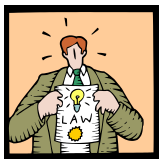
e-MANTSHI

A KZNJETCOM Newsletter

March 2015: Issue 107

Welcome to the hundredth and seventh 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 *National Credit Amendment Act (19/2014*) came into operation on the 13th of March 2015 .The proclamation to this effect was published in Government Gazette no 38557 dated 13 March 2015. In the same Government Gazette new regulations including affordability assessment regulations were published. Some of the amended sections that are of relevance to magistrates are the following:

24. Amendment of section 82 of Act 34 of 2005.—Section 82 of the principal Act is hereby amended—
(*a*) by the substitution for subsections (1) and (2) of the following subsections, respectively:
"(1) A credit provider may determine for itself the evaluative mechanisms or models and procedures to be used in meeting its assessment obligations under section 81, provided that any such mechanism, model or procedure results in a fair and objective assessment and must not be inconsistent with the affordability assessment regulations made by the Minister.
(2) The Minister must, on recommendation of the National Credit Regulator, make affordability assessment regulations."; and

(*b*) by the deletion of subsections (3) and (4).

"Application of prescription on debt

126B. (1) (*a*) No person may sell a debt under a credit agreement to which this Act applies and that has been extinguished by prescription under the Prescription Act, 1969 (Act No. 68 of 1969).

(*b*) No person may continue the collection of, or re-activate a debt under a credit agreement to which this Act applies—

(i) which debt has been extinguished by prescription under the Prescription Act, 1969 (Act No. 68 of 1969); and

(ii) where the consumer raises the defence of prescription, or would reasonably have raised the defence of prescription had the consumer been aware of such a defence, in response to a demand, whether as part of legal proceedings or otherwise."

32. Amendment of section 129 of Act 34 of 2005.—Section 129 of the principal Act is hereby amended—

(*a*) by the substitution for subsection (3) of the following subsection:

"(3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.".

(*b*) by the substitution in subsection (4) for the words preceding paragraph (*a*) of the following word:

"A credit provider may not re-instate or revive a credit agreement after—"; and

(*c*) by the addition of the following subsections:

"(5) The notice contemplated in subsection (1) (*a*) must be delivered to the consumer—

(*a*) by registered mail; or

(*b*) to an adult person at the location designated by the consumer.

(6) The consumer must in writing indicate the preferred manner of delivery contemplated in subsection (5).

(7) Proof of delivery contemplated in subsection (5) is satisfied by—

(*a*) written confirmation by the postal service or its authorised agent, of delivery to the relevant post office or postal agency; or

(*b*) the signature or identifying mark of the recipient contemplated

Recent Court Cases

1. S v MAAROHANYE AND ANOTHER 2015 (1) SACR 337 (GJ)

The determination of dolus eventualis is in essence a subjective value judgment that is reliant on inferential reasoning, and based on what the person thinks, not on what s/he should have foreseen.

The appellants caused a motor vehicle accident in which four pedestrians were killed and two maimed. The trial court found that his happened when the appellants lost control of their cars while racing each other on a public road in a built-up area, and while they were under the influence of drugs which 'induced . . . a euphoric state of mind . . . causing them to take risks that they would otherwise not have taken and [to assume] that other road users would give . . . way or that they would be able to avoid colliding with oncoming traffic and other road users'. Based on these findings the trial court convicted the appellants of murder based on intention in the form of dolus eventualis, for '(r)ecklessly disregarding the rules of the road, subjectively foreseeing that they might cause the death or injuries to [pedestrians] and still [persisting] in their conduct despite such foresight'. On appeal to a full bench of the high court —

Held: The determination of dolus eventualis was in essence a subjective value judgment that was reliant on inferential reasoning, and based on what the person thought, not on what he should have foreseen. Once the trial court made its finding about the effect of drugs on the faculties of the appellants — i.e. that the drugs induced a sense of euphoria which led them to believe that they would not cause any collision and that other road users would give way to them — dolus in any form, especially dolus eventualis, was eliminated from the equation. In this context there could be no suggestion that the appellants foresaw that their escapade could result in death and serious injury to pedestrians and had reconciled themselves to that eventuality. Their mental make-up must therefore have been the opposite of causing death or injury. Rather, their disposition was that no collision, let alone a life-threatening one, would take place. There having been no foresight of the possibility of a collision resulting in death or serious injury, coupled with a reconciliation to that eventuality and a persistence in their course, despite that reconciliation, there could be no dolus eventualis. Both conditions required for dolus eventualis were clearly absent. This was the conclusion that should have been arrived at by the trial court and the result was that the murder and attempted-murder convictions could not stand. (Paragraphs [16] at 344*b* and [24] at 348*c*.)

2. S v WANA AND OTHERS 2015 (1) SACR 374 (ECP)

The greater the involvement and the more advanced the execution of the criminal enterprise (where common purpose has been established), the more clearly an accused person who relies on dissociation has to establish a basis for a finding of dissociation.

The seven accused were charged with 17 offences, including robbery with aggravating circumstances and the unlawful possession of firearms and ammunition, as well as murder and attempted murder. The charges arose from an incident in which an armoured security vehicle carrying liquid platinum was intercepted by a group of armed men. During the incident shots were fired at the driver and passenger of the armoured vehicle, as well as at a group of policemen who had been placed on the scene in anticipation of the robbery. At the end of the exchange of gunfire, six persons were dead at the scene of the robbery. Accused 4 raised the defence that he had dissociated himself from the planned commission of the offences and had withdrawn from participation in the conspiracy. He had, however, played a significant role in devising the plan to commit robbery and functioned as the key link in securing buyers for the platinum. He contended that it was the discussion amongst the co-conspirators about the use of explosives that had sparked his decision to withdraw.

Held, that the greater the involvement and the more advanced the execution of the criminal enterprise, the more clearly an accused person who relied on dissociation had to establish a basis for a finding of dissociation. This was not to say that such an accused attracted an onus but rather suggested that the accused had to establish the performance of some positive act of withdrawal or dissociation. It was necessary to establish that the accused had a clear and unambiguous intention to withdraw from the criminal enterprise. (Paragraph [202] at 378*b*.)

Held, further, that accused 4's explanation for what had prompted his alleged withdrawal was not supported by the facts and appeared to be a self-serving explanation seized upon by him. The accused's conduct did not, in the circumstances of the case, establish that he manifested an unequivocal intention to dissociate himself from the commission of the offences or that his positive act was sufficient to establish dissociation from the commission of the crimes he had conspired to commit with his co-conspirators. Accordingly his liability for the commission of the offences was to be determined on the basis of the existence of a prior agreement to commit the offences and the existence of a continuing common purpose to carry into effect the criminal enterprise which was the subject of the conspiracy. (Paragraphs [211] – [212] at 380*b*–*c*.)

Held, further, that the prior agreement consisted of an agreement to commit robbery. Accused 4 knew that the perpetrators would be armed. He knew that the robbery was to take place in broad daylight and in a public place and that two of the perpetrators would be armed. He knew too that the passenger in the security vehicle

was not a participant in the criminal conspiracy. He must have foreseen that there was a possibility that violence might be used to overcome any resistance that might be encountered and that in the execution of the criminal enterprise persons might be injured or even killed. In the circumstances he was liable as a co-perpetrator for the commission of the offences. (Paragraph [213] at 380*d*.)

3. WOJI v MINISTER OF POLICE 2015 (1) SACR 409 (SCA)

The Constitution imposes a duty on the state and all of its organs not to perform any act that infringes the entrenched rights of an accused person's right to freedom at a bail application.

The appellant was arrested by a member of the South African Police Services and appeared in court on the following day, when the case was adjourned for a period of two weeks, and then for a further five days, to allow the appellant to obtain legal representation and apply for bail. At the bail hearing the appellant bore the onus of establishing that exceptional circumstances existed permitting his release on bail, the offence with which he was charged, namely robbery with aggravating circumstances, being a schedule 6 offence in terms of s 60(11)*(a)* of the CPA. The only evidence at the bail hearing linking the appellant (and the other three accused) was video footage which had been viewed by one Inspector Kuhn who told the court that the appellant was clearly depicted on the video. Relying on this evidence, the magistrate refused bail. The appellant was held in detention for a further month until the prosecutor viewed the footage and then withdrew the charge, having decided that the appellant could not be identified as one of the bank robbers. The appellant instituted action for damages for wrongful arrest and detention and contended that the magistrate, in refusing to grant bail, had acted upon the information supplied by Inspector Kuhn who owed him a duty to properly investigate the crime and bring to the attention, of the prosecutor and the magistrate at the bail hearing, information which was relevant to the exercise by the magistrate of his discretion. The high court dismissed the claim on the basis that, after the appellant's first appearance in court, the decision that he should remain in custody pending the trial was that of the magistrate.

Held, that the Constitution imposed a duty on the state and all of its organs not to perform any act that infringed the entrenched rights, such as the right to life, human dignity and freedom and security of the person. Inspector Kuhn had a public law duty not to violate the appellant's right to freedom, either by not opposing the application for bail, or by placing all relevant and readily available facts before the magistrate. A breach of this public law duty gave rise to a private law breach of the appellant's right not to be unlawfully detained, which could be compensated by an award of damages. (Paragraph [28] at 418*b*–*d*.)

Held, further, that, as the appellant was not clearly depicted on the video, Inspector Kuhn should not have opposed the application for bail or should at least have told the magistrate that, in the case of the appellant, he was not clearly depicted. He had failed in his duty in this regard. From the evidence led at the bail hearing, it was also clear that a reasonable policeman in the position of Inspector Kuhn would have foreseen the reasonable possibility that his evidence would lead to the refusal of the appellant's application for bail. Because the video was the only evidence ostensibly linking the appellant to the crime, the magistrate, more probably than not, would have released him on bail. It was also clear that Inspector Kuhn's wrongful conduct was sufficiently closely connected to the loss for liability to follow and the court a quo had therefore erred in dismissing the appellant's claim for unlawful detention. (Paragraphs [30]–[32] at 418*h*–419*e*.) Appeal upheld.

From The Legal Journals

Visser, J-M, Oosthuizen, H & Verschoor, T

"A critical investigation into prosecutorial discretion and responsibility in the presentation of expert evidence"

The South African Law Journal 2014 865

Boggenpoel, Z T

"Applying the *mandament van spolie* in the case of incorporeals: two recent examples from case law"

TSAR 2015:1

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

Contributions from the Law School

Sentencing considerations relating to a guilty plea

As with any discussion of sentencing considerations, it is necessary to start with a disclaimer: given the extent to which the sentencing process is discretionary in nature, and since courts tend to list aggravating and mitigating factors without giving an indication of their relative weight, any assessment of any one particular factor should be carefully and appropriately qualified, and accordingly contextualized.

Having delivered my disclaimer, I propose to briefly examine the guilty plea as a factor to be considered in the weighing up of criteria in determining an appropriate sentence. In South African practice, the question of whether a guilty plea could be regarded as having a mitigating effect has usually been linked to the question of remorse. Thus, the general point of departure in the courts is that the mere fact of a guilty plea will not avail the offender, unless the court finds that the offender is remorseful. Merely pleading guilty in itself has not been held to be indicative of remorse. The failure of the accused to testify as to his state of mind was deemed to be fatal to his argument that he was remorseful in *S v Martin* 1996 (2) SACR 378 (W), despite his counsel urging that his guilty plea was demonstrative of remorse. The court held that the accused, by not taking the step 'to say what is going on in his inner self' (at 383H-I) had not bridged the 'chasm between regret and remorse':

'[Regret] has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes repentance, an inner sorrow inspired by another's plight or by a feeling of guilt..' (at 383G-H)

Similar views were recently expressed in the Supreme Court of Appeal by Ponnan JA in *S v Matyiyi* 2011 (1) SACR 40 (SCA), where it was pointed out that regret does not translate to remorse, which is characterized by 'a gnawing pain of conscience' for the plight of another, and 'genuine contrition', that is, appreciating and acknowledging 'the extent of one's error' (at para [13]). The litmus test for distinguishing between mere regret and true remorse is set out as follows (ibid):

'Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or herself at being caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined.'

This approach mirrors the approach adopted by the same court in such cases as *S v Seegers* 1970 (2) SA 506 (A) at 511G-H; *S v Morris* 1972 (2) SA 617 (A) at 620G-H; and *S v Van der Westhuizen* 1995 (1) SACR 601 (A) at 605D.

Thus it seems clear that a guilty plea may be relevant in the inquiry into mitigating factors, in conjunction with other factors demonstrating the accused's state of mind. However a guilty plea per se, it seems, does not and cannot suffice for the purposes of mitigation, for the following reasons set out in *Matyiyi* (at para [13]):

'[B]efore a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.'

In the *Matyiyi* case, the accused's pleading guilty and his apology through counsel was therefore not given any weight. The court moreover approved of the approach that 'a plea of guilty in the face of an open and shut case against an accused person is a neutral factor' (ibid, referring to the statement by Marais JA in *S v Barnard* 2004 (1) SACR 191 (SCA) at 197, para [1]). As Professor Terblanche correctly points out, in practical terms, there may well be a focus on the guilty plea by defence counsel where aggravating factors proliferate (as in *Matyiyi*), and this may result in a court giving disproportionate attention to this factor, whilst inevitably concluding that such factor cannot outweigh the considerable aggravating factors.

Can we thus dogmatically conclude that a guilty plea is only mitigating when linked to real remorse? Perhaps not. The Sentencing Guideline released by the Sentencing Council for England and Wales in 2007 (http://sentencingcouncil.judiciary.gov.uk - for previous contributions to *e-Mantshi* discussing various Guidelines of the Sentencing Council, see issues 85, 89 and 94) entitled 'Reduction in Sentence for a Guilty Plea' makes provision for a reduction in sentence premised on a guilty plea, after the court has assessed the various aggravating and mitigating factors and decided on sentence. The level of reduction is a proportion of the total sentence imposed, assessed on a sliding scale

'ranging from a recommended one third (where the guilty plea was entered at the first reasonable opportunity in relation to the offence for which sentence is being imposed), reducing to a recommended one quarter (where a trial date has been set) and to a recommended one tenth (for a guilty plea entered at the 'door of the court' or after the trial has begun).' (Original emphasis, 5)

The 'first reasonable opportunity' may, inter alia, be the first time that an accused appears before the court and has the opportunity to plead guilty, although the court 'may consider that it would be reasonable to have expected an indication of willingness even earlier, perhaps under interview' (10).

The rationale for the operation of the reduction principle is instructive:

'A reduction in sentence is appropriate because a guilty plea avoids the need for a trial (thus enabling other cases to be disposed of more expeditiously), shortens the gap between charge and sentence, saves considerable cost, and in the case of an early plea, saves victims and witnesses from the concern about having to give evidence.' (4)

The Guideline makes it clear that the reduction principle, which operates separately from the inquiry into mitigation, 'derives from the need for the effective administration of justice' (ibid) rather than any assessment of the customary relevant factors determining punishment pertaining to the individual offender.

It is unclear to what extent this consideration is taken into account as a factor in reducing sentence in South African courts. The aforementioned paucity of principled discussion in sentencing judgments about mitigating and aggravating factors in sentencing makes such a judgment difficult. Interestingly enough, in the Supreme Court of Appeal case of *S v Samuels* 2011 (1) SACR 9 (SCA) it was held that the fact that the accused fully co-operated and *pleaded guilty at the first available opportunity* (my emphasis) amounted to a demonstration of his remorse, and thus was a 'weighty factor' serving to lessen the gravity of the offence (at para [15]). Despite the court once again reaffirming the link between remorse and a guilty plea in the context of mitigation in this particular case, there is arguably no reason why courts should not regard a guilty plea (along with further co-operation with the authorities) as founding a basis for mitigation, where the interests of the effective administration of justice are served, without employing the language and logic of remorse, which by definition requires the accused taking the court 'fully into his confidence' (*S v Seegers supra* at 511H). In this regard, it is argued (not for the first time) that the Guidelines emanating from the Sentencing Council are instructive, and worthy of closer consideration.

Shannon Hoctor
University of KwaZulu-Natal, Pietermaritzburg

Matters of Interest to Magistrates

IMPLEMENTATION OF JUSTICE CENTRE COURT RELIEF PROGRAMME

February 2015

1. Introduction

As part of our criminal court coverage programme, Legal Aid SA provides legal capacity to cover all criminal courts via our practitioner per court model in the lower courts and our court roll model in the high courts. A major challenge in our court coverage programme and one which has garnered a lot of criticism, especially in our coverage of the lower courts, is the absence of a relief component to substitute for any of our practitioners when they become unavailable for any reason. This has often led to courts being unable to function effectively whenever one of our practitioners are absent.

2. Funding for implementation of our JC Court Relief Programme

Whilst budget constraints were the primary reason why Legal Aid SA has not been able to implement a court relief programme thus far, limited funding has now been sourced which finally allows us to commence our implementation of a court relief programme. These funding sources include:

- An amount of R4.968million approved by Board in Feb 2014 for an increase in practitioner capacity for criminal court coverage from funds allocated to Legal Aid SA for the implementation of the Child Justice Act.

- Posts became available when contract backlog court positions were converted to permanent court positions at a ratio of 1.25 permanent positions per contract backlog position.

- The identification of surplus posts at some JCs as a result of the implementation of the recommendations of our court roll research project whereby JCs had to improve the alignment of the supply of practitioner capacity to the demand for legal aid services at each of their court rooms.

3. Selection of JCs for the Court Relief Programme

From the above mentioned funding sources, it has now become possible to create 33 posts for the implementation of our Justice Centre Court Relief Programme. Whilst the intention is to have a minimum of one relief capacity at every JC, we have selected the following 33 Justice Centres with the largest staff component to be included in this relief programme at this stage

Table 1: JCs allocated capacity to implement the Court Relief

Region	**No of JCs**	**Name of Justice Centres**

Programme **No**			
1	EC	6	East London; Grahamstown; King Williams Town; Mthatha; Port Elizabeth; Queenstown
2	FS/NW	4	Bloemfontein; Ga-Rankuwa; Mafikeng; Welkom
3	GP	6	Benoni; Johannesburg; Krugersdorp; Pretoria; Soweto; Vereeniging
4	KZN	7	Empangeni; Pietermaritzburg; Pinetown; Port Shepstone; Umlazi; Verulam; Durban
5	L/Mp	4	Nelspruit; Polokwane; Tzaneen; Witbank
6	WC/NC	6	Athlone; Bellville; Cape Town; George; Kimberley; Stellenbosch

A Last Thought

"[19] It needs be emphasised that courts are open in order to protect those who use the institution and to secure the legitimacy of the judiciary, not to satisfy the prurient interests of those who wish to examine the private details of others. The public, said Langa CJ in *SABC v NDPP,* 'is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness'. Without openness, the judiciary loses the legitimacy and independence it requires in order to perform its function. Thus Moseneke DCJ accepted in *Independent Newspapers* (para 43) that 'the default position is one of openness'. Accordingly, court proceedings should be open unless a court orders otherwise. The logical corollary must therefore be that departures should be permissible when the dangers of openness outweigh the benefits. And by extension, the right of open justice must include the right to have access to papers and written arguments which are an integral part of court proceedings (*Independent Newspapers* para 41). That must follow axiomatically, it seems to me, because the public would hardly be in a position to properly assess the legitimacy or fairness of the proceedings if they could observe the proceedings in open court but were denied access to the documents that provide the basis for the court's decision."

Per Ponnan J A in *City of Cape Town v South African National Roads Authority Limited & others* (20786/14) [2015] ZASCA 58 (30 March 2015)