionally treated this section as non-mandatory, and have as a matter of practice exercised a discretion by 'staying' the execution of the warrant of arrest. That certainly is outside of the scope of the Act and what magistrates are expected to do in such circumstances, in fact, the word 'stay' does not appear anywhere in the Act in relation to bail and warrants of arrest.

Reading further in section 67 of the CPA, we see that the forfeiture of the bail money, and the cancelling of bail in these circumstances is not a final measure. The Act is explicitly worded stating unequivocally that these steps are 'provisional', and only become final if, after 14 days, the accused does not appear before court and is not able to satisfy the court that the reason for his non-attendance was due to fault other than his own.

It would seem that the reason for the 'staying' of the warrant of arrest would be to afford the accused the advantage of not having his bail withdrawn and forfeited. However, this is exactly what the purpose of the 14 day period is – 14 days within

[15] Act 51 of 1977

which the accused can present himself before the court (voluntarily or after having been arrested) to explain to the court why the provisional order should not be made a final one. A further concern that becomes evident from the adoption of the 'staying' practice by magistrates, is that it becomes unnecessarily cumbersome and more so, result in the accused losing both his freedom of movement pending the outcome of the trial, as well as the bail amount itself. However, all of these concerns have been catered for in section 67 of the CPA.

S67 (2) states that

(a) If the accused appears before court within fourteen days of the issue under subsection (1) of the warrant of arrest, the court shall confirm the provisional cancellation of the bail and the provisional forfeiture of the bail money, ***unless***[16] the accused satisfies the court that his failure under subsection (1) to appear or to remain in attendance was not due to fault on his part.

(b) ***If***[17] the accused satisfies the court that his failure was not on his part, the provisional cancellation of the bail and the provisional forfeiture of the bail money shall lapse.

What is surprising regarding the *Lerumo* decision, is that this is not the first time that a higher court has had to deliberate on the issues catered for in s67.

In *S v Engelbrecht* 2012 (2) SACR 212 (GSG) the court definitively stated that 'The sanctions, which a court has to impose upon an accused who is released on bail and who fails to appear at his or her criminal trial or who fails to remain in attendance provided for in s 67(1), **are not separable and are obligatory**[18].'[19] The presiding magistrate, in *Lerumo* was called on to give reasons for her decision and why she did not stay the execution of the warrant of arrest. She correctly stated:
'The court has no discretion in terms of the said section whether to issue a warrant of arrest or not and/or to stay a warrant of arrest. It is an immediate action that he court "shall" perform upon the satisfying of the conditions mentioned in the section namely that the accused was released on bail and has failed to appear and/or remain in attendance on the trial date appointed and/or the date to which the matter was adjourned to, by the court.'

However, we must acknowledge that in *Lerumo* the attorney representing the accused, offered a reason to the court for the accused's absence. It is not clear from the review court decision why the court would not accept that version as a valid reason, and neither was there any indication as to why that was not part of the review parameters. All that the high court was asked to determine was whether or

[16] Emphasis added
[17] Emphasis added
[18] Emphasis added
[19] At para 7 of the judgement

not a magistrate had any discretion in 'staying' the execution of a warrant of arrest once it had been issued by a court.

In *Saluni*[20] however, it appears that the court did accept the reason (tendered by the accused's legal representative in the accused's absence) for her non-attendance at court. Regardless, relying on the *Lerumo* decision, the court then issued a warrant of arrest and provisionally forfeited the bail to the state. This in my opinion, was the incorrect procedure to follow.

In *Terry v Botes and Another*[21] the court addressed the issue on whether or not, in the absence of the accused, the legal representative was allowed to present the reason or reasons for the accused's absence in court. In this regard, the court in *Terry v Botes and Another*[22] stated thusly:
'What is quite clear from these provisions[23] is an accused person may, either himself or through his legal representative, satisfy the Court that his failure under s67(1) was not due to fault on his part, and also that the Court may receive any evidence as it considers necessary in order to determine this question. *Nowhere is it stated that a warrant of arrest **must** be executed before an accused in these circumstances may be heard, **nor** is it stated that an accused person is obliged to give evidence and that his attorney may not address the Court in regard to this question….*The magistrate seems to have adopted a policy in general that before he would be prepared to listen to the reasons why bail should not be forfeited[24] through non-appearance, that the arrest and incarceration of the accused was a **necessary precursor to any judicial consideration of the matter.** *There is no legal foundation for such view.";*[25][26]

The point that I am trying to make is that where a legal representative has offered a reason for the absence of an accused at court, and the magistrate finds that that reason is not satisfactory, *then* it is mandatory for the magistrate to issue the warrant of arrest and provisionally cancel the bail.

It is submitted that given the circumstances and facts which emerge in *Saluni* the court, on accepting the reason as valid, should not have issued a warrant of arrest at all. Instead, the matter should have been adjourned for a later date, that would suit the accused, given her medical condition (and the rights of her infant child – as per the reasoning offered[27] in terms of the Constitution[28]). In my opinion, and on my

[20] supra
[21] 2003 (1) SACR 206 (C)
[22] ibid
[23] S67 etc
[24] Provisionally or otherwise
[25] Supra at page 211
[26] Also quoted as correct in Sulani supra at page 6.
[27] Saluni supra at pages 4-6
[28] The Constitution of the Republic of South Africa, 1996

reading of s67 and its subsections, it is only mandatory for a magistrate to issue a warrant of arrest, order the provisional cancellation of bail and provisional forfeiture of same to the state, when and if the magistrate is not satisfied with the reason offered by the legal representative for the absence of the accused person that her or she is representing.

This point unfortunately, does not come out clearly in the *Lerumo* decision, but my criticisms of the quality and eloquence of that decision are best left for another day.

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Matters of Interest to Magistrates

The following sections of an act may not be well known to many but is still in operation and may be of interest to magistrates. The Riotous Assemblies Act No 17 of 1956 Sections 17 and 18 came into operation on 16 March 1956.

17. Acts or conduct which constitute an incitement to public violence.—A person shall be deemed to have committed the common law offence of incitement to public violence if, in any place whatever, he has acted or conducted himself in such a manner, or has spoken or published such words, that it might reasonably be expected that the natural and probable consequences of his act, conduct, speech or publication would, under the circumstances, be the commission of public violence by members of the public generally or by persons in whose presence the act or conduct took place or to whom the speech or publication was addressed.

18. Attempt, conspiracy and inducing another person to commit offence.—
(1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.
(2) Any person who—

(*a*) conspires with any other person to aid or procure the commission of or to commit; or
(*b*) incites, instigates, commands, or procures any other person to commit,
any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.

A Last Thought

[31] In *S v Reddy and Others 1996 (2) SACR 1 (A)* the following was stated at 8c – g:
"*In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft quoted dictum in Rex v Blom* 1939 AD 188 *at 202–203 where reference is made to two cardinal rules of logic which cannot be ignored. These are firstly, that the inference sought to be drawn must be consistent with all the proved facts and secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn". The matter is well put in the following remarks of Davis AJA in R v De Villiers* 1944 AD 493 *at 508–9:–*
'The Court must not take each circumstance separately and give the accused the benefit of any reasonable doubt as to the inference to be drawn from each one so taken. It must carefully weigh the cumulative effect of all of them together, and it is only after it has done so that the accused is entitled to the benefit of any reasonable doubt which it may have as to whether the inference of guilt is the only inference which can reasonably be drawn. To put the matter in another way; the Crown must satisfy the Court, not that each separate fact is inconsistent with the innocence of the accused, but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence.'"

Per Pickering J in *Sonamzi v S (CA254/2016) [2018] ZAECGHC 9* (22 February 2018)