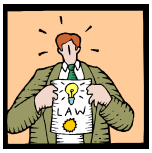
E-MANTSHI

A KZNJETCOM Newsletter

October 2008: Issue 33

Welcome to the thirty third 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. Your feedback and input is key to making this newsletter a valuable resource and we hope to receive a variety of comments and suggestions – these can be sent to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or faxed to 031-368 1366.



New Legislation

1. The *South African Judicial Education Institute Act*, Act 14 of 2008 has been promulgated in Government Gazette No. 31437 dated 16 September 2008. The purpose of the Act is to establish a South African Judicial Education Institute in order to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by providing judicial education for judicial officers. The institute will be governed by a council of which the Chief Justice is the Chairperson and will consist amongst others of 5 magistrates to be designated by the Magistrates Commission of whom at least 2 must be women and 2 must be Regional Court Magistrates.

2. The following persons have been designated as Commissioners of Oaths in terms of section 6 of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963.

   South African Institute of Tax Practitioners
   Master Tax Practitioner (SA)
   General Tax Practitioners (SA)
   Tax Technician (SA)

   The designations were published in Government Gazette No. 31444 of 26 September 2008.

Recent Court Cases

1. STRYDOM v CHILOANE 2008(2) SA 247 TPD

Equality court jurisdiction: If racially discriminatory conduct is more serious than hate speech (where uttered in employment relationship) the matter must be referred to the Labour court to decide jurisdiction.

The respondent instituted action against a fellow employee (the appellant) in the equality court, under s 20 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), arising out of an incident in which the appellant referred to him as a 'baboon'. The appellant contended that the equality court lacked jurisdiction (under s 5(3) of PEPUDA), and that the matter was justiciable in the labour court (under s 6, read with ss 49 and 50, of the Employment Equity Act 55 of 1998 (EEA)), because it related to racial discrimination in the workplace. The magistrate found that the matter complained of constituted 'hate speech' and, as such, was not covered by the EEA, with the result that the equality court had jurisdiction to hear the matter. On appeal:

Held that the magistrate was correct in finding that the utterance constituted 'hate speech' as defined in s 10 of the PEPUDA. (Paragraph [14] at 251 I-J.)

Held, further, that the utterance complained of was racially discriminatory in terms of s 6 of the EEA and therefore the respondent could have instituted action against the appellant in the labour court. (Paragraph [14] at 252B.)

Held, further, however, that racially discriminatory conduct was more serious than 'hate speech', 'hate speech' being one of the elements of racially discriminatory conduct. (Paragraph [16] at 252E-F.)

Held, further, that where the conduct complained of constituted the more serious of two or more complaints, and that conduct fell within the ambit of s 6 of the EEA, the correct forum to deal with the matter was the labour court. It followed then that the magistrate was wrong to hold that the equality court had jurisdiction. (Paragraph [17] at 252H-I.)

Held, further, that, in any event, in terms of s 49 of the EEA, the magistrate ought to have referred the matter to the labour court as it had exclusive jurisdiction to decide the question of jurisdiction. (Paragraph [17] at 252I-253B.)

Held, accordingly, that the appeal succeeded, the magistrate's decision that the equality court had jurisdiction was set aside and the matter was referred back to the magistrate so that it could be referred to the labour court. (Paragraph [17] at 253C-D.)

2. S v PETERSEN 2008(2) SACR 355 CPD

"Although "exceptional circumstances" in a bail application cannot be defined the context of the circumstances and the particular circumstances of each case is important as well as the constitutionally protected interests of minor children."

From the provisions of s 60(11) (a) of the Criminal Procedure Act 51 of 1977 it is clear that in an application for bail the onus is on the accused to adduce evidence, and hence to prove, to the satisfaction of the court the existence of exceptional circumstances of such a nature as to permit his or her release on bail. The court must also be satisfied that the release of the accused is in the interests of justice. (Paragraph [54] at 370g-i.)

On the meaning and interpretation of 'exceptional circumstances' in the context of s 60(11) (a) there have been wide-ranging opinions, from which it appears that it may be unwise to attempt a definition of this concept. Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different. There are, of course, varying degrees of exceptionality, unusualness, extraordinariness, remarkableness, peculiarity or difference. This depends on their context and on the particular circumstances of the case under consideration. In the context of s 60(11) (a) the exceptionality of the circumstances must be such as to persuade a court that it would be in the interests of justice to order the release of the accused person. This may, of course, mean different things to different people, so that allowance should be made for a certain measure of flexibility in the judicial approach to the question. In essence the court will be exercising a value judgment in accordance with all the relevant facts and circumstances, and with reference to all the applicable legal criteria. (Paragraphs [55]-[56] at 371c.)

When, in a second or subsequent application for bail, the accused relies on new facts which have come to the fore since the first, or previous, bail application, the court must be satisfied, first, that such facts are indeed new and, secondly, that they are relevant for purposes of the new bail application. They must not constitute simply a reshuffling of old evidence or an embroidering upon it. The purpose of adducing new facts is not to address problems encountered in the previous application or to fill gaps in the previously presented evidence. Where evidence was available to the applicant at the time of the previous application but for whatever reason, was not revealed, it cannot be relied on in the later application as new evidence. If the evidence is adjudged to be new and relevant, then it must be considered in conjunction with all the facts placed before the court in previous applications, and not separately. (Paragraphs [57] and [58] at 371e-f and 371g-h.)

When, in an application for bail, the exceptional circumstances relied on by the accused include the constitutionally protected interests of a minor child, the court must, in terms of s 28(1) (b) of the Constitution of the Republic of South Africa, 1996, take cognisance of the child's right 'to family care or parental care, or to appropriate alternative care when removed from the family environment'. Inasmuch as a decision in regard to an accused's bail application and subsequent appeal (if the

application is refused) will, of necessity, impact upon a child of the accused, it may not be lost from sight that the child's best interests are, in terms of s 28(2) of the Constitution, paramount. This does not, of course, mean that such interests will simply override all other legitimate interests, such as the interests of justice or the public interest. It must, however, always be taken into consideration as a relevant factor and a general guideline in assessing such competing rights. (Paragraph [63] at 372i-373a.)

3. S v MGABHI 2008(2) SACR 377 (D+CLD)

An order i.t.o. section 300 Act 51/1977 can only be made against an accused and can also not be used as an alternative to a sentence of imprisonment.

The accused was convicted of driving a motor vehicle without a driver's licence and of negligent driving, charges that arose out of an incident in which a minibus driven by the accused collided with a certain N, who was seriously injured as a result. At the hearing on sentence, N's husband indicated that he would like to apply for compensation in terms of s 300 of the Criminal Procedure Act 51 of 1977; their medical-aid scheme had paid out only R30 000 of their total medical expenses of R60 821. The accused was a scholar, and without resources. However, his father, the owner of the minibus, indicated that he was prepared to assist with the payment of a fine. The magistrate ultimately imposed a fine of R2 000 or six months' imprisonment, plus a further three years' imprisonment suspended on condition that the accused compensate the complainant in an amount of R30 000, at the rate of R1 000 per month.

Held, that while it was indeed sensible to impose a suspended sentence in order to act as a deterrent to the accused, the period of three years' imprisonment seemed disproportionate; it should be replaced by one year's imprisonment. (Paragraph [6] at 380g.)

Held, further, that a difficulty arose with the fact that the magistrate had made the suspension subject to the accused's paying compensation to the complainant. Firstly, it was plain on the evidence before the magistrate that the accused was in no position to pay such compensation. In order to overcome this difficulty the magistrate had provided that the accused's father was to pay the compensation. However, the magistrate had had no power to make such an order. The provisions of s 300, and especially ss (2) and (4) thereof, made it clear that the only person against whom an award of compensation could be made was an accused. This was in accordance with principle: in any criminal case the magistrate had jurisdiction only over the accused before court, and there was no basis for exercising jurisdiction over any other person. The fact that the accused's father had indicated a willingness to assist his son by way of compensating N was neither here nor there. (Paragraphs [7]-[10] at 380h-381f.)

Held, further, regarding the order against the accused, that it was impermissible to make an award of compensation subject, in the alternative, to a sentence of imprisonment. This was precisely what the magistrate had done, in substance if not in form, in regard to the suspended sentence. He was not entitled to do so.

(Paragraph [13] at 382d-e.)

Held, further, that this was not an appropriate case in which to make a compensatory award. N had suffered personal injuries and, in terms of s 17(1) of the Road Accident Fund Act 56 of 1996, the Road Accident Fund was obliged to compensate N for her loss and damages. Furthermore, in terms of s 21 of this Act, N was not entitled to claim compensation in respect of loss or damage from either the accused or his father, as driver and owner of the vehicle, respectively. It would be wrong in principle for s 300 of the Criminal Procedure Act to be used to circumvent this restriction and to impose upon either the accused or his father a liability that the law applicable to personal injuries explicitly excluded. Even were it wrong to conclude that the liability of the accused and his father was excluded by law, it was desirable that such liability be determined in ordinary civil proceedings, and not be pre-empted by a compensatory order. (Paragraphs [14]-[16] at 382f-383a.)

Compensatory award set aside. Period of suspended imprisonment reduced to one year and certain conditions added.

4. S. v. BAGADI 2008(2) SACR 400 TPD

An enquiry in terms of section 103(1) and (2) of the Firearms Control Act 60 of 2000 was not necessary where an accused was convicted of c/s 65(5)(a) of the National Road Traffic Act 93 of 1996.

The accused was convicted of contravening s 65(5) (a) of the National Road Traffic Act 93 of 1996, in that he had driven a motor vehicle while the concentration of alcohol in his breath exceeded the legally prescribed minimum. He was sentenced to a fine of R6 000 or 18 months' imprisonment, suspended for five years on condition that he was not convicted of contravening s 65(1), (2) or (5) of the Act during the period of suspension. In addition, the trial court conducted an enquiry in terms of s 103(1) and (2) of the Firearms Control Act 60 of 2000, following which the accused was not declared unfit to possess a firearm.

Held, on automatic review, that in convictions for this offence an enquiry in terms of the Firearms Control Act was not necessary. Even though the accused had not been prejudiced – since no adverse finding had been made against him – the enquiry was irregular. (Paragraph [9] at 402f-g.)

5. S v. HENGUA 2008(2) SACR 404 (NmHc)

If a person takes the property of another as security for a debt it does not constitute the crime of theft.

The accused had taken a machine from the complainant because the complainant did not want to return his money. In setting aside a conviction and sentence the court referred to S v Van Coller 1970(1) SA417 (A), where the appellant's conviction of theft was set aside. The appellant, a medical doctor, had removed medical equipment from Botswana to South West Africa, in order to exert pressure on an

official of the Botswana Government to withdraw criminal charges against him – something which was undertaken by the official, but which was not done as undertaken. The Appellate Division, Jansen JA writing the judgment, held, after a thorough consideration of relevant cases, that, where someone takes the property of another, for purposes of keeping it as security for payment, this does not constitute the crime of theft as the accused continues to acknowledge the ownership of the person from whom the article was removed. Jansen JA concluded at 426D:

"If the taking of another's property with the intent to hold it as a security, i.e. enforce a debt, does not amount to a taking with an intent 'to deprive the owner of the whole benefit of his ownership', there appears to be no reason in principle why the position should not be the same where the owner is held to ransom for purposes other than to enforce a debt."

From The Legal Journals

NAUDE, B

"The inclusion of inevitably, discoverable evidence."

2008 *SACJ* 168

DU PLESSIS, A.

"Therapeutic Jurisprudence: An assessment of its Possible Application to Cases of Domestic Violence in Magistrates Courts"

2007 *STELL LR* 91

SKELTON, A.

"Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa"

2007 *ACTA Juridica* 228

HOCTOR, S.

"The singular statutory housebreaking crime"

2008 *OBITER* 93

HOCTOR, S.

"Double inchoate crimes: serving a useful purpose or double trouble?"

2008 *OBITER* 124

BEKINK, M.

"The maintenance obligation of grandparents towards children born in and out of wedlock: comments on the case of *Petersen v The Maintenance Officer, Simons Town Maintenance Court*"

2008 *DE JURE* 145

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

Contributions from Peers

ASPECTS OF PROOF OF THE CRIME OF HOUSEBREAKING WITH INTENT

Difficulties of proof are inherent in the crime of housebreaking, particularly with regard to proof of the intention of the accused to commit some crime. This is evident in the legislative intervention in 1917 (see ss 132(11) and 236 of Act 31 of 1917, now ss 95(12) and 262 of the Criminal Procedure Act 51 of 1977), establishing the statutory substructure for the crime of 'housebreaking with the intent to commit a crime to the prosecutor unknown'. There are indications that the courts were aware of the need to lighten the heavy prosecutorial burden of proof beyond reasonable doubt prior to 1917 and in some decisions it was held that a presumption of intent to steal existed where an accused unlawfully broke into a house without an excuse (e.g. *Ganga* (1898) 12 EDC 214; *Cumoya* 1905 TS 402 at 405 per Innes CJ, who added that 'if there are special circumstances which would tend to show that he meant to commit some other offence, such as assault or rape, it is competent to charge him in the alternative'). No such presumption remains in South African law today, although the courts employ the standard inferential reasoning test, that is, a process of drawing inferences from the circumstances of the case, in a specified manner to facilitate other difficulties of proof, particularly where the housebreaking is associated with theft.

Where, for instance, there is a breaking into, and stealing from within, premises then evidence which is probative of the theft of the goods will often be regarded as also being probative of the housebreaking (Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) 816; *Gentleman* 1919 CPD 245 at 247: 'if being in possession of the stolen property is evidence of theft, it must also be regarded as evidence showing that he is the person who broke into the house with intent to steal'; *Sumani* 1960 (2) SA 330 (SR) at 332-5, where the court discusses the extent to which the principle laid down in *Gentleman* has been followed in the Cape, other provinces and in the Appellate Division). In particular (as Milton notes at 816), accused have often been convicted of housebreaking with intent to steal and theft when the only evidence was that of the breaking, the theft, the fact that the accused was found in possession some days after the property was stolen (which establishes a *prima facie* case of housebreaking with intent (*Van Vuuren* 1959 (2) SA 46 (O), *Fariranyi* 1939 (1) PH H108 (SR)), and that in the face of such evidence that the goods were stolen he gave no explanation or an unsatisfactory explanation of his possession (*McCallum* (1907) EDC 104 at 105).

Before the accused has to give a satisfactory explanation as to how he came into possession of the articles alleged to have been stolen, it is incumbent on the State to prove that the articles were stolen (see *De Vries* 1942 (2) PH H125 (C), where the particular problem was that the stolen articles were pieces of fish, and that the complainant was unable to identify the fish in the accused's possession as his property). Where there is no explanation on the part of the accused, the court would be entitled to conclude that he was guilty of housebreaking with intent to steal and theft (*Machipisa and Zanga* 1940 (1) PH H73 (SR)) and may decide that this was the only reasonable deduction which could be drawn from the proved facts (*Van Vuuren* 1959 (2) SA 46 (O); see also *Kalkiwich and Kruger* 1942 AD 79 at 84; *Sumani supra* at 333; *Samson* 1969 (4) SA 158 (RA) at 159; *Mofokeng* 1998 (1) SACR 57 (O)). If the accused's explanation of his possession has been rejected as untrue, the court may treat the case as tantamount to one where no explanation has been given at all (*Screech* 1967 (2) SA 407 (E)); where an accused was charged with four counts of housebreaking with intent to steal and theft, and his explanations on three of the counts were shown to be false, the court held that the fourth explanation, though not proven false, could not be accepted (*Malete* 1944 WLD 193).

Both the time period between the housebreaking and the finding in possession, and the accused's explanation of possession, are critical factors (*Sumani supra* at 331 and 334-5) In this regard, the 'doctrine' of recent possession may be held to have application. In terms of this 'doctrine', the court may infer that the accused stole the goods which were found in his possession if the following three requirements are satisfied: (i) that the goods were stolen; (ii) that the goods were recently stolen; and (iii) that the accused has failed to give an innocent explanation (for further discussion of these requirements, see Milton at 637-638). It may be noted that in fact the 'doctrine' is misnamed, as it has nothing to do with goods recently possessed but concerns the possession or handling of recently stolen goods; and that it is furthermore not even a doctrine, as it merely involves the application of the ordinary rules of circumstantial evidence (Card *Card, Cross and Jones Criminal Law* 15ed (2001) 389). It was recently held in *Tandimali* 1998 (1) SACR 119 (C) that although the doctrine of recent possession applied in respect of the crime of theft, it did not apply with regard to the crime of housebreaking with intent to commit any offence (at 121c). However, in *Jantjies* 1999 (1) SACR 32 (C), it was held that the 'doctrine' of recent possession is not applicable only with reference to the offence of theft. On the contrary, the Court (per Van Zyl J) held that the inference from an accused's possession of another's property may usefully be applied to prove the commission of other offences, such as housebreaking or malicious injury to property (this is also the view of Milton at 637n510, and in the context of English law, Smith and Hogan (Smith *Smith & Hogan Criminal Law* 8ed (1996) 662)).

Furthermore, where the accused, though not found in possession, points out recently stolen goods, and where the accused fails to give a satisfactory explanation, it may be held that he was a party not only to the theft of those goods but also to the housebreaking by which the goods were stolen (*Kanyile* 1968 (1) SA 201 (N)).

As far as proof of intent is concerned, the best evidence of intent as charged is that the accused actually committed the crime which it is alleged he intended (Milton at 816, citing Gardiner & Lansdown). The accused's intent may also be inferred from the circumstances:

> 'Generally speaking, if a stranger enters premises and commits an offence therein, the inference that he entered to commit that offence may be almost irresistible. But the inference is not nearly so strong when the person concerned is one who may have legitimate reasons for being in the premises' (*Andries* 1958 (2) SA 669 (E) at 670).

Thus where an accused is proved to have broken into an uninhabited storeroom in which he had no legitimate interest, it will usually be inferred that he intended to steal (Milton's example, at 816). This will not be the case where the accused gives an explanation which might reasonably be true or 'if the attendant circumstances indicate the reasonable possibility of an innocent intent' (*Mloso; Cronje* 1953 (4) SA 135 (T) at 139).

(Prof) Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg

If you have a contribution which may be of interest to other Magistrates could you forward it via email to RLaue@justice.gov.za or gvanrooyen@justice.gov.za or by fax to 031 3681366 for inclusion in future newsletters.

Matters of Interest to Magistrates

RESUCITATION OF ADVISORY BOARDS FOR THE SMALL CLAIMS COURT: COMMENT

Introduction
The Director-General DOJ&CD directed a request to the Regional Court President: Northern Cape requesting his intervention in encouraging the "Chief/Magistrates to participate and accept appointments as chairpersons or vice-chairpersons of the Advisory Boards and further engage in the Small Claims Courts activities and processes." He indicated that an audit had shown that among other causes for the non-functioning of the Small Claims Court was the absence of the Advisory Board; that the current prevailing status is that most Boards do not have Magistrates as members, hence the non-compliance which led to the collapse of these Boards and noting that the rate of success where Magistrates form part of the Advisory Boards is higher. It is then recommended that every Advisory Board should include:

- A Magistrate to be appointed as Chairperson
- Court Manager
- Attorney and community members as additional members of the Board.

Comment

[1] **EXTRACT FROM THE MINUTES OF THE MEETING OF THE MAGISTRATES COMMISSION HELD ON 31 AUGUST 1998**

Appointment of magistrates by law as chairmen or members of statutory boards and committees

Besluit: Die Kommissie is van mening dat landdroste nie by wetgewing verplig moet word om ampshalwe as voorsitters of lede van statutêre liggame op te tree nie. Waar landdroste op sodanige liggame wil dien of waar dit geregverdig is weens plaaslike omstandighede, behoort die Kommissie vooraf genader te word, aangesien die bepalings van artikels 14 en 15 van die Wet op Landdroste, 1993 (Wet 90 van 1993) ter sprake kan kom.
(The Commission is of the view that magistrates should not be compelled by law, and by virtue of their office, to act as chairpersons or members of statutory bodies. Where magistrates want to serve on such bodies or where it is justified by local circumstances the Commission should be approached beforehand, since the provisions of section 14 and 15 of the Magistrates Act, 1993 (Act 90 of 1993) may come into play – (own translation)).

[2] It is against the background of this resolution that the relevant provisions of Act 90 of 1993 and Rule 2 of the Small Claims Court Act, 1964 (Act 61 of 1984) will be discussed.

In *Van Rooyen and Others v S and Others* 2002 (8) BCLR 610 (CC) at [228] to [234] the constitutionality of sections 14 (1) and 14 (2) of Act 90 of 1993 in the context of the process of securing the institutional independence at all levels of the court system fell for consideration. At [75] the Court stated that in deciding whether the provisions of Act 90 of 1993 were inconsistent with the Constitution and, therefore invalid, it must be kept in mind that judicial independence is an evolving concept and that it is relevant to have regard to the legal and constitutional history of magistrates' courts and higher courts in South Africa in order to determine whether magistrates' courts as presently constituted have institutional independence. The Court (at [114] to [117]) classified the Magistrates Act as "old order legislation" and concluded that it remains in force in terms of the Constitution, unless it is repealed or amended by a competent authority or inconsistent with the Constitution. The Court categorically asserted that magistrates' courts do have institutional judicial independence (at [86]).

Section 14 (as it was at the time of the judgment) provided:

"(1) A magistrate shall possess the powers and perform the duties conferred on or assigned to him or her by or under the laws of the Republic or, in any specific case, by the Minister after consultation with the Commission.

[Editorial Note: The words "or, in any specific case, by the Minister after consultation with the Commission" in s. 14 (1) have been declared inconsistent with the Constitution and invalid as set out in the Constitutional Court Order published under Government Notice No. R.841 in Government Gazette 23535 of 28 June, 2002.]

(2) The Minister may, after consultation with the Commission, make regulations conferring on or assigning to magistrates administrative powers and duties which do not affect the judicial independence of magistrates, including regulations empowering the Minister, after consultation with the Commission, to confer or assign administrative powers and duties of a general nature on or to magistrates.

[3] In finding that section 14 (1) was (partly) inconsistent with the Constitution and invalid the Court held that magistrates can have only those powers vested in them by law, and that it is not consistent with institutional independence to permit the Minister to assign judicial powers to magistrates in addition to those that are ordinarily vested in them (at [230]).

[4] Regarding section 14 (2) the Court (at [231] to [234]) found that ideally, magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers. To require them to do so may make them answerable to the executive, and if that happens, the separation of powers that should exist between the executive and the judiciary would be blurred. The Court drew attention to the difficulties confronting government in attempting to carry out its constitutional mandate to transform our society and that there may be a reason why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, and is not *at present* inconsistent with the evolving process of securing institutional independence at all levels of the court system (my emphasis). Whether administrative duties unrelated to their judicial functions can properly be assigned to magistrates was a question the Court expressly refrained from dealing with. In deciding not to declare section 14 (2) unconstitutional the Court found that the power of the Minister to make regulations may only be exercised after consultation with the Magistrates Commission and is subject to the qualification that the functions assigned should "not affect the judicial independence of magistrates" and that if regulations are made that are inconsistent with judicial independence they will be invalid. Constitutional control over such regulations provides adequate protection against any possible abuse of the power to assign administrative functions and duties to magistrates in terms of section 14 (2), the Court concluded.

[5] Section 25 (1) (d) of the Small Claims Court Act provides:

*"**25. Power of Minister to make rules.**—(1) The Minister may make rules regulating the following matters in respect of small claims courts:*

(a)…;

(b)…;

(c)…;

(d) the establishment, duties and powers of one or more boards to advise the Minister on the functioning of courts;

(e)…"

[6] Rule 2 of the Small Claims Court Rules provides:

"***Advisory Board.****—(1) (a) The Minister may establish a board as contemplated in section 25 (1) (d) of the Act for a district or area and may appoint as many members to such board as he deems fit.*

(aA) A member of such a board shall hold office during the Minister's pleasure.

(b) The Minister shall appoint the chairman and vice-chairman of the said board.

(c) If the chairman and vice-chairman are not available, a chairman shall be appointed by the members present.

(2) The Minister may at any time dissolve the board.

(3) The board may advise the Minister in regard to—

(a)

the appointment of suitable persons as commissioners, in the case of an attorney, after consultation with the president of the law society of which the attorney is a member and, in the case of an advocate, after consultation with the chairman of the bar council for the division of the Supreme Court of South Africa where the advocate practises;

(b)

the recruitment and utilisation of persons as commissioners, clerks, assistant clerks, interpreters, legal assistants and such other persons as may be necessary;

(c)

suitable court and office accommodation;

(d)

the times for the holding of court; and

(e)

any other matter which may be necessary for the proper functioning of the court."

[7] A comparative analysis of the provisions of the Small Claims Court Act with the principles emanating from the *Van Rooyen* judgment as outlined above reveals the

following distinguishing features:

1. The Small Claims Court Act does not expressly vest the Minister with the power to appoint magistrates as members of the Board or to impose or confer administrative functions and duties upon magistrates. Only when they are appointed to the Board as members do they indirectly become subject to the duties and functions imposed by the Minister.
2. The Minister is not required to consult with the Magistrates Commission concerning the appointment of magistrates as members of the Board.
3. The magistrates appointed as members of the Board would hold office during the Minister's pleasure. Moreover, the Minister may at any time dissolve the Board. Such an arrangement may make them answerable to the executive, and if that happens, the separation of powers that should exist between the executive and the judiciary would be blurred.
4. Even though the functions of the members of the Board are of an administrative nature, and not judicial, those functions are limited only to advising the Minister on specified matters. They do not involve the taking of an administrative decision or the exercising of a discretion in the execution of a judicial or an administrative function. Ideally, magistrates should not be required to perform administrative duties unrelated to their functions as judicial officers. The duties imposed by the Rules are unrelated to their judicial functions. Whether these can properly be assigned to magistrates has not been addressed authoritatively. In *The City of Cape Town v The Premier of the Western Cape and others* (unreported High Court judgment in Case No. 5933/08 dated 1st September 2008) the Court stated in passing: *"[184] With great respect to the views of the Constitutional Court, that judges may in "appropriate circumstances" preside over commissions of inquiry without infringing the separation of powers, the problem lies in deciding in any particular case whether it is "appropriate" for a judge to involve him or her self, in the particular commission. The facts of the present case starkly illustrate the problem. As will become apparent in this judgment the City and the DA contend that the appointment of Erasmus J contravenes the guidelines laid down by the Constitutional Court in Heath's case supra, namely, there is a risk of judicial entanglement in matters of political controversy, the judge will be involved in the process of law enforcement and the function to be performed is more appropriate to another branch of government. This however is hotly disputed by the Premier. [186] The Constitutional Court has emphasized in Heath's case supra, the vital role to be played by a judiciary which is independent and seen to be so, in ensuring that the limits placed upon the exercise of public power by the executive are not transgressed. The Constitutional Court has also stated that it is undesirable at this stage of our jurisprudence concerning the separation of powers to lay down rigid tests for determining whether the performance of a particular function by a judge is, or is not incompatible with the judicial office. [187] With great respect to the views of the Constitutional Court, it seems to me that at this early stage of our fledgling democracy, and with the vital object of preserving public confidence in the independence of the judiciary, active judges should as a matter of principle, not chair commissions of inquiry. This would eliminate the risk of judges becoming*

embroiled in disputes such as the present and the need to define in what circumstances a judge could "appropriately" chair a commission of inquiry." Professor Denise Meyerson in P Andrews and S Bazilli (eds), *Law and Rights: Global Perspectives on Constitutionalism and Governance* (Vandeplas Publishing, Florida, 2008) echoes the High Court's approach where she argues that "*Courts should not attempt to determine whether a particular non-judicial function is incompatible with the purposes of the separation of judicial power. Instead they should follow a strict rule that judges should be confined to judicial functions, because the best strategy for promoting judicial independence and impartiality in this context is the indirect one of rigid rule-following.*" Such an approach, with respect, would be more preferable in determining whether administrative duties unrelated to their judicial functions can properly be assigned to magistrates in terms of the Small Claims Courts Act than resorting to a case by case assessment of compatibility.

5. The Small Claims Courts function generally at a relatively low key level, after court hours and they use the established court facilities. The demand for Advisory Board meetings is, therefore, not frequent. The main contributor to success is not so much the mere presence of magistrates on the Board as is the extent to which its needs for support are met. The presence of Court Managers on the Board, therefore, could enhance success.
6. The appointment of magistrates to the Board and their consequent obligation to perform the administrative functions is not subject to the qualification that the functions assigned should "not affect the judicial independence of magistrates." There is thus no provision for constitutional control over the assignment of such functions which would provide adequate protection of that judicial independence against any possible abuse of power.
7. Section 9 of the Small Claims Court Act provides for extensive powers, including delegated powers to specified departmental officials and magistrates, concerning the appointment of Commissioners, which are separate from and in no way dependent upon any prior advice from the Board concerning the suitability of Commissioners for appointment. The need for the establishment of Boards (involving magistrates) seems, therefore, overstated.
8. The Small Claims Court Act and its Rules are "old order legislation" and in this regard it must be kept in mind that judicial independence is an evolving concept and that it is relevant to have regard to the legal and constitutional history of magistrates' courts. At the time that these provisions were enacted magistrates were officials of the Department of Justice and subject to the Minister's authority.
9. Despite the difficulties confronting government in attempting to carry out its constitutional mandate to transform our society and that there may be a reason why existing legislation that makes provision for administrative functions and duties to be performed by magistrates is necessary, it has not been shown conclusively that it is *necessary* that magistrates should be members of the Board or that it is *necessary* that they should perform these administrative functions. The processes that have been followed and the thinking that has developed since the *Van Rooyen* judgment incline towards the conclusion that it is *at present* inconsistent with the evolving process of securing institutional independence at all levels of the court system for

magistrates to be required to be members of the Board.

Conclusion

The general caution expressed by the Magistrates Commission in 1998, with respect, is at present even more compelling and I accordingly propose that the Magistrate's Forum should consider referring the matter to the Magistrates Commission for its recommendation or advice to the Minister of Justice and Constitutional Development.

R E Laue
Senior Magistrate
Durban

A Last Thought

"Corruption… is to be found in luxury, dependence, and ignorance. Luxury is that pursuit of material things that diverts us from concern for the public good, that leads up to exclusive concern for our own good, or what we would today call consumerism. Dependence naturally follows from luxury, for it consists in accepting the dominance of whatever person or group, or, we might say today, governmental or private corporate structure, that promises it will take care of our material desires… And finally ignorance, that is, political ignorance, is the result of luxury and dependence. It is a lack of interest in public things, a concern only for the private, a willingness to be governed by those who promise to take care of us even without our knowledgeable consent."

ROBERT N, BELLAH (1980)